UNITED STATES OF AMERICA CONSUMER PRODUCT SAFETY COMMISSION

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

COMPLAINT COUNSEL'S APPEAL BRIEF

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In accordance with 16 C.F.R. § 1025.53, Complaint Counsel files its Appeal Brief. Complaint Counsel supports the vast majority of findings and conclusions issued by Judge Grimes (Dkt. No. 27, Order on Motion to Dismiss and Motion for Summary Judgment) and Judge Patil (Dkt. No. 109, Order on Summary Decision Motions, and Dkt. No. 119, Initial Decision and Order on Remedies) in this matter. However, Complaint Counsel appeals three determinations in the Initial Decision on Remedies ("Initial Decision"). Specifically, the Initial Decision errs: (1) to the extent it limits the scope of products covered by the remedial order only to Amazon Standard Identification Number ("ASIN") listings in the Complaint or in Respondent Amazon.com, Inc.'s ("Amazon") Exhibit 130, but does not expressly include the same products identified in those ASIN listings—or those with only cosmetic variations—listed for sale under different Amazon ASINs or otherwise distributed by Amazon, (2) in not defining a minimum time period of at least 120 days Amazon must maintain a banner informing consumers of a product recall on its newly developed "Your Orders" webpages, thereby allowing Amazon to remove such notice at any time, and (3) in ordering Amazon to issue only one social media post per social media platform.

I. STATEMENT OF THE CASE

A. Complaint

On July 14, 2021, Complaint Counsel filed the Complaint commencing this action under Sections 15(c) and (d) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. §§ 2064(c)–(d). Dkt. No. 1. The Complaint alleges that certain children's sleepwear garments, carbon monoxide detectors and hand-held hair dryers (the "Subject Products") distributed by Amazon through its Fulfillment by Amazon ("FBA") program present a substantial product hazard necessitating

public notification and remedial action to protect consumers from the risk of injury and death presented by those products.

On October 13, 2021, Complaint Counsel filed a Motion for Partial Summary Decision on the issue of whether Amazon is a "distributor" under the CPSA for products sold through the FBA program, and in response, Amazon filed a Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Decision. In its Motion, Amazon argued that it is not a distributor, but rather a "third-party logistics provider" under the CPSA, 15 U.S.C. § 2052(a)(16), for products sold through its FBA program, and that the proceeding must be dismissed as moot because Amazon had already unilaterally sent an e-mail to purchasers of the Subject Products concerning the Subject Products and issued them a gift card in the amount of the purchase price. Amazon also argued that the Complaint violated the Administrative Procedure Act ("APA") and should therefore be dismissed.

After receiving briefing on the issues presented in the cross-motions and hearing oral argument in December 2021, on January 19, 2021, ALJ Grimes issued his "Order on Motion to Dismiss and Motion for Summary Judgment," Dkt. No. 27. The January 2021 Order found that Amazon's activities brought it squarely within the definition of a distributor under the CPSA for products distributed through Amazon's FBA program and rejected Amazon's argument that it falls into the statutory definition of a "third-party logistics provider." The Order explained that because Amazon holds products for sale and distributes the products after they have been introduced into commerce, products are delivered to Amazon's FBA program "for purposes of distribution in commerce," therefore meeting the definition of a "distributor" under 15 U.S.C. § 2052(a)(8). Dkt. No. 27 at 25. Specifically, the ALJ found Amazon holds products provided by third-party sellers until a consumer purchases them on Amazon.com, thereby holding the

products for sale. *Id.* at 25. Furthermore, because Amazon holds products until a consumer has ordered them, and then either delivers or arranges for the delivery of the products, it therefore holds products for distribution. *Id*. at 25-26.

In addition, the Order describes actions Amazon undertakes which take it outside of the narrow definition of a "third-party logistics provider." Such actions include operating the Amazon.com website where products are purchased by consumers, providing round-the-clock customer service, processing returns of FBA products, including deciding whether a product may be resold upon receipt of the return, enforcing Amazon's Fair Pricing Policy, and processing payments for product purchases, which are then returned to the sellers minus Amazon's fee. *Id.* at 26-27. The ALJ also rejected Amazon's assertion that it was simply providing reverse logistics in its return and refund activities, finding that Amazon's processing of refunds to consumers as well as the contractual clause allowing Amazon to decide how to handle returned products, including whether to sell them, went beyond reverse logistics. *Id*. at 27.

Finally, the January 2022 Order also rejected Amazon's arguments that the Complaint was moot and found that Amazon's APA challenges to the Complaint were premature. Thereafter, the parties entered into discovery, including multiple rounds of document productions and depositions.[1] During discovery, the parties entered into a Stipulation that the Subject Products meet the requirements for a substantial product hazard. *See* Dkt. No. 35.

[1] On September 10, 2022, the Presiding Officer at the time, Judge James E. Grimes, departed from his position as an ALJ at the U.S. Securities and Exchange Commission ("SEC"). ALJ Appointment Letter to OPM, Dkt. No. 70. In the interim, SEC ALJ Carol Fox Foelak presided over this proceeding, before SEC ALJ Judge Patil was appointed to the proceeding on December 5, 2022. Email to the parties, December 6, 2022.

B. Motions for Summary Decision

Both parties filed Motions for Summary Decision following completion of discovery. Oral argument was held on March 28, 2023, and the parties submitted responses to additional questions raised by ALJ Patil after the oral argument.

On May 8, 2023, the ALJ ruled on the Motions, finding that the Subject Products present a substantial product hazard and finding that direct and public notification as well as remedial action were in the public interest and required to adequately protect the public. The May 8, 2023 Order found that the Subject Product children's sleepwear garments failed to meet federal flammability requirements, meaning they could ignite when being worn, and therefore present a substantial product hazard. Dkt. No. 109 at 14. It also found that 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." The ALJ thus found that the carbon monoxide detectors present a substantial risk of injury and meet the requirements for a substantial product hazard. Dkt. No. 109 at 14. Finally, the ALJ adopted the parties' Stipulation that the Subject Product hair dryers are "hand-supported hair dryers that lack integral immersion protection." Dkt No. 109 at 15. Therefore, the May 8th Order concludes that the hair dryers present a significant risk of shock or electrocution and present a substantial product hazard. *Id*.

The ALJ also asked for additional briefing on the scope, form, and content of the individual remedies required to adequately protect consumers from the hazards and risks of injury and death presented by the 400,000 units of Subject Products purchased by consumers. The Order unequivocally rejected Amazon's arguments that additional notice or refunds would not be in the public interest.

C. Initial Decision on Remedies

After receiving additional briefing, on July 10, 2023, ALJ Patil issued the Initial Decision on Remedies. The Initial Decision reiterates that the Subject Products present a substantial product hazard under Section 15(a)(2) of the CPSA. It defines the Subject Products for which remedial action is in the public interest as those product ASINs listed in the Complaint, as well as certain additional ASINs that were identified by Amazon during the discovery process. The Initial Decision states that Amazon shall immediately cease distribution of the Subject Products and notify relevant entities to immediately cease distribution. The ALJ also ordered Amazon to provide full refunds of the Subject Products, conditioned on either return of the products or proof of destruction, and to provide monthly progress reports for a period of no more than five years, rejecting Amazon's argument that it could not be ordered to issue a refund because it had already unilaterally provided original purchasers with a gift card.

Similarly, the Order rejected Amazon's assertion that the messages it had already unilaterally sent to initial purchasers were sufficient, finding that it was in the public interest for Amazon to send two rounds of direct notices including language approved by Complaint Counsel to consumers, publish one notice on each of Amazon's social media accounts, and provide notice on Amazon.com via a new "clear and conspicuous link" on Amazon's homepage, accessible to the public. The Initial Decision attaches as Exhibits A through D the cease distribution notices to third-party sellers, direct notices to consumers and social media posts that Amazon is ordered to send, as well as the recall press releases that would be posted on CPSC's website and which Amazon must use to publish a "substantially similar" notice on Amazon's website.

II. STATEMENT CONTAINING THE REASONS WHY THE INITIAL DECISION IS INCORRECT

Complaint Counsel supports the vast majority of findings and conclusions issued by Judge Grimes (Dkt. No. 27, Order on Motion to Dismiss and Motion for Summary Judgment) and Judge Patil (Dkt. No. 109, Order on Summary Decision Motions, and Dkt. No. 119, Initial Decision and Order on Remedies). This limited appeal focuses on three issues on which the Initial Decision misconstrued the law, regulations, and facts, resulting in a limitation of remedies unsupported by the law and the record.

A. The ALJ Improperly Limited the Scope of Products Covered by the Initial Order to the Extent the Definition of Subject Products is Limited to Specific Product ASIN Listings

The ALJ erred to the extent the Initial Decision can be read to limit the scope of covered products to specific Amazon product listings identified in the Complaint by "Parent ASIN" and certain additional listings subsequently identified in Amazon Exhibit 130 as "Child ASINs." Dkt. No. 119 at 2-3. Specifically, the ALJ found "that the scope of the ordered remedies regarding products is hereby limited to those specifically identified by ASIN in the Complaint—as stipulated by the parties—and in Amazon Exhibit 130 . . . . No other products are subject to this remedial order." *Id.* This description of covered products is problematic in two respects. First, it does not make adequately clear that it is the product—not the ASIN—that controls. In other words, regardless of whether a product is listed for sale through any particular ASIN, if the product is the same ***product*** as those listed in the identified ASINs in the Complaint and Amazon Exhibit 130, then the product should be subject to the Order. Second, it does not expressly include products that differ only cosmetically from such products but present the same hazard.

As an initial matter, an "Amazon Standard Identification Number," or "ASIN," does not represent a product, but rather a listing for a product for sale on Amazon.com. In tying the scope of the remedial action to specific ASINs, the ALJ failed sufficiently to clarify that any products that are the same as those identified in such ASINs or that have only cosmetic differences are also covered by the Order, even if, for example, they are sold through a different ASIN or otherwise distributed by Amazon.

Indeed, [redacted], not the entire scope of where a given hazardous product may appear on Amazon.com.[2] More specifically, when a seller lists a product for sale on Amazon's website,[3] an ASIN is assigned to that listing. [redacted] Each such variation of the "parent" listing—which may encompass differences in size, color, or style—is designated with individual, purchasable "child" ASINs that are connected to the "parent" listing.[5] Dkt. No. 119 at 2.

[2] Sagi Goldberg Testimony, Amazon Exhibit 2, at 102:9-17; Amazon, The beginner's guide to selling on Amazon, available at https://sell.amazon.com/beginners-guide?ld=SEUSSOAGOOG-sitelink-guide&tag=googhydr-20&hvadid=642018142210&hvpos=&hvexid=&hvnetw=g&hvrand=3200840918191541936&hvpone=&hvptwo=&hvqmt=p&hvdev=c&hvdvcmdl=&hvlocint=&hvlocphy=9007537&hvtargid=kwd-297281921160&ref=pd_sl_2vge9q2e84_b&ld=SEUSSOAGOOG-NAG131-TOPIS-D (last accessed August 16, 2023).

[3] Amazon.com is "a website on which third-party sellers can list and sell consumer products." Amazon Answer to Complaint, Dkt. No. 2, at ¶ 7.

[4] Sagi Goldberg Testimony, Amazon Exhibit 2, at 102:9-17.

[5] The Initial Decision correctly recognizes that it is nonsensical to tie the definition of a Subject Product to a parent ASIN which would not have any sales attached to it. Instead, the ALJ recognized that the Subject Product children's sleepwear garments covered by the order should include the child ASINs purchased by consumers, and the Initial Decision incorporates those child ASIN children's sleepwear garments regardless of their variations in size, color and print pattern from other garments with the same parent ASIN.

However, as Amazon has explained, "sellers—not Amazon—organize FBA products into 'parent' categories." Amazon Ex. 130. Accordingly, ASIN designations depend on subjective marketing decisions of sellers,[6] and they may be influenced by factors as arbitrary as technological limitations.[7] [redacted] Sagi Goldberg Testimony, Amazon Exhibit 2, 249:21 (relevant portions attached). Thus, a single product distributed by Amazon could be listed for sale through multiple, separate ASINs.

The Initial Decision therefore errs by failing to sufficiently clarify that the scope of the Subject Products covered by the order extends to all products—regardless of ASIN—identified in the Complaint. Because ASINs correspond only to product listing decisions of sellers and Amazon, the items included in a particular ASIN family may not accurately capture all instances of those hazardous products distributed by Amazon. In order to effectuate the purposes of the CPSA and ensure that the risks of injury and death presented by the Subject Products are remedied, the scope of the remedial order must encompass all such products, including those that may be listed under a different ASIN, whether for strategic reasons, in error, or otherwise. The Order must also extend to products with mere cosmetic differences and those variations must include not only variations in children's sleepwear garments in particular child ASINs

[6] *See* Amazon Exhibit 130. (explaining that "[t]he relationships and similarities between 'children' assigned to a 'parent' therefore vary widely between third-party sellers"); "Luxury French swimwear brand uses sponsored ads to launch in EU", Amazon Ads, https://advertising.amazon.com/library/case-studies/vilebrequin (case study on Amazon's advertising site describing a company that was "creating a new ASIN for each size, color, and pattern combination" of swimsuits, until a consultant advised them to "create variations (known as child ASINs) that lived together on one product detail page," allowing customers "to explore different color, design, and size options without being required to navigate from page to page") (last accessed Aug. 16, 2023).

[7] *See, e.g.,* "Post-Launch Checklist," Amazon Ads, https://advertising.amazon.com/library/guides/how-to-optimize-your-store ("Depending on how you originally set up ASINs, and how your Amazon Brand Registry profile was set up, some (or all) ASINs may not link to the Store properly once live.") (last accessed Aug. 16, 2023).

recognized by the ALJ,[8] but also cosmetic variations such as in color and size of hair dryers and carbon monoxide detectors that may appear elsewhere.

Notably, in the Order on Summary Decision Motions (Dkt. No. 109), issued on May 8, 2023, the ALJ initially agreed with Complaint Counsel that the cease distribution order for at least the children's sleepwear Subject Products "should include products that are but 'a mere alteration' of a [children's sleepwear] Subject Product: 'for example, one is red and the other is blue, or one is a smaller model and one larger—but all presenting the same substantial product hazard . . . .'" Dkt. No. 109 at 30. Indeed, the ALJ found the argument "persuasive" and stated that the "ultimate relief ordered will incorporate those concepts." *Id.* However, the ALJ's July 10, 2023, Initial Decision and Order on Remedies (Dkt. No. 119), nonetheless appears to limit relief to the "Parent ASINs" identified in the Complaint and the corresponding "Child ASINs" identified in Amazon Exhibit 130.

As discussed below, this decision, without further clarification as to the scope of the order, would unduly restrict the proper legal scope of products that should be covered.

B. The ALJ Improperly Granted Respondent Complete Discretion to Remove Notice on Each Original Purchaser's "Your Orders" Web Page

The Initial Decision errs in failing to specify a length of time that Amazon must maintain notice of the recall on each original purchaser's "Your Orders" web page. Consumers logged into their Amazon account can see all information relating to any past purchase they have made through their account. Amazon Letter to Judge Patil, Dkt. No. 103, at Appendix C. The ALJ ordered Amazon to use its "already extant process for notifying purchasers of products subject to

[8] Indeed, as noted in Footnote 5, *supra*, the Initial Order includes child ASINs listed in Amazon Exhibit 130, which vary in size, color, and style from the corresponding parent ASINs listed in the Complaint. This represents an implicit understanding by the ALJ that products with only cosmetic differences are the same product, and that the Order must protect consumers from such products.

recall" to notify consumers of the hazards presented by the Subject Products via a banner on top of each consumer's "Your Orders" page linking to additional information about the recall. Dkt. No. 119 at 7. Specifically, finding that there was a need to provide public notice of the recall in addition to the direct notices that will be sent to original purchasers,[9] the ALJ ruled that Amazon must use its newly created, personalized banner on consumers' "Your Orders" page to inform purchasers of the recall when logged into their accounts.[10] However, the ALJ erred in declining to order that Amazon post the banner for a minimum of 120 days, instead leaving it entirely to Amazon to determine how long such banners will be posted.

C. The ALJ Improperly Restricted Notice to Consumers by Ordering Respondent Issue Only a Single Social Media Post Per Social Media Platform

The Initial Decision errs in ruling that Amazon must post notice of the recall on its social media accounts only once, on the day the recall announcement is issued, instead of once every week for three weeks, as sought by Complaint Counsel. Allowing Amazon to post on its social media accounts only once means that the notice will effectively disappear from most consumers' social media feeds as new posts are published by Amazon or by other social media users. Posting at least once every three weeks and making the first post a "featured" post ensures that consumers, especially those who do not receive Amazon's direct notification, will have multiple opportunities to see the recall notice and become aware of the hazards presented by the Subject

[9] May Order on Summary Decision Motions, at 38 ("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."). In addition, the ALJ recognized the importance of a website notice in ordering that Amazon include a new, publicly accessible link to the "Product Safety and Recalls" page where the recall notices will be posted, on Amazon's homepage, and that the recall notice be maintained for a minimum of five years. Dkt. No. 119, at Order, 2(b)(i) & 2(b)(v).

[10] The Initial Decision also orders Amazon to "publish a clear and conspicuous notice in a form substantially similar to the draft press releases (attached as Exhibit B) to Amazon's "Product Safety and Recalls" pages on Amazon.com. Dkt. No. 119, at Order, 2(b)(ii). The latter notice must be viewable to the general public, including non-purchasers of the Subject Products. Dkt. No. 119 at 7.

Products. Indeed, in the May 8th Order on the Summary Decision Motions, the ALJ confirmed that notice on social media of a recall is "consistent with at least one previous administrative decision," Dkt. No. 109 at 38, and that it was needed to adequately protect the public. The ALJ additionally noted that social media posting "represents a minimally burdensome action." *Id.* at 39.

However, after receiving additional briefing on the form and content that the social media posts should take, the ALJ ruled in the Initial Decision that Amazon need only post notice of the recall once on each of its social media accounts. Dkt. No. 119 at 7. In coming to that conclusion, the ALJ erroneously concluded, contrary to the record evidence, that Complaint Counsel did not sufficiently articulate why multiple posts would be beneficial.

III. LEGAL STANDARD

The Commission considers the whole record, but shall "exercise all the powers which it could have exercised if it had made the Initial Decision," and is free to "adopt, modify or set aside" any or all of the ALJ's findings and conclusions. 16 C.F.R. § 1025.55. Although CPSC's adjudication rules do not specify a standard of review, courts have interpreted similar rules as providing for *de novo* review. *See, e.g.*, *Landry v. FDIC*, 204 F.3d 1125, 1138 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 924 (2000) (in administrative proceedings, ALJ has "purely recommendatory power" subject to de novo review). Under *de novo* review, the Commission "review[s] the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered." *Freeman v. Directv, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006).

Where, as here, an agency's statute does not provide a standard of review, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* and the case law interpreting it establish that the preponderance of the evidence standard is the burden of proof that must be met to prevail

in an administrative proceeding. *See Steadman v. S.E.C.*, 450 U.S. 91, 104 (1981) (determinations in agency adjudicatory proceedings "are made according to the preponderance of the evidence"), *reh'g denied*, 451 U.S. 933 (1981); *see also In re Zen Magnets, LLC*, CPSC Dkt. No. 12-2, Final Decision and Order, 2017 WL 11672449, at *7 (Oct. 26, 2017) ("No such express statutory provision exists here. The CPSA is silent regarding the standard of proof governing Commission adjudications. Therefore, the Commission reaffirms that the preponderance of the evidence standard applies."). With respect to remedies, the Commission has broad authority to order remedies that are in the public interest or required in order to adequately protect the public from an established substantial product hazard. *See* 15 U.S.C. § 2064(c)-(d).

IV. ARGUMENT

The Commission should clarify or correct three rulings by the ALJ because doing so is both in the public interest and necessary to adequately protect the public. First, the scope of the products covered by the Commission's Order should expressly not be limited to a particular set of ASIN listings, but rather should clearly encompass all products that are the same as those in the subject ASINs, including those that have only cosmetic variations. Second, Respondent should be ordered to maintain the notice of the recall on each original purchaser's "Your Orders" page on Amazon's website for at least 120 days. Third, Respondent should be ordered to issue multiple social media posts relating to the recall and should designate one such post as a "featured post" for at least 120 days, in accordance with CPSC practice.

A. The Scope of Products Covered by the Initial Order Should Not Be Limited by ASIN Listing and Should Include Products with Only Cosmetic Variations

Complaint Counsel seeks a revised order that makes clear Amazon's obligations with respect to the Subject Products extend to all products identified in the Complaint, regardless of associated ASINs, including those with cosmetic variations—such that they differ only in size, color, or style—that pose the same substantial product hazard.

Under the CPSA, a covered "product" under Section 15(c) not only encompasses the precise items expressly identified in a Complaint or during the course of a Section 15 proceeding, it also covers the same products, however identified, as well as products differing only cosmetically such as by size or color variations.[11] Indeed, products that happen to be sold or offered for sale through a separate ASIN or products with only cosmetic variations are the same "product" under the CPSA. This concept has been upheld in other legal contexts. *See, e.g.*, *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 916 (7th Cir. 2007) (finding that despite minor cosmetic differences in the appearance of two dolls, including different colored shoes, chairs, one wearing a hat and one doll having their name emblazoned on their chest, an "objective observer" would believe the dolls were the same); *Beaty v. Ford Motor Co.*, 854 F. App'x 845, 848–49 (9th Cir. 2021) (reasoning that knowledge of a defect in one model of panoramic sunroofs may be attributable to another model where the purported differences between models were "merely cosmetic and 'immaterial' to the defect at issue").

While the generic term "product" in the context of the scope of a Section 15 corrective action is not expressly defined in the statute, the first delineated purpose of the CPSA is defined

[11] The inclusion of products with only cosmetic differences is wholly consistent with the ALJ's original articulation of what additional products should have been subject to the order in the May 8, 2023, Order on Summary Decision Motions (Dkt. No. 109).

and stated simply: "to protect the public against unreasonable risks of injury associated with consumer products."[12] 15 U.S.C. § 2051(b)(1). It would be both nonsensical and antithetical to that first and primary purpose of the CPSA to interpret the word "product" in Section 15 to exclude products that are the same as those specifically identified in the Complaint in every non-cosmetic respect, and therefore present the same substantial product hazard, from the scope of Section 15 remedial orders simply because they are listed for sale on Amazon.com under a different ASIN. More specifically, it makes no sense to treat an otherwise identical product differently just because one is red and one is blue, or because it is listed for sale under a different listing on Amazon.com.

Indeed, since the filing of the Complaint in 2021, Complaint Counsel has identified products for sale on Amazon.com with mere cosmetic differences to the Subject Products that present the same substantial products hazards. May 8, 2023 Order, Dkt. No. 109, at 30.

[redacted] *See* Sagi Goldberg Testimony, Amazon Exhibit 2, 249:7-21.[13] It would not serve the public interest to allow those products, and any other such products that Amazon may otherwise distribute in the future, to fall through the cracks of the remedial order in this case.

[12] "Consumer product" is defined in the CPSA as "any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or (ii) for personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise . . . ." 15 U.S.C. § 2052(a)(5). The parties agree that the Subject Products are consumer products, and the definition does not appear to have any direct bearing on the meaning of the word "product" in Section 15.

[13] [redacted] Amazon Exhibit 2, 249:12-13.

The Commission has previously recognized that Section 15 actions are not strictly limited to the particular products identified in a complaint. In *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Order, at 1 (Oct. 27, 1976), the Commission ordered that "Respondents are to refrain from manufacturing and distributing in commerce or any manner affecting commerce . . . the Wel-Dex Electric Arc Welder, or any other electric welder of similar design or construction, containing any of the defects alleged to create a substantial product hazard in the Notice of Enforcement issued herein on July 17, 1974." The *Relco* decision makes clear that, in a mandatory recall context, a responsible party may be ordered to refrain from distributing not only the specific items named in the complaint, but also any product "of similar design or construction" that presents the same substantial product hazard. By not expressly addressing this issue, the ALJ here may have unduly limited the scope of the remedial order to listings, not products, which would allow the same products (including those with minor cosmetic differences) put up for sale on Amazon.com under different ASINs to be distributed by Amazon to consumers without implicating the Order. This result would not be in the public interest, and it would not protect consumers from the full scope of hazardous products that the ALJ found pose a substantial product hazard.

Respondent argued, and the ALJ ultimately appeared to agree, that its role as a distributor rather than a manufacturer should narrow the scope of products covered by the order. *See* Dkt. No. 109 at 30-31; Dkt. No. 119 at 1-3. Specifically, the ALJ cited to the fact that Respondent is the distributor of "hundreds of thousands" of products through its FBA Program. Dkt. No. 109 at 30. But the CPSA does not differentiate Section 15 obligations for distributors versus manufacturers or retailers. Nor does the CPSA present alternative legal responsibilities for

parties that distribute large volumes of products. A company cannot, under the CPSA, outgrow its legal obligations.

In fact, Amazon has conceded that it has the capability to address such products when it determines a specific ASIN for a product may present a safety hazard to consumers, "if that ASIN has a size, color, or style variation, we will look at those variations to see if they pose the same product safety hazard. And, if they do, we would take the same actions that we took with respect to the specific ASIN. We then look at the brand, and try to identify products from that brand that are the same products." Amazon's Response to Complaint Counsel SUMF ¶ 112.

Accordingly, it is in the public interest to apply the remedial order in this case to all products that are the same as those expressly identified in the Complaint, whether or not distributed to consumers through the specific examples of ASINs listed in the Complaint, including those with cosmetic differences that present the same substantial product hazard.

B. The Order Should Require Respondent to Maintain the Required Notice on Consumer's "Your Orders" Page for 120 Days.

The ALJ erred in declining to order that the personalized "Your Orders" website notice to consumer purchasers of the Subject Products remain online for at least 120 days. A 120-day order would be consistent with the standard period for which CPSC requires firms to maintain a prominent link to recall information on recalling entities' main landing pages. *See* Complaint Counsel's Brief in Support of Amended [Proposed] Initial Order, Dkt. No. 110 at 7; *see also* Initial Decision and Order on Remedies, Dkt. No. 119, at 6 (citing Recall Handbook). The ALJ distinguished the practice of maintaining a link on a homepage to the banner on the "Your Orders" page, Dkt. No. 119, at 6, but both are web-based notices serving the purpose of ensuring that affected consumers are alerted to a recall. The fact that Amazon's "Your Orders" page

utilizes technological advancements to provide more targeted web-based notice to consumers should not alter the length of time that notice is available to consumers. And notably, Amazon did not present any evidence demonstrating that all affected consumers would visit their "Your Orders" pages in the normal course of use of such pages in any lesser period that the proposed 120 days.

Further, because the Initial Decision does not require Amazon to keep the "Your Orders" banner live for any period, Amazon could remove the notice at any time. Indeed, Amazon could take down the banner after a single day.

The CPSA provides the Commission with broad authority to order public notification of a substantial product hazard and to specify the form and content of any such notice, provided the notification is required to adequately protect the public from the substantial product hazard. *See* 15 U.S.C. § 2064(c)(1)(D); 16 CFR § 1115.26-27. *See also* 75 Fed. Reg. 3355 *et seq.* (Jan. 21, 2010). In addition, any such notice on an Internet website must be "clear and conspicuous." *Id*.

"Clear and conspicuous" notice requires that a link to recall information be placed on the top of a company's website for the first 120 days following a recall announcement, as noted in the Recall Handbook. Exhibit S (Recall Handbook) at CPSC_AM0011486 ; Dkt. No. 110 at 7. Similarly, ordering Amazon to post notice of the recall on consumers' "Your Orders" page for at least 120 days makes it more likely affected consumers will be made aware of the hazards posed by the Subject Products because the notice would be visible for at least a defined period of time. Further, this minimum posting requirement would prevent Amazon's premature removal of such notice, which could thwart consumer awareness.

C. The Order Should Require Respondent to Issue Four Total Social Media Posts Relating to the Recall of the Subject Products, and Designate One Post as a "Featured" Post for 120 Days

The Initial Decision errs in ruling that Amazon must post notice of the recalls on its social media accounts only once, on the day the recall announcement is issued. Amazon should be ordered to post notice of the recall on its social media platforms both the day the recall is announced, as well as thereafter, once a week, for three weeks. In addition, Amazon should be ordered to designate the first of the social media notices as a "featured post" for 120 days, consistent with the duration of the banner on the "Your Orders" page. Although the ALJ correctly recognized the importance of notice on social media platforms as "needed to adequately protect the public," Dkt. No. 109, at 38-39, and required that Amazon utilize its main social media accounts to effectuate notice (not its customer service accounts as requested by Amazon, Dkt. No. 119, at Order, 2(b)(iv)), the ALJ erred in ordering only a single posting.

The Commission has the authority to order a recalling company to provide public notice through a "clear and conspicuous notice on its Internet website", 15 U.S.C. § 2064(c)(1)(D). Because social media posts are displaced in a user's feed as new posts are published, and may eventually no longer appear at all, publishing notice of the recall on social media just once and without any highlighting of the post is not "clear and conspicuous." [redacted] Amazon Ex. 68 ("Goals for CPSC Recall Press Releases," Recall Effectiveness Workshop) at CPSC_AM0009651.

In addition, use of a single social media posting is contrary to agency practice and policy, which recognizes that internet notices generally can be difficult to find and should not be buried.

For this reason, the Recall Handbook calls for companies to make their social media posts a "featured post" when applicable. Exhibit S (Recall Handbook) at CPSC_AM0011486-11487, Amazon's Response to CC SUMF ¶ 133. Here, to effectuate the purposes of the CPSA and adequately protect consumers from the hazards presented by the Subject Products, Amazon should be required to designate its first social media posts as a "featured post" on each platform, and maintain that notice for at least 120 days, the same as the duration of the "Your Orders" banner. That will ensure that consumers view the recall notice and can take appropriate action. Ensuring consumers view social media posts regarding a recall is also why the Corrective Action Plan Template ("CAP Template"), [redacted], *see* Dkt. No. 93 at 4, [redacted] CC's Exhibit T, at CPSC_AM0012127. [redacted] *See* Amazon Ex. 68 ("Goals for CPSC Recall Press Releases," Recall Effectiveness Workshop) ("multiple communication channels," "media stories& social media mentions," and notification "multiple times" help to make recalls more effective (CPSC_AM0009651)); Amazon Ex. 94 (Report by XL Associates and Heiden Associates prepared for the U.S. Consumer Product Safety Commission titled Recall Effectiveness Research: A Review and Summary of the Literature on Consumer Motivation and Behavior) (citing a study that "provides evidence on the efficacy of multiple sources of notification about recalls" (CPSC_AM0010108)); *see also* Dkt. 93 at 20-21 (collecting sources

stating the importance of multiple communications). Here, Amazon should be required to do no less than is typically executed in voluntary recalls.

V. CONCLUSION

For these reasons, Complaint Counsel asks the Commission to expressly require that the scope of covered products encompass all products that are the same as those in the subject ASINs, including those that have only cosmetic variations, that the notice of the recall on each original purchaser's "Your Orders" page be maintained for at least 120 days, and that Amazon issue multiple social media posts in accordance with CPSC practice.

In accordance with 16 C.F.R. § 1025.53(b)(5), Complaint Counsel concurrently files its proposed order that would effectuate this relief.

Respectfully submitted,

John C. Eustice, Senior Trial Attorney
Serena Anand, Trial Attorney
Liana G.T. Wolf, Trial Attorney
Thomas J. Mendel, Trial Attorney

Division of Enforcement and Litigation
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7809

Complaint Counsel for
U.S. Consumer Product Safety Commission

August 21, 2023

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2023, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

By email to the Secretary:

Alberta E. Mills
Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
Email: AMills@cpsc.gov

By email to Counsel for Respondent:

Sarah L. Wilson
Stephen P. Anthony
Thomas R. Brugato
Nicholas Griepsma
Kevin F. King
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001-4956
swilson@cov.com
santhony@cov.com
tbrugato@cov.com
ngriepsma@cov.com
kking@cov.com

John C. Eustice

Complaint Counsel for
U.S. Consumer Product Safety Commission