UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

COMPLAINT COUNSEL'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY DECISION

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I. INTRODUCTION[1]

Amazon does not contest that the Subject Products at issue in this administrative litigation present substantial product hazards under the Consumer Product Safety Act ("CPSA"). Children can be seriously injured and die from the burn hazards presented by the Subject Product children's sleepwear garments. Consumers can be seriously injured and die from carbon monoxide poisoning due to the Subject Product carbon monoxide detectors' failure to alarm in the presence of hazardous levels of carbon monoxide. And, consumers can be seriously injured and die from the electric shock and electrocution hazards presented by the Subject Product hair dryers' lack of integral immersion protection. Accordingly, the public must be fully informed about these hazardous products so that they can take all necessary precautions to protect themselves and their families, and the products must be permanently removed from the marketplace so they will not threaten consumer safety in the future.

To accomplish these goals and to ensure that the public interest in consumer safety prevails over conflicting business interests when products present substantial product hazards, the Consumer Product Safety Commission ("CPSC" or "Commission") is empowered with broad authority to order firms to engage in remedial action to protect the public from products that present substantial product hazards. Pursuant to this authority, Complaint Counsel seeks an enforceable, mandatory order under Section 15(c) of the CPSA requiring Amazon to: cease distribution of the Subject Products and any functionally equivalent products and notify entities in its distribution chain to cease distribution; provide notification to the public of the recall of the Subject Products in a press release jointly issued with CPSC and on Amazon's website and

[1] This Memorandum of Points and Authorities is supported by Complaint Counsel's Statement of Undisputed Material Facts ("SUMF"), concurrently filed with this Motion and Memorandum in Support of Summary Decision.

social media platforms; send multiple, complete and effective direct notifications of the Subject Product recalls to all known purchasers and owners of the Subject Products; and provide notification to second-hand sellers to inform all interested persons of the substantial product hazards and the available remedies to redress the dangers presented by the Subject Products. 15 U.S.C. § 2064(c)(1). In addition, in furtherance of the CPSA's mandate to remove hazardous products from the hands of consumers and from the stream of commerce to provide lasting protection to the public, Complaint Counsel seeks an enforceable, mandatory order under Section 15(d) requiring Amazon to provide refunds or replacements to all consumers in possession of a Subject Product, conditioned on the tender of the hazardous product at issue or proof of its destruction. 15 U.S.C. § 2064(d).

In contrast to the comprehensive relief sought by Complaint Counsel to protect consumers, Amazon's self-selected unilateral actions to date are much more limited and include a single, inadequate email and an Amazon credit issued solely to original purchasers of the Subject Products without any condition to return or provide proof of destruction of the product, thereby in no way incentivizing removal of the products from commerce. These limited actions are not even close to commensurate with the standard relief to protect the public that is routinely provided in voluntary recalls conducted by the Commission in conjunction with companies to remedy product hazards that endanger consumers, including products much like the Subject Products at issue here. To order less of Amazon in this action seeking an order requiring mandatory relief than what CPSC requires for voluntary corrective actions would create a perverse result to the detriment of consumers and would set a dangerous precedent for future recalls.

A mandatory, enforceable order under Section 15 of the CSPA including Complaint Counsel's requested relief will safeguard the public from the whims of Amazon's business decisions and will ensure the public is protected from the substantial product hazards presented by the Subject Products. Because it is undisputed the Subject Products present substantial product hazards and because the undisputed facts demonstrate the requested relief is required in furtherance of the CPSA's goals to protect the public, a summary decision in favor of Complaint Counsel is appropriate now without further delay.

Section II below explains the procedural posture of this administrative litigation. Section III reviews the undisputed material facts evidencing the substantial product hazards presented by the Subject Products, the remedies CPSC requires to protect the public from substantial product hazards, and the inadequate unilateral actions taken by Amazon without the consent or approval of CPSC. Section IV sets forth the legal standard for summary decision. Section V demonstrates that summary decision is warranted on the issue of substantial product hazards. Section VI explains CPSC's broad authority to order a firm to cease distribution and provide notification, refunds, and replacements under 15 U.S.C. § 2064(c) and (d). Sections VII through IX explain the relief that is vital to protect the public from the hazardous Subject Products.

II. PROCEDURAL BACKGROUND

The Commission authorized the initiation of this administrative proceeding to seek public notification and remedial action pursuant to Sections 15(c) and (d) of the Consumer Product Safety Act ("CPSA"), as amended, 15 U.S.C. § 2064(c) and (d), to protect the public from the substantial product hazards presented by violative children's sleepwear garments and defective carbon monoxide detectors and hair dryers (the "Subject Products") that were distributed by Amazon through its Fulfillment by Amazon ("FBA") program.

In the Court's January 19, 2022 Order on Motion to Dismiss and Motion for Summary Decision, the Court found that "Amazon meets the statutory definition of the term *distributor*" under the CPSA, Dkt. No. 27 at 27 (emphasis in original). Thereafter, in the April 26, 2022 Stipulation of the Parties, the parties stipulated that the Subject Products meet the requirements for a substantial product hazard under the CPSA, Dkt. No. 35. On May 10, 2022, the court accepted the parties' stipulations. Dkt. No. 37.

III. THE UNDISPUTED FACTS REGARDING THE SUBJECT PRODUCTS, THE REMEDIES CPSC REQUIRES TO PROTECT THE PUBLIC FROM SUBSTANTIAL PRODUCT HAZARDS, AND AMAZON'S UNILATERAL ACTIONS

A. The Subject Products Were Sold on Amazon.com Through Amazon's FBA Program and Meet the Requirements for a Substantial Product Hazard.

The more than 400,000 Subject Products at issue in this matter are children's sleepwear garments, carbon monoxide detectors, and hand-supported hair dryers sold on Amazon.com through Amazon's FBA program. Statement of Undisputed Material Facts ("SUMF") ¶¶ 1-2, 13, 22, 27, 44, 48. The parties agree that the Subject Products are consumer products. *Id.* ¶¶ 12, 26, 47. The parties do not dispute that the Subject Products present a substantial product hazard to consumers. *Id.* ¶¶ 21, 43, 55. Specifically, the children's sleepwear garments fail the flammability requirements set forth in the Flammable Fabrics Act, 15 U.S.C. §§ 1191–1204 and 16 C.F.R. Parts 1615–16 (2021), and pose an unreasonable risk of burn injuries and death. SUMF ¶¶ 18-21. The carbon monoxide detectors fail to detect carbon monoxide gas and fail to alarm in its presence, posing a risk of exposure to a poisonous gas that can cause severe injury, including tissue damage and death. *Id.* ¶¶ 40-43. And, the hair dryers lack a required immersion protection device integral to the power cord, posing a significant electric shock and electrocution hazard to users. *Id.* ¶¶ 51-55.

B. CPSC Requires Remedies to Protect Consumers From Substantial Product Hazards.

When products present substantial product hazards to consumers, the Commission works with firms to conduct product recalls which are necessary "to prevent injuries and save lives." SUMF ¶¶ 116-117. CPSC makes numerous resources available on its website, including a fifty-two-page Recall Handbook that walks companies, in great detail, through the process of conducting a recall and providing remedies to consumers. SUMF ¶ 116. The objectives of a recall, as set forth in the Recall Handbook, include locating all recalled products as quickly as possible, removing the products 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. SUMF ¶ 116.

To help industry actors be prepared to address hazardous products, the Recall Handbook explains that companies conducting a recall need to, among other actions: discontinue production, sales, and distribution; notify distribution chain entities to cease distribution and sales; "prepare, for CPSC approval, a comprehensive communications plan, including a media plan utilizing direct notice, for communicating the recall;" "develop a plan to quarantine and correct returned products;" develop and implement procedures to ensure hazardous products do not reenter the stream of commerce;" and provide an email address, a toll-free telephone number, and a website URL "for consumers to respond to the recall announcement." SUMF ¶¶ 119, 125, 137. As the Recall Handbook explains, collaboration with CPSC staff throughout the recall process is key and "results in greater protection for consumers from injury or death, as well as a more efficient and productive process for companies." SUMF ¶ 126.

When a firm engages in a voluntary recall, a firm signs a "corrective action plan" or CAP, a document "which sets forth the remedial action which the firm will voluntarily undertake

to protect the public." 16 C.F.R. § 1115.20(a); SUMF ¶ 118. General governing requirements for voluntary CAPs are set forth in the regulations at 16 C.F.R. § 1115.20(a) and are memorialized in a CAP template document, [redacted] SUMF ¶ 118.

Among other elements, the CAP template [redacted] SUMF ¶¶ 121, 148, 144-145, 150-152, 155.

The CAP template also states, [redacted] SUMF ¶ 153. [redacted]

[redacted] SUMF ¶ 154.

After initiating the recall, the CAP template [redacted] SUMF ¶¶ 156-159. [redacted] SUMF ¶ 158. The CAP template further states that [redacted] SUMF ¶ 156. As the CAP template states, [redacted] SUMF ¶ 159.

In order to familiarize the Court with CPSC's actions in recalling similar products, Complaint Counsel has prepared a chart that summarizes the documents produced in this administrative litigation relating to corrective actions that CPSC sought from various companies for recalls of hair dryers, carbon monoxide detectors, and children's sleepwear garments conducted between 2015 and the present. SUMF ¶ 162.[2]

C. Amazon Failed to Properly Notify the Public And Incentivize the Removal of the Substantial Product Hazards from Commerce.

Amazon's actions fall well short of the corrective actions CPSC requires to protect the public when conducting voluntary recalls with companies to remediate product hazards.

[redacted]

[2] The numbers set forth in the chart summarizing the remedies sought by CPSC in past recalls were tabulated conservatively based only on the information that is plainly reflected in the materials produced in discovery in this matter. *See* Fed. R. Evid. 1006.

[redacted] SUMF ¶ 96. [redacted]

[redacted] *Id.* ¶¶ 95-96. [redacted]

[redacted] *Id.* ¶ 95.

[redacted] *Id.* ¶ 66. [redacted]

[redacted] *Id.* ¶¶ 67-88. [redacted]

[redacted] *Id.* ¶¶ 68, 76, 83.

[redacted] *Id.* ¶¶ 72, 79, 86, 95-96. [redacted]

[redacted] *Id.* ¶¶ 72, 79, 86.

[redacted] *Id.* ¶ 89. [redacted]

[redacted] *Id.* ¶¶ 74, 81, 88.

[redacted]

Id. ¶¶ 72-73, 79-80, 86-87. [redacted]

[redacted] *Id.* ¶¶ 72, 79, 86. [redacted]

[redacted]

[redacted] *Id.* ¶¶ 92-94.

Amazon's actions fall well short of Amazon's capabilities to implement the remedial actions required in this case. Amazon provides 24/7 customer service as part of its FBA program. *Id.* ¶ 98. Amazon's FBA Service Terms provide that Amazon is "responsible for all customer service issues relating to . . . customer returns, refunds, and adjustments related to Amazon Fulfillment Units," which are products sold through the FBA program. *Id.* ¶ 99. FBA product returns are sent to and handled by Amazon, and Amazon can destroy and track destruction of inventory for itself and entities that sell products on Amazon.com. *Id.* ¶¶ 101-102. Amazon has the contractual right to "determine whether a customer will receive a refund, adjustment or replacement for any Amazon Fulfillment Unit," and Amazon "will require [the contracting party] to reimburse" Amazon where Amazon determines that entity has "responsibility in accord with the Agreement." *Id.* ¶ 100.

Further, when a product with one Amazon Standard Identification Number ("ASIN")[3]

[redacted] *Id.* ¶¶ 112-113. [redacted]

[redacted] *Id.* ¶ 114. [redacted]

[redacted] *Id.* ¶ 107.

[redacted] *Id.* ¶¶ 166, 171, 175. [redacted]

[redacted] *Id.* ¶¶ 168-169. [redacted]

[redacted] *Id.* ¶ 173. [redacted]

[3] An "ASIN" is a number used by Amazon to identify specific product listings on Amazon.com. "ASINs are computer-generated once a third-party seller posts a product offering on" the website. *See* Amazon's Response to Complaint Counsel's Statement of Undisputed Material Facts and Amazon's Statement of Undisputed Material Facts, Nov. 2, 2021 (Dkt No. 16) at 2.

[redacted] *Id.* ¶ 173. [redacted]

[redacted] *Id.* ¶¶ 177-178. [redacted]

[redacted] *Id.* ¶ 170, 174, 179.

IV. LEGAL STANDARD FOR SUMMARY DECISION

Under the Commission's Rules of Practice, any party may file a motion, with supporting memorandum, for a Summary Decision and Order in its favor upon all or any of the issues in controversy. 16 C.F.R. § 1025.25(a). Such a motion "shall be granted if the pleadings and any depositions, answers to interrogatories, admissions, or affidavits show 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).

The Commission's Summary Decision standard is similar to Rule 56(a) of the Federal Rules of Civil Procedure,[4] which states:

> A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

[4] Where the Federal Rules of Civil Procedure do not conflict with an agency's rules of practice, judicial interpretation of the Federal Rules of Civil Procedure may guide the Presiding Officer's decision-making. *See, e.g.*, *In re Spring Grove Resource Recovery, Inc.*, 1995 EPA ALJ LEXIS 28, at *2 (Sept. 8, 1995) (noting that Federal Rules "often guide decision making in the administrative context" and relying upon the Federal Rules of Civil Procedure where the EPA's Rules of Practice merely stated that amendments were available only upon motion granted by the Administrative Law Judge with no further guidance).

In cases interpreting Rule 56, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the United States Supreme Court reinforced this standard. As *Anderson* makes clear, the appropriate inquiry at summary judgment is not whether issues of fact exist, but rather whether any issue of "material fact" exists: "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

The standard holds that if "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co.*, 475 U.S. at 587. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. The mere existence of a "scintilla of evidence" is insufficient to defeat summary judgment." *Anderson*, 477 U.S. at 252.

Under Federal Rule of Civil Procedure 56(a), a court may grant summary judgment on "part of" a claim or defense. This provision allows for a ruling on summary judgment as to both liability and remedies or for separate summary judgment rulings on liability and remedy, if necessary. A finding that a factual dispute exists as to remedy in no way precludes a finding of partial summary judgment on the issue of liability alone. *See* § 2736 Summary Judgment on the Issue of Liability, 10B Fed. Prac. & Proc. Civ. § 2736 (4th ed.) ("[W]hen there is a genuine issue as to damages but not as to the ultimate liability of the nonmoving party, an interlocutory summary judgment is appropriate."); *see also Merrill Lynch Bus. Fin. Servs. Inc. v. Heritage*

Packaging Corp., 2007 WL 2815741, at *7 (E.D.N.Y. Sept. 25, 2007) ("[D]ispute over the amount owed does not preclude summary judgment on the issue of liability. . . .").

Because there is no dispute as to the material facts demonstrating that the Subject Products present a substantial product hazard, or that the requested 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 remedy.

V. THE SUBJECT PRODUCTS PRESENT SUBSTANTIAL PRODUCT HAZARDS UNDER SECTION 15 OF THE CPSA, 15 U.S.C. § 2064

Section 15 of the CPSA holds a distributor (or manufacturer or retailer) legally responsible for consumer products distributed in commerce that present a substantial product hazard, and such entity may be ordered to take corrective action. *See* 15 U.S.C. § 2064(c) and (d). As set forth below, the Subject Product children's sleepwear garments constitute a substantial product hazard under Section 15(a)(1). The Subject Product carbon monoxide detectors constitute a substantial product hazard under Section 15(a)(2). And, the Subject Product hair dryers constitute a substantial product hazard under Sections 15(a)(2) and (j).

A. The Subject Product Children's Sleepwear Garments Present a Substantial Product Hazard Because They Violate the FFA and Create a Substantial Risk of Injury to Children.

Under CPSA Section 15(a)(1), a "substantial product hazard" includes products that fail "to comply with an applicable consumer product safety rule under this chapter or a similar rule, regulation, standard, or ban under any other Act enforced by the Commission which creates a substantial risk of injury to the public." 15 U.S.C. § 2064(a)(1). In 1953, Congress enacted the Flammable Fabrics Act ("FFA"), 15 U.S.C. §§ 1191-1204, in response to serious injuries and deaths resulting from burns associated with clothing. The FFA is an Act enforced by the

Commission as referenced in CPSA Section 15(a)(1). *See* 15 U.S.C. § 2064(a)(1); 15 U.S.C. § 2079(b).

In the 1970s, pursuant to 15 U.S.C. § 1193, the Standard for the Flammability of Children's Sleepwear: Sizes 0 Through 6X, and the Standard for the Flammability of Children's Sleepwear: Sizes 7 Through 14 (collectively, the Standards) were established to address the ignition of children's sleepwear, such as nightgowns, pajamas, and robes. *See* 16 C.F.R. §§ 1615 and 1616. 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. 14624, 14624 (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. SUMF ¶ 17. The primary hazard is ignition of the sleepwear by contact with hot surfaces and/or small open-flame ignition sources, such as stove elements, matches, and lighters. *Id.*

Children's sleepwear garments must comply with the flammability requirements of the FFA, 15 U.S.C. §§ 1191-1204, and the Standards. The Standards require that children's sleepwear garments stop burning when a flame source is removed. In order to meet the flammability requirements of the Standards, the average char length[5] of five specimens of a children's sleepwear garment may not exceed seven inches. 16 C.F.R. §§ 1615.3(b) and 1616.3(b). In addition, no individual specimen can have a char length of ten inches under 16 C.F.R. § 1615.3(b) or ten inches $\pm$0.2 inches under 16 C.F.R. § 1616.3(b).

[5] Char length is "the distance from the original lower edge of the specimen exposed to the flame . . . to the end of the tear or void in the charred, burned, or damaged area." 16 C.F.R. § 1615.1(g).

CPSC staff tested the Subject Product children's sleepwear garments, and the Subject Products fail to meet the flammability requirements for children's sleepwear garments. *See* 16 C.F.R. §§ 1615 and 1616; SUMF ¶ 19. 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* SUMF ¶ 20.

Amazon does not contest that the Subject Product children's sleepwear garments were tested by the CPSC, fail to meet the current flammability requirements for children's sleepwear as required under the Flammable Fabrics Act, 15 U.S.C. §§ 1191–1204 and 16 C.F.R. §§ 1615–16 (2021), and meet the requirements for a substantial product hazard under Section 15 (a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1). Dkt. No. 35, ¶ 1; *see also* SUMF ¶ 21. Accordingly, Complaint Counsel is entitled to judgment as a matter of law that 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).

B. The Subject Product Carbon Monoxide Detectors Present a Substantial Product Hazard Because They Contain a Product Defect that Creates a Substantial Risk of Injury to the Public.

Under CPSA Section 15(a)(2), a "substantial product hazard" includes "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)(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.*

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. SUMF ¶ 22. Carbon monoxide ("CO") is a "colorless, odorless, toxic gas" produced by burning gasoline, wood, propane, charcoal, or other fuel. *Id.* ¶ 38. Improperly ventilated appliances and engines, particularly in a sealed or enclosed space, may allow carbon monoxide to accumulate to dangerous levels. *Id.* "More than 150 people in the United States die every year from accidental non-fire related CO poisoning associated with consumer products, including generators." *Id.* ¶ 39. "CO poisoning from portable generators can happen so quickly that exposed persons may become unconscious before recognizing the symptoms of nausea, dizziness or weakness." *Id.*

The voluntary standard set forth in the Underwriters Laboratories ("UL") *Standard for Single and Multiple Station Alarms*, UL 2034 (4th edition)[6] states that a carbon monoxide detector shall alarm within 4-15 minutes when exposed to a carbon monoxide concentration of 400 ppm. SUMF ¶ 31. According to the UL Standard, this time frame is designed so that an alarm will sound before an individual experiences "a loss of ability to react to the dangers of carbon monoxide exposure." *Id.* Continued exposure to 400 ppm CO concentration can hinder an individual's ability to self-rescue as they become increasingly disoriented, drowsy, and ill. *Id.* ¶ 41. Figure 41.1 in the UL Standard plots the estimated carboxyhemoglobin blood level of an individual exposed to certain concentrations of carbon monoxide over certain periods of time and displays that individuals can experience permanent brain damage and death when exposed to 400 ppm CO concentration for 140 minutes. SUMF ¶ 41.

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[6] "UL Standards encompass UL's extensive safety research and scientific expertise. With over a century of experience in the development of more than 1,500 Standards, UL is an accredited standards developer in the US and Canada. In extending its global public safety mission, UL Standards partners with national standards bodies in countries around the world to build a safer, more sustainable world." SUMF ¶ 31.

CPSC staff first tested the Subject Product carbon monoxide detectors [redacted] SUMF ¶ 31. [redacted] *Id.* [redacted] *Id.* ¶¶ 32-37. [redacted] SUMF ¶ 33. [redacted] SUMF ¶ 34. [redacted] SUMF ¶ 35. [redacted] SUMF ¶ 36.[7] The failure to alarm and sufficiently alert consumers to the presence of hazardous levels of carbon monoxide before consumers experience serious health consequences and "a loss of ability to react to the dangers of carbon monoxide exposure," SUMF ¶ 41, demonstrates 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.

The CPSA sets forth three factors to be considered in determining whether a substantial product hazard exists as the result of a defect which creates a substantial risk of injury: pattern

[7] [redacted] SUMF ¶ 37.

of defect, the number of defective products distributed in commerce, and the severity of the risk. 15 U.S.C. § 2064(a)(2). These factors are disjunctive: "any one of the factors could create a substantial product hazard." 16 C.F.R. § 1115.12(g)(1). Here, all three factors are satisfied, clearly establishing the existence of a substantial product hazard.

For the pattern of the defect, CPSC considers how the defect arises and the conditions under which the defect manifests itself. 16 C.F.R. § 1115.12(g)(1)(i). Here, the defect involves the intended operation and use of the products and manifests itself in failing to adequately warn consumers to the presence of hazardous levels of carbon monoxide, creating a substantial risk of injury to consumers. SUMF ¶ 42. For the number of defective products distributed in commerce, "[e]ven 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). [redacted] SUMF ¶ 28. This factor therefore provides a clear basis for a substantial product hazard determination. Lastly, for the severity of the risk, "a risk is severe 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)(iii). As previously stated, if consumers are not adequately alerted to the presence of hazardous levels of carbon monoxide, the consequences can be fatal. SUMF ¶¶ 39-41. Together, the pattern of defect, the number of products distributed, and the severity of the risk associated with the Subject Products, establish conclusively that the Subject Product carbon monoxide detectors present a substantial product hazard within the meaning of section 15(a)(2).

Amazon does not contest that the Subject Products fail to alarm in accordance with the standards set forth in UL 2034, and Amazon does not contest that the Subject Products meet the requirements for a substantial product hazard under Section 15(a)(2) of the CPSA. Dkt. No. 35, ¶ 2; SUMF ¶ 43. Accordingly, Complaint Counsel is entitled to judgment as a matter of law that the Subject Product carbon monoxide detectors present a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA. 15 U.S.C. § 2064(a)(2).

C. The Subject Product Hair Dryers Present a Substantial Product Hazard Because They Violate Section 15(j)(1) Due to the Lack of Immersion Protection.

Pursuant to CPSA Section 15(j), the Commission "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) . . . ." 15 U.S.C. § 2064(j)(1). In 2011, CPSC approved a federal safety rule specifying that hand-supported hair dryers that do not provide integral immersion protection in compliance with the requirements of Section 5 of UL *Standard for Safety for Household Electric Personal Grooming Appliances*, UL 859 (10th edition) or Section 6 of *UL Standard for Safety for Commercial Electric Personal Grooming Appliances*, UL 1727 (4th edition) are a "substantial product hazard" under Section 15(a)(2) of the CPSA. 16 C.F.R. § 1120.3(a).

The purpose of the federal safety rule is to reduce the risk of electric shock and electrocution hazards created by hand-supported hair dryers. SUMF ¶¶ 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." Substantial Product

Hazard List: Hand-Supported Hair Dryers,76 Fed. Reg. 37636, 37637 (June 28, 2011). When issuing the rule to add hand-supported hair dryers without integral immersion protection to the substantial product hazard list, CPSC determined that the UL standards referenced in 16 C.F.R. § 1120.3(a) had "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. at 37640.

CPSC staff evaluated the Subject Product hair dryers and determined that the Subject Products are hand-supported hair dryers that lack integral immersion protection in compliance with Section 5 of UL 859 or Section 6 of UL 1727. SUMF ¶¶ 46, 51. 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)." Substantial Product Hazard List: Hand-Supported Hair Dryers, 76 Fed. Reg. at 37637. Because the hair dryers fail to provide integral immersion protection, they present a significant electric shock and electrocution hazard to consumers. SUMF ¶ 54.

Amazon does not contest that the Subject Product hair dryers were tested by CPSC, fail to have integral immersion protection, and meet the requirements for a substantial product hazard under Sections 15(a)(2) and (j) of the CPSA. SUMF ¶ 55. Accordingly, Complaint Counsel is entitled to judgment as a matter of law that the Subject Product hair dryers present a substantial product hazard within the meaning of Sections 15(a)(2) and (j) of the CPSA. 15 U.S.C. § 2064(a)(2) and (j).

VI. THE CONSUMER PRODUCT SAFETY ACT, AS AMENDED, 15 U.S.C. § 2051, *ET SEQ.*, PROVIDES BROAD AUTHORITY FOR CPSC TO ORDER FIRMS TO TAKE REMEDIAL ACTIONS IN THE PUBLIC INTEREST

In 1972, Congress found that "an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce"; that "complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately"; that "the public should be protected against unreasonable risks of injury associated with consumer products"; and that "existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury" was inadequate. 15 U.S.C. § 2051(a). In response to these findings, Congress passed the Consumer Product Safety Act to empower the CPSC "to protect the public against unreasonable risks of injury associated with consumer products." *Id.* § 2051(b).

Although the vast majority of firms agree to take voluntary corrective action in conjunction with CPSC when a product presents a hazard to consumers, where, as here, a firm does not provide a voluntary corrective action plan agreeable to CPSC, Congress provided CPSC with the authority to issue an administrative complaint against the firm and to "order the notification and remedy of products which fail to comply with Commission safety rules or which contain safety related defects." H.R. Rep. No. 92-1153, at 21 (1972). The authority for this mandatory corrective action process is established in Section 15 of the CPSA. 15 U.S.C. § 2064.

While the authority for mandatory corrective actions has existed since the Commission's inception in 1972, the 2008 Consumer Product Safety Improvement Act ("CPSIA"), which amended the CPSA, recognized that CPSC needed even "more power to negotiate and order appropriate remedies after unsafe or defective products have been recalled and then to notify the

public effectively about the scope of a recall and the available remedies." H.R. Rep. No. 110-501, at 21 (2007); *see also* 154 Cong. Rec. H7580 (July 30, 2008) (statement of Rep. Stearns) ("It is very important that they have this additional recall authority that is in this bill."); 154 Cong Rec. S7873 (July 31, 2008) (statement of Sen. Schumer) ("The CPSC must do a better job of getting hazardous products off the shelves and out of consumers' reach and these provisions will give the CPSC the tools to do just that.").

Notably, in part, the legislation shifted some of the CPSA's remedial regime from a business-led process to a Commission-directed one, granting the Commission additional authority to determine what remedy is appropriate in a given case. *See* S. Rep. No. 110-265 (Feb. 25, 2008) at 13 (explaining that the legislation "would provide the Commission the authority to approve the corrective action plan it determines to be in the public interest, instead of allowing the manufacturer to select the corrective action plan it believes appropriate"); *see also* 154 Cong. Rec. H7585 (July 30, 2008) (statement of Rep. Eshoo) ("It's become glaringly obvious that we can't rely on manufacturers to police themselves, we need to give the chief consumer regulatory agency the authority and the resources necessary to get unsafe products off the shelves and stop them from coming into the country.").

Congress' efforts to strengthen the Commission's authority included an expanded Section 15(c), which, as amended, armed the Commission with a number of additional notice-related actions it could require of firms in a mandatory corrective action: an order to cease distribution, an order to notify all persons in the distribution chain to cease distribution, and an order to notify appropriate State and local public health officials. Pub. L. 110-314. The 2008 amendments also "create[d] requirements for recall notices in order to better inform the public of potential product harms," as set forth in Section 15(i)(2). H.R. Rep. No. 110-787, at 71 (2008) (Conf. Rep.) (Joint

Explanatory Statement of the Committee of Conference, Section 214); *see* 15 U.S.C. § 2064(i). And, the 2008 amendments required CPSC to establish guideline rules for any notice required under Section 15(c). Those requirements are set forth in 16 C.F.R. §§ 1115.23-1115.29. *See* Guidelines and Requirements for Mandatory Recall Notices, 75 Fed. Reg. 3355, 3356 (Jan. 21, 2010) (explaining that the Commission developed the guidelines and requirements for mandatory recall notices "based on its expertise with recall notifications since the Commission's inception").

The legislation made significant changes to Section 15(d), replacing language that had originally allowed a firm to elect its preferred remedy with a provision that instead granted the Commission authority to mandate "any one or more" of the following actions: repair a product, replace a product, and provide a refund. 15 U.S.C. § 2064(d)(1). Notably, this list of remedies is not authorized in the disjunctive. Rather, the Commission may order one, two, or all three of the available options. *Id.* "CPSC has administrative discretion to determine its enforcement efforts – and potential remedies – based on the unique circumstances of each case, company, product, and agency resources." *In re TK Access Solutions Corp*., CPSC Dkt. No. 21-1, Decision and Order on Otis Elevator Company Motion to Quash Subpoena at 7 (April 11, 2022); *see also* SUMF ¶ 117 ("Rarely will any two recall programs be identical."). Accordingly, the Commission may order any one or more of the actions "it determines to be in the public interest." 15 U.S.C. § 2064(d)(1).

Although the term "public interest" is not specifically defined in the Consumer Product Safety Act or its related regulations, it is a familiar concept in the laws concerning the federal government's enforcement powers. The Supreme Court, in *National Ass'n for Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 669 (1976), explained that it had

reviewed "the words 'public interest' in a regulatory statute" on numerous occasions and "consistently held" that the phrase is not meant as a vague reference to "the general public welfare," but rather "take[s] meaning from the purposes of the regulatory legislation."

Accordingly, federal courts have generally interpreted "public interest" language – where not otherwise specifically defined – as an expression of the discretion Congress granted a federal agency to effectuate the goals of its governing legislation. *See F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (describing a public-interest standard applicable to the Federal Communications Commission as a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy") (quoting *F.C.C. v. Pottsville Broadcasting Co*., 309 U.S. 134, 138 (1940)); *see also Buckner Trucking, Inc. v. U.S.,* 354 F. Supp. 1210, 1222 (S.D. Tx. 1973) ("Since the term public convenience and necessity is not defined by the [Interstate Commerce Act], the [Interstate Commerce] Commission was implicitly given administrative discretion to draw its own conclusions as to the basic public interest from an 'infinite variety of circumstances which may occur in specific instances.'") (citation omitted); *Citizens Organized to Defend Env't, Inc. v. Volpe*, 353 F. Supp. 520, 531 (S.D. Ohio 1972) (holding that the undefined phrase "in the public interest" in a Department of Transportation regulation meant something "not inconsistent with the purposes of the Act and [that] either furthers some recognized public good or minimizes a public harm").

As the federal governmental entity empowered to enforce the Consumer Product Safety Act, CPSC is uniquely positioned to understand and determine how to best achieve Congress' goal of "protect[ing] the public against unreasonable risks of injury associated with consumer products." 15. U.S.C. § 2051(b). Congress created CPSC specifically to grant the federal government greater "authority to protect consumers from exposure" to hazardous products at a

time when an underregulated marketplace had allowed an "unacceptable number of consumer products which present unreasonable risks of injury [to be] distributed in commerce." *Id.*

Indeed, the history of both the original 1972 Consumer Product Safety Act and its 2008 amendments makes clear that a primary purpose of the law is to ensure the protection of consumer safety above and beyond what industry may deem sufficient. *See* 153 Cong. Rec. H16882 (Dec. 19, 2007) (statement of Rep. DeLauro) ("The days of industry self-policing must come to an end."); *see also* 1970 Nat'l Commission on Product Safety, Final Rep. 4 ("[T]he sincere efforts of many producers to achieve uniform optimum safety for their products can be frustrated without positive government involvement."); *id.* at 4-5 ("Government must participate, in behalf of the consumer, in making the quasi-political decision of determining how much risk to safety the public should tolerate under the circumstances. . . . When some manufacturers ignore safety standards, only Government can assure compliance."). The 2008 amendments "represent commonsense solutions to keeping consumers informed and safe from dangerous products." 154 Cong. Rec. S7873 (July 31, 2008) (statement of Sen. Schumer).

VII. UNDER SECTION 15(C), AMAZON MUST CEASE DISTRIBUTION AND PROVIDE EFFECTIVE NOTIFICATIONS REGARDING THE SUBSTANTIAL PRODUCT HAZARDS PRESENTED BY THE SUBJECT PRODUCTS

If the Commission determines that a product presents a substantial product hazard and that notification is required to adequately protect the public from the substantial product hazard, the Commission may order a distributor such as Amazon to take "any one or more" of the remedial actions set forth in Section 15(c) of the CPSA. 15 U.S.C. § 2064(c). Because Amazon has provided no public notification of a "recall" of the Subject Products to reach all consumers in possession of the Subject Products, because Amazon's unilateral emails concerning the Subject Products to original purchasers are insufficient to properly warn them of the hazard and to

effectuate a recall of the Subject Products, and because Amazon or any other entities in the chain of distribution could resume or continue distribution of the hazardous products without entry of a Section 15 Order, action under Section 15(c) is required. Such order should require Amazon to: "cease distribution" of the Subject Products and any functionally equivalent products; notify all persons in Amazon's distribution chain "to cease immediately distribution of the product[s]"; "give public notice of the defect or failure to comply" in the form of a joint press release with CPSC; post "clear and conspicuous notice" of the hazards on its website and social media platforms; give effective notice of the hazards to every person to whom the "product was delivered or sold"; and give notice of the hazards to second-hand sellers of the Subject Products. 15 U.S.C. § 2064(c).

With Amazon's considerable corrective action capabilities based upon its expansive size and resources, Amazon is more than capable of effectuating with ease and with success the requested remedies to cease distribution and provide notification. *See In re Dye and Dye*, CPSC Dkt. No. 88-1, Opinion and Order, 1989 WL 435534, *21 (July 17, 1991) ("In determining what notice is required to adequately protect the public, the Commission believes that some consideration of the circumstances of the respondents, and of their ability to comply with the order, is appropriate."). Furthermore, the requested remedies closely mirror the obligations the Commission requires of firms engaging in voluntary corrective action plans as indicated in the Recall Handbook, the CAP template, and as demonstrated by numerous corrective actions in evidence in this case. SUMF ¶¶ 162, 163, 164. Because these commonsense requests are required in voluntary corrective actions to adequately protect the public, a mandatory order under Section 15(c) should require no less. *See* 16 C.F.R. § 1025.26(c) (explaining that settlement offers in Section 15 administrative litigation proceedings "shall contain all the elements of a

'Corrective Action Plan'" as outlined in 16 C.F.R. § 1115.20(a)(1)). Indeed, to require anything less of Amazon would embolden other companies to avoid public notice to hide the safety hazards of their products from public view.

A. Amazon Must Cease Distribution Under a Section 15 Order.

Pursuant to 15 U.S.C. § 2064(c)(1)(A) and (B), Amazon must cease distribution of the Subject Products and must "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 Subject Products. These steps are important elements of every corrective action undertaken in conjunction with CPSC – voluntary or mandatory – to protect the public and to ensure that hazardous products are no longer introduced anew into the marketplace. *See* SUMF ¶¶ 116, 119, 120, 121, 122, 148, 149.

As the Recall Handbook explains in the context of a voluntary recall, a firm must cease distribution and sales and must "[s]end a stop-sale notice to all entities in the chain of commerce." SUMF ¶ 119; *see* Guidelines and Requirements for Mandatory Recall Notices, 75 Fed. Reg. 3355, 3356 (Jan. 21, 2010) (explaining that the Recall Handbook summarizes "the Commission's expertise"). [redacted] SUMF ¶ 119. Furthermore, the corrective action documents produced in this case relating to voluntary recalls of children's sleepwear, carbon monoxide detectors, and hair dryers, demonstrate that CPSC instructed firms to cease sales and/or distribution in at least 71 of 77 voluntary recalls of similar products since 2015, and to notify companies in their distribution chain to similarly cease distribution in at least 66 of those recalls. SUMF ¶ 162.

Complaint Counsel's request for an order requiring Amazon to take the actions set out in 15 U.S.C. § 2064(c)(1)(A) and (B) is also firmly supported by prior decisions in administrative litigation matters. *See, e.g., In re Zen Magnets, LLC*, CPSC Dkt. No. 12-2, Final Decision and Order, 2017 WL 11672449, at *45 (Oct. 26, 2017) (finding "that because of the substantial risk of injury such magnets pose to children, it is in the public interest that Respondent cease from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States, the Subject Products"), *vacated on other grounds,* 2018 WL 2938326 (D. Colo June 12, 2018), *amended in part*, 2019 WL 9512983 (D. Colo. Mar. 6, 2019), *aff'd in part, rev'd in part* 986 F.3d 1156 (10th Cir. 2020) ("*Zen Magnets* Final Decision and Order"); *see also In re Dye and Dye*, 1989 WL 435534 at *21 ("In view of the serious hazard presented by worm probes, and the substantial risk of injury they present to the public, the Commission concludes that it is in the public interest to issue an order in this proceeding prohibiting, with respect to respondents' worm probe, manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States.").

Amazon, presumably, will contend that it has voluntarily ceased distribution of the Subject Products. But, without a mandatory, enforceable order under Section 15, Amazon – and others in the distribution chain – are positioned to resume distribution at any time without the consequence of the enforcement of a mandatory order. Thus, only an order to cease distribution can fully protect the public, particularly here, where Amazon distributes so many thousands of products in its FBA program through Amazon.com. Through these proceedings Complaint Counsel seeks for consumers the protection of a mandatory, enforceable order, not just a voluntary business decision that may change or be laxly executed now or in the future absent any threat of enforcement.

Because Amazon [redacted] SUMF ¶¶ 112-113, to adequately protect the public from the hazards presented, an order to cease distribution should similarly extend to products that are functionally equivalent to the Subject Products. *See In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Order, at 1 (Oct. 27, 1976) (ordering in a Section 15 administrative litigation proceeding 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") (Decision and Order and Order attached as Ex. EE to the Declaration of John Eustice). Indeed, [redacted] SUMF ¶ 112.

[redacted] SUMF ¶ 114. [redacted] SUMF ¶ 166-179. A[redacted] SUMF ¶¶ 166, 171, 175. [redacted]

[redacted] SUMF ¶¶ 168-169, 173, 177-178. [redacted]

[redacted] SUMF ¶¶ 170, 174, 179. [redacted]

Amazon should be ordered to identify and cease distribution of functionally equivalent products and to continue monitoring and taking action to prevent such products from resurfacing on Amazon.com. Without such an order, consumers face continued exposure to the hazards.

[redacted] this type of request from CPSC to search for and identify functionally equivalent products that present the same hazards as known substantial product hazards is not new. To protect the public, once CPSC identifies a product that presents a substantial product hazard, CPSC routinely asks firms to undertake a review of similar products for similar treatment as part of effectuating a corrective action plan. *See, e.g.*, SUMF ¶ 180 [redacted].[8]

[8] When firms are unable to effectively identify all functionally equivalent products at a recall's announcement, a firm may later need to re-announce the recall to extend the remedies to additional products presenting the same hazard. *See* SUMF ¶ 181 (citing a press release for a second expansion of an April 2014 recall of certain "candles sold in tins" to include additional designs of "candles sold in jars and tins" posing the same fire hazard and a press release for an expansion of a July 2008 recall involving Taggies Sleep 'n Play infant garments with "Butterfly Applique" and "Fun Dog Print" designs to include "The Dinosaur Applique and the Pink Toss Print styles," which were found to pose the same choking hazard).

Here, an order to cease distribution under Section 15 would prevent the Subject Products and functionally equivalent products from resurfacing on Amazon's online marketplace and would have the force and effect of providing lasting protection to the public.

B. Amazon Must Provide Effective Notifications that Meet the Requirements of the CPSA and its Corresponding Regulations for Mandatory Recall Notices.

Public notification of a hazard – announced in coordination with the government agency in charge of consumer product safety – is a key element of any corrective action, voluntary or mandatory. SUMF ¶ 116 (explaining that one objective of a recall is "to communicate to the public in a timely manner accurate and understandable information about the product defect or violation, the hazard, and the corrective action"). To state the obvious, consumers must be fully informed of and aware of a hazard to be able to safeguard themselves from the risk presented. *See In re Dye and Dye*, 1989 WL 435534, at *23 (finding that "because of the risk of injury or death by electric shock from such worm probes to persons who use them or who are in the vicinity of their use, public notification pursuant to 15 U.S.C. § 2064(c) is required to adequately protect the public from the substantial product hazard presented by such worm probes").

In the Final Decision and Order in *In re Zen Magnets, LLC*, the Commission explained that "widespread public notice that the Subject Products present a substantial product hazard is necessary to adequately protect the public," because numerous rare-earth magnets "may be in the hands of consumers" and "[a] child need only ingest one magnet and a metallic object, or two magnets, to suffer catastrophic injuries." *Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *42. Further, without public information, the Commission noted that consumers may not appreciate the risk of injury presented.

The same is true here. Amazon distributed more than 400,000 Subject Products, and an untold number may remain in the hands of consumers. SUMF ¶ 2. Yet it only takes one Subject

Product to result in an irreversible catastrophe. It requires no stretch of the imagination to understand the serious and deadly consequences that can result as to uninformed individuals who are renting a home or apartment that relies on a Subject Product carbon monoxide detector, to uninformed gift recipients of a Subject Product hair dryer, or to uninformed second-hand purchasers of a Subject Product children's sleepwear garment. *See, e.g.*, 118 Cong Rec. S13844, 13846 (reprinting in the Congressional Record a *Seattle Times* article about the death of an 11-year-old girl who became "trapped in a suddenly flaring nightgown after standing, warming her back and legs in front of the fireplace;" the nightgown was purchased from "The Salvation Army") (April 20, 1972).

Here, [redacted] SUMF ¶ 95. [redacted]

Even in voluntary corrective actions, companies work with CPSC to develop comprehensive communications plans to adequately inform the public about product hazards with a press release, website postings, social media postings, direct notifications to consumers, and notifications to second-hand retailers, thrift stores, and online re-sale websites. SUMF ¶¶ 125, 152. Including CPSC in notifications related to consumer product hazards and recalls lends credibility to the messaging, letting the public know that the government agency charged with their protection has evaluated the product and remedy at issue. *Id.* ¶¶ 115, 126.

For mandatory corrective actions, "Recall notices required under a Section 15(c) Order shall include the information specified in Section 15(i) of the CPSA (15 U.S.C. § 2064(i)), and the Commission's corresponding regulations at 16 C.F.R. part 1115, subpart C, unless the Commission determines that one or more of the recall notices requirements is unnecessary or inappropriate." *Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *42. Although the requirements expressly apply to mandatory recall notices, CPSC refers to these requirements in all recalls – voluntary and mandatory – to "ensure that every recall notice effectively helps consumers and other persons to: (1) Identify the specific product to which the recall notice pertains; (2) Understand the product's actual or potential hazards to which the recall notice pertains, and information relating to such hazards; and (3) Understand all remedies available to consumers concerning the product to which the recall notice pertains." 16 C.F.R. § 1115.23(b); *see also* SUMF ¶¶ 116.

To adequately inform the public of the substantial products hazards presented by the Subject Products, as set forth below, Amazon must at least provide the same basic notifications as a voluntary corrective action, *see* SUMF ¶ 125, and each notification must comply with 15 U.S.C. § 2064(i)(2) and the "Guidelines and Requirements for Mandatory Recall Notices" set forth in 16 C.F.R. §§ 1115.23-1115.29. Among other content requirements consistent with the statute and CPSC regulations, Amazon must include in each notification: the word "recall" in the heading and text of the notice, 16 C.F.R. § 1115.27(a); a photograph of the product at issue, 15 U.S.C. § 2064(i)(2)(A)(iii), 16 C.F.R. § 1115.27(c)(6); a clear and concise description of the product's actual or potential hazards, *id.* § 1115.27(f); a description of the action being taken to "request return and provide a refund," *id.* § 1115.27(d); all information a consumer needs to "obtain each remedy and to obtain all information about each remedy," including "distributor

contact information (such as name, address, telephone and facsimile numbers, e-mail address, and Web site address)," *id.* § 1115.27(n)(3), 15 U.S.C. § 2064(i)(2)(H); and any other information as the Commission "deems appropriate and orders," *id.* § 1115.27(o).

1. Amazon Must Provide Public Notification of the Substantial Product Hazards in a Joint Press Release with CPSC.

Pursuant to 15 U.S.C. § 2064(c)(1)(D), Amazon must "give public notice of the defect or failure to comply" in the form of a joint press release with CPSC, including the content set forth in 15 U.S.C. § 2064(i)(2) and 16 C.F.R. §§ 1115.23-1115.29. CPSC press releases, also commonly referred to as "news releases," are distributed to the media and can increase public awareness of a recall of hazardous products and the response rates of consumers. SUMF ¶ 129. The releases are posted on cpsc.gov and SaferProducts.gov, where they serve as a useful public resource and public record of the recall. SUMF ¶ 128. A consumer can therefore easily access the recall information whenever the need arises, now or years from now if a product resurfaces.

To ensure consistency and clarity when drafting the language of a press release, CPSC staff uses publicly available templates, which are attached to the Recall Handbook. *See* SUMF ¶ 135. [redacted] SUMF ¶¶ 141, 142. The inclusion of a photograph, [redacted] helps consumers to visually identify their product in the press release. SUMF ¶ 133, 135. All press releases – in a voluntary recall or in a mandatory recall – must be approved by CPSC. SUMF ¶ 143.

In CPSC's Recall Handbook, to guide manufacturers, importers, distributors, and retailers on implementing voluntary product safety recalls, CPSC reiterates the content requirements in a checklist for press releases. *See* SUMF ¶ 135. As the Recall Handbook explains, "CPSC's

headline for recall announcements will include the word 'recall.' That headline is standard as part of a CAP agreement." SUMF ¶ 134. [redacted] SUMF ¶ 155.

In previous matters involving similar products, a public-facing news release was issued on CPSC's website for every single recall of a hair dryer, carbon monoxide detector, or children's sleepwear garment conducted between 2015 and the present. *See* SUMF ¶ 162. Complaint Counsel's request for an Order under 15 U.S.C. § 2064(c)(1)(D) requiring Amazon to provide public notification in a press release is also firmly supported by prior decisions in administrative litigation matters. *See, e.g.*, *Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *46 (finding that "because Respondent sold millions of individual magnets and caregivers and medical professionals are not generally aware of the substantial risk of injury that the Subject Products present to children, public notification pursuant to 15 U.S.C. § 2064(c)(1) is required to adequately protect children from the substantial product hazard presented by the Subject Products"); *see also In re Zen Magnets,* CPSC Dkt. No. 12-2, Opinion and Order Approving Public Notification and Action Plan, 2017 WL 11672451, at *13-14 (Dec. 8, 2017) (approving public notifications, including joint press release) (hereinafter, "*Zen Magnets* Opinion and Order"); *In re Dye and Dye*, 1989 WL 435534 at *21, 23 (concluding "that notice to as many members of the public that may be exposed to the hazards of the worm probes manufactured by the respondents as is feasible is required so that members of the public may take appropriate actions to protect themselves" and ordering notification through a press release).

2. Amazon Must Provide Notice on Amazon's Website and Social Media Platforms.

Pursuant to 15 U.S.C. § 2064(c)(1)(D), in addition to a joint press release with CPSC, Amazon must also post "clear and conspicuous notice on its Internet website" and social media platforms, including the content specified in 15 U.S.C. § 2064(i)(2) and 16 C.F.R. § 1115.27. CPSC – and the statute – expect recalling firms to post a recall announcement on their current website, and, to take advantage of advances in communications technology, the notice should extend to social media platforms. SUMF ¶¶ 130-133. "The last several decades have seen significant changes and advancements to the way companies reach consumers for marketing and advertising products," and "[t]hose same developments should be reflected in the way companies communicate with consumers about recalls and other important safety issues." SUMF ¶ 132. With the inclusion of website and social media platforms, any consumer who failed to hear about the news release from the media or from CPSC's website, has an increased likelihood of seeing the recall announcement when they return to a website they have frequented for shopping in the past or when they view social media sources.

As CPSC's Recall Handbook explains, "companies must post recall announcements to all current websites." SUMF ¶ 130. Firms must "link recall announcements to the company website's first-entry point, such as the consumer home page (not the corporate/shareholder site)," "include the words 'recall' and 'safety' in the link to the recall information," "include all available recall information in the news release," "allow consumers to request the remedy directly from the website," and "convey any additional instructions that consumers need to receive the remedy in plain language and include photos or videos to explain the remedy process clearly." SUMF ¶¶ 131. [redacted]

[redacted]

SUMF ¶ 147. [redacted] *Id.*; *see also* 16 C.F.R. § 1115.26(b)(3) (explaining that the public notice should be on the "Web site's first entry point such as a home page, should be clear and prominent, and should be interactive by permitting consumers and other persons to obtain recall information and request a remedy directly on the Web site").

For social media notifications, the Recall Handbook explains that firms must "use the terms 'recall' and 'safety' in the social media messaging about the recall," "keep it concise," "link directly to the dedicated recall webpage," "use photos to increase priority on social media feeds and recall views," "use videos to give even greater priority on the various platforms, where possible," "make the recall a featured post, if possible," and "use direct messaging to answer recall questions from consumers." SUMF ¶ 133. [redacted]

[redacted] SUMF ¶ 147.

In previous matters involving similar products, CPSC has routinely sought recall notification postings on firm websites and social media platforms. Indeed, out of every recall of a hair dryer, carbon monoxide detector, or children's sleepwear product conducted between 2015 and the present, CPSC sought notice published on firms' websites or social media platforms in all but one of these recalls. SUMF ¶ 162. Complaint Counsel's request for an Order under 15 U.S.C. § 2064(c)(1)(D) requiring Amazon to provide notification on Amazon's website and on Amazon's social media platforms is also firmly supported by the Commission's prior decision in an administrative litigation matter. *See Zen Magnets* Final Decision and Order, 2017 WL

11672449, at *46 (ordering that "every social media platform used by Respondent shall include a link to the recall notice approved by the Commission and posted on Respondent's Internet website prominently and for an extended period of time, to the extent possible, or a hyperlink to this recall notice if the complete recall notice cannot appear on the social media platform because of messaging restrictions"); *see also Zen Magnets* Opinion and Order, 2017 WL 11672451, at *13-14 (approving public notifications, including the recall notice for the Respondent's website and the social media recall notices).

This commonsense approach is the best way to reach the public in today's modern society. As noted both by industry and CPSC, other persons outside of the original purchaser of a product may benefit from seeing a recall notice, including second-hand purchasers and gift recipients. *See* Guidelines and Requirements for Mandatory Recall Notices, 75 Fed. Reg. 3355, 3360 (Jan. 21, 2010). "Since at least 2000, the CPSC has provided guidance to firms to post recall notices prominently on the home page of the firm's Web site." *Id.* at 3361. With Amazon's consumer base, posting a recall announcement to Amazon's social media platforms and to Amazon's website will increase views and can "enhance consumer understanding and recall effectiveness." *Id.* at 3360.

3. Amazon Must Provide Effective Direct Notification to Consumers to Inform Them of the Substantial Product Hazards.

Pursuant to 15 U.S.C. § 2064(c)(1)(F), in addition to the joint press release with CPSC and website and social media postings, Amazon must provide effective direct notification of the Subject Product hazards to all known purchasers and owners of the Subject Products. Effective direct notification to specifically identified consumers, where possible, can help alert known consumers of the hazards presented by the products they possess and allows companies to open a line of communication with consumers to assist them in the recall process. As the Recall

Handbook explains, effective direct notice, where possible, is part of a "comprehensive communications plan." SUMF ¶ 125. To perform its statutorily mandated duty to protect the public against unreasonable risk of injury and death associated with consumer products, the Commission has invoked its authority in this administrative litigation to order direct notice with the content it requires "to ensure that every recall notice effectively helps consumers and other persons" to identify the hazardous products, understand the hazards, and seek appropriate remedies. 16 C.F.R. § 1115.23(b).

In voluntary recalls, [redacted] SUMF ¶ 146. At a minimum, the same steps are required here.

Complaint Counsel produced corrective action documentation from previous matters involving similar products, which showed that CPSC sought effective direct notice to consumers in at least 72 of the 77 recent recalls of similar products since 2015. SUMF ¶ 162. [redacted] SUMF ¶ 163. [redacted]

[redacted] SUMF ¶¶ 89, 90-91.

Complaint Counsel's request for an order under 15 U.S.C. § 2064(c)(1)(F) requiring Amazon to provide effective direct notice to consumers is firmly supported by prior decisions in administrative litigation matters. *See, e.g.*, *Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *43 (determining that the forms of notice that must be issued to warn consumers about the substantial product hazard posed by the Subject Products included "Direct notice via first-class mail and electronic mail to each person to whom Respondent knows such product was delivered or sold"); *Zen Magnets* Opinion and Order, 2017 WL 11672451, at *13-14 (approving public notifications, including the recall notice to be provided directly to consumers); *In re Dye and Dye*, 1989 WL 435534 at *23 (ordering a direct notice communication to "include a statement that the Commission has determined that the design and instructions of the WORM GETT'RS constitute substantial product hazards, a description of the nature of the hazard from worm probes, and warnings against further use of the worm probes").

To adequately protect consumers, Amazon must provide at least two rounds of direct notice to consumers. The notices should state that Amazon is working in coordination with CPSC to recall the Subject Products. And, the notices should contain the content required by 15 U.S.C. § 2064(i)(2) and 16 C.F.R. § 1115.29, including a "clear and concise description" of the hazard presented by the Subject Products. *See* 16 C.F.R. § 1115.27(f). The Commission's decision in *In re Zen Magnets, LLC*, provides further guidance on the basic requirements for a clear and concise statement of the hazard. *See Zen Magnets* Opinion and Order, 2017 WL 11672451, at *3. In that matter, the Commission recognized that the risk presented by the

Subject Products was "serious and can be fatal." *Id.* Even though there were no known deaths resulting from the Respondent's specific products in that matter, the Commission rejected the Respondent's attempt to omit the word death altogether from a description of the hazard. *See id.* at 7 (concluding that the description of the risk of injury "should state that there is a risk of death, as well as injury, from the Subject Products"). Similarly here, a clear and concise description of the hazard requires notice that use of the Subject Products can result in serious injury or death, which is information that consumers currently lack.[9]

4. Amazon Must Provide Notification to Second-Hand Sellers to Inform Them of the Substantial Product Hazards.

Pursuant to 15 U.S.C. § 2064(c)(1)(D) and (E), in addition to the notices explained above, Amazon must provide notification to potential second-hand sellers of the Subject Products, including second-hand retailers, thrift stores, and online re-sale websites (*e.g.*, Facebook Marketplace, eBay, Craigslist), to ensure that such entities are similarly apprised of the hazards presented by the Subject Products. A recall is only as strong as its weakest link, and today's marketplace makes it very easy for any consumer to list a product for re-sale on a secondary market. If parties in the secondary market chain are not kept in the loop, they are not positioned to play their part in removing the products from commerce to protect consumers from further exposure to the hazards.

[redacted]

[redacted] email address, a toll-free telephone number, and a website URL "for consumers to respond to the recall announcement").

[redacted] SUMF at ¶ 152. Notice to such entities is also supported by the Commission's prior decision in a previous administrative litigation matter. *See, e.g.*, *Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *43 (determining that the forms of notice that must be issued included "Direct notice via first-class mail and electronic mail to each third party Internet platform on which the Subject Products may be sold by persons other than Respondent, including, but not limited to, eBay"); *see also Zen Magnets* Opinion and Order, 2017 WL 11672451, at *13-14 (approving public notifications, including the recall notices for online re-sale websites).

VIII. UNDER SECTION 15(D), TO PROMOTE THE PERMANENT REMOVAL OF THE SUBJECT PRODUCTS FROM CONSUMERS' HOMES AND FROM THE STREAM OF COMMERCE, AMAZON MUST INCENTIVIZE CONSUMERS TO RETURN THE SUBJECT PRODUCTS OR PROVIDE PROOF OF THEIR DESTRUCTION

If the Commission determines that a product presents a substantial product hazard and that action under Section 15(d) is in the public interest, the Commission may order the distributor "to take any one or more of the following actions:" bring the products into conformity with applicable requirements, replace the products, and issue refunds for the products. 15 U.S.C. § 2064(d)(1) (emphasis added). One of the key goals of the CPSA in furtherance of the public interest is "to remove hazardous products from consumers' hands." *Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *41; *see also* SUMF ¶ 122 (citing the Recall Handbook's explanation that the goal of any remedial action taken by a company "should be to remove or correct as many hazardous products as possible from the distribution chain and from consumers"). Notably, to accomplish this goal, the Commission has the discretion to order one, two, or all three of the available options depending on the needs of a given case. *See* 15 U.S.C. § 2064(d)(1). For all of the remedies under Section 15(d), the firm must submit a plan for

approval by the Commission for providing the repair, replacement, and/or refund, 15 U.S.C. § 2064(2), and no charge shall be made to any consumer who avails himself of the remedy. 15 U.S.C. § 2064(e)(1).

As the Commission has expressly confirmed, "[g]iven the strong Congressional intent and 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." *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Decision and Order, at 5. Thus, to meet the strong "public interest" in removing the Subject Products from consumers' homes and from the marketplace, Amazon should incentivize all consumers in possession of the Subject Products through a statutorily authorized tender mechanism to remove the Subject Products from commerce. Amazon's remedial action should reach all consumers in possession of the Subject Products, whether or not they were an original purchaser.

[redacted] *See* SUMF ¶¶ 73, 80, 87. [redacted] SUMF ¶¶ 72, 79, 86, [redacted] But that inappropriately puts Amazon's business interest above the public interest and expressly contravenes the objectives of the CPSA.[10]

Without tender of the Subject Product or proof of the Subject Product's destruction, a consumer could conceivably receive a remedy – like Amazon's issuance of an Amazon credit –

10 [redacted] *See* SUMF ¶ 93.

and then continue to use the product or give it or sell it to someone else. Hazardous products that are not returned or destroyed can remain in homes, can be inadvertently donated, can be sold on a secondary market, and can continue to pose hazards in numerous ways. Absent proof that the Subject Products have been removed from commerce, the threat to the safety of consumers remains. *See, e.g., In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Decision and Order, at 6 (explaining that "a refund allowance not accompanied by a tender requirement would not advance the purposes of the legislation and might expose unwary consumers and other users to the dangers posed by the hazardous product").

Because it is in the public interest to remove as many dangerous Subject Products from the stream of commerce as possible, under Section 15(d) Amazon should provide refunds to incentivize consumers to return the Subject Products or provide proof of their destruction. In the alternative, if the court is not inclined to order refunds to original purchasers based upon Amazon's unilateral action, Amazon should provide replacements to original purchasers conditioned on return of the Subject Products or proof of their destruction.

A. Amazon Must Provide Refunds to All Consumers in Possession of a Subject Product Conditioned on Return of the Subject Products or Proof of Their Destruction.

Amazon should provide refunds pursuant to 15 U.S.C. § 2064(d)(1)(C) to all consumers who possess the Subject Products conditioned on return of the Subject Products or proof of their destruction. As the Commission stated in *In re Zen Magnets*, "[i]n view of the substantial product hazard presented by the Subject Products . . . the Commission's interest is in removing as many of the Subject Products as possible from consumers' hands by promoting consumer participation in the recall." *Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *45. And, "a substantial refund, available to all owners of the Subject Products, is the best and most

adequate incentive to encourage consumers to participate in the recall." *Zen Magnets* Opinion and Order, 2017 WL 11672451, at *11.

The Commission has broad authority to order refunds and broad authority to "specify in the order the persons to whom refunds must be made." 15 U.S.C. § 2064(d)(2); *see also* H.R. Rep. No. 92-1153, at 43 (1972) ("This would permit the Commission to control not only who will be entitled to refund but also what proof of claim must be made in order for a person to recover the purchase price."). Under Section 15(d), Amazon must issue refunds to all persons in possession of the Subject Products, including current owners of the Subject Products who were not the original purchasers and to date have received nothing. As the Commission explained in *In re Zen Magnets*, while rejecting a Respondent's attempt to narrow the scope of recipients of a refund, scope restrictions to only certain recipients "would unduly and arbitrarily limit the scope of the recall, leaving many hazardous products in the hands of consumers." *Zen Magnets* Opinion and Order, 2017 WL 11672451, at *9.

[redacted] *See* SUMF ¶ 153; *see also* 16 C.F.R. § 1115.27(d) (explaining that a recall notice must contain "a clear and concise statement of the actions that a firm is taking concerning the product," which may include "request return and provide a refund"). [redacted] SUMF ¶ 153.

Even in voluntary recalls executed in concert with CPSC, recalling firms of hair dryers, carbon monoxide detectors, and children's sleepwear have conditioned refunds or replacements

on a product return or proof of destruction in at least 51 of 77 voluntary recalls since 2015, a fact which is generally evident from the language of the press release. SUMF ¶ 162. *See, e.g.*, SUMF ¶ 164 (citing to a May 2022 press release for the recall of children's sleepwear garments which notes that consumers will either be "provided prepaid mailers to return the garment(s)" or "be asked to destroy the garments . . . and send[] the firm a photo" in order to receive a refund).

Complaint Counsel's request for an order requiring Amazon to issue refunds conditioned on return of the Subject Product or proof of its destruction under 15 U.S.C. § 2064(d)(1)(C) and (d)(2) is also firmly supported by prior decisions in administrative litigation matters. *See, e.g., Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *45 (finding that "because of the substantial risk of injury that the Subject Products present to children, as many as possible of these hazardous products must be removed from consumers"); *see also Zen Magnets* Opinion and Order, 2017 WL 11672451, at *13-14 (approving an Action Plan that required Respondent to refund original purchasers and non-original purchasers of the Subject Products conditioned upon return of the Subject Products); *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Decision and Order, at 13 (altering the Administrative Law Judge's initial order in an administrative litigation "to require tender from persons in possession of the welder who seek a refund").

Although Amazon will presumably argue that its issuance of Amazon gift card credits to certain individuals should exempt it from an order compelling refunds contingent on return or proof of destruction under Section 15(d), that is not so. Amazon's action failed to accomplish the prime purpose of the CPSA – removing hazardous products from the marketplace. [redacted] SUMF ¶ 93. To allow Amazon to evade a Section 15 order would create a perverse incentive for businesses to

act without input or approval from CPSC and without incentivizing removal of the hazardous product from commerce, which would come at a high cost to consumer safety. Amazon has already demonstrated that it can easily issue a monetary credit to consumers, and Amazon's immense resources and business model fully equip it to receive and accept returned items, as much or more so than any other firm. SUMF ¶ 73, 80, 87, 99. In fact, through the FBA program, consumers must send their items to Amazon when returning a product. SUMF ¶ 101.

To the extent that Amazon protests the additional expenditure of money on refunds, Amazon, as one of the largest companies in the world, is fully capable of financing such refunds for products it distributed. SUMF ¶ 106. It is also worth noting that Amazon has the contractual right to recover its recall expenses from the merchants participating in its FBA program. SUMF ¶ 100. [redacted] *Id.* ¶¶ 104-105.

And, in any event, the CPSA expressly places the burden on recalling firms to foot the bill for a refund. *See* 15 U.S.C. § 2064(e)(1) (providing that a firm subject to a Section 15(d) order shall reimburse each person entitled to a remedy under the order for "any reasonable and foreseeable expenses incurred" in availing themselves of the remedy); *see also id.* § 2064(h) ("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 incurred in providing notification or taking other action under this section with the benefits from such notification or action."). The statute also makes plain that a recalling firm may be required to pay more than its out-of-pocket costs for the recall. *See, e.g.,* 15 U.S.C. § 2064(e)(2) ("[a]n order issued under subsection (c) or (d) with respect to a product may require any person

who is a manufacturer, distributor, or retailer of the product to reimburse any other person who is a manufacturer, distributor, or retailer of such product for such other person's expenses in connection with carrying out the order, if the Commission determines such reimbursement to be in the public interest"); *see also* H.R. Rep. No. 92-1153, at 43 (1972) ("While it is expected that the Commission in the exercise of this authority will most commonly order those at fault to reimburse others for their expenses, it is contemplated that the Commission would have the authority to place this obligation on the person most able to bear the cost where equitable and other considerations appear to warrant such action in the public interest. In this area, general rules are neither appropriate or feasible. The Commission would be expected to exercise this power on an ad hoc basis taking into account the individual circumstances of each case.").

Thus, especially in light of Amazon's position as the leading online marketplace in the United States and with the enormous resources of its FBA program that plays a dominant role in bringing products to consumers, SUMF ¶ 99, Amazon cannot prevail with an argument that a Section 15(d) order to provide refunds would unlawfully require Amazon to "overpay" for the cost of properly incentivizing consumers to remove dangerous products from commerce.

B. In the Alternative, Amazon Must Provide Safe Replacement Products Conditioned on Return of the Subject Products or Proof of Their Destruction.

Amazon's self-inflicted expenditure of certain funds should not shield it from an enforceable, mandatory order under Section 15 to accomplish the goals of the CPSA for consumer safety. Any other conclusion would send a message to companies (and to Amazon) that it is acceptable to ignore the statute's objective of removing hazardous products from consumers' hands and instead quickly take unilateral action to avoid the costs and efforts involved in responsibly retrieving and destroying the hazardous items the companies put into the

hands of consumers. If the Court declines, however, to order refunds to those to whom Amazon unilaterally issued a gift card, Amazon should be ordered to provide such consumers appropriate replacements pursuant to 15 U.S.C. § 2064(d)(1)(B) conditioned on return of the Subject Products or proof of their destruction.

Because the statute expressly allows the Commission to order more than one remedy under Section 15(d), Amazon's issuance of a credit to original purchasers in no way prohibits an order requiring replacement products be provided to such consumers in furtherance of the CPSA's goals. As the statute explains, the replacement product must be "a like or equivalent product which complies with the applicable rule, regulation, standard, or ban or which does not contain the defect." 15 U.S.C. § 2064(d)(1)(B). CPSC's publicly available Recall Handbook confirms that a corrective action plan can provide for the return of a product for "a replacement product," SUMF ¶ 123, [redacted] *Id.*; *see also In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Order, at 3 (ordering that for any replacement product provided as a remedy to consumers as a result of the administrative litigation, "a prototype of the replacement welder unit shall be submitted with all supporting technical data, electrical drawings and component materials information, to the Commission's staff to enable it to determine, before the welder is placed in the hands of consumers, that any defects have been corrected and that the replacement welder will not create a substantial product hazard").

The public interest demands that consumers be incentivized to remove the hazardous products from their homes and from the marketplace. In the absence of a refund, a replacement must substitute as that needed incentive.[11]

IX. AMAZON MUST PROVIDE REPORTS TO DEMONSTRATE COMPLIANCE WITH THE COURT'S ORDER AND TO ENABLE CPSC TO EVALUATE THE EFFECTIVENESS OF AMAZON'S ACTIONS

To ensure the public is protected from unreasonable risks of injury or death presented by the Subject Products, CPSC is empowered to review, approve, and monitor the details of an approved action plan under a Section 15 Order. 15 U.S.C. § 2064(d)(3)(B), (C). Pursuant to 15 U.S.C. § 2064(d)(3)(B), "If the Commission finds that an approved action plan is not effective or appropriate under the circumstances, or that the manufacturer, retailer, or distributor is not executing an approved action plan effectively, the Commission may, by order, amend, or require amendment of, the action plan." Pursuant to 15 U.S.C. § 2064(d)(3)(C), "If the Commission determines, after notice and opportunity for comment, that a manufacturer, retailer, or distributor has failed to comply substantially with its obligations under its action plan, the Commission may revoke its approval of the action plan." Such monitoring and revision is important for all recalls

[11] If the Commission determines that a product presents a substantial product hazard and that action under subsection (d) is in the public interest, the Commission "may order the manufacturer or any distributor or retailer of such product to provide the notice required by subsection (c)." 15 U.S.C. § 2064(d)(1). An order under Section 15(d), may also "prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States . . . or from doing any combination of such actions, the product with respect to which the order was issued." 15 U.S.C. § 2064(d)(2). Complaint Counsel hereby incorporates its arguments stated above in Section VII seeking notification and an order to cease distribution under Section 15(c). Because notification and cessation of distribution are in the public interest to inform consumers about the substantial product hazards, are necessary to protect the public from the substantial product hazards presented by the Subject Products, and are appropriate to ensure such products are no longer distributed in commerce, Complaint Counsel similarly seeks the notice required by subsection (c) and an order to cease distribution under the authority of Section 15(d).

– voluntary and mandatory – to ensure the corrective action is protecting the public and accomplishing the goals of the CPSA. Accordingly, Amazon must be ordered to provide: consumer contact information for direct notice recipients, as requested by CPSC; a plan for quarantining, retrieving, and destroying the Subject Products; proof of destruction of any remaining inventory and of returned items to ensure that the products cannot reenter commerce; and monthly progress reports detailing the implementation of the Section 15 order.

The information requested here is consistent with what firms provide in voluntary correction actions. In all recalls, as the Recall Handbook states, "companies must provide sufficient customer contact information for CPSC to verify later that consumers received the recall communication." SUMF ¶ 158. [redacted] SUMF ¶ 158.

The Recall Handbook instructs firms to provide detailed information regarding their plan for recovery and destruction of hazardous products - a process commonly referred to as "Reverse Logistics." SUMF ¶¶ 125, 137. [redacted] SUMF ¶ 154. Additionally, the reverse logistics plan ensures that hazardous products are being destroyed, therefore rendering them unable to reenter commerce. CPSC must approve a firm's destruction plan, which can occur either on-site or off-site. SUMF ¶ 138. If destruction occurs on-site, CPSC requires firms to submit at a minimum, "a signed statement, including the date, stating which recalled products were destroyed, the number of recalled

products destroyed, and the name of the employee who performed the destruction, signed by the employee who performed the destruction and a witness." SUMF ¶ 139.

The Recall Handbook [redacted] also explain that firms submit monthly progress reports to CPSC after initiating a recall. SUMF ¶ 156. [redacted] SUMF ¶¶ 159, 160. Firms are required to submit electronic information each month informing CPSC: (1) how many products have been corrected; (2) whether any new incidents have come to light; (3) how many consumers the firm has notified during the past month; (4) how many consumers have contacted the firm about the recall during the past month; (5) whether the recall announcement is currently posted on the firm's website, and more. SUMF ¶ 157. [redacted] SUMF ¶¶ 156, 158.

In previous matters involving similar products, CPSC has routinely requested information necessary to monitor the effectiveness of a recall, including submission of monthly progress reports, and it has produced the reports provided in 44 voluntary recalls of hair dryers, carbon monoxide detectors, and children's sleepwear garments from 2015 to the present. SUMF ¶ 162. Complaint Counsel's request for an order requiring Amazon to provide monitoring information and monthly progress reports is also firmly supported by a prior Commission decision in an administrative litigation matter. *See, e.g., Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *47 (ordering that "Respondent shall file with Complaint Counsel monthly progress reports in a format specified by Complaint Counsel, documenting the progress of the

recall"); *Zen Magnets* Opinion and Order, 2017 WL 11672451, at *14 (ordering the Respondent to ensure proper quarantine of the products, to notify CPSC of Respondent's plans to destroy the products so that CPSC staff could approve and witness the destruction, and to "ensure complete destruction of units of the Subject Products" because these steps "are necessary to address the hazard posed by the Subject Products by preventing their redistribution"); *id.* at 15 ("the Commission approves an Action Plan requiring that Respondent shall maintain all records relating to the Action Plan for a period of 5 years").

To enable CPSC to perform its statutory obligation to monitor the implementation of the action plan, Amazon must be ordered to provide the requested information. [redacted] SUMF at ¶ 111. Such reporting will allow CPSC to determine whether Amazon's actions have been sufficient in reaching consumers and removing the Subject Products from commerce and whether additional action is needed.

X. CONCLUSION

For the reasons stated above, Complaint Counsel moves the Presiding Officer to grant Complaint Counsel's Motion for Summary Decision.[12]

[12] Accompanying this Motion and Memorandum in Support of Summary Decision is a Proposed Order similar to the Commission's Order in the *Zen Magnets* administrative litigation. *See Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *45-47.

Respectfully submitted,

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September 23, 2022

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2022, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

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