UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

COMPLAINT COUNSEL'S REPLY IN SUPPORT OF
COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

I. Introduction

Amazon's Opposition acknowledges that the Subject Products present substantial product hazards but attempts to complicate the straightforward question of remedy before this Court: Should Amazon be ordered to provide notifications and take remedial action under the express authority of the Consumer Product Safety Act to address the 400,000 substantially hazardous Subject Products that Amazon distributed in commerce? The answer – as supported by the law and the undisputed facts – is yes.

Amazon, however, in direct opposition to the governing administrative case law, asks this Court to endorse an unprecedented contrary conclusion: (1) that notification is not required under Section 15 for substantial product hazards even though the undisputed record shows that Amazon provided no public notification of the substantial product hazards, and failed to fully inform even original purchasers of the risks the Subject Products present, including the risk of death; (2) that a cease distribution order is not required under Section 15 because the government and the public must trust that Amazon will voluntarily prevent distribution of the hazardous products even as the undisputed record shows that Amazon has not instructed all entities in the distribution chain to cease distribution; and (3) that it is not in the public interest to order Amazon to provide a refund or replacement to all consumers in possession of the Subject Products, conditioned on return of the Subject Products or proof of their destruction, even though the undisputed record shows that Amazon has not taken any action to incentivize consumers to remove the Subject Products from commerce and *none of the 400,000 hazardous Subject Products* Amazon distributed into commerce are confirmed to have been removed from consumers' hands.

Urging the Court to reach this extraordinary conclusion, Amazon resorts to procedurally improper constitutional arguments, misplaced APA arguments, and repetitive arguments from previous briefing. First, as explained below, Amazon raises a constitutional attack on the "public interest" standard in Section 15. But even the case law that Amazon cites confirms that the "public interest" standard has withstood constitutional challenges, and the remedies sought here are properly central to furthering the core purposes of the CPSA. Second, Amazon again raises premature APA claims that are not applicable to this proceeding, which does not yet have any final agency action. And to the extent that Amazon attempts to use its APA claims to attack the sufficiency of the evidence before the Court, the undisputed record amply demonstrates that the Subject Products constitute substantial product hazards (which Amazon has conceded) and that the requested remedies are in the public interest. Third, Amazon argues against a cease distribution order, an order for notification of the substantial product hazards, and an order requiring refunds or replacements conditioned on returns, but Amazon's arguments ignore the undisputed facts, are wrong on the law, and are contrary to administrative litigation precedent. In making these flawed arguments Amazon tries to hide behind its unilateral voluntary actions to argue that its self-selected actions usurp the Commission's ability to exercise remedial authority under Section 15. But Amazon's argument is not supported by the law and would have a disastrous impact on consumer safety by allowing companies to evade statutorily authorized remedies for substantially hazardous products they put into commerce. Lastly, Amazon attempts to distinguish precedential Commission actions requiring functionally equivalent product remedies, but Amazon is incorrect that such prior actions focused solely on manufacturers. And, in any event, Amazon's admissions confirm its ability to identify and take action to protect consumers from functionally equivalent products.

II. The Undisputed Factual Record

Following each party's submission of a Statement of Undisputed Material Facts and Response, the record of undisputed facts in this case is clear. It is wholly undisputed that:

(1) consumers purchased more than 400,000 units of the Subject Products through Amazon's "Fulfillment by Amazon" program[1];

(2) the Subject Products meet the requirements for a substantial product hazard under the Consumer Product Safety Act[2]; and

(3) [redacted].[3]

[redacted][4]

Amazon confirms that it did not incentivize consumers to return the Subject Products or provide proof of their destruction.[5] [redacted][6] [redacted]

[redacted][7] Moreover, the single email sent to original purchasers of the Subject Products did not include all of the content required by 15 U.S.C. § 2064(i)(2) or 16

[1] *See* Amazon's Response to Complaint Counsel's Statement of Undisputed Material Facts ("Amazon's Response to CC's SUMF"), at ¶ 2.
[2] *See id.* at ¶¶ 21, 43, 55.
[3] *See id.* at ¶¶ 66, 95, 103; Amazon's Statement of Undisputed Material Facts ("Amazon's SUMF"), at ¶¶ 17, 37, 50, 70, 86, 100.
[4] *See* Amazon's Response to CC's SUMF, at ¶ 92.
[5] *See* Amazon's SUMF, at ¶¶ 19, 52, 71, 87, 101.
[6] *See* Amazon's Response to CC's SUMF at ¶ 93.
[7] *See id.* at ¶ 94.

C.F.R. § 1115.27 and did not state that the Subject Products create a risk of death.[8] [redacted]

[redacted][9]

In its response to Complaint Counsel's Statement of Undisputed Material Facts, Amazon admitted the accuracy of CPSC's practices and guidelines for handling recalls as set forth in the Recall Handbook, Corrective Action Plan Template, and Office of Communications Content Guides.[10] [redacted]

[redacted][11]

Moreover, Amazon admits that Complaint Counsel's chart summarizing the corrective actions sought by CPSC from companies conducting voluntary recalls of similarly hazardous children's sleepwear garments, hair dryers, and carbon monoxide detectors since 2015 is accurate.[12] The summary chart demonstrates that, since 2015, CPSC obtained and posted a public notice on CPSC.gov for every recall of children's sleepwear garments, hair dryers, and carbon monoxide detectors.[13] In addition, CPSC sought notice on a recalling firm's website and/or social media in

[8] *See* Amazon's SUMF, at ¶¶ 19, 52, 71, 87, 101.
[9] *See* Amazon's Response to CC's SUMF, at ¶ 95.
[10] *See id.* at ¶¶ 115-161. Amazon objects to Complaint Counsel's citations to the operative and most recent version of the Recall Handbook, which was made public in September 2021. However, the prior Recall Handbook, made public in March 2012, sets forth nearly identical goals for recall actions as those set forth in the most recent version: "1. to locate all defective products as quickly as possible; 2. to remove defective products from the distribution chain and from the possession of consumers; and 3. to communicate accurate and understandable information in a timely manner to the public about the product defect, the hazard, and the corrective action. Companies should design all informational material to motivate retailers and media to get the word out and consumers to act on the recall." *See* Declaration of Joshua González in Support of Amazon's Motion for Summary Decision, Ex. 60 at 18.
[11] *See* Amazon's Response to CC's SUMF, at ¶ 120 (quoting Amazon's Response).
[12] *See id.* at ¶ 162.
[13] *See* Sept. 23, 2022 Declaration of John Eustice ("Sept 23, 2022 Declaration"), Ex. Z. .

76 out of 77 such recalls.[14] CPSC instructed firms to cease sales and/or distribution in at least 71 of 77 such recalls and to notify companies in their distribution chain to similarly cease distribution in at least 66 of those recalls.[15] In at least 51 of 77 such recalls, a refund or replacement of the hazardous product was conditioned on the return or proof of destruction of the product.[16] And in 44 of 77 recalls, recalling firms submitted monthly progress reports to track the success of the recall.[17] Essentially, Amazon argues that CPSC should be consistent and not act in a purportedly "arbitrary" fashion, yet admits that CPSC both sought and obtained the remedies sought here in the vast majority of other recalls of the same categories of consumer products over the last seven years.[18]

Finally, as to functionally equivalent products, [redacted][19] [redacted][20] [redacted][21]

[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* Of these 77, the undisputed record demonstrates that monthly progress reports were submitted in 39 of the 50 most recent recalls, reflecting the Commission's increased focus on recall effectiveness monitoring. *See id.*
[18] In fact, in voluntary recalls involving "Amazon Basics" products, Amazon has issued refunds that were conditioned on either proof of destruction or returns and joined CPSC in a news release announcing the recalls, among other corrective actions that are typical of CPSC recalls. *See, e.g.*, https://www.cpsc.gov/Recalls/2023/Amazon-Recalls-Amazon-Basics-Desk-Chairs-Due-to-Fall-and-Injury-Hazards-Recall-Alert; https://www.cpsc.gov/Recalls/2018/Amazon-Recalls-Portable-Power-Banks-Due-to-Fire-and-Chemical-Burn-Hazards-Recall-Alert.
[19] *See* Amazon's SUMF, at ¶¶ 12, 32, 44, 63, 84, 98, 114; Amazon's Response to CC's SUMF, at ¶ 114.
[20] *Id.*
[21] *See* Amazon's Response to CC's SUMF, at ¶¶ 166-180.

These facts demonstrate that Amazon has the capability to locate functionally equivalent products that pose the same hazard and that functionally equivalent products to the Subject Products have been identified by both Amazon and CPSC since the filing of this lawsuit.

III. Amazon Does Not Contest Summary Decision as a Matter of Law That the Subject Products Present Substantial Product Hazards.

As set forth above, Amazon does not contest that the Subject Products pose substantial product hazards and can seriously injure or kill children and other consumers. Faced with these irrefutable facts, Amazon struggles to downplay their significance. First, Amazon attempts to belittle the conclusion that the Subject Products present a substantial product hazard by contending that the law sets forth "a low bar for a substantial product hazard." Amazon Opp'n at 4. But that argument is contradicted by the plain language of the statute, which itself defines a *substantial* product hazard as "a failure to comply with an applicable consumer product safety rule which creates a *substantial risk of injury* to the public" or "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) (emphasis added); *see also In re Zen Magnets, LLC*, CPSC Dkt. No. 12-2, Final Decision and Order, 2017 WL 11672449, at *45 (Oct. 26, 2017), *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"); *In re Dye and Dye*, CPSC Dkt. No. 88-1, Opinion and Order, 1989 WL 435534, at *23 (July 17, 1991).

Second, Amazon again contends that "Complaint Counsel fails to identify any instances of property damage, injury, or death in connection with the Subject Products." Amazon Opp'n at 4. But, as Complaint Counsel previously explained, that information is under Amazon's control,

and Complaint Counsel previously provided a representative sample of such information by citing to an Amazon spreadsheet that identified over 100 incidents where consumers complained that the Subject Product hair dryers caught fire, burned consumers, or shocked consumers. *See* Oct. 21, 2022 Declaration of John Eustice, Exhibit K, CPSC_AM0001807-11. In any event, the Commission need not await serious injuries and deaths to require corrective actions for known substantial product hazards. *See In re Dye and Dye*, 1989 WL 435534, at *14 (explaining that "the Commission is not required to have evidence of actual injuries in order to address a risk"); *see also Consumer Product Safety Commission Reauthorization: Hearing Before the Subcomm. On Commerce, Consumer Protection, and Competitiveness of the H. Comm. On Energy and Commerce*, H. Hrg., Serial No. 100-47, 67 (June 4, 1987) ("If done right, recalls occur before there are many injuries and before the full potential for injury or death can be calculated.") (Statement of former CPSC Commissioner R. David Pittle). A contrary conclusion would be detrimental to consumer safety and to the Commission's statutory mandate to "protect the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. § 2051(b)(1).

Overall, Amazon strives to keep this Court from focusing on the dangers associated with the Subject Products to justify the very inaction that Congress aimed to prevent with the CPSA. But the risks of serious injury and death presented by the 400,000 Subject Products require the notification and remedial action sought in this proceeding to adequately protect the public. Not surprisingly, in previous administrative litigation matters, when the Commission has determined that products present substantial product hazards, the Commission has consistently determined that Section 15 remedies were necessary to protect the public from the hazards. *See, e.g.*, *Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *45-46. Tellingly, Amazon is unable

to cite a single case from a prior administrative litigation proceeding where a product was determined to present a substantial product hazard but the Commission found no Section 15 remedies were required to protect the public from the hazardous products.

IV. Amazon's Mischaracterization of the Public Interest Language in Section 15 is Contradicted by the Law, Including the Law it Cites.

Amazon attempts to mischaracterize Complaint Counsel's "public interest" argument by alleging that Complaint Counsel's interpretation somehow runs afoul of *National Ass'n for Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 669 (1976) ("*NAACP*"). Amazon Opp'n at 6. But, interestingly, in attempting to make its argument, Amazon cites the exact language from *NAACP* that Complaint Counsel cited in its opening brief. *Id.* As Complaint Counsel previously explained, in that case, the Supreme Court held that the phrase "public interest" "take[s] meaning from the purposes of the regulatory legislation" and does not grant regulatory agencies unlimited power to promote "the general public welfare." *NAACP*, 425 U.S. at 669.[22] Here, consistent with the holding in *NAACP*, Complaint Counsel is

[22] Numerous federal court decisions have likewise interpreted "public interest" language in various regulatory statutes as an expression of broad agency discretion within the bounds of the governing statute. Contrary to Amazon's suggestion that two of these cases cited in Complaint Counsel's brief were overruled by the Supreme Court's opinion in *NAACP*, all three cases are entirely consistent in their holdings that the "public interest" standard provides agencies with broad discretion within the bounds of their statutory scheme. *Compare Buckner Trucking, Inc. v. United States*, 354 F. Supp. 1210, 1222 (S.D. Tx. 1973) ("[T]he 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' . . . . predicated on proper statutory criteria . . . .") (citations omitted), *and Citizens Organized to Defend Env't, Inc. v. Volpe*, 353 F. Supp. 520, 531 (S.D. Ohio 1972) ("A use is 'in the public interest' if it is not inconsistent with the purposes of the Act and it either furthers some recognized public good or minimizes a public harm."), *with NAACP*, 425 U.S. at 669 (1976). Furthermore, Amazon completely ignores the post-*NAACP* case, *F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981), which explains that the public-interest standard is a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *See also Huawei Techs. USA, Inc. v. F.C.C.*, 2 F.4th 421, 439 (5th Cir. 2021) (upholding F.C.C. rule barring use of government subsidies to buy equipment from companies designated "national

seeking remedies that are squarely within the consumer protection goals at the foundation of the Consumer Product Safety Act and that are expressly set forth as available remedies in Section 15 of the statute.

In *NAACP*, by contrast, the Supreme Court rejected an argument that references to "the public interest" in the Power and Gas Acts gave the Federal Power Commission the authority to compel regulated entities to adopt affirmative action and anti-discriminatory hiring practices, explaining that the public interest phrase in that legislation "is not a directive to the [Federal Power] Commission to seek to eradicate discrimination, but rather, is a charge to promote the orderly production of plentiful supplies of electrical energy and natural gas at just and reasonable rates." *Id.* at 664-69. There is no allegation in this case that the Commission is straying from its core consumer protection goals into extraneous or unrelated areas.

Amazon next incorrectly argues that Complaint Counsel is attempting "to *ensure* the absolute protection of consumers from *any* risk" and attempting to achieve the "impossible standard" of "absolute safety." Amazon Opp'n at 7. But nothing about the remedies sought in this case goes beyond the Commission's fundamental authority to protect consumers from unreasonable risks of injury associated with dangerous products. And Amazon's cited case of *Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981), has no applicability here. Amazon Opp'n at 7. That case related to the specific legislative history of a provision in the Occupational Safety and Health Act, empowering OSHA to promulgate standards that eliminate or reduce workplace safety risks relating to toxic chemicals "to the extent feasible." *Donovan,* 452 U.S. at

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security risks," because the agency had "reasonably read 'public interest'" in light of the "larger goals" of the Communications Act to "mak[e] [communication] available ... for the purpose of the national defense" and "promot[e] safety of life and property through the use of wire and radio communications").

5007. The Supreme Court noted that Congress had included the "feasibility" language to guard against regulations so strict that they might "close every business in this nation" or "forbid employment in all occupations where there is any risk of injury." *Id.* at 516. [redacted] *See* Amazon's Response to CC's SUMF ¶¶ 103, 106-111; *see also* Amazon.com, Product Safety and Recalls, https://www.amazon.com/gp/help/customer/display.html?nodeId=GLD7VXFKV4AWU78X (last visited Nov. 15, 2022). Indeed, countless firms with substantially fewer resources have undertaken remedial actions in recalls of hair dryers, carbon monoxide detectors, and children's sleepwear over the last several years. *See* Sept. 23, 2022 Declaration, Ex. Z. Thus, the notion that the Commission is seeking to hold Amazon to an "impossible standard" in this case is simply false.[23] *See Donovan*, 452 U.S. at 514. [24]

[23] In recalls involving Amazon Basics products, Amazon has undertaken the same remedies Complaint Counsel seeks here, including a joint press release, direct notification to consumers, and refunds conditioned on a return or proof of destruction. *See* https://www.cpsc.gov/Recalls/2023/Amazon-Recalls-Amazon-Basics-Desk-Chairs-Due-to-Fall-and-Injury-Hazards-Recall-Alert; https://www.cpsc.gov/Recalls/2018/Amazon-Recalls-Portable-Power-Banks-Due-to-Fire-and-Chemical-Burn-Hazards-Recall-Alert.

[24] In addition, *Donovan* further undermines Amazon's attempts to require a cost-benefit analysis under Section 15. The opinion made clear that Congress understood that the "real and substantial costs of compliance on industry . . . were part of doing business," and the Court expressed concerns that OSHA would be forced to adopt "less stringent" standards if governed by a cost-benefit requirement. *Id.* at 513-14; *see also id.* at 513 ("[W]e should not 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.'") (*quoting Weinberger v. Hynson, Westcott & Dunning, Inc*. 412 U.S. 609, 631 (1973)). The Court's concerns in *Donovan* and *Weinberger* mirror Congress's discussion prior to adding the language in Section 15(h) clarifying that no cost-benefit analysis is required under Section 15. *See, e.g*., 135 Cong. Rec. S10049-01, 1989 WL 193553, at S10052* (Aug. 3, 1989) ("In recent years, there have been suggestions that the CPSC has used analysis of costs and benefits from

Given how Amazon has misconstrued Complaint Counsel's interpretation of the "public interest" language in Section 15, Amazon is also wrong to claim that the language allegedly "presents a constitutional non-delegation issue." Amazon Opp'n at 8.[25] Pursuant to the non-delegation doctrine, Congress may delegate power to another branch of government so long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Touby v. United States*, 500 U.S. 160, 165 (1991) (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). But Amazon concedes that the Supreme Court "has upheld a 'public interest' test against a non-delegation challenge precisely because it contained 'ascertainable criteria' that provide a 'standard to guide determinations' of the agency."' Amazon Opp'n at 8 (citing *New York Cent. Sec. Corp. v. United States,* 287 U.S. 12, 24 (1932)). The Supreme Court did so in *New York Cent. Sec. Corp.* after considering the purposes of the Interstate Commerce Act, the context of the challenged provisions, and the history and purpose of statutory amendments, concluding that it was a "mistaken assumption" to construe the "public interest" language as "a mere general reference to the public welfare without any standard to guide determinations." *Id.*; *see also Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (explaining that the Supreme Court has "approved delegations to various agencies to regulate in the 'public interest'"). Similarly here, the non-delegation doctrine is not implicated in this case because the public interest requirement in

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corrective action to justify inaction, and even in some cases to second guess an industry determination to improve a product.") (Statement of Sen. Bryan); *see also* S. Rep. No. 261-41, at 60 (May 13, 1987) ("The use of such a mechanistic formula by the Commission might encourage firms to generate such analyses to justify actions that their management perceives to be in their immediate self-interest.") (Statement of CPSC Commissioner Anne Graham).

[25] As explained in Complaint Counsel's Opposition to Amazon's Motion for Summary Decision, administrative litigation is generally not the proper forum to challenge the constitutionality of a statute. *See* Complaint Counsel's Opp'n at 39, 58.

Section 15 sets appropriate boundaries on CPSC's authority, guided by the context of the CPSA, the legislative history of the CPSA and its amendments, and the purposes of the statute.

V. Amazon's APA Arguments are Premature and Contrary to the Record Before the Court.

In its Opposition, Amazon discusses standards of review that courts use to evaluate final agency action under the Administrative Procedure Act ("APA"). *See* Amazon Opp'n at 9-10. However, because there is no final agency action here, Amazon's invocation of the "substantial evidence" scope of judicial review is premature. *See* Jan. 19, 2021 Order on Motion to Dismiss and Motion for Summary Judgment, Dkt No. 27, at 14; *see also* CC's Opp'n, at 55. Moreover, there is "substantial evidence" to support a substantial product hazard finding and the requested remedial order in this matter.

First, in an administrative proceeding subject to 5 U.S.C. § 556 and 5 U.S.C. § 557, the agency is still creating the record before issuance of a final agency decision, which may later be subject to appellate review under a "substantial evidence" standard. However, any such evaluation is dependent on final agency action, which has not yet occurred here. *See Steadman v. S.E.C.,* 450 U.S. 91, 98 (1981) (citing APA § 10(e), codified at 5 U.S.C. § 706, as "the APA's explicit 'Scope of review' provision," which provides that final agency action shall be held unlawful by a reviewing court if "unsupported by substantial evidence"); *see also id*. at 102 n.22 (explaining that "[t]he APA […] was passed with an explicit judicial review provision, § 10(e)").

Second, to the extent that Amazon is attempting to argue that the record lacks sufficient evidence to grant Complaint Counsel's Motion for Summary Decision, Amazon is incorrect. As an initial matter, as to substantial product hazard determinations, the Commission has determined that the "preponderance of the evidence" rather than the "substantial evidence" standard applies. *Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *7; *see also Steadman*, 450 U.S.

at 91. The preponderance standard "simply means that the record must be sufficient to find that a fact is more likely to be true than untrue," and the record fully supports, by a preponderance of the evidence, a ruling in favor of Complaint Counsel here. *Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *7. Indeed, Amazon has conceded that the standard has been met for a substantial product hazard determination. *See* Amazon Opp'n at 4.

Once a substantial product hazard is established, Section 15 merely requires that any remedial order be in the "public interest" or "required in order to adequately protect the public." *See* 15 U.S.C. § 2064(c)(1); 15 U.S.C. § 2064(d)(1); *see also Steadman*, 450 U.S. at 95 ("[W]here Congress has spoken, we have deferred to 'the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts.'"); *id.* at 95 n.9 (explaining that "[t]here is no reason to accord less deference to congressionally prescribed standards of proof and rules of evidence in administrative proceedings than in federal courts"). The considerable basis for finding that the requested remedies are in the public interest is addressed in detail in Complaint Counsel's Motion for Summary Decision and Complaint Counsel's Opposition to Amazon's Motion for Summary Decision. *See* CC's Mem. at §§ VII, VIII, IX; CC's Opp'n. at §§ IV.A, IV.B, IV.D, IV.E, IV.F.

However, even if the basis for remedial action were predicated on the "substantial evidence" standard, this is a lower standard than preponderance of the evidence. *See Webster v. Kijakazi*, 19 F.4th 715, 718 (5th Cir. 2021) (explaining that under a substantial evidence standard, "though the evidence must be more than a scintilla, it need not be a preponderance") (quotation marks and citation omitted). Such a standard is easily met, as the Commission's determination must merely be sufficient to satisfy a reasonable factfinder, and the agency's factfinding receives deference. *See Honeyville Grain, Inc. v. N.L.R.B.,* 444 F.3d 1269, 1277

(10th Cir. 2006) ("The 'substantial evidence' test itself already gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the court that the requisite fact exists, but merely the degree that could satisfy a reasonable factfinder.") (citation omitted); *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1102–03 (10th Cir. 1999) ("The substantial-evidence standard does not allow a court to displace the agency's 'choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.'") (*quoting NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 405 (1962) (per curiam)). The overwhelming basis for issuing the requested remedies in the public interest also meets this "substantial evidence" threshold. *See* CC's Mem. at §§ VII, VIII, IX; CC's Opp'n. at §§ IV.A, IV.B, IV.D, IV.E, IV.F. [26]

Further, Amazon is incorrect in arguing that any applicable standard of proof requires "empirical evidence" and that lack of empirical evidence renders an agency action arbitrary and capricious. *See* Amazon Opp'n at 10. To state the obvious, empirical evidence is not always available, and blind focus on empirical evidence "ignores many of the fundamental non-quantifiable benefits of corrective action under Sections 12 and 15." *CPSC Authorization: Before the Subcomm. on the Consumer of the Comm. on Commerce, Science, and Transportation,* S.Hrg. 100-142 (May 13, 1987) (statement of former CPSC Commissioner Anne Graham). As former CPSC Commissioner Anne Graham previously summarized in a Congressional hearing, such non-quantifiable benefits include, but are not limited to:

> (1) Recalls give consumers a chance to take action to protect themselves. This enhances their faith in industry and government. They can have faith that someone is trying to protect them from injury.

[26] Indeed, the evidence in the undisputed record as set forth in Complaint Counsel's briefing also more than satisfies even a preponderance of the evidence standard. *See* CC's Mem. at §§ VII, VIII, IX; CC's Opp'n. at §§ IV.A, IV.B, IV.D, IV.E, IV.F

(2) Requiring firms to correct defective products may motivate them, or their competitors, to make safer products in the future, and to improve product quality.
(3) Section 15 actions may motivate improvements in industry standards.

Id.[27]

As courts have expressly explained, "[a] lack of empirical data does not render an otherwise reasonable conclusion based on agency experience arbitrary or capricious." *Alaska v. Bernhardt*, 500 F. Supp. 3d 889, 921 (D. Alaska 2020) (*citing Sacora v. Thomas*, 628 F.3d 1059, 1069 (9th Cir. 2010) (explaining that "it was reasonable for the [agency] to rely on its experience, even without having quantified it in the form of a study")); *see Nasdaq Stock Market LLC v. S.E.C.*, 38 F.4th 1126, 1142 (D.C. Cir. 2022) (stating that "an agency 'need not – indeed cannot – base its every action upon empirical data' and may, 'depending upon the nature of the problem, . . . be 'entitled to conduct . . . a general analysis based on informed conjecture'"); *see also F.C.C. v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (explaining that courts will uphold agency action where "complete factual support in the record for the Commission's judgment or prediction is not possible or required; a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency").[28]

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[27] *See also Consumer Product Safety Commission Reauthorization: Hearing Before the Subcomm. On Commerce, Consumer Protection, and Competitiveness of the H. Comm. On Energy and Commerce*, H. Hrg., Serial No. 100-47, 67 (June 4, 1987) ("If done right, recalls occur before there are many injuries and before the full potential for injury or death can be calculated. . . . The lack of an accurate body count means that cost-benefit analyses will always be skewed against recall action. The Commission will almost always have a better idea of the costs of a recall than of its benefits.") (Statement of former CPSC Commissioner R. David Pittle).

[28] The cases Amazon cites for the proposition that Complaint Counsel is attempting to "avoid its evidentiary burden," Amazon Opp'n at 34-36, are all inapposite and narrowly applicable to specific statutory schemes that are not relevant here. Amazon's cited case *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 188 (1999), addresses the Government's burden to justify commercial speech restrictions under the First Amendment and says nothing

Here, the undisputed record demonstrates the factual predicates for the substantial product hazard determinations and the need for the requested remedies, confirms that the requested remedies are authorized by statute and implemented by agency practices, and includes evidentiary support from 77 voluntary recalls of similar products since 2015 in further demonstration of how the remedies sought here are consistent with past agency practice. *See, e.g.*, CC's Memorandum of Points and Authorities in Support of Motion for Summary Decision, at III.(B) ("CC Mem."); *see* Sept. 23, 2022 Declaration, Exhibit S (CPSC_AM0011464-11515), Exhibit T (CPSC_AM AM0012125-133).[29]

VI. Amazon's Claim that a Cease Distribution Order and an Order to Notify Other Entities to Cease Distribution is "Unnecessary" or Impermissible is Unsupported by Law and Contrary to the Undisputed Facts.

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whatsoever about the evidentiary burden in an administrative adjudication. Amazon Opp'n at 34. Amazon also repeatedly quotes from *In re Sang-Su Lee*, 277 F.3d 1338 (Fed. Cir. 2002), Amazon Opp'n at 35, a case concerning what specific evidence of "obviousness" is required in patent hearings, and which the U.S. Patent and Trademark Office states has been "overruled" by subsequent Supreme Court and Federal Circuit precedent. Manual of Patent Examining Procedure (Ninth Ed.), 2141 Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103 [R-10.2019], (June 2020), *available at* https://www.uspto.gov/web/offices/pac/mpep/s2141.html; *see KSR International Co. v. Teleflex Inx.*, 550 U.S. 398, 421 (2007) ("Rigid preventative rules that deny recourse to common sense are neither necessary under, nor consistent with, this Court's case law."). Finally, Amazon's reliance throughout its brief on *NRDC v. EPA*, 857 F.3d 1030 (9th Cir. 2017), is misplaced. That case was narrowly focused on an EPA process for granting conditional approval to pesticides with incomplete risk data—which Congress intended to be a "stringent test" reserved for "truly exceptional case[s]"— and is neither analogous to this case, nor relevant to agency enforcement actions more generally. *Id.* at 1037. In any event, Complaint Counsel's remedial requests are well supported by the undisputed facts of this case, as well as CPSC past practice, policy, and research. *See infra*, at 21-22.

[29] Although Amazon makes a conclusory assertion that agencies must "treat like cases alike," Amazon Opp'n at 10, the undisputed record establishes that CPSC routinely seeks remedies similar to those sought here. *See* Sept. 23, 2022 Declaration, Ex. Z. Amazon's allegation that "changes in agency policy must be explicit and supported by reasoned explanation," Amazon Opp'n at 10, is therefore inapplicable. Regardless, even if it were applicable, a change in policy would be created by a final agency action, not by the mere existence of a Complaint or further pleadings. *See* Jan. 19, 2022 Order on Motion to Dismiss and Motion for Summary Judgment, Dkt No. 27, at 16.

Amazon fails to rebut Complaint Counsel's arguments that an order to cease distribution and an order to notify entities in the distribution chain to cease distribution are important elements of voluntary and mandatory corrective actions that CPSC has instructed firms to take in voluntary recalls involving similar products, and that such orders are supported by prior decisions in administrative litigation matters. *See* CC Mem. at 27-28. Amazon merely protests that such orders are "unnecessary" here and that such orders would be impermissible "obey-the-law" orders. Amazon Opp'n at 21, 22. Amazon is wrong.

First, Amazon cites no law in support of its contention that its current voluntary action to cease distribution and its limited communications with third-party sellers preclude a Section 15(c) or (d) order. As discussed further in Section X below, the Commission's remedial authority is in no way preempted by actions Amazon has taken unilaterally. And as previously articulated in Complaint Counsel's prior briefing, an enforceable order is necessary to protect consumers from a voluntary business decision that may be laxly enforced, rescinded, or ignored. CC's Opp'n, § IV.A.[30]

Second, the undisputed facts also contradict Amazon's position. For example, while Amazon claims to have notified the "third-party manufacturers of the Commission's findings regarding the Subject Products," Amazon Opp'n at 22, Amazon does not claim that it notified the third-party manufacturers or all distribution chain entities to cease distribution. [redacted] *See* Amazon Opp'n at

[30] In the heading for Section III of Amazon's Opposition brief, Amazon includes the word "moot," but Amazon provides no case law or argument regarding mootness. In any event, the January 19, 2022 Order already denied Amazon's mootness challenge. Jan. 19, 2022 Order on Motion to Dismiss and Motion for Summary Judgment, Dkt No. 27, at § 4.1.4. ("Contrary to Amazon's argument, the complaint is not moot").

22, [redacted] Thus, an enforceable Section 15 order requiring Amazon to do so is necessary here to protect the public.

Moreover, after initially insisting that the Commission is not "automatically entitled to relief" based on a substantial product hazard determination, Amazon Opp'n at 4, Amazon attempts to argue instead that a substantial product hazard determination somehow *prevents* the Commission from seeking relief in the form of a Section 15(c) or (d) order to cease distribution. In Amazon's new formulation, because it "has already stipulated that the Subject Products meet the requirements for a substantial product hazard under the CPSA," Amazon Opp'n at 21, a Section 15(c) or (d) order is unnecessary because the civil penalty provisions of the CPSA set forth in 15 U.S.C. § 2068 state that it is unlawful for any person to sell consumer products that are not in conformity with a regulation under an Act enforced by the Commission. 15 U.S.C. § 2068(a)(1).[31] But Amazon's argument is self-defeating. If Amazon were correct that a substantial product hazard showing obviates a Section 15(c) or (d) order to cease distribution, the

[31] Amazon's argument would not even apply to the Subject Product hair dryers and Subject Product carbon monoxide detectors. Only the Subject Product children's sleepwear garments, which are subject to federal flammability requirements, *see* 15 U.S.C. § 2079(b), 16 C.F.R. §§ 1615 and 1616, are subject to a consumer product safety rule or a similar rule, regulation, standard, or ban under an Act enforced by the Commission, and would therefore fall under the prohibition in 15 U.S.C. § 2068(a)(1). The Subject Product hair dryers and carbon monoxide detectors, on the other hand, require a voluntary corrective action undertaken by the manufacturer or an order under 15 U.S.C. §§ 2061 or 2064 for it to be prohibited to sell, offer for sale, manufacture, distribute in commerce, or import them. 15 U.S.C. § 2068(a)(2).

language in 15 U.S.C. § 2064(c)(1)(A) authorizing the Commission to order a distributor to "cease distribution of the product" and the language in 15 U.S.C. § 2064(d)(2) providing that an order may prohibit the distributor from offering the product "for sale" and from "distributing [it] in commerce" would be rendered superfluous. That, of course, is contrary to the basic cannon of statutory interpretation that a statute should not be interpreted to render certain provisions in the act to be unnecessary or superfluous. *See Lockhart v. United States*, 577 U.S. 347, 357 (2016) (citing *Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning")).

Moreover, Amazon completely misses the mark with its citations to *SEC v. Goble*, 682 F.3d 934 (11th Cir. 2012) and *Hughey v. JMS Development Corp.*, 78 F.3d 1523 (11th Cir. 1996), in support of an attempted argument that a Section 15(c) or (d) order requiring Amazon to cease distribution and to notify entities in the distribution chain to cease distribution would impermissibly instruct Amazon to obey the law. In *Goble*, the appellate court held that a permanent injunction, which "simply cross-reference[d] the [securities] statutes and regulations," did not satisfy the specificity requirements of the Federal Rules of Civil Procedure because "without a compendious knowledge of the codes, [the defendant] has no way of understanding his obligations under the injunction." 682 F.3d at 953-53 (remanding for the district court to redraft the injunction). And, in *Hughey*, the court similarly vacated an injunction that "failed to specifically identify the acts that JMS was required to do or refrain from doing." 78 F.3d at 1532. Such cases have no applicability here where Complaint Counsel is seeking an order requiring actions set forth under Section 15(c) and (d) and where the proposed order explains with specificity the actions required by Amazon, including to "immediately cease distribution of the Subject Products and notify all persons or entities that transport, store, distribute, or

otherwise handle any Subject Product or to which any Subject Product has been transported, sold, distributed, or otherwise handled, to immediately cease distribution of the Subject Products." CC Proposed Order ¶ 1.

VII. Amazon Fails to Rebut the Need for Notification of the Substantial Product Hazards in Light of the Undisputed Facts that Amazon Has Provided No Public Notification, No Consumers have Confirmed Reading Amazon's Unilateral Email, and Amazon Failed to Provide Required Information to Original Purchasers

In the face of Complaint Counsel's cited precedent and the undisputed facts, Amazon has nearly nothing new to say in opposition to Complaint Counsel's request for an order requiring notification under Section 15(c).[32] Instead, Amazon attempts to attack the evidence in the record supporting notification, and Amazon again argues that notification is "unnecessary" because Amazon's unilateral email was allegedly effective. Amazon's arguments are unavailing.

To begin, Amazon does not dispute that consumers must be informed of substantial product hazards to protect themselves from hazardous consumer products. Nor could anyone dispute the soundness of such a self-evident truth. *See* CC's SUMF, at¶ 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"). Amazon itself acknowledges that "[i]n support of [Complaint Counsel's] request for additional notice, Complaint Counsel" has relied on agency regulations regarding mandatory notice content requirements, the agency's Recall Handbook, the Corrective Action Plan template, CPSC Office of Communications guidance documents regarding recall notices, and "the

[32] In previous briefing, Complaint Counsel addressed the arguments Amazon raises again in its Opposition brief, including Amazon's ineffective attempt to deprive consumers of substantial product hazard information based upon a speculative concept of recall fatigue. *See* C.C. Mem. at VII.B.; C.C. Opp'n at IV.B.

Commission's acceptance of recalls in the past that include the notice Complaint Counsel now seeks." Amazon Opp'n at 11.

While Amazon attempts to demand additional quantifiable data, nothing more is needed here in light of the undisputed facts and the materials already put forward in the record. Congress itself mandated "certain content that must be included in mandatory recall notices," Guidelines and Requirements for Mandatory Recall Notices, 75 Fed. Reg. 3355, 3356 (Jan. 21, 2010), and CPSC promulgated the mandatory recall notice content requirements after careful consideration of public comments during the notice and comment rulemaking. *See id.* at 3360 ("The Commission agrees that a direct recall notice should not be the sole form of recall notification because the purpose of a recall notice is to reach the broadest possible audience of consumers that may have purchased *or received the products*. Sole reliance on direct recall notices ignores the fact that other persons may benefit from receiving recall notices and assist in broad dissemination of recall notices.") (emphasis added).

Amazon also fails to acknowledge that all of the governing Commission documentation in the record is informed by and based upon: the Commission's experience involving thousands of recalls over fifty years (and monitoring the effectiveness of those recalls with monthly progress reports); numerous research reports prepared by CPSC staff that are available on CPSC.gov (https://www.cpsc.gov/research-and-reports-overviewCPSC.gov); metrics published in agency reports that are available on CPSC.gov (https://www.cpsc.gov/About-CPSC/Agency-Reports); and studies and workshops evaluating recall effectiveness (https://www.cpsc.gov/Recall-Effectiveness). *See also* Amazon Ex. 66 ("CPSC Defect Recall Data," Recall Effectiveness Workshop); Amazon Ex. 68 ("Goals for CPSC Recall Press Releases," Recall Effectiveness Workshop) ("multiple communication channels," "media stories

& social media mentions," and notification "multiple times" help to make recalls more effective (CPSC_AM0009651)); Amazon Ex. 90 ("Recall Effectiveness Workshop Report"); [redacted]. The record here is replete with evidence supporting Complaint Counsel's request for notification of the substantial product hazards.

Further, the undisputed facts confirm the necessity of a Section 15(c) order here. "A recall notice must be read to be effective." Guidelines and Requirements for Mandatory Recall Notices: Notice of Proposed Rulemaking, 74 Fed. Reg. 11883, 11884 (Mar. 20, 2009). And it is undisputed that Amazon does not know how many – if any – original purchasers read Amazon's unilateral email. And without incentivizing consumers to return the Subject Products or provide proof of their destruction, Amazon's unilateral email generated no evidence of consumers actually removing the hazardous products from their homes and from the marketplace. Thus, the number of consumers confirmed to have been adequately informed of the substantial product hazards is *zero*. This demonstrates that a Section 15(c) notification order is required to adequately protect the public.

Even assuming *arguendo* that some original purchasers read Amazon's unilateral email, the undisputed record *still* establishes that notification is required to adequately protect the public for all of the reasons Complaint Counsel has explained through its prior briefing, including Amazon's failure to provide public notification of the substantial product hazards,[33] failure to provide critical information to original purchasers,[34] failure to track if original purchasers notified subsequent recipients of the Subject Products, and failure to track if any Subject Products were removed from consumers' hands.

Of the 400,000 Subject Products that Amazon distributed to consumers, *zero* are accounted for and *zero* are confirmed to have been removed from consumers' hands. With the risk of injury and death that each product presents, the undisputed record confirms that notification is required to adequately protect the public from the substantial product hazards, as the Commission similarly concluded in the *Zen Magnets* administrative litigation. *See Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *42 (explaining that "widespread

[33] Amazon misleadingly attempts to argue that public notification is unnecessary here based upon a misinterpretation of the Commission's research as summarized during CPSC's Recall Effectiveness Workshop. *See* Amazon Opp'n at 18 (citing Amazon Ex. 66, at 9-10). As CPSC has previously explained, and as Amazon ignores, all CPSC recalls involve a public notification element through a recall press release or a recall alert, both of which are posted on CPSC's website, and both of which memorialize a recall and provide a permanent public record of that recall. *See* Sept. 23, 2022 Declaration, Exhibit S at CPSC_AM0011485 (explaining that a recall alert is identical to a joint news release); *see also* CC's Response to Amazon SUMF ¶137. The analysis cited by Amazon compared recalls with public notification through a press release to recalls with both public notification through a recall alert and through direct notifications. Not surprisingly, utilizing both public notification and direct notification together is more effective. Contrary to Amazon's position, this supports the importance of pairing both forms of notification here.

[34] Amazon does not dispute that its unilateral email failed to include all of the content required by 15 U.S.C. § 2064(i)(2) and 16 C.F.R. § 1115.27. And Amazon accomplishes nothing with its argument that a consumer *could* find a picture of the product at issue if the consumer endeavored to follow up and take additional actions of clicking through to a certain location in the consumer's Amazon account. *See* Amazon Opp'n at 16. It is undisputed that the unilateral email itself contained no photograph for the consumer to quickly identify the hazardous product.

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").

And although Amazon argues that there is "no evidence that there is (or ever was) an active secondary market for any of the Subject Products," Amazon Opp'n at 19, that is demonstrably false based upon Amazon's own actions through its "Amazon Warehouse" program. *See* Amazon Answer, Dkt. No. 2, at ¶¶ 1, 10, 14, 36, 45. Through Amazon's Warehouse program, Amazon sells "used, pre-owned, or open box products." Amazon.com, FAQ, "What is Amazon Warehouse?", *available at* https://www.amazon.com/Warehouse-Deals/b?node=10158976011 (last visited Nov. 14, 2022). Here, Amazon admits that "approximately 32 units [of the Subject Products were] sold through the Amazon Warehouse program (consisting of approximately 28 carbon monoxide ('CO') detectors and approximately 4 hair dryers)." Amazon's Declaration of Lauren Shrem ¶ 5; *see also* Amazon Answer, Dkt. No. 2, Add'l and Affirmative Defenses ¶ 3 (admitting that Amazon was "a seller, manufacturer, distributor, or retailer" of the "approximately 28 units of CO detectors and approximately 4 units of hair dryers sold by Amazon through the 'Amazon Warehouse' program"). These sales by Amazon itself confirm that a secondary market demand for the Subject Products does indeed exist, without even considering the many well-known secondary market sellers in commerce (*e.g.*, eBay, Facebook Marketplace, and Craigslist), thereby necessitating notification of the substantial product hazards to other second-hand sellers to prevent avoidable serious injury and death.

VIII. Amazon's Argument that it is Not in the Public Interest to Provide Refunds Conditioned on Return of the Subject Products is Wrong on the Law and the Facts with 400,000 Hazardous Products Unaccounted for in the Marketplace.

In attempting to evade an order to provide refunds conditioned on return or tender of a Subject Product, Amazon makes three unavailing arguments regarding the statutory language, the legislative history, and the public interest.[35] Amazon acknowledges that the CPSA empowers the Commission to order refunds under Section 15, but Amazon nonetheless attempts to argue that the Commission cannot have statutory authority to condition refunds on a consumer's return or tender of the Subject Product because the word "return" is not in 15 U.S.C. § 2064(d). *See* Amazon's Opp'n at 27. Amazon is wrong.

As Complaint Counsel previously explained, Section 15 empowers the Commission with the authority to order refunds conditioned on returns. *See, e.g.*, CC Mem. at 42-43, 45, 47; CC Opp'n at 41, 43-44. Under 15 U.S.C. § 2064(d)(2), "[t]he Commission shall specify in the order the persons to whom refunds must be made if the Commission orders the action described in paragraph (C)." *Id.* at § 2064(d)(2). Accordingly, a Section 15 order here should specify that the refunds must be made to those consumers who tender the Subject Product or provide proof of its destruction. Additional statutory authority in 15 U.S.C. § 2064(d)(2) also requires the distributor, here Amazon, "to submit a plan for approval by the Commission," for providing the ordered refund. This action plan requirement, which is subject to the approval of the Commission, necessarily further provides the Commission the statutory authority to require the distributor to issue a refund to consumers who tender the product or provide proof of its destruction. *See also id.* at § 2064(i)(2)(H)(ii) (specifying that notice required under Sections

[35] In previous briefing, Complaint Counsel addressed the arguments Amazon raises again in its Opposition brief. *See* CC Mem. at VIII.; CC Opp'n at IV.C. and IV.D.

15(c) or (d) "shall include" a description of "any action a consumer must take to obtain a remedy").

And the legislative history amply supports this interpretation. Although Amazon struggles to oppose discussion of the legislative history here, it is permissible for courts to review legislative history and, in particular, to note when the legislative history confirms the statutory interpretation at issue. *See, e.g.*, *Unicolors, Inc. v. H&M Hennes & Mauritz, L. P.*, 142 S. Ct. 941, 948 (2022) ("Those who deem legislative history a useful interpretive tool will find that the congressional history of the Limited Review Provision supports this analysis."); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 (2010) ("Although reliance on legislative history is unnecessary in light of the statute's unambiguous language, we note the support that record provides for the Government's reading.").

Here, Amazon agrees that the Senate version of the bill required tender for a refund, that the House version of the bill instead provided discretion for the Commission to choose whether to require tender, and that "[a]t conference, the conferees agreed to the House version of the provision," which was ultimately signed into law, leaving the Commission with the discretion to impose such a requirement. Amazon Opp'n at 31. The legislative history therefore supports the Commission's remedial authority under Section 15 to require tender or proof of destruction as a condition of a Section 15 remedy. And with the legislative history fully supporting the Commission's authority to order refunds conditioned on returns, Amazon has no compelling method of diverting the Court's attention from the administrative case law cited by Complaint

Counsel, which supports the requested Section 15 order here. *See, e.g.*, *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Decision and Order, at 13 (Oct. 27, 1976).[36]

Amazon instead repeats its cursory argument that, in any event, an order requiring refunds conditioned on returns or proof of destruction would be arbitrary and capricious and is not in the public interest. Amazon's Opp'n at 33-34. In making this argument Amazon ignores nearly all of the undisputed facts and the governing Commission documentation in the record, which, as explained above in Section VII, is informed by and based upon five decades of agency recall experience, research, and practice. Instead, Amazon's Opposition once again mischaracterizes the language within one 1992 directive. *See* Amazon Opp'n at 33-34. As Complaint Counsel previously explained and, as the language of the directive itself confirms, contrary to Amazon's representation, the directive does not say that recall notices may not instruct consumers to return products for corrections or refunds. *See* C.C. Opp'n at 45-46.

[redacted]. *See* C.C. SUMF ¶¶ 119, 125, 153, 154.

Indeed, Amazon does not dispute that even in voluntary recalls, CPSC has instructed firms recalling hair dryers, carbon monoxide detectors, and children's sleepwear to condition refunds or replacements on a product return or proof of destruction in at least 51 of 77 voluntary recalls since 2015. SUMF ¶ 162. Amazon even expressly states that "Complaint Counsel is

[36] Although Amazon attempts to distinguish *Zen* by acknowledging that the respondent there agreed to request product returns, that does nothing to alter the fact that the Commission exercised its Section 15 authority to order the respondent to provide refunds conditioned on returns, above and beyond the terms presented in the respondent's proposed action plan. *In re Zen Magnets*, CPSC Dkt. No. 12-2, Opinion and Order Approving Public Notification and Action Plan, 2017 WL 11672451, *8 ("*Zen Magnets* Opinion and Order").

correct that the Commission frequently approves refund remedies mandating return of the product." Amazon Opp'n at 36. Amazon argues, instead, that because the Commission has occasionally approved non-return recalls in a minority of cases (less than 25 out of 77 voluntary recalls for similar products), the Commission must explain why Amazon is not being treated like the minority exception. *See* Amazon Opp'n at 37. That makes no sense. Complaint Counsel is seeking the remedy set forth in CPSC's guidance documents, as requested in the majority of voluntary recalls for similar products, and as expressly supported by prior decisions in administrative litigation matters. *See, e.g.*, *Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *45; *see also Zen Magnets* Opinion and Order, 2017 WL 11672451, at *13-14; *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Decision and Order, at 13. Given this overwhelming authority and precedent, there is no legal requirement to distinguish any outliers.

Amazon fares no better with its general argument that ordering return or destruction of the Subject Products is not in the public interest merely because Amazon requested one population of consumers – original purchasers – to discard the Subject Products. As the *Relco* opinion itself explains, "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." *Id.* at 6 (citing by way of example, that "[a] defective welder which had been stored by the owner after not working properly was retrieved and caused a serious injury to a family member").[37] [redacted]

[37] Although Amazon proclaims that a "scientific literature review commissioned by the CPSC" supports the idea that "in-home" remedies can slightly increase recall effectiveness, *see* Amazon Opp'n at 36 (citing Amazon Ex. 94), Amazon fails to acknowledge that the remedy sought here seeks to condition refunds on return of the Subject Products or proof of their destruction, and consumers have the freedom to choose the "in-home" remedy of submitting proof of destruction.

[redacted][38] It is an undisputed fact, then, that Amazon provided consumers no incentive to remove the 400,000 Subject Products that create an unreasonable risk of injury or death from commerce and that they are unaccounted for in the marketplace. It is in the public interest to take action to prevent dire consequences from known substantial product hazards. It is not in the public interest to await dire consequences as a prerequisite for action. *See United States v. Zen Magnets,* LLC, 170 F. Supp. 3d 1365, 1377, 1380 (D. Colo. 2016) (ordering defendants to provide refunds conditioned on returns and explaining that return of the products "will reduce the likelihood that such consumers are injured by those products, and it will also deter future violations of the CPSA") (*citing United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1061 (10th Cir. 2006) ("To be sure, the public health is protected not only by halting current violation of the Act, but also by deterring future violations.")).

IX. Amazon Wrongly Disputes Replacement as an Alternative Remedy.

Amazon claims that because the Complaint in this case does not specifically refer to product replacement, Complaint Counsel cannot seek product replacement in the alternative as a remedy here. Amazon is wrong. As stated in Fed. R. Civ. Proc. 54(c), a party is not constrained to the literal wording of a Complaint, as courts may "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."[39]

[38] [redacted]

[39] While Fed. R. Civ. Proc. 54(c) is not binding in administrative adjudication, it can inform and guide the court, *see* 45 Fed. Reg. 29206 (May 1, 1980) (stating that the Commission's Rules of Practice for Adjudicative Proceedings are "patterned on the Federal Rules of Civil Procedure").

Therefore, if the Court for whatever reason declines to order refunds to those to whom Amazon unilaterally issued a gift card, it remains in the public interest to order Amazon to provide a replacement product conditioned on the return of the Subject Product or proof of its destruction, and this Court may so order. Indeed, the caselaw Amazon cites does not undermine this conclusion and, in fact, confirms that Complaint Counsel was not required to list all requested relief in the Complaint. *See* Amazon Opp'n at 39 (citing *Santa Clara Valley Water Dist. v. Olin Corp.*, 2009 WL 667429, *2 (N.D. Cal. Mar. 13, 2009)).

Here, Amazon was at all times on notice of the Complaint's request for an order that Amazon "facilitate the return and destruction of the Subject Products, at no cost to consumers, under Section 15(d)(1)," "including but not limited to" the issuance of refunds. *See* Complaint, Dkt. No. 1, at XI. Relief Sought, ¶ 4. Section 15(d)(1) includes replacements as an available remedy, and the Complaint further requested an order that Amazon "take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA and FFA." *Id.* ¶ 7.[40] Further, Amazon does not dispute that ordering a replacement product conditioned upon return is a common Commission practice in voluntary recalls for children's sleepwear garments, carbon monoxide detectors, and hair dryers. *See* Ex. AA to Complaint Counsel's Motion for Summary Decision, at CPSC_AM0015371-74 (recall announcement involving replacement of a hair dryer); CPSC_AM0015366-70 (recall

[40] Furthermore, Amazon is uniquely situated to be able to provide consumers with a safe replacement product. As explained *supra*, Amazon has not yet engaged in a remedy in conjunction with CPSC and has simply made the business decision to provide Amazon gift cards to certain Amazon accounts. With Amazon's vast online marketplace, which lists hundreds of thousands of products available for sale including its own Amazon Basics product line, Amazon is well equipped to provide a replacement as contemplated in 15 U.S.C. § 2064(d)(1)(B), which empowers the Commission to order the replacement of a Subject Product with a "like or equivalent product" that lacks the known defect or hazard.

announcement involving replacement of a carbon monoxide detector); and CPSC_AM0015193-99 (recall announcement involving children's sleepwear garments with replacement option).

X. Amazon's Unilateral Issuance of a Gift Card Does Not Usurp the Commission's Statutory Authority Under Section 15.

Amazon's last-ditch argument that the "Commission Cannot Order More than One Refund for the Same Product," Amazon Opp'n at 37, is a non-starter. To state the obvious, the Commission has not previously ordered Amazon to provide a refund for the Subject Products. A Section 15(d) order here would be the first order requiring Amazon to provide a refund, and it would only require one refund for each consumer who tendered a Subject Product or provided proof of its destruction.

To the extent that Amazon is attempting to argue that its *unilateral* decision to issue Amazon gift cards to original purchasers somehow usurps the government's statutory authority to order a refund under the CPSA to all consumers who tender a Subject Product, that self-serving argument fails. Courts have routinely rejected defendants' arguments attempting to evade liability or remedies based on voluntary actions undertaken by the defendants.[41] For example, in *In re Mattel, Inc.*, 588 F. Supp. 2d 1111, 1115-16 (C.D. Cal. 2008), a federal district court rejected the defendants' argument that their voluntary replacement of defective products barred the plaintiffs from seeking a state law refund remedy. The *Mattel* court found that this type of argument would "essentially allow [firms] to choose their own remedy to a CPSA violation." *Id.* at 1115; *id.* at 1117 ("The Court knows of no authority for the proposition that a defendant can defeat a plaintiff's claim on standing grounds through the unilateral offering of a

[41] In any case, given that the Commission plainly has the authority to correct inadequate remedies as part of both mandatory and voluntary corrective actions, it can certainly also do so here, where Amazon has taken incomplete, ineffective unilateral action. *See* 15 U.S.C. § 2064(d)(3), (4); 16 C.F.R. § 1115.20.

remedy of the defendant's choosing."). Thus, Amazon's so-called "substantial undertaking" was a self-inflicted expenditure of funds that cannot grant it immunity to a lawful remedy authorized under Section 15(d). *Compare Midwest Guar. Bank v. Guar. Bank*, 270 F. Supp. 2d 900, 924 (E.D. Mich. 2003) ("Stated another way, Guaranty cannot place itself in harms way, and then later claim that an injunction should not issue because of costs which it must incur in order to remedy its own misconduct.").

Further, allowing Amazon's provision of gift cards to usurp the Commission's Section 15 authority would contravene the plain language and purpose of the CPSA. Contrary to Amazon's argument that the CPSA was designed to make consumers "whole," Amazon Opp'n at 39, the CPSA is meant to protect the public from hazardous products – not to provide a limited universe of product holders financial compensation for ill-advised purchases (nor does the CPSA limit the costs associated with protecting consumers to a company's revenues tied to sale of the hazardous product). *See* 15 U.S.C. § 2064(e)(1); *see also Center for Auto Safety v. Ruckelshaus*, 747 F.2d 1, 4-5 (D.C. Cir. 1984) (reasoning that "[a]bsent evidence of contrary intent," the remedial provisions of the Clean Air Act "must be presumed to bear their normal meaning of eliminating, rather than merely providing compensation for the effects of, the condition that is to be 'remedied'").

Allowing Amazon to evade a statutorily-authorized remedy based on self-selected unilateral actions would directly undercut the safety purposes of the statute, would create an untenable loophole for firms seeking to minimize the government's role in consumer protection,

and would permit companies to avoid the costs and logistics of assisting consumers with removing the hazardous products that they put into commerce.[42]

XI. Amazon's Admissions Confirm its Ability to Address and the Importance of Addressing Functionally Equivalent Products that Pose the Same Hazards as the Subject Products.

Complaint Counsel's previous briefing rebuts Amazon's arguments about the Commission's alleged inability to reach "functionally equivalent" products and the alleged impossibility of implementing an order to cease distribution of functionally equivalent products. *See* CC Mem. at 29-31; CC Opp'n at IV.E. As Complaint Counsel previously explained, the Commission's authority extends to products that are "functionally equivalent" to those presenting a substantial product hazard, as evidenced by the reporting obligations of Section 15(b) and the replacement remedy language in Section 15(d)(1)(B).[43] *See* CC Opp'n at IV.E. Enforcement of these provisions includes authority over products that differ only in size, color, or other immaterial ways from a product determined to present a substantial product hazard and

[42] In attempting to oppose a monthly progress reporting requirement for the remedies ordered under Section 15, *see* Amazon Opp'n at 40-42, Amazon simply ignores the statutory authority laid out in Complaint Counsel's earlier briefing, including 15 U.S.C. § 2064(d)(3)(B), (C) and 15 U.S.C. § 2076(j)(6). *See* CC Mem. at 50-53; *see also* CC Opp'n at 53-55. Amazon also fails to acknowledge the administrative litigation precedent, which previously ordered the submission of monthly progress reports. *See Zen Magnets* Opinion and Order, 2017 WL 11672451, at *11. Monthly progress reports can serve, as Amazon acknowledges, as a means to track destruction of a recalled product, which Amazon has failed to track. But that is not all. Monthly progress reports also provide valuable information regarding whether consumers have received notice of a recall, are utilizing a remedy offered, and how many products remain with consumers or elsewhere in commerce.

[43] Section 15(b) requires firms to report to the Commission when information "reasonably supports the conclusion" that a product fails to comply with a consumer product safety rule or contains a defect. 15 U.S.C. § 2064(b). Relevant information "which a subject firm should study and evaluate in order to determine whether it is obligated to report under section 15(b)" includes "[i]nformation received from the Commission or other governmental agency." 16 C.F.R. § 1115.12(f). Section 15(d)(1)(B) empowers the Commission to order replacement of a hazardous product with a "like or equivalent product which complies with the applicable rule, regulation, standard, or ban or which does not contain the defect."

over products that present the same hazards identified in the Subject Products. For this reason, as discussed in prior briefing, the Commission has long included such products in remedies for both voluntary and mandatory corrective actions.[44]

Amazon's attempt to distinguish these precedential Commission actions as to functionally equivalent products under the theory that they only applied to manufacturers is unavailing for a number of reasons. *See* Amazon Opp'n at 26-27. In the first place, Amazon's argument is factually incorrect, as the undisputed evidence of the remedies sought in past corrective actions flatly refutes the assertion that such remedies only apply to manufacturers.[45] Furthermore, there is no basis anywhere in the statute to support Amazon's implication that lesser remedial authority extends over distributors as compared to manufacturers. *See* 15 U.S.C. § 2064(b) (applicable to "every manufacturer of a consumer product . . . and every distributor and retailer of such product"); 15 U.S.C. § 2064(c) ("[T]he Commission may order the

[44] Amazon incorrectly argues that Complaint Counsel only made the request for Amazon to cease distribution of functionally equivalent products in Complaint Counsel's Proposed Order. Amazon Opp'n at 22. To the contrary, Complaint Counsel's request is articulated in its Memorandum of Points and Authorities in Support of Complaint Counsel's Motion for Summary Decision at pages 29-31. In that filing, Complaint Counsel cites administrative litigation case law ordering a respondent to cease distribution of functionally equivalent products, explains how CPSC routinely asks firms conducting voluntary corrective actions to review their products and take similar action for functionally equivalent products, explains Amazon's power and ability to identify functionally equivalent products, explains that Amazon itself has identified functionally equivalent products, and identifies additional functionally equivalent products that CPSC identified for sale on Amazon.com. *See* CC Mem. at 29-31.

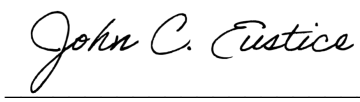
[45] *See, e.g*. Sept. 23, 2022 Declaration, Ex. AA, at CPSC_AM0015755-68 (reflecting a request that importer and distributor Sweet Bamboo "[c]arefully review your product line for other possibly violative children's sleepwear garments and report any other violative garments" and "ensure that all current and future production of tight-fitting children's sleepwear complies with the specified dimensions and labeling requirements . . . ."); CPSC_AM0015554-73 (reflecting a request that importer Roberta Roller Rabbit "carefully review your product line for other possibly violative children's sleepwear garments" and "immediately stop the sale and distribution of all violative children's sleepwear garments"); CPSC_AM0015621-26 (reflecting the same request of online retailer Eleanor Rose).

manufacturer or any distributor or retailer of the product to take any one or more of the following actions."); 15 U.S.C. § 2064(d) ("[I]t may order the manufacturer or any distributor or retailer of such product to . . . take any one or more of the following actions . . . ."). Finally, even if true as Amazon asserts that such relief is most appropriate for entities that are well-positioned to identify functionally equivalent products, that is all the more reason to require Amazon to take the kinds of actions that it is already admittedly performing on a voluntary basis. Amazon Opp'n at 25. [redacted] *see also* Sept. 23, 2022 Declaration, Ex. R.

XII. Conclusion

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

Respectfully submitted,



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November 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2022, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

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