

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

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

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I. INTRODUCTION

Respondent Amazon.com, Inc. (“Amazon”) is the leading online marketplace in the United States, with its e-commerce gross merchandise volume share rising every year and projected to reach an astonishing 50% of all online sales in 2021.¹ Amazon itself lauded that “2020 was one of the most successful years” for merchants “in Amazon’s store,” noting that from April 15, 2020, to January 15, 2021, third-party sellers,² which Amazon describes as numerous “small and medium-sized businesses,” “increased their Amazon sales by more than 55% year-over-year.”³ And the number of digital shoppers in the United States is growing rapidly, with 256 million online shoppers in 2020 and a projection of more than 291 million by 2025.⁴ As these trends show, Amazon plays a dominant role in bringing consumer products to the doorsteps of American consumers.

Recognizing Amazon’s expansive role in commerce, and the importance of protecting consumers from hazardous consumer products sold on Amazon.com, the Commission authorized the initiation of this administrative proceeding to hold Amazon accountable for remediating certain dangerous products distributed to consumers by Amazon in its role as a “distributor” under the Consumer Product Safety Act (“CPSA”), 15 U.S.C. § 2051 *et seq.* Specifically, this

¹ See “U.S. Amazon retail e-commerce GMV share 2016-2021” (found at <https://www.statista.com/statistics/788109/amazon-retail-market-share-usa/>).

² Complaint Counsel uses the term “third-party sellers” because this is the term Amazon uses in its Answer to describe the merchants that list products on Amazon.com.

³ See Respondent’s Answer to Complaint ¶ 16, Amazon.com’s Seller Central web page (<https://sellercentral.amazon.com/gp/help/external/201074400>), hyperlink to “2021 US referral and FBA fee changes summary” (found at https://sellercentral.amazon.com/gp/help/external/help.html?itemID=201411300&language=en_US&ref=efph_201411300_cont_201074400).

⁴ See “Number of digital buyers in the United States from 2017 to 2025” (found at <https://www.statista.com/statistics/273957/number-of-digital-buyers-in-the-united-states/>).

proceeding seeks to obtain relief authorized by Section 15 of the CPSA for particular products sold on Amazon.com through Amazon's Fulfillment by Amazon ("FBA") program, including violative children's sleepwear garments and defective carbon monoxide detectors and hair dryers (the "Subject Products") as identified in Section V of the Complaint. These products present substantial hazards to consumers: the children's sleepwear fail flammability standards, the carbon monoxide detectors fail to detect carbon monoxide, and the hair dryers lack parts necessary to prevent electrocution.

Amazon distributed these products as part of its FBA program, through which it distributes consumer products manufactured by third parties. Many of these third parties are smaller, less sophisticated entities based outside the United States, not motivated or capable of remediating hazards their products may present. Thus, the U.S. Consumer Product Safety Commission ("CPSC") seeks an order issued pursuant to Section 15 of the CPSA requiring Amazon to engage in CPSC-approved corrective actions for the Subject Products, including recalling them in conjunction with the CPSC, issuing CPSC-approved notice to consumers of the substantial product hazards posed by the products, ensuring destruction and/or removal of the products from commerce, and providing information related to Amazon's corrective actions to the Commission to enable the Commission to evaluate the efficacy of the corrective actions.

No genuine dispute of material fact exists as to whether Amazon is a "distributor" of the Subject Products for purposes of the CPSA. The parties agree that the Subject Products are consumer products and that they were fulfilled by Amazon through its FBA program. *See* Complaint Counsel's Statement of Undisputed Material Facts ("SUMF") ¶¶ 4, 34-43. Moreover, Amazon has admitted that, in administering its FBA program, it receives, stores, tracks, moves, ships, delivers or arranges for delivery, and processes product returns of consumer products. *Id.*

¶¶ 8, 16, 24-34. These admissions bring Amazon squarely within the definition of a “distributor” of FBA products sold on Amazon.com under the CPSA, and therefore within CPSC jurisdiction.

Amazon’s defense that it is not a “distributor” of FBA program products, but rather a “third-party logistics provider,” is belied by the undisputed facts and the plain language of the statute. CPSA Section 3(a)(16) defines a third-party logistics provider as an entity that “*solely* receives, holds, or otherwise transports” consumer products in the ordinary course of its business. 15 U.S.C. § 2052(a)(16) (emphasis added). By controlling and directing the entire customer relationship from the sale of an FBA product through its potential return, Amazon does far more than “solely” transport products. *See* SUMF ¶¶ 24-33.

Amazon must not be allowed to evade its legal obligation under the CPSA to take corrective action regarding unsafe FBA products, including unsafe products manufactured by difficult-to-reach foreign entities. Permitting Amazon to self-identify as a third-party logistics provider of FBA products to shield itself from responsibility would invite hazardous products to flood U.S. markets with impunity; not only is such a result contrary to the plain language of the CPSA and Congressional intent, it is contrary to case law interpreting the role of a “distributor” and at odds with sound public policy.

II. LEGAL STANDARD FOR PARTIAL 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,⁵ 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.

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.

⁵ 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).

Finally, it is appropriate for Complaint Counsel to move for partial summary decision on the threshold issue of jurisdiction over Respondent Amazon for its distribution of the Subject Products. In *Consumer Prod. Safety Comm'n v. Chance Mfg. Co.*, 441 F. Supp. 228, 229 (D.D.C. 1977), the Commission “moved for partial summary judgment on the issue of subject matter jurisdiction.” The District Court ruled in CPSC’s favor on the jurisdictional issue and the case proceeded from there. *Id.* at 233-34.

Because there is no genuine dispute as to the material facts demonstrating that Respondent Amazon is a “distributor” of the Subject Products, Partial Summary Decision for Complaint Counsel on this issue is appropriate.⁶

III. THE UNDISPUTED FACTS REGARDING AMAZON’S “FULFILLMENT BY AMAZON” PROGRAM AND THE SUBJECT PRODUCTS

A. Amazon’s Undisputed Actions Fulfilling FBA Products for Consumers

Amazon operates Amazon.com, a website on which products are sold to consumers. SUMF ¶ 1. One business lane through which products are sold on Amazon.com is Amazon’s Fulfillment by Amazon (“FBA”) program, in which third parties list products for sale on Amazon.com. *Id.* ¶ 2. When third-party sellers contract with Amazon in its FBA program, Amazon, among other things, “stores products and delivers [them] to customers.” *Id.*⁷

Participation in Amazon’s FBA program “is governed by a Business Services Agreement and other policies.” *Id.* at ¶ 5. Products on Amazon.com are assigned and identified by Amazon

⁶ This matter may then proceed on the remaining issues of whether the Subject Products are substantial product hazards under the CPSA and the appropriate relief authorized by Section 15 of the CPSA.

⁷ Amazon also operates at least two other business lanes through which products are sold on Amazon.com. One in which Amazon sells products on Amazon.com as a retailer, and another in which third parties participate in Amazon’s Merchant Fulfilled Network (“MFN”) and “elect to store products and fulfill orders on their own.” SUMF ¶ 3.

Standard Identification Numbers (“ASINs”). *Id.* Amazon also requires third-party sellers to abide by specific FBA features, services, and fees that it communicates to them via its online seller central portal. *See id.* ¶ 19.

Through its Amazon Services Business Solutions Agreement (“BSA”), Amazon requires that third-party sellers represent and warrant to Amazon that they have “all necessary rights to distribute” the products that they list on Amazon.com. *Id.* ¶ 6. However, third-party sellers participating in Amazon’s FBA program do not send their products to customers who order them through Amazon.com. *Id.* ¶ 7. Instead, the third-party sellers send their products to Amazon. *Id.* Amazon does not take legal title to these products, *see* Respondent’s Answer to Complaint ¶ 14, but Amazon does control the products throughout the sale process. In addition, Amazon possesses the authority to refuse registration in the FBA program of any product, including on the basis that the product violates any applicable FBA program policies. SUMF ¶ 23.

After receiving an FBA product, Amazon provides a number of services, including “storing third-party sellers’ products in Amazon fulfillment centers; using technology to track, move, and ship products to customers; processing product returns; and delivering or arranging for delivery to customers.” *Id.* ¶ 8. Amazon has also, at times, “provided certain labeling services to some third-party sellers for some products for which Amazon fulfills orders through the FBA” program. *Id.* ¶ 9. As part of its FBA program, Amazon “generally maintains electronic records to track products, including products belonging to third-party sellers, at Amazon warehouses and facilities” *Id.* ¶ 10. This tracking facilitates Amazon’s provision of services through its FBA program. *Id.*

After storing third-party sellers’ products, Amazon “fulfills orders placed by customers for products sold by third-party sellers on Amazon.com.” *Id.* ¶ 11. When fulfilling orders,

“multiple products ordered by a customer from different third-party sellers may be combined in one shipment to that customer.” *Id.* ¶ 12. Amazon “employees and equipment may be used to fulfill orders for products sold by third-party sellers.” *Id.* ¶ 13.

In addition to storage and shipping services, Amazon provides 24/7 customer service to purchasers of an FBA seller’s products as part of its FBA program. *Id.* ¶ 14. Indeed, to the extent that third-party sellers need to communicate with customers regarding orders on Amazon.com, they must do so exclusively through the Amazon platform. *Id.* ¶ 15.

Amazon’s role continues well after the consumer receives ordered FBA products. If a customer has to return a product, it may be “shipped to Amazon for processing, and thereafter may be returned to the third-party seller, handled by Amazon in accordance with the third-party seller’s instructions, or transferred by the third-party seller to Amazon for later sale through the ‘Amazon Warehouse’ program.” *Id.* ¶ 16.⁸

Third-party sellers pay Amazon fees for the services Amazon provides through its FBA program. *Id.* ¶ 18. Amazon’s “FBA fulfillment fee” information, provided via link in its Answer, lists at least 6 categories of fees that may be charged through Amazon’s FBA program. *Id.* ¶ 19. These categories include Fulfillment fees for FBA orders, Monthly inventory storage fees, Long-term storage fees, Removal order fees, Returns processing fees, and Unplanned service fees. *Id.* Amazon processes customer payments, charging the payment instrument designated in the customer’s account, and remits the agreed-upon monies to the third-party seller minus the FBA program fees set forth in the applicable contract. *Id.* ¶¶ 20, 27.

⁸ When a product is transferred to Amazon through the Amazon Warehouse program, Amazon takes legal title to it and is contractually empowered to sell the product as a retailer. SUMF ¶ 17. Amazon therefore possesses the authority to receive an FBA product through a customer return, handle the product, and sell it on Amazon.com. *Id.*

Amazon also applies a Fair Pricing Policy to prices charged by third-party sellers using its FBA program, and that Policy allows Amazon to take action against third-party sellers whose pricing practices may harm customer trust. “Pricing practices that harm customer trust include, but are not limited to: . . . setting a price on a product or service [on Amazon.com] that is significantly higher than recent prices offered on or off Amazon.” *Id.* ¶ 21.

Overall, a customer ordering, receiving, and getting notices relating to an FBA product will deal only with Amazon. *Id.* ¶¶ 24-33. This control is illustrated by the experience of a CPSC Internet Investigative Analyst who purchased one of the Subject Products at issue in this matter, a carbon monoxide detector, in July 2020.⁹ *Id.* ¶ 24. When the Analyst purchased the product it was listed as “Sold by TJTQQZHZ and Fulfilled by Amazon.” *Id.* ¶ 26. After purchasing the product, the Analyst received an email from Amazon (auto-confirm@amazon.com) confirming the order and stating “[t]he payment for your invoice is processed by Amazon Payments, Inc. P.O. Box 81226 Seattle, Washington 98108-1226.” *Id.* ¶ 27. On the order page for the product, the Analyst also received numerous advertisements for other products she recently purchased or may be interested in “based on your [her] shopping trends.” *Id.* ¶ 28. She received the product on August 5, 2020. *Id.* ¶ 29.

More than ten months after receiving the product, on June 11, 2021, the Analyst received an email from Amazon Product Safety (order-update@amazon.com) with the Subject Line

⁹ The CPSC Internet Investigative Analyst is competent to attest to the experience of a customer ordering, receiving and getting a safety notice for an FBA product from Amazon as she is an Internet Investigative Analyst with personal knowledge of all that she attests to, she routinely purchases products as part of her duties, and the documents she relies upon are complete and part of her regular conduct of business. *See Walling v. Fairmont Creamery Co.*, 139 F.2d 318, 322 (8th Cir. 1943); *Zampos v. U.S. Smelting, Ref. & Min. Co.*, 206 F.2d 171,174 (10th Cir. 1953) (stating that an affidavit supporting a motion for summary judgment must be made not only on personal knowledge of the affiant, but must show that the affiant possesses the knowledge asserted, and must in full exhibit any written documents relied upon).

“Attention: Important safety notice about your past Amazon order.” *Id.* ¶ 30. The message informed the Analyst that “We [Amazon] have learned of a potential safety issue that may impact your Amazon purchase(s) below:” and then listed the Order ID numbers of the affected purchases. *Id.* ¶ 31. The notice further stated that there was no need for the Analyst to return the product, and that Amazon was applying a refund in the form of a gift card to her Amazon Account. *Id.* ¶ 32. It included a link to view her available balance and activity on Amazon.com. *Id.* The message was signed “Sincerely, Customer Service, Amazon.com.” *Id.* At no point during the purchase, notification, or refund process did Amazon refer to the third-party seller. *Id.* ¶ 33.

B. Amazon’s Undisputed Actions with Respect to the Subject Products

Amazon admits that the Subject Products are consumer products. *Id.* ¶¶ 34, 37, 40. Amazon received and stored the Subject Products under the FBA program. *Id.* ¶¶ 35, 38, 41. In addition, Amazon admits that the Subject Products were sold on Amazon.com and fulfilled through Amazon’s FBA program for certain identified date ranges. *Id.* ¶¶ 36, 39, 42. In summary, the Subject Products listed in the Complaint “were sold by third-party sellers on Amazon.com and the orders for the Subject Products were fulfilled by Amazon through its” FBA program, “except for a limited number of units of the Subject Products that were transferred from third-party sellers to Amazon and later sold through the ‘Amazon Warehouse’ program” in which Amazon is the retailer. *Id.* ¶ 4; *see also id.* ¶ 43 (admitting that Amazon received approximately 28 units of the carbon monoxide detectors and approximately 4 units of the hair dryers from consumer returns and “sold” those products on Amazon.com through the “Amazon Warehouse” program).

IV. THE UNDISPUTED FACTS SHOW THAT AMAZON IS A DISTRIBUTOR OF FBA PRODUCTS AND SUBJECT TO SECTION 15 OF THE CPSA

Section 15 of the CPSA holds a “distributor” (or “manufacturer” or “retailer”) legally responsible for any consumer product distributed in commerce that presents a substantial product hazard, and such entity may therefore be ordered by the CPSC to take necessary corrective action. 15 U.S.C. § 2064(c) and (d). The core contention in this case and in this Motion is simple: Amazon is a “distributor” of FBA products under the CPSA. The plain language of the statute, legislative history, case law, and public policy all compel this same conclusion and its consequence—Amazon is responsible as a “distributor” for the remediation of hazardous consumer products sold through its FBA program.

A. Amazon Is a “Distributor” of FBA Products Under the Plain Language of the Consumer Product Safety Act

“Interpretation of a statute must begin with the statute’s language.” *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 300 (1989). For the CPSA, courts have recognized that the language of the Act “must be liberally construed in order to effectuate its purpose, i.e. the protection of the public from injury due to hazardous products.” *United States v. One Hazardous Product Consisting of a Refuse Bin*, 487 F. Supp. 581, 588 (D.N.J. 1980). This means that its terms should be interpreted broadly. *See, e.g., Consumer Prod. Safety Comm’n v. Chance Mfg. Co.*, 441 F. Supp. 228 (D.D.C. 1977) (finding at summary judgment stage that the congressional intent was for the definition of “consumer product” to be construed broadly to advance the Act’s purpose); *Consumer Prod. Safety Comm’n v. Anaconda Co.*, 593 F.2d 1314 (D.C. Cir. 1979) (discussing CPSC’s “broad jurisdiction” over consumer products, provided they meet the definition of “consumer product” under the CPSA).

Under the CPSA, “distributor” is defined as “a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, except that such term does not

include a manufacturer or retailer of such product.” 15 U.S.C. § 2052(a)(7). As recognized in case law, the CPSA contains “expansive interpretation[s] of the concepts of ‘commerce’ [and] ‘distribution in commerce.’” *One Hazardous Product*, 487 F. Supp. at 588. The definition of “commerce” encompasses transactions “which affect[] trade, traffic, commerce, or transportation” “between a place in a State and any place outside thereof,” 15 U.S.C. § 2052(a)(3), and “distribution in commerce” means “to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.” *Id.* § 2052(a)(8). The breadth of this language captures a wide variety of transactions “under the umbrella of ‘distribution.’” *One Hazardous Product*, 487 F. Supp. at 586 (quoting 42 Fed. Reg. 30295, 30297 (June 13, 1977)). “Examples of the types of transactions coming under this umbrella are a sale in commerce, an introduction into commerce, a delivery for introduction into commerce, a holding for sale after introduction into commerce, and a holding for distribution after introduction into commerce.” *Id.*

With this breadth of the statutory text in mind, the plain language of the CPSA confirms that Amazon is a “distributor” of FBA products. Under the FBA program, third-party sellers deliver consumer products to Amazon. SUMF ¶¶ 2, 7, 11. Specifically, the Subject Products are consumer products Amazon received and fulfilled through its FBA program. *Id.* ¶¶ 4, 38-42. And, the consumer products are delivered to Amazon under the FBA program for distribution in commerce. This delivery for distribution is evidenced by the fact that Amazon holds and stores the consumer products in its various warehouses and facilities before distributing them to consumers, or to common carriers who deliver the products to consumers. *Id.* ¶ 2 (Amazon “stores products and delivers [them] to consumers”); *see also id.* ¶¶ 8, 10. Here, Amazon held and stored the Subject Products before fulfilling the FBA orders. *Id.* ¶¶ 2, 4, 7, 35, 36, 38, 41.

This plainly constitutes holding for distribution under the statutory language. These actions alone are enough to bring Amazon squarely within the statutory definition of “distributor” in the CPSA.

While these acts are sufficient to bring Amazon within the confines of the CPSA, Amazon does far more. Through the FBA program, Amazon maintains the online marketplace, empowers third-party firms to list products on its website, provides templates for product listings (while holding the power to reject listings for products it deems illegal or obscene), imposes a Fair Pricing Policy on its third-party sellers, provides 24/7 customer service for all consumers, processes product returns, processes consumer payments (charging the payment instrument designated in the consumer’s account), and remits the agreed-upon monies to the third-party seller. *See* SUMF ¶¶ 2, 5-16, 18, 20-22, 23-33. Amazon does all of this while taking a fee for each service it provides. *Id.* ¶ 19. These actions constitute further evidence of Amazon’s central role in the distribution of FBA products in commerce. *See, e.g., One Hazardous Product*, 487 F. Supp. at 586, 588 (noting that for the CPSA, Congress intended to “include transactions ‘affecting commerce’” and noting that examples of products “distributed in commerce” included “those that are in the marketing chain, and also rented or leased [products] that are available for use by consumers”) (quoting 42 Fed. Reg. 30295, 30296 (June 13, 1977)).¹⁰

¹⁰ With Amazon’s actions under its FBA program, it plays an instrumental role in how FBA products are introduced into commerce and sold to consumers, and such actions support the conclusion that Amazon is a distributor of FBA products under the CPSA. This result is consistent with other Acts designed to protect the public. *See, e.g., United States v. Dotterweich*, 320 U.S. 277, 284 (1943) (explaining that the Federal Food, Drug, and Cosmetic Act (“FDCA”) prohibits the “introduction or delivery for introduction into interstate commerce” of any adulterated or misbranded drug and stating that an FDCA offense is committed “by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs”). When interpreting such Acts, courts have recognized that Congress often prefers to place the burden “upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.” *Id.* at 285.

Not only does the unambiguous plain language of the statute demonstrate that Amazon is a distributor, the legislative history does as well. For example, when it passed the CPSA, Congress made clear that it saw “distribution” as a broad, inclusive concept that encompassed more than simply selling a consumer product. To cement this vision, Congress revised the “definition of ‘consumer product’ . . . to delete the requirement that the distribution of the product must be ‘for sale,’ so that any distribution of a hazardous product would properly be within . . . the definition.” S. Rep. No. 92-835, at 7 (1972).¹¹ This revision is consistent with Amazon’s FBA program actions constituting “distribution” under the Act, regardless of whether or not Amazon is the seller of the FBA products.

B. Recent Products Liability Decisions Holding Amazon Responsible as a Distributor Under State Law Are Consistent with Finding Amazon to be a Distributor Under the CPSA

Amazon has fought claims that it is a “distributor” of FBA products before, mostly in the products liability context. Even in these matters, which involve a different standard implicating strict liability damages, three courts have recently found Amazon to be a “distributor.” *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964 (W.D. Wis. 2019); *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431 (Cal. Ct. App. 2020); *Loomis v. Amazon.com LLC*, 63 Cal. App. 5th 466, 277 Cal. Rptr. 3d 769 (2021). In the process, these courts noted key facts and circumstances that support establishing CPSC jurisdiction over Amazon for FBA products.

¹¹ This broad approach counters the notion that a sale or transfer of title are necessary elements for an entity to be considered a “distributor” under the CPSA. Indeed, the current version of 15 U.S.C. § 2052(a)(5)’s definition of “consumer product” includes a product “distributed” not only for “sale,” but also “for . . . use,” consistent with the notion that distribution of a consumer product does not require title. Moreover, the definition of “distributor” only requires that a product be “delivered,” confirming that a conveyance of title is not required. *See* 15 U.S.C. § 2052(a)(7).

These courts focused on Amazon’s control of FBA product transactions, its oversized role in commerce, and the integral actions it takes in the chain of commerce.

First, in *State Farm Fire & Cas. Co.*, the district court found Amazon to be a distributor under Wisconsin law and liable for a fire caused by a faulty laptop battery sold on Amazon.com. In Wisconsin, strict products liability can extend to a “distributor” if the manufacturer would otherwise be liable and the distributor either undertakes the manufacturer’s duties or the manufacturer is unavailable or judgment-proof. “Looking more broadly at the structure of the statute, under Wis. Stat. § 895.047, the manufacturer is the preferred target, and neither sellers nor distributors are liable for product defects if the manufacturer can be hailed into a Wisconsin court. So sellers and distributors are liable, not because of any particular activity on their part, but because they are proxies for the absent manufacturer. [I]n the absence of the manufacturer, the entity responsible for getting the defective product into Wisconsin is liable.” *State Farm Fire & Cas. Co.*, 390 F. Supp. 3d at 970.¹²

In finding the absent manufacturer predicate was met and holding that Amazon qualified as a “distributor” under Wisconsin tort law, the court explained that Amazon is an integral part of the chain of distribution and is well-positioned to allocate the risks of defective products to the other participants in the chain. *Id.* at 972. The court further noted that Amazon is a critical component of the chain of distribution, playing all of the roles of a traditional reseller and distributor except for its calculated decision not to accept title of the products. *Id.* Amazon is the sales venue, the advertiser, the payment processor, the logistics provider, and the shipping company all rolled into one, and it profits from sales and distribution of products that otherwise

¹² It is worth noting that, in the experience of CPSC, the majority of FBA product manufacturers are foreign entities that are either unable or unwilling to work with CPSC to conduct an effective recall. *See, e.g.,* Complaint ¶¶ 24, 33, 39, 42.

would not enter the market. Indeed, without Amazon, the product at issue would not have been available in the U.S. *Id.*

Second, in *Bolger*, the court found Amazon to be a distributor under California law and liable for the FBA sale of another defective laptop battery. Notably, California law is less restrictive than Wisconsin law in that strict products liability may be applied to entities within the “vertical distribution of consumer goods,” no matter the availability of the manufacturer, where the policies of the doctrine support its application. *Bolger*, at *453. Nonetheless, Amazon argued that it did not “manufacture, distribute, or sell the battery” to the plaintiff, and the trial court agreed, granting Amazon’s motion for summary judgment. *Id.* at*438, 446. On appeal, the plaintiff argued that, regardless of whether Amazon was technically the seller of the battery, it was part of the chain of production and distribution, and therefore liable under California law. *Id.* at *445. The appellate court agreed, finding that Amazon “acted as an intermediary between an upstream supplier and the ultimate consumer,” and was essentially a distributor whose integral involvement in the transaction supported the imposition of strict liability. *Id.* at *449,450-454.

The analysis by the appellate court in *Bolger* focused on the dominant role Amazon plays in the FBA program, creating the environment (i.e., the marketplace) that allowed the third-party company to offer the product for sale. *Id.* at *449. Amazon set the terms of the third-party company’s involvement, required indemnification, and created the format for the product listing, even allowing the third-party firm to use a fictitious name under the “Sold By” notice. *Id.* Ultimately, in purchasing an FBA product, a consumer adds it to his or her “Amazon cart,” not the third-party seller’s cart, and remits payment to Amazon, which then retrieves the product, ships it to the consumer, and deals with any issues the consumer has during the entire process.

Id. at 24-25. This process has not changed, as evidenced by the experience of a CPSC Analyst purchasing, receiving, and then being noticed about a safety issue for an FBA consumer product. *See* SUMF ¶¶ 24-33.

The court in *Bolger* also emphasized that Amazon had “control” over “both the product at issue and the transaction that resulted in its sale to” the plaintiff. *Id.* at 31. Amazon “constructed the . . . website, accepted . . . a third-party seller, marketed [the] offer for sale, took possession of the [product], accepted [the plaintiff’s] order for the [product], billed her for the purchase price, and shipped her the [product] in Amazon-branded packaging.” *Id.*

The *Bolger* decision laid bare Amazon’s purposeful decisions which led to the plaintiff’s injury, explaining: “*Amazon is no mere bystander* to the vast digital and physical apparatus it designed and controls. It chose to set up its website in a certain way, it chose certain terms and conditions for third-party sellers and their products, it chose to create the FBA program, it chose to market third-party sellers’ products in a certain manner, it chose to regulate third-party sellers’ contact with its customers, it chose to extend certain benefits to its customers and members who purchase third-party sellers’ products, and most importantly it chose to allow the sale at issue here to occur” *Id.* at 32 (emphasis added). All this Amazon did consciously, and for these actions the court held that Amazon should share in the consequences of the plaintiff’s injury.

Finally, in *Loomis*, the court relied upon *Bolger* and found that Amazon’s business practices in the FBA program brought them within reach of California’s products liability law because Amazon was a direct link in the vertical chain of distribution of a defective hoverboard. *Loomis*, 277 Cal. Rptr. 3d at *19. In dispensing Amazon’s argument that it acted merely as a “service provider,” the court explained that “it is undisputed Amazon placed itself squarely between TurnUpUp, the seller, and Loomis, the buyer, in the transaction at issue.” *Id.* at *20.

When Loomis wondered whether the hoverboard would arrive in time for Christmas, she communicated her concerns through Amazon. TurnUpUp was not allowed to communicate with Loomis directly. If Loomis had wanted to return the hoverboard, the return would have been routed through Amazon. Amazon remitted Loomis's payment to TurnUpUp after deducting its fees, including a 15 percent referral fee based on the total sale price. These facts undermine Amazon's characterization of its marketplace as an online mall providing online storefronts for sellers.

Id. at *20. Ultimately, Judge Wiley ruled that “these actions—1) interacting with the customer, 2) taking the order, 3) processing the order to the third party seller, 4) collecting the money, and 5) being paid a percentage of the sale—are consistent with a retailer or a distributor of consumer goods.” *Id.* at *21.

These three decisions rely upon virtually the same set of facts identified in this Motion in finding that Amazon plays an integral role in the distribution chain for FBA products and therefore stands uniquely suited to address safety concerns. The courts focused on the full gamut of Amazon's control, power, and actions in the sales of FBA products to hold it directly responsible for injuries caused by such products, and that reasoning applies with significantly more force in the context of this administrative action. Here, CPSC asserts its jurisdiction over Amazon as a distributor of FBA products to require it to take corrective actions for the Subject Products in concert with the Agency. Put simply, CPSC seeks a common sense holding that Amazon's actions in its FBA program render it subject to the Commission's authority. As noted above, the CPSA does not permit an entity with such intimate involvement in the distribution of consumer goods into homes to then avoid legal responsibility for removing them from those same homes when they prove to be hazardous. Indeed, Amazon is “no mere bystander” to the sales of FBA products, playing the same role in the vertical chain of distribution from the foreign

seller to the ultimate consumer as it played in the sales of the products in *State Farm Fire & Cas. Co., Bolger, and Loomis*.¹³

C. Amazon Is Not a Third-Party Logistics Provider for FBA Products

Amazon has argued that it is not a distributor of FBA products, but rather a third-party logistics provider that has no legal obligations under the CPSA. This argument, however, does not withstand even a cursory examination of the CPSA or the scope of Amazon's actions within the FBA program.

Under the CPSA, a "third-party logistics provider" is "a person who *solely* receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product." 15 U.S.C. § 2052(a)(16) (emphasis added). While it is true that Amazon does not take title of the products in its FBA lane, it does far more than "solely" receive, hold, and transport those products. Among other things, Amazon also provides:

1. A highly orchestrated sales venue, SUMF ¶¶ 1-2,
2. Payment processing, *id.* ¶¶ 20, 27,
3. Storage, sorting and shipping services, *id.* ¶¶ 8-13,
4. 24/7 customer service, *id.* ¶¶ 14-15, 30-32,
5. Pricing restrictions, *id.* ¶ 21, and

¹³ The public policy considerations referenced in these cases also apply with more vigor in this action, as Amazon is uniquely positioned to safeguard consumers from harmful products sold through its website. Amazon can identify and recall potentially defective and dangerous FBA products in a highly efficient manner, regardless of the location or financial viability of the manufacturer. Indeed, Amazon unilaterally messaged customers and issued refunds relating to the sales of the Subject Products in this case. *See* Respondent's Answer to Complaint ¶ 47. Amazon cannot dispute, therefore, that it possesses the ability to effectuate the requirements of Section 15 of the CPSA for products sold through its FBA program. Amazon's position is simply that it does not want to be subject to CPSC jurisdiction. On the other hand, the CPSC often faces insurmountable practical and legal obstacles to obtaining timely relief for consumers if the manufacturer or seller is a foreign entity or lacks financial resources to take corrective action, such that, absent action from Amazon, consumers may be left unsafe and remediless.

6. Customer return services, *id.* ¶¶ 16, 32.

Amazon does all of this while receiving varied fees¹⁴ and obtaining significant rights in the process, including receiving customer returns and potentially reselling items as a seller or retailer through its Amazon Warehouse program. *Id.* ¶¶ 16-19. Amazon’s policing of the prices charged by third-party sellers using its FBA program, *id.* ¶ 22, and its authority to reject products for any reason (including products that violate its FBA policies), *id.* ¶ 23, further undercut its argument that it is merely a third-party logistics provider.

Put simply, Amazon does not “solely” receive, hold, or otherwise transport a consumer product in the ordinary course of business. Amazon does far more and receives a significant percentage of revenue (and obtains more rights, including the right to sell returned products in certain circumstances) than an entity fairly characterized as a third-party logistics provider. For these reasons, Amazon’s defense that it cannot be considered a distributor because it is a “third-party logistics provider” for FBA products fails.

V. CONCLUSION

The foregoing establishes that there is no genuine dispute as to any material fact on the issue of whether Amazon is a “distributor” of the FBA products identified as Subject Products in the Complaint. Based on Amazon’s actions and authority in its FBA program, the plain language of the CPSA, the legislative history of the statute, analogous case law, and public policy, judgment should be entered in favor of Complaint Counsel holding that Amazon is a distributor of the Subject Products. The matter may then proceed on the remaining legal issues.

¹⁴ In the *State Farm* case, Amazon acknowledged that it received a fee of \$6.02 from the sale by a third-party firm of an adaptor that cost \$19.99. *See* Pl.’s Mem. In Opp’n to Def.’s Mot. for Summ. J. at 8, *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964 (W.D. Wis. 2018). That is about a 30% cut for Amazon for the services and platform that it provided to the third-party firm. In *Bolger*, a battery sold for \$12.30 incurred a \$4.87 fee, about 40% of the purchase price. *See Bolger*, slip op. at *444.

Respectfully submitted,

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October 13, 2021

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2021, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

An original and three copies by U.S. mail, postage prepaid, and one copy by email to the Secretary:

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