UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of Amazon.com, Inc., Respondent.	CPSC Docket No. 21-2 Hon. James E. Grimes Presiding Officer

RESPONDENT AMAZON'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY DECISION

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INTRODUCTION

This case should be dismissed for three reasons. First, the Complaint seeks an order that is beyond the statutory power of the Consumer Product Safety Commission to enter. Amazon, when it provides logistical services to third-party sellers through its Fulfillment by Amazon program, is a "third-party logistics provider" and not a "distributor" as those terms are defined in the Consumer Product Safety Act. Amazon receives and stores third-party sellers' products, and then packs and ships those products to consumers who have purchased them from the third-party seller. Amazon does not take title to, manufacture, or sell the products. The CPSA expressly excludes "third-party logistics provider" from the definition of "distributor." The Complaint's contrary premise—that Amazon is a "distributor" of third-party sellers' products—is contradicted by the plain language of the Act, longstanding CPSC practice, and recent judicial interpretation.

Second, the CPSC cannot retroactively create and selectively impose on one company (and not others) a sweeping new policy by means of an administrative lawsuit. The Commission's attempt to expand the definition of "distributor" and ignore the statutory exception for "third-party logistics providers" through adjudication violates the Administrative Procedure Act and the Due Process Clause. In its Complaint, the CPSC publicly contends for the first time that logistics services such as Fulfillment by Amazon constitute "distribution" under the CPSA, and that Amazon is thus a "distributor" of third-party sellers' products. The CPSC has never publicly taken that position—as to Fulfillment by Amazon or similar services—in a rulemaking, adjudication, or informal guidance document. By announcing its new interpretation for the first time in this proceeding—and by seeking to impose liability only on Amazon and not on other third-party logistics

providers—the CPSC unlawfully denies fair notice, and an opportunity to comment on its new policy. The suit also unlawfully attempts to impose retroactive liability for past conduct based solely on a new agency interpretation, advanced for the first time in this suit. Seeking a declaration that Amazon is a "distributor" of third-party sellers' products is the sort of sweeping, unprecedented pronouncement that must be established by congressional amendment or rulemaking, not selective adjudication.

Finally, the Complaint is moot. Before Complaint Counsel filed this suit, Amazon had already taken effective remedial steps. Amazon removed the Third-Party Products from Amazon.com so consumers could no longer purchase the products, stopped shipping the Third-Party Products, directly notified consumers of the potential product hazards, instructed consumers to immediately stop using and dispose of the products, and refunded the full purchase price. Complaint Counsel does not adequately plead—and cannot show—that an order for further corrective action is "required in order to adequately protect the public." 15 U.S.C. § 2064(c)(1).

For these reasons, the Presiding Officer should deny Complaint Counsel's motion for partial summary decision and should dismiss the Complaint, or, in the alternative, grant a summary decision in favor of Amazon.

LEGAL BACKGROUND

The Consumer Product Safety Act ("CPSA") was enacted in 1972, long before the growth of modern online third-party logistics services. Pub. L. 92–573, § 2, *codified at* 15 U.S.C. § 2051 *et seq*. Under the CPSA, as amended, the Commission's authority to impose

orders remediating substantial product hazards is limited to "manufacturers," "distributors," or "retailers," as defined by the statute.[1] *See id.* §§ 2052(a)(3)-(13), 2064.

From the outset, Congress expressly excluded common carriers, contract carriers, and freight forwarders from the CPSA's definition of "distributor." *Id.* § 2052(b). In 2008, as part of the Consumer Product Safety Improvement Act ("CPSIA"), Congress added "third-party logistics providers" to that list of excluded entities. *Id.* § 2052(a)(16), (b). Such entities "shall not . . . be deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder." *Id.* § 2052(b). "The term 'third-party logistics provider' means 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." *Id.* § 2052(a)(16).

The CPSA obligates a manufacturer, distributor, or retailer—but not a third-party logistics provider—to report to the CPSC whenever it obtains information that "reasonably supports the conclusion" that a consumer product is noncompliant with a relevant safety standard, or contains a defect that could create a "substantial product

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[1] A "manufacturer" is a person who "manufactures," "produces," "assembles," or "imports" a consumer product. 15 U.S.C. § 2052(a)(10)–(11). A "distributor" is "a person to whom a consumer product is delivered or sold for purposes of distribution" in interstate commerce. *Id.* § 2052(a)(8). To "distribute 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.* § 2051(a)(7). A "retailer" is "a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer." *Id.* § 2052(a)(10)–(13).

hazard." *Id.* § 2064(b).[2] The Commission has power to issue mandatory remedial orders, but may direct such orders only to manufacturers, distributors, or retailers, not to third-party logistics providers. *Id.* § 2064(c), (d). Specifically, the Commission may:

- Order a manufacturer, distributor, or retailer to halt a product's distribution. *Id.* § 2064(c)(1)(A).

- Order a manufacturer, distributor, or retailer to provide notice of a product safety defect or noncompliance, if the product "presents a substantial product hazard and . . . notification is required in order to adequately protect the public." *Id.* § 2064(c).

- Order a manufacturer, distributor, or retailer to provide a repair, replacement, or refund as a remedy, if the "product distributed in commerce presents a substantial product hazard" and ordering such action would be "in the public interest." *Id.* § 2064(c).[3]

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[2] The CPSA defines "substantial product hazard" as "(1) a failure to comply with an applicable consumer product safety rule under [the CPSA] or a similar rule, regulation, standard, or ban under any other Act enforced by the Commission which creates a substantial risk of injury to the public, or (2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public." 15 U.S.C. § 2064(a).

[3] The Commission may also require the manufacturer, distributor, or retailer to "submit a plan," for approval by the Commission, for such remedial action. 15 U.S.C. §§ 2064(d)(2), (3)(A), 2064(e). After approving a plan, the Commission may modify the plan if it determines that it "is not effective or appropriate under the circumstances," or that "the manufacturer, retailer, or distributor is not executing [it] effectively." *Id.* § 2064(d)(3)(B).

FACTUAL AND PROCEDURAL BACKGROUND

A. The "Fulfillment By Amazon" Logistics Service

Amazon established its "Fulfillment by Amazon" ("FBA") third-party logistics service in 2007.[4] In exchange for fees paid by third-party sellers,[5] Amazon stores third-party sellers' products in its fulfillment centers. Fulfillment by Amazon Service Terms ("FBA Terms")[6] § F-4. Once a customer orders a third-party seller's product, Amazon picks, packs, ships, and delivers the product to the customer. CPSC's Statement of Undisputed Material Facts ¶¶ 2–8; Amazon's Statement of Undisputed Material Facts ("SUMF") ¶ 10.

Third-party sellers who use the FBA logistics service retain title to their products at all times, subject to the FBA Service Terms.. SUMF ¶¶ 4, 7. Third-party sellers may at any time withdraw their products from the FBA logistics service or request return of the units from Amazon. SUMF ¶ 9.

Amazon does not "influence . . . the design and manufacturing decisions" of third-party sellers who use the FBA logistics service.[7] Third-party sellers generate product listings on Amazon.com, including the product name and description. FBA Terms § F-2.

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[4] Henri Schildt, *The Data Imperative: How Digitalization is Reshaping Management, Organizing, and Work* 54 (Oxford Univ. Press: 2020).

[5] Answer ¶ 16 (citing *FBA Features, Services, and Fees*, Amazon SellerCentral, https://sellercentral.amazon.com/gp/help/external/201074400).

[6] *Fulfillment by Amazon Service Terms, Amazon Services Business Solutions Agreement*, Amazon SellerCentral, https://sellercentral.amazon.com/gp/help/external/help.html?itemID=1791.

[7] *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213, 216 (9th Cir. 2020).

Amazon sets only basic ground rules, such as limiting the product title to 200 characters and requiring product descriptions to be accurate, non-duplicative, and free of obscene material.[8] Amazon's limited role in fulfilling customer orders for third-party products is reflected on the Amazon.com product pages.[9] Third-party sellers set the prices of their products, subject to applicable fair pricing policies.[10]

Amazon has operated its FBA logistics service for more than a decade. Until recently, the CPSC never treated Amazon—nor, to Amazon's knowledge, any other logistics provider—as a "distributor" of FBA or equivalent products. Instead, Amazon routinely assisted the CPSC with recalls jointly announced by the CPSC and the manufacturer or third-party seller, including sellers who sold their products exclusively on Amazon.com. *See* Appendix A. As these examples show, the CPSC is capable of implementing joint recalls with manufacturers, distributors, and sellers.

B. The Third-Party Sellers' Products

Amazon cares deeply about the safety of consumers who shop on Amazon.com. As part of its commitment to consumer safety, Amazon voluntarily takes action to protect

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[8] *Program Policies: Product Detail Page Rules*, Amazon SellerCentral, https://sellercentral.amazon.com/gp/help/external/G200390640; *see also Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 142 (4th Cir. 2019 (third-party seller "designed the product description for the website").

[9] *State Farm*, 835 F. App'x at 216 ("the third party is listed as the seller on the website and receipt"); *see also Selling Policies and Seller Code of Conduct*, Amazon SellerCentral, https://sellercentral.amazon.com/gp/help/external/G1801 ("you must use a business name that accurately identifies your business").

[10] *See* Answer ¶ 17 (referring to *Amazon Marketplace Fair Pricing Policy*, Amazon SellerCentral, https://sellercentral.amazon.com/gp/help/external/G5TUVJKZHUVMN77V).

consumers when it becomes aware of potential hazards posed by third-party sellers' products. For the Third-Party Products at issue in this case, Amazon took a number of steps. For example, Amazon (1) removed all listings of the Third-Party Products from Amazon.com;[11] (2) sent emails to all 376,009 purchasers of the Third-Party Products, notifying them of the potential hazard and instructing them to immediately stop using and dispose of the product;[12] (3) refunded the full purchase price to each purchaser;[13] (4) destroyed, or set aside for destruction, all units of the Third-Party Products in Amazon's warehouses;[14] and (5) informed the Third-Party Sellers of the CPSC outreach.[15]

STANDARD OF REVIEW

Under the CPSC's Rules of Practice for Adjudicative Proceedings ("Rules"), a respondent may move "to dismiss a complaint or . . . for other relief." 16 C.F.R. § 1025.23(d). While the Rules do not set forth a standard of review or specify the grounds for a motion to dismiss, they are "patterned on the Federal Rules of Civil Procedure." 45 Fed. Reg. 29,206, 29,207 (May 1, 1980). Thus, the Complaint should be dismissed if jurisdiction is lacking or if the Complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(1), (2), (6).

In a motion to dismiss for lack of subject-matter jurisdiction, the Presiding Officer may consider publicly available facts beyond the pleadings. *Adkisson v. Jacobs Eng'g Grp. Inc.*, 790 F.3d 641, 647 (6th Cir. 2015); *Sizova v. Nat'l Inst. of Standards & Tech.*,

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[11] SUMF ¶¶ 12–15.
[12] *Id.* ¶¶ 19–23.
[13] *Id.* ¶¶ 19, 23.
[14] *Id.* ¶ 16.
[15] *Id.* ¶ 17.

282 F.3d 1320, 1324 (10th Cir. 2002). Additionally, facts subject to judicial notice may be considered in a Rule 12(b)(6) motion "without converting the motion to dismiss into a motion for summary judgment." *Hodgson v. Farmington City*, 675 F. App'x 838, 840–41 (10th Cir. 2017).

The Rules also allow motions for summary decision. "Any party may file a motion, with a 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). "A Summary Decision and Order shall be granted if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a Summary Decision and Order as a matter of law." *Id.* § 1025.25(c).

ARGUMENT

I. Amazon Is A Third-Party Logistics Provider and Not a "Distributor" of Third-Party Sellers' Products.

The Complaint and Complaint Counsel's Motion ("Motion" or "Mot.") fail as a matter of law because Amazon is a third-party logistics provider, not a "distributor," of products sold by third-party sellers who use the FBA logistics service. The relief sought by Complaint Counsel may only be entered against manufacturers, distributors, and retailers. 15 U.S.C. § 2064(c), (d).[16] The Commission therefore lacks jurisdiction to order the requested relief, and the Complaint should be dismissed. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) ("A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or

[16] *See also* CPSC Advisory Op. 149 (Nov. 4, 1974) ("the remedial powers of the Commission are limited to action against manufacturers, distributors, and retailers").

constitutional power to adjudicate it."); *In re Birmingham*, 846 F.3d 88, 92 (4th Cir. 2017) ("A motion to dismiss . . . tests the legal sufficiency of the complaint.").

The plain language of the CPSA's definitions of "distributor" and "distribution," as well as the "third-party logistics provider" exception, compel the conclusion that Amazon is a logistics provider of the Third-Party Products. Congress added the "third-party logistics provider" exception to the statute in 2008, at a time when the e-commerce market and third-party logistics services were experiencing substantial growth. The Complaint fails to mention, and Complaint Counsel's Motion does not meaningfully address, this controlling exception. Complaint Counsel's contention that Amazon is a distributor of the Third Party Products also cannot be reconciled with the decisions of numerous courts (ignored in its Motion) holding that Amazon neither "sells" nor "distributes" the products of third-party sellers who use the FBA logistics service.[17]

A. Under the CPSA, Amazon Is Not a "Distributor" of Third-Party Sellers' Products, Including Because It Does Not Take Title to the Products.

The Complaint's assertion that Amazon is a "distributor" of products manufactured and sold by third parties through the FBA logistics service is contradicted by the CPSA's plain text. The CPSA defines "distributor" as "a person to whom a consumer product is delivered or sold for purposes of distribution in commerce." 15 U.S.C. § 2052(a)(8). To "distribute in commerce" means "to sell in commerce, to introduce or

[17] *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101 (Tex. 2021); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213 (9th Cir. 2020); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393 (S.D.N.Y. 2018); *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, 2018 WL 3546197 (D.N.J. July 24, 2018).

deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce." *Id.* § 2052(a)(8).

Amazon does not "sell" products for which third-party sellers use FBA logistics services—the third-party sellers do, as courts have held. *E.g.*, *McMillan*, 625 S.W.3d at 112 (under Amazon's FBA logistics service, "Amazon did not make the ultimate consumer sale because Amazon did not hold title to the" product); *Erie*, 925 F.3d at 141, 144 ("when [Amazon] provides a website for use by other sellers of products and facilitates those sales under its fulfillment program, it is not a seller, and it does not have the liability of a seller").

Nor does Amazon "introduce" into commerce, or "deliver for introduction into commerce," third-party sellers' products. As courts have recognized, third-party sellers and importers introduce products into commerce. *See, e.g.*, *McMillan*, 625 S.W.3d at 112 (Amazon, by providing FBA logistics service, "was not 'engaged in the business of distributing or otherwise placing' the [FBA product] into the stream of commerce").

Since Amazon does not sell or distribute FBA products, it necessarily does not "hold for sale or distribution" FBA products—particularly because it does not take title to such products. *See Eberhart*, 325 F. Supp. 3d at 398 ("[R]egardless of what attributes are necessary to place an entity within the chain of distribution, the failure to take title to a product places that entity on the outside.").

Complaint Counsel concedes that Amazon never holds title to FBA products, including the Third-Party Products. Complaint ¶ 14; Answer ¶ 14; Mot. at 6, 18. Significantly, and contrary to Complaint Counsel's position, the CPSC has previously interpreted the term "distributor" as an entity that purchases (*i.e.*, takes title to) consumer products. For example, in an advisory opinion issued a few years after the CPSA's

enactment, the Commission's General Counsel addressed two examples of "distribution," both of which considered transfer of title to be a requirement of distribution. CPSC Advisory Op. 255 (Nov. 4, 1977).[18] In one example, "a glass distributor cuts a billet *purchased from* a laminated glass manufacturer"; in the other, "a distributor *buys* tempered glass from a manufacturer and *sells* it to a retailer or contract glazer." *Id.* (emphases added). Another advisory opinion described products "shipped from the manufacturer's place of production for *sale to distributors*," reinforcing that transfer of title is a key characteristic of distribution. CPSC Advisory Op. 238 (Apr. 9, 1979) (emphases added).[19]

The CPSC General Counsel's advice is consistent with the essential common-law principle that "a distributor must, at some point, own the . . . product." *Eberhart*, 325 F. Supp. 3d at 398. Indeed, the CPSA excepts third-party logistics providers from the definition of "distributor" so long as they, among other requirements, do "not take title to the product." 15 U.S.C. § 2052(a)(16). Congress's incorporation of this requirement into the statutory exception makes clear that taking title is an indispensable element of being a "distributor." The lack of transfer of title or sale of Third-Party Products from sellers to Amazon is thus fatal to CPSC's allegation that Amazon is a "distributor" of products sold by companies that use Amazon's logistics services.

Complaint Counsel relegates the discussion of title to a footnote containing an erroneous analogy between the definition of "consumer product" not hinging on sale of a product to a consumer and the definition of distributor not requiring title. Mot. at 13 n.11.

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[18] *Available at* https://www.cpsc.gov/s3fs-public/pdfs/blk_media_255.pdf.

[19] *Available at* https://www.cpsc.gov/s3fs-public/pdfs/blk_media_238.pdf.

That the CPSA definition of "consumer product" does not hinge on a *consumer* purchase is irrelevant to the requirement that a *distributor* hold title to a product. It is true that a product is still a "consumer product" in "situations in which a consumer acquires the use of a product other than through a direct sale transaction, *e.g.*, through lease, promotional gift, or purchase by an institution for consumer use." *CPSC v. Anaconda Co.*, 593 F.2d 1314, 1320 (D.C. Cir. 1979). However, that bears no relationship to the separate statutory definition of "third-party logistics provider," which expressly references title.

Complaint Counsel's contention is unsupported by relevant decisional law, and contradicts an established body of case law holding that Amazon is *not* a distributor or seller of third-party sellers' FBA products under product liability laws. The vast majority of federal and state courts to consider the issue have held that, with respect to product liability claims, Amazon is not a "distributor" or "seller" of third-party products for which orders were fulfilled by Amazon. *See McMillan*, 625 S.W.3d 101 (Amazon not a "seller," which includes those who are "distributors"); *State Farm*, 835 F. App'x 213 (Amazon not a seller); *Erie*, 925 F.3d 135 (Amazon not a seller); *Eberhart*, 325 F. Supp. 3d 393 (Amazon neither seller nor distributor); *Allstate*, 2018 WL 3546197 (Amazon neither seller nor distributor). In concluding that Amazon was not a "seller" or "distributor" of FBA products for purposes of product liability law, these state and federal courts have cited many of the same characteristics dispositive of the CPSA "distributor" versus "non-distributor"/ "third-party logistics provider" issue. For example, these courts concluded that:

- Amazon never held title to the third-party goods. *McMillan*, 625 S.W.3d at 109-112; *State Farm*, 835 F. App'x at 216; *Erie*, 925 F.3d at 141–42; *Eberhart*, 325 F. Supp. 3d at 398; *Allstate*, 2018 WL 3546197, *8.

- Amazon merely facilitated the sale, rather than controlling or inspecting the third-party seller's product. *State Farm*, 835 F. App'x at 216; *Allstate*, 2018 WL 3546197, *7–8.

- Amazon did not influence third-party sellers' design and manufacturing decisions. *State Farm*, 835 F. App'x at 216; *Erie*, 925 F.3d at 142.

- Amazon clearly and repeatedly identified the third-party seller to the consumer. *Id.*

Complaint Counsel relies on three cases reaching a different conclusion, without even mentioning this extensive contrary authority. Mot. at 13–18. Those three cherry-picked decisions—two from a single jurisdiction (California)—are outliers. Moreover, each involved application of common-law liability principles, and were "based on a policy determination" that the courts considered appropriate as a basis to hold Amazon strictly liable. *See, e.g.*, *State Farm & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 968 (W.D. Wis. 2019). As one court explained, "[t]he strict liability doctrine derives from judicially perceived public policy considerations." *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 449 (2020); *accord Loomis v. Amazon.com LLC*, 63 Cal. App. 5th 466, 480 (2021) ("[T]he question whether to apply strict liability in a new setting is largely determined by the policies underlying the doctrine." (citation omitted)).

Complaint Counsel does not explain why such rulings, consciously framed as a matter of judge-made, policy-based common law appropriate in the tort context, are apposite to the interpretation of the federal statute that lies at the heart of this case. An administrative agency interpreting a statute in an adjudication is not a state court engaged in common-law decision-making. A federal agency is a "creature of statute, having no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Nat. Res. Defense Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 108 (2d Cir. 2018); *accord Am. Library Ass'n v. Fed. Comm'cs. Comm'n*,

406 F.3d 689, 698 (D.C. Cir. 2005). Thus, while a common-law court may "expand[]" liability to "cover new transactions" based on "judicially perceived public policy considerations," *Bolger*, 53 Cal. App. 5th at 449, a federal agency has no such authority. In short, even if the outlier cases *were* correctly decided (and in Amazon's view they were not), the foundation of those decisions cannot be imported into the CPSA.

Complaint Counsel relies on a few cases to argue that the CPSA must be "interpreted broadly" as a remedial statute. Mot. at 10. But the Supreme Court has rejected this mode of statutory interpretation as a flawed "substitute for a conclusion grounded in the statute's text and structure." *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014). "After all, almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem. And even if the Court identified some subset of statutes as especially remedial, the Court has emphasized that 'no legislation pursues its purposes at all costs.' Congressional intent is discerned primarily from the statutory text." *Id.* (internal citation omitted). Thus, courts have explained that this principle of interpretation is "of dubious value," has been repeatedly rejected by the Supreme Court since 1995, and that it is a "widely criticized 'canon' of interpretation." *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1195 (11th Cir. 2019).

Complaint Counsel's reliance on certain language from *United States v. One Hazardous Product Consisting of a Refuse Bin*, 487 F. Supp. 581 (D.N.J. 1980), Mot. at 11, is similarly misplaced. The court held that refuse bins in active use that were supplied "prior to [a] regulation's effective date" were "distributed in commerce" such that they could be subject to a CPSC hazardous product ban. *Id.* at 586–87. The decision did not address whether third-party sales on an e-commerce platform are "distribution." Nor did

the decision address which entities are "distributors" for purposes of mandatory recall orders under 15 U.S.C. § 2064(c) or (d).

Likewise, *United States v. Dotterweich*, 320 U.S. 277 (1943), provides no support for Complaint Counsel's contentions here. *Dotterweich* addressed the question of whether officers and employees of a company could be held individually liable for the conduct of the company they are responsible for running—*not* whether entities like Amazon are responsible for the products of other, separate entities (the third-party sellers). *See United States v. Park,* 421 U.S. 658, 667 (1975).

B. Amazon's Fulfillment Services Are Squarely Within the CPSA's "Third-Party Logistics Provider" Exception.

1. FBA Activities Are Consistent With the Statutory Definition of "Third-Party Logistics Provider."

Amazon also is not a distributor because its fulfillment services fit within the definition of a "third-party logistics provider." While the original statute excepted common carriers, contract carriers, and freight forwarders from the definition of distributor, Congress expanded the list of entities carved out of the definition of "distributor" in 2008 when it added the "third-party logistics provider" exception. By making this addition, Congress necessarily meant to reach entities providing services beyond those of common carriers, contract carriers, or freight forwarders. *See Bilski v. Kappos*, 561 U.S. 593, 607–08 (2010) (applying "the canon against interpreting any statutory provision in a manner that would render another provision superfluous" and noting that "[t]his principle, of course, applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times").

Prior to the 2008 enactment, the e-commerce market was growing substantially, as Amazon and other entities began providing online third-party logistics services. For

example, one 2007 publication explained that "there's a new third-party logistics player on the block"—FBA—which represented "potentially a major move into the business-to-consumer fulfillment sector so far dominated by parcel and package carriers such as the U.S. Postal Service, UPS and others that specialize in home delivery."[20] Another highlighted Amazon's entry into the circle of the "many [third-party logistics] companies who warehouse, fill orders, track orders, accept returns and provide basic customer service functions."[21] Amazon's status as a third-party logistics provider continues to be widely and publicly recognized. A panel of CEOs of several of the world's largest third-party logistics providers, surveyed by *Supply Chain Quarterly* in 2014, concluded that "Amazon does already act as a [third-party logistics provider] in many situations."[22] In 2016, the U.S. Postal Service acknowledged that Amazon was a third-party logistics provider.[23] In 2017, the *Wall Street Journal* noted that Amazon "is openly acting as a global freight forwarder and third-party logistics provider."[24] And last year, the *New York*

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[20] William Hoffman, *Pushing the Shopping Cart*, SHIPPING DIGEST (May 21, 2007).

[21] Sam Kandel, *To Expand, Make Use of Outsourcing*, POUGHKEEPSIE J. (July 22, 2007).

[22] Mark Millar, *Global Supply Chain Ecosystems: Strategies for Competitive Advantage in a Complex, Connected World* (Kogan Page: 2015), at 204-05 (citing Robert C. Lieb & Kristin J. Lieb, *Is Amazon a 3PL?*, CSCMP'S SUPPLY CHAIN Q., Oct. 27, 2014)).

[23] Rpt. No. RARC-WP-16-015, *The Evolving Logistics Landscape and the U.S. Postal Service*, Office of the Inspector Gen., U.S. Postal Srv. (Aug. 15, 2016), at 4, 8–9 ("Amazon has entered and transformed the logistics market in important ways" and "may even be in the process of transitioning itself into a logistics company.").

[24] Laura Stevens, *Amazon Expands into Ocean Freight*, WALL ST. J. (Jan. 25, 2017); *see also* Emily Hessenthaler, Note, *Promoting Expedited Progress: The Case for Federal Sexual Assault Kit Software*, 98 U. DET. MERCY L. REV. 261, 262 (2021) (noting "the parcel tracking systems used by Amazon, FedEx, and other logistics companies").

Times Magazine noted that, with respect to FBA products, third-party sellers "are effectively leasing floor space and logistics capacity" from Amazon.[25]

Congress enacted the CPSIA's exception to make clear that third-party logistics providers are not distributors "solely by reason of receiving or transporting a consumer product in the ordinary course of its business." 15 U.S.C. § 2052(b). The CPSIA defined "third-party logistics provider" as an entity that "solely receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product." *Id.* § 2052(a)(16). The Complaint entirely ignores this provision, and Complaint Counsel's Motion makes only a perfunctory argument that certain other logistics services provided by Amazon render the exemption inapplicable. Mot. at 18–19.

Amazon falls squarely within the scope of this express statutory exception. When Amazon provides FBA logistics services, it "solely receives, holds, or otherwise transports a consumer product in the ordinary course of business but . . . *does not take title* to the product." *Id.* (emphasis added). Indeed, the Complaint repeatedly refers to activities falling squarely within the scope of logistics services. Compl. ¶ 19 ("receiving, sorting, storing and preparing for shipment" FBA products); ¶ 11 ("storing," "sorting," and "shipping" FBA products); ¶ 13 (Amazon employees "physically ship or cause to be shipped" FBA products).

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[25] John Herrman, *Amazon's Big Breakdown*, N.Y. TIMES MAG. (May 27, 2020); *see also* Louise Matsakis, *Amazon Warehouses Will Now Accept Essential Supplies Only*, WIRED (Mar. 13, 2020) ("'FBA was created to help sellers not have to deal with logistics,' says James Thomson, a former Amazon employee and partner at Buy Box Experts, a firm that consults with Amazon sellers"); Isaac Rounseville, Comment, *Drawing a Line: Legislative Proposals to Clarify the CDA, Reinforce Consumer Rights, and Establish a Uniform Policy for Online Marketplaces*, 60 JURIMETRICS J. 463, 479 (2020) ("FBA is the most widely used method by third parties for logistical services").

In an effort to establish that Amazon is a "distributor" of third-party sellers' products, the Complaint points to several Amazon FBA logistics service activities. Each of these activities, however, is a classic third-party logistics activity, fitting within the CPSIA's "third-party logistics provider" exception. Amazon's FBA activities fall into two categories, both of which constitute logistics: (a) fulfillment and facilitation (*e.g.*, boxing, packing, delivering, receiving payment, remitting payment to the seller, and handling returns) or (b) activities that necessarily must take place in order to carry out fulfillment (*e.g.*, accepting sellers into the FBA logistics service and setting the program's rules).

First, the Complaint alleges that "Amazon acts as a 'distributor' of" FBA products by "receiving delivery . . . from a merchant with the intent to further distribute the product." Comp. ¶ 19. But the CPSA expressly classifies third-party logistics providers as entities that "receive[]," "hold[]," and "otherwise transport[]" products. 15 U.S.C. § 2052(a)(16). Carrying out these functions makes Amazon a quintessential third-party logistics provider excluded from the CPSA's definition of "distributor."

Second, the Complaint asserts that "Amazon acts as a 'distributor' of" "FBA products" by holding, storing, sorting, and preparing for shipment FBA products in its warehouses and fulfillment centers. Compl. ¶ 19. Again, these activities fall within the scope of third-party logistics provider operations because these activities are part and parcel of "receiv[ing], hold[ing], or otherwise transport[ing]" consumer products. 15 U.S.C. § 2052(a)(16). These services are standard for modern third-party logistics providers. *Accord* Joan Jané & Alfonso de Ochoa, *The Handbook of Logistics Contracts: A Practical Guide to a Growing Field* (Palgrave Macmillan: 2006), at 16 ("Typical services outsourced to 3PL providers are transportation, warehousing, inventory management,

value-added services, information services and design, and re-engineering of the supply chain.").

Third, the Complaint asserts that providing FBA logistics services amounts to "distributing . . . into commerce" because the services involve "delivering FBA products directly to consumers or to common carriers for delivery to consumers." Compl. ¶ 19; *see also id.* ¶ 11 (Amazon's fulfillment services are in "furtherance of bringing [the Third-Party Products] to consumers' doorsteps"). This, too, falls within the "third-party logistics provider" definition: delivering products to consumers or to other carriers for delivery to consumers is "otherwise transport[ing] a consumer product in the ordinary course of business." 15 U.S.C. § 2052(a)(16). Amazon is thus not transformed into a distributor merely because it delivers products to consumers, or arranges for delivery for products to consumers.[26] To the contrary, the third-party sellers—who retain title to their products throughout the fulfillment process—"sell in commerce, . . . [or] introduce or deliver for introduction into commerce" their products. 15 U.S.C. § 2052(a)(7).

In sum, none of Amazon's order-fulfillment activities turns the company into a "distributor" of the Third-Party Products, because all of the activities provided as part of the FBA service relate to logistics—*i.e.*, "receiv[ing], hold[ing], or otherwise transport[ing] a consumer product in the ordinary course of business." *Id.*

2. The CPSC's Approach Would Render the Exception a Nullity.

Complaint Counsel's erroneous interpretation of the statute would render the "third-party logistics provider" exception a nullity. Under the CPSA's plain text, a third-

[26] Moreover, Amazon informs customers on its website that FBA products are "sold by" a third-party seller and "shipped by Amazon," SUMF ¶ 8, making clear that Amazon is simply providing logistics services to those sellers.

party logistics provider may take delivery of products; hold, store, and sort products in preparation for shipment; and deliver products to purchasers (either directly or through common carriers) without being deemed a "distributor." *See* Compl. ¶ 19 (alleging these activities). As the statute makes clear, the very purpose of logistics providers is to "receive[], hold[], or otherwise transport" another party's consumer products. 15 U.S.C. § 2052(16).

The third-party logistics provider exception to the definition of "distributor" applies to entities who "*solely* receive[], hold[], or otherwise transport[] a consumer product in the ordinary course of business." 15 U.S.C. § 2052(a)(16) (emphasis added). Complaint Counsel interprets "solely" in a way that would eviscerate the "third-party logistics provider" exception, urging that logistics providers be deemed "distributors" merely because they engage in *any activity at all* beyond receiving, holding or transporting goods, even where those activities do *not* amount to "distribution" under the CPSA. Mot. at 3, 18–19. This "textually dubious construction . . . threatens to render the entire provision a nullity," and should thus be rejected. *United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007); *see also Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 299–31 (2014) (rejecting interpretation of a statutory exception that ran "the risk of reducing [the statutory exception] to near nothingness," even when the interpretation was "more readily administrable").

The term "solely" must be read in the context of the statutory provision, which addresses whether an entity is engaged in "distribution." *See, e.g.*, *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) ("Statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal

quotation marks omitted)). Accordingly, it would be illogical to construe the statute as rendering the third-party logistics exception inapplicable to entities who engage in activities beyond receiving, holding, or transporting goods, but that do *not* constitute distribution within the meaning of the statute. The exception is a carve-out from the CPSA definition of "distribution." Logically, the only activity that would render the third-party logistics provider exception inapplicable is activity that (1) itself would qualify as "distribution," and (2) extends beyond solely receiving, holding, or otherwise transporting a consumer product in the ordinary course of business. The statute was clearly not intended to cause a third-party logistics provider to be deemed a "distributor"—with all of the associated CPSA obligations—simply because the logistics provider undertook actions that do *not* qualify as distribution. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

The word "solely" instead serves a different function. *Without* the word "solely," a distributor could engage in activity that indisputably would be covered by the CPSA, yet claim that reporting and recall obligations did not apply because it *also* engages in third-party logistics provider activities. The word "solely" prevents such an unintended result.

Complaint Counsel's perfunctory argument that Amazon is not a third-party logistics provider, Mot. at 18–19, underscores the point. Complaint Counsel identifies six services that it contends exceed the scope of the third-party logistics provider exemption. *Id.* at 18. One—"[s]torage, sorting and shipping services"—plainly is third-party logistics activity under the CPSA. 15 U.S.C. § 2052(a)(16) (allowing a third-party logistics provider to "receive[], hold[] or otherwise transport[]" a consumer product without being

considered a distributor). The remaining activities are (1) a "highly orchestrated sales venue," (2) payment processing, (3) 24/7 customer service, (4) pricing restrictions, and (5) customer return services. Mot. at 18–19.

But Complaint Counsel does not explain why any of these activities amounts to "distribution." Instead, Complaint Counsel's theory is that *any* activity undertaken by a third-party logistics provider, even an activity that is not distribution, renders the third-party logistics provider exemption inapplicable. This interpretation is not consistent with the statutory structure, and would frustrate its purpose. Moreover, if applied consistently, that interpretation would deny common-carrier or third-party logistics provider status to traditional delivery services. *See State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213, 216 (9th Cir. 2020) (Amazon's "facilitat[ion of] shipping of the third-party seller's [products] from the warehouse to the consumer . . . did not make Amazon the seller of the product any more than the U.S. Postal Service or United Parcel Service are when they take possession of an item and transport it to a customer."); *Erie*, 925 F.3d at 142 ("Although Amazon's services were extensive in facilitating the sale, they are no more meaningful to the analysis than are the services provided by UPS Ground, which delivered the [product].").

3. Complaint Counsel's Public Policy Arguments Are Misplaced.

Complaint Counsel repeatedly cites policy reasons as a basis to find Amazon to be a distributor. *See* Mot. at 12 n.10, n.18. But, "it is quite mistaken to assume . . . that whatever might appear to further the statute's primary objective must be the law." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (internal quotation marks omitted). To the contrary, a court's task "is to follow the text even if doing so will supposedly undercut a basic objective of the statute." *Baker Botts L.L.P. v. ASARCO LLC*,

576 U.S. 121, 135 (2015) (internal quotation marks omitted)); *see also Landstar Express Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009) ("[N]either courts nor federal agencies can rewrite a statute's plain text to correspond to its supposed purposes.").

The classification of Amazon FBA as a logistics service is consistent with the CPSA's fundamental structure and purpose. The Act treats manufacturers, importers, distributors, and retailers differently from third-party logistics providers because the former have more control over the design and sale of products than the latter.

A product's manufacturer, for instance, establishes a product's specifications, designs and engineers the product, and selects the product's material composition. Congress enacted the CPSA with the background understanding that "the manufacturers and distributors were the ones with inexpensive and ready access to the information that is required for a meaningful analysis of" whether a product defect might present a "substantial product hazard." *United States v. Spectrum Brands, Inc.*, 218 F. Supp. 3d 794, 810 (W.D. Wis. 2016). In contrast, with regard to third-party sellers who use FBA services, "Amazon's only role . . , [is] locating, boxing, and shipping an already packaged and assembled product." *Allstate*, 2018 WL 3546197, at *8; *see also* Feng Zhu & Qihong Liu, *Competing With Complementors: An Empirical Look At Amazon.com*, 39 Strategic Mgmt. J. 2618, 2624 (2018) ("Asymmetric capabilities between Amazon and third-party sellers may also render some third-party sellers better positioned than Amazon to sell the product. For example, a third-party seller may have product-specific knowledge that Amazon lacks, making it less costly for that seller to market the product and answer consumers' inquires."). For these reasons, Congress allocated the responsibility for reporting and remedial decisions to manufacturers, retailers, and distributors.

A third-party seller's choice to use Amazon FBA's logistics services is thus similar to a third-party seller's choice to sell a product on eBay or Alibaba, and then use UPS or FedEx to fulfill orders. Indeed, many third-party merchants that sell products on Amazon.com do not use FBA logistics services. Orders for these sellers' products are instead "merchant-fulfilled"—meaning that the seller fulfills customers' orders for its products through a non-Amazon logistics provider or common carrier. The Complaint provides no basis to believe (and does not even allege) that merchants' independent choice to use Amazon FBA logistics services somehow transforms fulfillment services into "distribution."

Complaint Counsel's claim that the CPSC "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," Mot. at 18 n.13, is contradicted by the CPSC's text and the agency's public enforcement record. The CPSA expressly extends to persons who "import" a product into the United States. This ensures that an importer may be held responsible for reporting and remediating hazards in products manufactured by foreign companies. 15 U.S.C. § 2602(a)(10). Far from being an "insurmountable" barrier, the Commission regularly enforces federal safety laws against foreign companies. Foreign manufacturers and importers have carried out recalls thousands of times, include many cases where sellers undertook recalls of third-party products sold on Amazon.com (including third-party products sold *exclusively* on Amazon.com). *See* Appendix A.

II. Complaint Counsel's Attempted Adjudicatory Expansion of the "Distributor" Definition, and Disregard of "Third-Party Logistics Provider" Exception, Violates the APA.

A. Complaint Counsel Cannot Use An Adjudication to Extend the CPSA's Reach Through A Novel Interpretation.

Complaint Counsel's attempt to use an administrative suit to expand the CPSA's definition of "distributor" and vitiate the CPSIA's "third-party logistics provider" exception violates the APA. The CPSC has neither promulgated regulations nor issued guidance addressing the scope of the terms "distributor" and "third-party logistics provider" as applied to e-commerce websites. SUMF ¶¶ 24–29. Under these facts, the APA bars Complaint Counsel from proceeding by adjudication to regulate online logistics providers as "distributors."

To Amazon's knowledge, the CPSC has never previously launched an adjudicative proceeding against an e-commerce website regarding sales by third-party merchants to consumers. Indeed, as Acting Chairman Adler acknowledged in a statement regarding his vote "to approve the filing of the complaint . . . with great reluctance," the CPSA "is not perfectly clear on the point because these types of platforms did not exist when the agency was formed or when our statute was updated in 2008."[27] The CPSC has not obtained an amendment by Congress to expand or clarify the Commission's authority. Nor has the CPSC initiated a rulemaking, SUMF ¶¶ 24–29, or encouraged a voluntary standard-setting process to address e-commerce companies that fulfill orders for third-party sellers' products. The CPSC has not even published an informal guidance document

[27] *Statement of Acting Chairman Robert S. Adler on the Vote to Approve Filing of An Administrative Complaint Against Amazon.com*, https://www.cpsc.gov/s3fs-public/Statement%20on%20Amazon%20RSA%207.14.pdf (July 14, 2021).

announcing its views. Instead, the CPSC unilaterally asserts for the first time, in this suit, that a single company's logistics services qualify as "distribution" under the CPSA. Such a novel proclamation through the adjudicative process is unlawful. *See, e.g.*, *Doe v. Tenenbaum*, 127 F. Supp. 3d 426, 453–54 (D. Md. 2012) (noting that "[t]ypically, an agency's interpretation of a statute . . . amounts to an abuse of discretion where it strays substantially from previous agency interpretations," and holding that CPSC action violated the APA where "the Commission . . . utterly failed to explain the inconsistency between its conduct in this case and its prior conduct").

While agencies have some discretion to proceed by rulemaking or by adjudication, in various circumstances "reliance on adjudication would amount to an abuse of discretion." *Nat'l Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). One such situation is when an agency attempts to "propose legislative policy by an adjudicative order." *First Bancorporation v. Bd. of Governors of Fed. Reserve Sys.*, 728 F.2d 434, 438 (10th Cir. 1984). Another is when agencies attempt to "use adjudication to circumvent the [APA]'s rulemaking procedures." *City of Anaheim v. Fed. Energy Regul. Comm'n*, 723 F.2d 656, 659 (9th Cir. 1984).

Here, the CPSC is doing both. The Complaint aims to create new policy—*i.e.*, that e-commerce companies that fulfill orders for third-party sellers' products must be considered "distributors," even though their activities are logistical. In doing so, Complaint Counsel is attempting to significantly expand the scope of the CPSIA by adjudication. The Complaint and Complaint Counsel's Motion are devoid of any reference to prior notice to potentially regulated parties. While various e-commerce websites and online third-party logistics services, such as Amazon FBA, have been operating for years, the Complaint appears to be the first time that the CPSC has formally or publicly taken

the position that logistics-related activities amount to "distribution" under the CPSA. SUMF ¶¶ 24–29.

The CPSC may not extend the reach of the CPSIA via a novel interpretation announced in an adjudication. *See, e.g.*, *Ford Motor Co. v. Fed. Trade Comm'n*, 673 F.2d 1008, 1010 (9th Cir. 1981) (rejecting FTC attempt to "create new law by adjudication," specifically by "creat[ing] a national interpretation" of a statutory provision and "establish[ing] rules of widespread application," particularly where notice of that interpretation had not been previously provided to interested parties); *Pfaff v. U.S. Dep't of Housing & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996) (use of adjudication to announce a new standard is inappropriate "where the new standard, adopted by adjudication, departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application"); *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1339 (Fed. Cir. 2017) (separate op. of Reyna, J.) ("[r]ulemaking through adjudication is a nonstarter here, where the subject rule is a significant game change").

Rulemaking and policy reform by adjudication also violates the Due Process Clause. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fed. Commc'ns Comm'n v. Fox Tele. Stations*, 567 U.S. 239, 253 (2012). As the Supreme Court has explained, "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement

proceeding and demands deference." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158–59 (2012). Courts have not hesitated to require agencies to provide fair notice in the context of agency attempts to require recalls. For example, the D.C. Circuit has explained that "a manufacturer cannot be found to be out of compliance with a standard if NHTSA has failed to give fair notice of what is required by the standard." *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998).

B. The CPSC Cannot Impose Its Brand-New Policy Retroactively.

Even if the CPSC could extend the CPSIA through adjudication, it cannot impose its brand-new policy retroactively on Amazon's past conduct, relating to products that are not currently listed on Amazon.com. Even assuming that the CPSC has "the power to construe the statute" in this way, "the public may not be held accountable under this construction without some appropriate notice." *Stoller v. Commodity Futures Trading Comm'n*, 834 F.2d 262, 267 (2d Cir. 1987) (rejecting procedures used to interpret the Commodity Exchange Act).

The "courts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests." *Retail, Wholesale & Dep't Store Union v. Nat'l Labor Relations Bd.*, 466 F.2d 380, 390 (D.C. Cir. 1972). In considering whether to grant or deny retroactive force to principles newly adopted in an adjudication, the courts consider five factors: "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the

burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." *Id.*

Here, all five factors weigh against the CPSC's attempt to retroactively impose a new rule. *First*, the issue regarding "third-party logistics providers" versus "distributors" under the CPSIA is a case of first impression. *Second*, the CPSC's new contention—that Amazon's third-party logistics services amount to "distribution" under the CPSIA—is an abrupt departure from its agency practice since e-commerce became commonplace in the late 1990s. *See supra* section I.B. Retroactive application of an adjudicatory decision is especially improper where a member of a multi-member commission acknowledged "uncertainty" over the relevant legal rules (as Acting Chairman Adler did here) and the resolution of those questions was "not clearly foreshadowed" by preexisting Commission decisions. *J.L. Foti Const. Co v. Occupational Safety & Health Review Comm'n*, 687 F.2d 853, 857 (6th Cir. 1982). *Third*, Amazon's FBA logistics service developed under the longstanding practical reality that fulfilling orders for third-party sellers' goods was not considered "distribution" by the CPSC. *Fourth* and *fifth*, the CPSC's action would impose a burden on Amazon that outweighs any purported statutory interest in retroactively applying a new rule. The burdens on Amazon would be particularly unjustifiable given that—as explained below—Amazon has already provided a complete remedy to all affected consumers who purchased the of the Third-Party Products on Amazon.com.

III. The Complaint Is Moot Based on Amazon's Pre-Suit Actions to Protect Consumers From Third-Party Product Hazards.

The Complaint must also be dismissed for an independent reason: the case is moot. Federal courts may not "give opinions upon moot questions or abstract propositions." *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (quoting *Mills v. Green*, 159 U.S. 651, 653

(1895)). If "effectual relief" cannot be granted to a plaintiff, no "actual controversy" exists, and the case must be dismissed as moot. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160–61 (2016) (citations omitted). "Constitutional mootness is jurisdictional," *Brown v. Buhman*, 822 F.3d 1156, 1165 n.15 (10th Cir. 2016), and "to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right," *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Prudential mootness allows a court to dismiss a case not yet moot if the circumstances "forestall any occasion for meaningful relief." *Deutsche Bank Nat. Trust Co. v. Fed. Deposit Ins. Corp.*, 744 F.3d 1124, 1135 (9th Cir. 2014).

The mootness doctrine applies equally in federal agency adjudications,[28] and in the product recall context. In *United States v. Ford Motor Co.*, the National Highway Traffic Safety Administration ("NHTSA"), like the CPSC here, took issue with Ford's decision to "unilaterally" institute a recall (*e.g.*, notice and a remedy). 574 F.2d 534, 539–46 (D.C. Cir. 1978). The court rejected NHTSA's challenge to the "adequacy of the final recall notice" issued by Ford, explaining that Ford's notice (like Amazon's notice)

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[28] *See, e.g., Size App. of Avenue Mori Med. Equip., Inc.*, Small Bus. Admin. No. SIZ–6090, 2021 WL 625291, *1–2 (Feb. 5, 2021) (dismissing procurement appeal on mootness grounds because "corrective action"—specifically a new request for proposals and a new award determinations—had already taken place, rendering "the dispute academic"); *Perisho v. U.S. Postal Serv.*, 569 M.S.P.R. 55, 58 (1995) (dismissing Merit Systems Protection Board appeal on mootness grounds because appellant's challenged demotion had been reversed and "the agency provided [appellant] all of the relief with respect to the demotion that he could get if the instant appeal were to be adjudicated in his favor."); *Nat'l Fed'n of Fed. Emps. Local 1997 v. U.S. Dep't of State*, 48 F.L.R.A. 1074, 1075 (1993) (dismissing agency's exceptions to arbitral award because "the Union has withdrawn the underlying grievance which is the basis for the Arbitrator's award"); *In re Markt Truck Lines, Inc.*, Docket No. FMCSA-2015-0384, 2018 WL 2193183, *1 (May 11, 2018) (dismissing petition for administrative review seeking upgrade in company's proposed safety rating, because agency upgraded rating before case could be adjudicated).

included an "unambiguous" statement that communicated the nature of the safety risk to the purchaser. *Id.* at 543–46. Ford had, "on its own," launched a recall to remediate the safety defect, no "actual controversies affecting the rights of some litigant," such as whether a defect existed or whether a recall was required, existed. *Id.* at 539. For these reasons, the court dismissed the case as moot. *Id.* at 539–40.

More recently, in *Winzler v. Toyota Motor Sales U.S.A., Inc.*, the court held that a putative class action, seeking "an order requiring Toyota to notify all relevant owners of [a] defect and then to create and coordinate an equitable fund to pay for repairs," was prudentially moot. 681 F.3d 1208, 1209–15 (10th Cir. 2010). The court determined that Toyota's "remedial commitment" to undertake a recall, combined with the lack of a "cognizable danger" that the remedy would be incomplete, made dismissal appropriate. *Id.* at 1211–12. In then-Judge Gorsuch's words, "if events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits, equity may demand not decision but dismissal." *Id.* at 1210.

This case is moot for similar reasons: Amazon has already taken extensive remedial steps, and the Complaint fails to identify specific additional relief that (i) is necessary to protect consumers; (ii) is within the Commission's power to order; and (iii) has not already been undertaken by Amazon.

A. The Complaint Is Moot as to the Stop-Ship Requests.

The Complaint first seeks an order directing Amazon to "[c]ease distribution of" the Third-Party Products and to remove the Amazon Standard Identification Numbers

("ASINs") and any other listings of the Third-Party Products from Amazon.com. Compl. at 18.[29] But Amazon has already done so.

Upon learning of the potential hazards or noncompliances, Amazon promptly removed the product listings from Amazon.com and stopped fulfilling customer orders for the Third-Party Products. The Complaint fails to plead that any of the Third-Party Products continue to be listed on Amazon.com. Complaint Counsel's request for relief regarding removal of the products from Amazon.com is thus moot.

B. The Complaint Is Moot as to the Notification Requests.

The Complaint seeks an order directing Amazon to provide additional "public notification . . . to adequately protect the public from substantial products hazards created by" the Third-Party Products, including by sending "direct notice to all consumers" and circulating unspecified "public notice documents or postings . . . that inform consumers of the hazard posed by" the Third-Party Products. Compl. at 18–19.

Before the Complaint was filed, Amazon had already sent direct consumer safety notifications via email to *every* purchaser (approximately 376,009 purchasers) of *every* Third-Party Product sold on Amazon.com (approximately 418,818 units). SUMF ¶ 6, 19–23. The Complaint fails to adequately allege that further or different notification is necessary to "adequately protect the public from . . . substantial products hazards created by" the Third-Party Products. Compl. at 18.

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[29] The Complaint also asks for Amazon to remove any "functionally identical" products, and to "[i]dentify[] such ASINs to CPSC." Compl. at 18. The Complaint never defines what "functionally identical" means, nor does it identify any products that it asserts are "functionally identical" to the Third-Party Products.

Complaint Counsel's affiant admits receiving a direct notification from Amazon for the Third-Party Product that she purchased as part of a CPSC "evalua[tion]." Morelli-Linen Aff. ¶¶ 4, 14–18, Exs. E, F. Amazon's notifications—sent well before the filing of the Complaint—identified the specific hazard, referenced the CPSC coordination, and urged purchasers to "immediately" stop using and dispose of the product. The notice stated:

> Dear Amazon Customer,
>
> We have learned of a potential safety issue that may impact your Amazon purchase(s) below:
>
> Order ID: 112-9830707-3360219;112-0812146-4161861
>
> Item: B07HK8JHDV;B07MPP42GT—Carbon Monoxide Detector Carbon Alarm, WJZXTEK Digital Display Carbon Monoxide Alarm, [….]
>
> The product listed above is either a product that the U.S. Consumer Product Safety Commission (CPSC) has informed us about, or our Product Safety team has identified, that may fail to alarm on time, posing a risk of exposure to potentially dangerous levels of Carbon Monoxide.
>
> If you still have this product, we urge you to stop using it immediately and dispose of it. If you purchased this product for someone else, please notify the recipient immediately and let them know they should dispose of it. There is no need for you to return the product.
>
> Amazon is applying a refund in the form of a gift card to Your Account. You can view your available balance and activity here: https://www.amazon.com/gp/css/gc/balance/.
>
> The safety and satisfaction of our customers is our highest priority. We regret any inconvenience this may cause you.

Morelli-Linen Aff., Exs. E, F. The notices for the other types of Third-Party Products (the children's sleepwear and the hair dryers) contained essentially the same elements. SUMF ¶¶ 21–23.

The Complaint does not allege that Amazon's notifications failed to reach consumers, that they downplayed the alleged hazard or noncompliance, or that they were

insufficient to alert consumers. To the contrary, the Complaint concedes that Amazon provided prompt notice, complaining only that the notice was "unilateral" and "without CPSC involvement or input concerning the content." Compl. ¶ 49. But the Complaint does not identify a provision in the CPSA requiring these practices. Additionally, a side-by-side comparison of Amazon's consumer notifications with standard CPSC joint recall press releases shows that Amazon provides more safety information to consumers, in a more effective manner. *See* Appendix B. Unlike most CPSC recalls, which are publicized through press releases or "recall alerts" posted on the CPSC's website and "brick and mortar" stores, Amazon directly notified affected purchasers of the hazard, issued automatic refunds to all affected purchasers, and instructed consumers to dispose of the product. This notification and remedy process spared purchasers of a hit-or-miss notification, the need to sort out whether their particular unit was affected (based on sale period, serial number, color, and other characteristics), and the time and effort typically required to obtain a refund or other remedy.

The Complaint's vague request for unspecified "public notification" or "other public notice documents or postings required by CPSC staff," Compl. at 18–17, fails as a matter of law. The Complaint contains no plausible allegation as to why such additional, unspecified notice is "required in order to adequately protect the public," 15 U.S.C. § 2064(c)(1), in light of Amazon's direct notice to *all* purchasers.

Indeed, the direct notification already provided is the most effective form of notification. As the CPSC has observed, "[d]irect notice recalls have proven to be the most

effective recalls." 83 Fed. Reg. 29,102, 29,102 (June 22, 2018).[30] According to the Commission, "[t]he average correction rates at the consumer level for all product types is around 6 percent."[31] Consistent with academic studies,[32] Amazon's direct digital outreach to relevant purchasers was targeted and effective.

C. The Complaint Is Moot as to Refunds and Other Remedial Action.

Amazon has also refunded the full purchase price of the Third-Party Products. As Complaint Counsel concedes, Compl. ¶ 49, Amazon completed the refund and notification process before the Complaint was filed. SUMF ¶ 20. Nevertheless, Complaint Counsel seeks an order requiring Amazon to refund the purchase price "to all consumers who purchased the [Third-Party] Products and, to the extent not already completed, conditioning such refunds on consumers returning the [Third-Party] Products or

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[30] The CPSC has recognized that "improving direct notice to consumers" is a "best practice[]" and one of the CPSC's "priorities." U.S. Gov't Accountability Office, GAO-21-56, *Consumer Product Safety Commission: Actions Needed to Improve Processes for Addressing Product Defect Cases* (2020) [hereinafter 2020 GAO Report] at 29.

[31] Tr. of Recall Effectiveness Workshop (Early Session), CPSC, July 25, 2017, at 39–40 (statement of Ms. Carol Cave, deputy director, Office of Compliance & Field Operations), https://www.cpsc.gov/s3fs-public/Recall_Effectiveness_Workshop-Transcripts-2018.pdf. Even consumer advocates concede that "Amazon does a pretty good job of, you know, telling you if something's been recalled." *Id.* at 14 (statement of Nancy Cowles, Kids in Danger).

[32] "Direct notification of consumers was found to have a powerful positive relationship to recall success." *Recall Effectiveness Research: A Review and Summary of the Literature on Consumer Motivation & Behavior*, ZL Assocs. & Heiden Assoc. (prepared for CPSC) (July 2003), at 8 (citing studies). Such direct consumer messages—like the ones sent by Amazon here—cut through the "noise" and are more apt to capture the attention of consumers. By contrast, "[w]here direct notification of most consumers is not possible, manufacturers may have to rely on mass media to notify the public of a recall"—*i.e.*, untargeted measures such as recall press releases. *Id.* 9.

providing proof of destruction"; to accept returns of the Third-Party Products to Amazon; and to destroy Third-Party Products "that are returned to Amazon by consumers or that remain in Amazon's inventory, with proof of such destruction via a certificate of destruction or other acceptable documentation provided to CPSC staff." *Id.* The Complaint fails to adequately plead that the steps already undertaken by Amazon were insufficient or that further corrective action would be "in the public interest," *id.* § 2064(d), and it seeks forms of additional remedial action that are not authorized by the CPSA.

Before this Complaint was filed, Amazon provided full purchase price refunds to all 376,009 purchasers of the Third-Party Products, along with the direct consumer safety notifications urging each consumer to immediately stop using and dispose of the product. Amazon's voluntary action, completed more promptly and efficiently than most CPSC recalls,[33] ensured speedy refunds for consumers.

Complaint Counsel's request for additional remedial steps fails as a matter of law because nothing in the CPSA authorizes the Commission to prohibit a company from providing refunds.[34] To the contrary, the CPSA includes refunds as an option: a Commission order may direct that a manufacturer, distributor, or retailer of a recalled product provide a repair, a replacement, or a "refund [of] the purchase price of such product." 15 U.S.C. § 2064(d)(1)(C). While the Commission may "specify in the order the persons to whom refunds *must* be made," *id.* § 2064(d)(2) (emphasis added), nothing in

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[33] 2020 GAO Report at 11–13.

[34] None of the CPSC press releases for prior recalls involving third-party products sold exclusively on Amazon.com or eBay.com indicate that any refunds issued to consumers in those recalls were contingent on forcing consumers to show proof of destruction. *See* Appendix A.

the CPSA authorizes the Commission to order persons to whom refunds must *not* be made. Nor does the statute contemplate that the Commission could require companies to condition the provision of refunds on product returns.

Finally, even if the Commission was empowered to enter an order blocking consumers from obtaining refunds, the Complaint fails to allege that doing so would be "in the public interest." *Id.* § 2064(d). Complaint Counsel fails to adequately explain how creating barriers for consumers to receive compensation increases consumer safety generally, let alone with respect to the Third-Party Products at issue here. Indeed, erecting hurdles directly conflicts with the CPSC's prior emphasis on providing a prompt, easy remedy to consumers.[35] In any event, all consumers have already received refunds, so there is no live dispute to be resolved here. Complaint Counsel's destruction-related request, Compl. ¶ 19, is also moot, given that, the Third-Party Products in Amazon fulfillment centers have either been destroyed or set aside for future destruction. SUMF, ¶ 16.

D. The Complaint's Request for "Monthly Progress Reports" and "Monthly Reports" Is Mooted By Amazon's Prior Notices to Purchasers and the CPSC.

Finally, Complaint Counsel seeks an order requiring Amazon to "[p]rovide monthly progress reports" ("MPRs") that "reflect, among other things, the number of [Third-Party] Products located in Amazon's inventory, returned by consumers, and destroyed," and identify "all functionally equivalent products removed by Amazon from

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[35] Tr. of Recall Effectiveness Workshop (Early Session), CPSC, July 25, 2017, at 31 (statement of Patty Davis, Acting Director, CPSC Office of Communications: "What is the remedy for consumers? And who should consumers contact? Make it easy for them. . . . we advocate giving consumers an easy way just to reach that firm, an easy way to get their remedy.").

amazon.com." Compl. at 19–20. Complaint Counsel also seeks an order requiring Amazon to "[p]rovide monthly reports summarizing the incident data submitted to CPSC through the Retailer Reporting Program." *Id*. at 20.

These claims fail as a matter of law because the CPSC does not adequately plead that these measures are either "notification[s] . . . required in order to adequately protect the public" under Section 2064(c) or remedial action that would be "in the public interest" under Section 2064(d). The "MPR requirement is plainly inapplicable where consumers receive direct digital notifications and full purchase price refunds. The CPSC's MPR forms[36] were designed (1) for recalling manufacturers and retailers to report to the CPSC how many consumers requested a remedy based on recall notifications and (2) to enable the CPSC to compare the number of remediated products to the number of units in the field. *See CPSC Recall Handbook* (March 2012 ed.), at 25, https://www.cpsc.gov/s3fs-public/8002.pdf.

Here, Amazon notified all impacted purchasers by email before the Complaint was filed. SUMF ¶¶ 20–21. Amazon also provided a full refund to each purchaser. *Id*. ¶¶ 18, 23. The MPR form thus serves no purpose here, and would effectively duplicate the information that Amazon has already provided to the CPSC.

In sum, the Complaint must be dismissed as moot in light of the steps already taken by Amazon, including removing the Third-Party Products from Amazon.com, providing full refunds to purchasers, notifying purchasers of the specific hazard, and directing purchasers to immediately stop using and dispose of the Third-Party Products.

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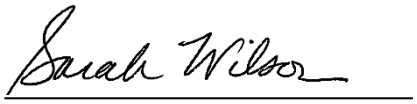
[36] *Monthly Progress Report Form*, https://www.cpsc.gov/s3fs-public/MonthlyProgressReport-ElectronicForm_0.pdf.

CONCLUSION

For the reasons stated above, the Presiding Officer should deny Complaint Counsel's motion for partial summary decision and grant Amazon's motion to dismiss the Complaint or, in the alternative, issue a summary decision in Amazon's favor.

Dated: November 2, 2021

Respectfully submitted,



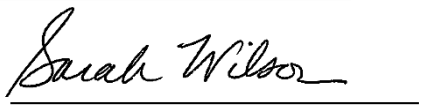
Sarah L. Wilson
Stephen P. Anthony
Thomas Brugato
Benjamin L. Cavataro
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
202-662-5397
swilson@cov.com
santhony@cov.com
tbrugato@cov.com
bcavataro@cov.com

Counsel for Respondent

CERTIFICATE OF SERVICE

Pursuant to the October 19, 2021 Order Following Prehearing Conference entered by the Presiding Officer, I hereby certify that on November 2, 2021, a true and correct copy of the foregoing document, and the appendices that follow, was:

- filed by email to the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills, at amills@cpsc.gov, with a copy to the Presiding Officer at alj@sec.gov and to all counsel of record; and
- served to Complaint Counsel by email at jeustice@cpsc.gov, lwolf@cpsc.gov, and sanand@cpsc.gov.



Sarah L. Wilson

APPENDIX A: JOINT RECALL PRESS RELEASES

This appendix contains examples of CPSC recalls undertaken by manufacturers, distributors, or retailers of products sold exclusively on e-commerce sites.

Amazon

- Recall by importer Pacapet: *Area Rugs Recalled Due to Violation of Federal Flammability Standard and Fire Hazard; Imported by Pacapet; Sold Exclusively on Amazon.com* (Recall Alert), https://www.cpsc.gov/Recalls/2021/Area-Rugs-Recalled-Due-to-Violation-of-Federal-Flammability-Standard-and-Fire-Hazard-Imported-by-Pacapet-Sold-Exclusively-on-Amazon-com-Recall-Alert (Aug. 12, 2021).

- Recall by manufacturer SIORO: *Children's Robes Sold Exclusively on Amazon.com Recalled Due to Violation of Federal Flammability Standard and Burn Hazard*, https://www.cpsc.gov/Recalls/2021/Childrens-Robes-Sold-Exclusively-on-Amazoncom-Recalled-Due-to-Violation-of-Federal-Flammability-Standard-and-Burn-Hazard-Manufactured-by-SIORO (June 30, 2021)

- Recall by importer HOFISH Inc.: *HOFISH Recalls Mattresses Due to Violation of Federal Flammability Standard; Sold Exclusively on Amazon.com*, CPSC https://www.cpsc.gov/Recalls/2021/hofish-recalls-mattresses-due-to-violation-of-federal-flammability-standard-sold (Mar. 17, 2021).

- Recall by importer Endliss Technology Inc.: *Endliss Technology Recalls Trianium Battery Phone Cases Due to Burn Hazard; Sold Exclusively on Amazon.com*, https://www.cpsc.gov/Recalls/2020/endliss-technology-recalls-trianium-battery-phone-cases-due-to-burn-hazard-sold Oct. 7, 2020).

- Recall by importer SKE Outdoors Inc. / manufacturer by Dongguan Flying Sports Goods Co. Ltd., *SKE Outdoors Recalls Kids Bike Helmets Due to Risk of Head Injury*, https://www.cpsc.gov/Recalls/2021/SKE-Outdoors-Recalls-Kids-Bike-Helmets-Due-to-Risk-of-Head-Injury (Sept. 1, 2021).

- Recall by manufacturer Booph, *Children's Nightgowns Sold Exclusively on Amazon.com Recalled Due to Violation of Federal Flammability Standard and Burn Hazard; Manufactured by Booph*, https://www.cpsc.gov/Recalls/2021/Childrens-Nightgowns-Sold-Exclusively-on-Amazon-com-Recalled-Due-to-Violation-of-Federal-Flammability-Standard-and-Burn-Hazard-Manufactured-by-Booph (June 30, 2021).

- Recall by importer Frieyss / manufacturer Qingdao Ruizexin Electronic Technology Co. Ltd., *Infant Bath Seats Recalled Due to Drowning Hazard; Imported by Frieyss and Sold Exclusively on Amazon.com (Recall Alert)*, https://www.cpsc.gov/Recalls/2021/Infant-Bath-Seats-Recalled-Due-to-Drowning-

Hazard-Imported-by-Frieyss-and-Sold-Exclusively-on-Amazon-com-Recall-Alert (Aug. 19, 2021).

- Recall by manufacturer Auranso Official, *Children's Nightgowns Sold Exclusively on Amazon.com Recalled Due to Violation of Federal Flammability Standard and Burn Hazard; Manufactured by Auranso Official*, https://www.cpsc.gov/Recalls/2021/Childrens-Nightgowns-Sold-Exclusively-on-Amazon-com-Recalled-Due-to-Violation-of-Federal-Flammability-Standard-and-Burn-Hazard-Manufactured-by-Auranso-Official (June 30, 2021).

eBay

- Recall by importer West Lake International LLC d/b/a Any Volume: *Any Volume Recalls Bicycle Helmets Due to Risk of Head Injury; Sold Exclusively on ebay.com (Recall Alert)*, https://www.cpsc.gov/Recalls/2021/Any-Volume-Recalls-Bicycle-Helmets-Due-to-Risk-of-Head-Injury-Sold-Exclusively-on-ebay-com-Recall-Alert (Nov. 24, 2020);

- Recall by distributor DCI LLC, d/b/a Hanashop: *Hanashop Recalls Counterfeit Power Cords Due to Fire and Shock Hazard; Sold Exclusively on eBay*, https://www.cpsc.gov/Recalls/2008/hanashop-recalls-counterfeit-power-cords-due-to-fire-and-shock-hazard-sold-exclusively (Sept. 17, 2008).

Children's Robes Sold Exclusively on Amazon.com Recalled Due to Violation of Federal Flammability Standard and Burn Hazard; Manufactured by SIORO

APPENDIX B

Recalled SIORO children' s robe - white

Name of Product:
Children's Robes

Hazard:
The children's robes fail to meet the federal flammability standards for children's sleepwear, posing a risk of burn injuries to children.

Remedy:
Refund

Recall Date:
June 30, 2021

Units:
About 950

Recall Details

Consumer Contact

SIORO email at cs@sioro.com or online at www.SIORO.com and click on "Recall Notice" at the bottom of the page for more information on how to receive a refund.

Description:

This recall involves SIORO-branded children's 100% cotton robes. They were sold in sizes S, M, and L in the following eight colors: brown, dark gray, green, light blue, teal, navy, plum and white. The long-sleeved, hooded robes have two front pockets and two side seam belt loops with a matching belt. "Made in China" and "100% Cotton" are printed on a sewn-in label.

Remedy:

Consumers should immediately stop using the recalled garments and contact SIORO for instructions on returning the garments with free shipping to receive a full refund.

Incidents/Injuries:

None reported.

Sold Exclusively At

Online at www.Amazon.com from December 2020 through April 2021 for between $24 and $29.

Manufacturer(s):

SIORO, of Wuhan, China

Manufactured In:

China

Recall number:

21-159

Important safety notice about your past Amazon order
order-update@amazon.com

Thursday, January 21, 2021 at 5:09 PM (PST)
SENT [redacted]

Dear Amazon Customer,

We have learned of a potential safety issue that may impact your Amazon purchase(s) below:
Order ID: [redacted]
Item: B07SCJNMFP - IDGIRLS Kids Animal Hooded Soft Plush Flannel Bathrobes for Girls Boys Sleepwear Orange Fox M

The U.S. Consumer Product Safety Commission (CPSC) has informed us that the products listed above failed to meet the federal safety standard for the flammability of children's sleepwear, posing a risk of burn injuries to children.

If you still have this product, we urge you to stop using it immediately and dispose of the item. If you purchased this item for someone else, please notify the recipient immediately and let them know they should dispose of the item. There is no need for you to return the product.

Amazon is applying a refund in the form of a gift card to Your Account. You can view your available balance and activity here: https://www.amazon.com/gp/css/gc/balance/

The safety and satisfaction of our customers is our highest priority. We regret any inconvenience this may cause you.

Sincerely,
Customer Service
Amazon.com
www.amazon.com

Please note: this e-mail was sent from a notification-only address that cannot accept incoming e-mail. Please do not reply to this message. Please be aware that links contained in this message may not be owned by Amazon.