COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG
LONDON LOS ANGELES NEW YORK PALO ALTO
SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000

August 18, 2022

The Honorable James E. Grimes
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street NE, Mail Stop 2585
Washington, DC 20549

Re: *In the Matter of Amazon.com, Inc.* ("Amazon"), CPSC Docket No. 21-2, Reply in Support of Amazon's Motion to Compel Discovery of CPSC Policy and Practice Material

Dear Judge Grimes:

Your August 11, 2022 Order requested that Amazon reply to three arguments raised in Complaint Counsel's Opposition to Amazon's Motion to Compel: (1) Amazon's motion is untimely pursuant to 16 C.F.R. § 1025.36, (2) Amazon seeks "specific Corrective Action Plans" agreed to by other companies in a request that is not proportional to the needs of the case and is subject to protection from disclosure under 15 U.S.C. § 2055, and (3) the law enforcement privilege shields disclosure of "non-remedy related sections of the Section 15 Investigation Procedures Manual and the Regulatory Enforcement Division Standard Operating Procedure."

Complaint Counsel's arguments misconstrue Amazon's requests and are unsupported by well-established and applicable law. *First*, pursuant to the operative rule, the deadline for filing motions to compel is within twenty days of the parties reaching an impasse following a good faith attempt to resolve a discovery dispute—not twenty days following the filing of objections. *Second*, contrary to Complaint Counsel's assertion regarding Corrective Action Plan ("CAP") material, Amazon has made clear from the start of discovery that it is not seeking disclosure of business confidential CAP material, but rather documents reflecting remedies accepted by the agency. *Third*, Complaint Counsel's eleventh-hour assertion of the law enforcement privilege to protect policy documents produced publicly in other cases is overbroad, inconsistent, and unreasonable.

1. Amazon's Motion is Timely.

Complaint Counsel's timeliness argument contradicts the plain language of the operative rule, defies common sense, and would undermine the discovery schedule ordered by the Presiding Officer. Pursuant to 16 C.F.R. § 1025.36, "[i]f a party fails to respond to discovery, in whole or in part, the party seeking discovery may move within twenty (20) days for an order compelling an answer[.]" Discovery and other scheduling

decisions nonetheless remain "subject to the control of the Presiding Officer, who may issue any just and appropriate order" concerning discovery. *Id.* § 1025.31(i).

Section 1025.36 makes clear that the motion clock is initiated by a party's failure to respond to discovery. Complaint Counsel nonetheless argues that Amazon's filing window began when Complaint Counsel served its objections to Amazon's requests. Opp. at 12. Complaint Counsel cites no authority for the proposition that service of objections initiates the motion clock. Beginning the motion clock upon the filing of objections would run counter to the Presiding Officer's October 19, 2021 Order, which directs the parties to "try in good faith to resolve" any disputes. Dkt. 13 at 2. Accordingly, Amazon engaged in extensive written correspondence and participated in multiple meet-and-confer calls with Complaint Counsel in a good faith effort to resolve the pending dispute. Throughout that process, Amazon continued to identify unproduced documents referenced in already-produced material and other public sources, and Complaint Counsel produced such material only after Amazon requested it by name. *See* Mot. Exs. C–V.

Given the Presiding Officer's Order, the earliest date on which Complaint Counsel could therefore "fail" to produce requested material pursuant to Section 1025.36—as a technical matter—would be the day on which the parties reach a definitive impasse. Here, the parties reached an impasse during their final meet-and-confer on July 12. Mot. Ex. V at 2. Amazon initiated the Presiding Officer's motion dispute process ten days later on July 22 through the joint submission of a 1-page summary of the dispute and request for a conference before the Presiding Officer. This clearly falls within the prescribed 20 days.

Finally, as a matter of fundamental fairness, Complaint Counsel should not be permitted to advance a timeliness argument after ***insisting*** on delays in Amazon's filing of a motion. On July 7, Amazon communicated the need to seek relief from the Presiding Officer. *See* Mot. Ex. T. Per the Presiding Officer's protocol for submission of discovery motions, Amazon requested that Complaint Counsel provide edits to a joint 1-page summary of the dispute to be submitted in-turn to the Presiding Officer. *Id.* Complaint Counsel, however, declined to provide its portion of the 1-page submission as requested, instead asserting that a supplemental production of just five additional documents would resolve the dispute. *See* Mot. Ex. U at 2. Nor did Complaint Counsel raise timeliness as a bar to Amazon's escalation of the dispute to the Presiding Officer. According to Complaint Counsel, "[i]f, following this production, Amazon nonetheless desires to seek relief from Judge Grimes, we will work with you on a . . . letter that sets forth the issues." *Id.* Pursuant to the Presiding Officer's broad discovery authority, Complaint Counsel should not be permitted to engage in a "bait and switch" tactic to delay Amazon's filing of a motion and then cite timeliness as a basis to deny that same motion. 16 C.F.R § 1025.31.

2. Amazon Does Not Seek Protected Corrective Action Plan Material.

Complaint Counsel also incorrectly asserts that Amazon seeks the full Corrective Action Plan ("CAP") files of other companies. To the contrary, Amazon has made clear from the outset of its communications with Complaint Counsel that the CPSC could satisfy Amazon's discovery requests without necessarily producing documents from a company-specific CAP file. *See* Mot. Ex. D at 2. Rather, Amazon was willing to accept compilations

or other tracking records of the remedies accepted by the CPSC in similar cases to the extent such documents exist and sufficiently encompass the requested discovery. *Id.*[1]

To the extent the CPSC has not created compilation documents showing remedies accepted across multiple CAPs, Amazon is not requesting that Complaint Counsel produce in the alternative every single document contained within each company CAP file. Upon information and belief, each CAP file contains documents (among many others) memorializing the remedies that the agency agreed to accept in that case. Those are the documents that Amazon seeks—not the entire CAP file. Indeed, Complaint Counsel appended the template of such a document to its brief. *See* Opp. Ex. L. And when asked whether certain remedies were imposed in a prior recall, a CPSC compliance officer testified in his August 16 deposition that in order to be sure, he would need to locate the remedy summary document contained within the CAP file as opposed to the public press release that Complaint Counsel claims to be sufficient here. *See* Reply Ex. A at 179–80.

Amazon's Motion narrowed its request to a subset of the agency's CAPs directly relevant here: those involving children's sleepwear, hair dryers and air brushes, and carbon monoxide detectors from 2015 to the present. *See* Mot. at 2.[2] According to publicly available recall press releases and alerts, Amazon estimates that fewer than 100 CAPs would fit into these product categories. Complaint Counsel's attempt to paint Amazon's narrowing as a new or impermissibly reformulated request is inaccurate. The document categories listed in Amazon's Proposed Order represent a reasonable narrowing of Amazon's original document requests (RFP Nos. 15, 19–26) and reflect the bare minimum of material necessary to develop a sufficient discovery record.[3]

Although Complaint Counsel asserts that production of CAP documents reflecting remedies accepted by the agency would be burdensome or disproportional to the needs of the case, its assertion is conclusory. Complaint Counsel has made no effort to quantify how many recalls it conducted for these product categories since 2015, the time required to collect the requested documents, or how the agency lacks the resources necessary to collect such material. *See Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd.*, 242

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[1] Amazon made clear to Complaint Counsel that any narrowing of its requests to exclude documents contained within a CAP file was contingent on Complaint Counsel explaining "how it did (or did not) compile" its records of past remedies. Mot. Ex. D at 2. Because Complaint Counsel has failed to do so, Amazon's request for such material remains live.

[2] Complaint Counsel has informed Amazon that files associated with recalls initiated via NOV do not carry the "CAP," nomenclature. *See* Reply Ex. B. Amazon nonetheless seeks the corresponding material reflecting remedies accepted in recalls initiated via NOV.

[3] Complaint Counsel asserts that Amazon "never addressed or sought materials relating to joint CPSC recalls conducted with other companies involving 'children's sleepwear, hair dryers and air brushes, and carbon monoxide detectors.'" Opp. at 13–14. That is incorrect. Amazon RFP Nos. 19 and 20, for example, seek documents reflecting CPSC's "practices . . . pertaining to corrective actions or recalls conducted by [distributors, manufacturers, importers, and retailers] or consumer products." *See* Mot. Ex. A at 9.

F.R.D. 1, 10 (D.D.C. 2007). Because Amazon estimates the number of responsive CAPs to be less than 100, Complaint Counsel lacks any reasonable basis to assert burden here.[4]

At 11:43 p.m. on August 17, Complaint Counsel produced a subset of CAP and NOV files based on what Complaint Counsel characterizes as a "reasonable" search. *See* Reply Ex. B. Complaint Counsel further communicated its new position that the Protective Order in this matter sufficiently resolves any "issues with respect to 15 U.S.C. § 2055 and applicable regulations." *Id.*[5] Amazon has not had sufficient opportunity to review the production, made at 11:43 p.m. on the night before Amazon's Reply was due. Accordingly, Amazon cannot evaluate whether Complaint Counsel's production of what it deems to be a "reasonable" set of material fulfills Amazon's requests. For that reason, Amazon respectfully requests that the Presiding Officer proceed with ordering production of documents reflecting remedies accepted by the CPSC in prior recalls involving children's sleepwear, hair dryers and air brushes, and carbon monoxide detectors since 2015.

3. CPSC's Assertion of the Law Enforcement Privilege is Overbroad.

Complaint Counsel argues that every portion of the Section 15 Manual that it withheld pursuant to its self-administered relevance test is also protected by the law enforcement privilege. That qualified common-law privilege permits withholding of law enforcement records if two elements are met: (1) "the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions," and (2) "if such disclosure could reasonably be expected to risk circumvention of the law." *Blackwell v. FBI*, 646 F.3d 37, 41–42 (D.C. Cir. 2011) (quoting 5 U.S.C. § 552(b)(7)(E)).

As a threshold matter, the CPSC has failed to meet its "burden of showing that the privilege applies." *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010). The Kaye Declaration makes no effort to specify why particular portions of the documents are privileged; rather, it speaks in broad terms about the documents in their entirety. Complaint Counsel recites the legal elements for the privilege and simply asserts in conclusory fashion that the elements are met here. Opp. at 25–26. More is required. A "near-verbatim recitation of the statutory standard is inadequate." *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 746 F.3d 1082, 1102 (D.D.C. 2014).

The limited information the CPSC has made available regarding the Section 15 Manual and the Regulatory Enforcement SOP strongly suggests that the privilege does ***not*** apply. First, the CPSC has previously produced in litigation an earlier version of the entire Manual. *See United States v. Spectrum Brands, Inc.*, No. 3:15-cv-371, Doc. No. 86-

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[4] Complaint Counsel has failed to cite any cases showing that the limited exceptions permitting certain federal court discovery apply to formal adjudications, where the record is limited exclusively to the record that was before the agency. *See Nat'l Labor Rels. Bd. v. CNN Am., Inc.*, 865 F.3d 740, 751 (D.C. Cir. 2017).

[5] Complaint Counsel's original position was nonetheless incorrect. The statute makes clear that it does not apply in administrative proceedings such as this one. *See id.* § 2055(a)(8) ("The provisions of paragraphs (2) through (6) shall not prohibit the disclosure of information . . . when relevant in any administrative proceeding[.]").

2 (W.D. Wis. 2016). Amazon raised this prior production with Complaint Counsel during the parties' correspondence, *see* Ex. Q, but Complaint Counsel has provided no basis for its inconsistent treatment of the earlier Manual as unprivileged in *Spectrum Brands*, but as privileged here for the current version of the Manual.

Second, the CPSC's law enforcement privilege claims are plainly overbroad. Most strikingly, Complaint Counsel rejected Amazon's request to produce even the table of contents of the Section 15 Manual. *See* Mot. Ex. N at 1–2, Ex. P at 1, Ex. V at 1 ("You … have yet to elaborate as to how any [risks] reasonably apply to chapter headings[.]"). The withholding of the table of contents demonstrates that Complaint Counsel is applying an overbroad privilege standard, and also frustrates evaluation of its privilege claims.

Third, the Manual does not directly implicate law enforcement issues—which may be why it was produced in *Spectrum Brands*. The Manual relates to Section 15 of the CPSA, which not only addresses substantial product hazards, but also how to evaluate and respond to potential hazards. While Section 15 confers certain remedial powers on the CPSC, it does not pertain to law ***enforcement***, because the prohibitions under Section 15(b) are narrow, and the prohibited acts that are subject to investigation and penalties are referenced in Section 19 of the CPSA, *e.g.* failing to provide information under Section 15(b) or failing to comply with an order under Section 15(b). *See* 15 U.S.C. §§ 2068(a)(2), (4), (5), (13), (15). How the CPSC evaluates product defects, prioritizes recalls, or negotiates corrective actions do not implicate these prohibitions.

Finally, even if these materials are initially found to be within the scope of the privilege, the relevant factors do not justify their withholding here. *See In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988). There is no reason to think that production will "thwart governmental processes by discouraging citizens from giving the government information," result in disclosure of the identities of informants, chill "governmental self-evaluation and consequent program improvement," or implicate any ongoing criminal or police investigation or proceeding or disciplinary procedure. *Id.* In contrast, this information is relevant to Amazon's defense and is not available from any other source.

For example, according to the November 2020 GAO report, withheld portions of the Section 15 Manual contain guidance on the classification of product hazards into various classes and further provides guidance "for determining the level and intensity of corrective action and public notice" in light of the applicable hazard class.[6] Such information is indisputably discoverable and not implicated by any privilege. Guidance issued to staff in the withheld portions of the Manual regarding hazard classification and corresponding remedies applicable to each class could reasonably lead to admissible evidence regarding CPSC policies and practices applicable to the Subject Products.

Amazon appreciates the opportunity to respond to the above arguments and remains available to provide any other briefing to the Presiding Officer as requested.

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[6] *See Consumer Product Safety Commission: Actions Needed to Improve Processes for Addressing Product Defect Cases*, U.S. Gov't Accountability Office, GAO-21-56 at 8–9 (Nov. 2020), https://www.gao.gov/assets/gao-21-56.pdf.

Sincerely,

Sarah Wilson
Stephen P. Anthony
Thomas Brugato
Nicholas J. Griepsma

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
ngriepsma@cov.com

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2022, a true and correct copy of the foregoing document was, pursuant to the Order Following Prehearing Conference entered by the Presiding Officer on October 19, 2021:

- 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.

Nicholas Griepsma

Nicholas Griepsma

Reply Exhibit A
In Camera Exhibit
Not for Public Filing

Reply Exhibit B

From: Eustice, John <JEustice@cpsc.gov>
Sent: Wednesday, August 17, 2022 6:08 PM
To: Wilson, Sarah; Anthony, Stephen; Brugato, Thomas; Ramirez, Diane; Griepsma, Nick; Korde, Rukesh
Cc: Wolf, Liana; Anand, Serena; Mendel, Thomas; Millett, Frederick
Subject: RE: In the Matter Amazon.com, Inc.; CPSC Docket No.: 21-2

[EXTERNAL]
Sarah,

Although we disagree with your reading of Judge Grimes' Order of August 11th, we are providing additional documents today that relate to his Order and instruction to the parties. After a reasonable search of our files, we are providing – marked "Confidential" under the Protective Order in order to avoid issues with respect to 15 U.S.C. § 2055 and applicable regulations – the Corrective Action Plans for the CPSC's recalls of hair dryers and carbon monoxide detectors dating back to 2015, and the NOVs and related materials sufficient to show the remedies sought (there are no CAPs for regulated products) for children's sleepwear products dating back to 2015. We are also providing – also marked "Confidential" under the Protective Order and redacted to remove the contact information for consumers – post-recall reporting documents for hair dryers, carbon monoxide detectors, and children's sleepwear garments (Monthly Progress Report data) dating back to 2015. You will receive an email later this evening with instructions for accessing these documents.

We are also providing unredacted versions of the Section 15 Defect Investigation Procedures Manual and the Regulatory Enforcement Division Standard Operating Procedure (SOP) for Assessing Compliance and Removing Violative Products to Judge Grimes *in camera* so that he can decide whether the law enforcement privilege and constraints on relevance prevent their full disclosure in this litigation. We also intend to inform Judge Grimes of our document production, which we believe moots the portions of his Order relating to 15 U.S.C. § 2055.

Kind regards,

John