

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)

AMAZON.COM, INC.)

Respondent.)

CPSC DOCKET NO.: 21-2

COMPLAINT COUNSEL’S OPPOSITION TO
AMAZON.COM, INC.’S MOTION TO COMPEL

Amazon’s eleventh hour Motion to Compel should be denied for several reasons. First, only the narrow issue of required corrective action remedies – an issue the Consumer Product Safety Commission (“CPSC” or “the Commission”) makes highly transparent through publication of detailed industry guidance – remains in controversy in this proceeding, and Complaint Counsel has fully satisfied its discovery obligations on this issue with the production of both publicly available and internal agency materials. Second, Amazon has not met its burden of establishing that any of the additional material sought in its six newly formulated categories of information related to “CPSC’s policies and practices” is relevant to a live claim or defense and proportional to the needs of the case. Third, Complaint Counsel has produced the portions of its internal investigations manuals that relate to remedies, and Amazon has not demonstrated a basis for discovery of the non-remedy, privileged portions of the manuals concerning CPSC investigative practices, particularly in light of the parties’ stipulation that the products named in the Complaint present a substantial product hazard. Finally, the Administrative Procedures Act provides no basis for overriding these compelling reasons to deny Amazon’s motion.

I. BACKGROUND

A. Remedy is the Only Issue Remaining in This Case

The Commission authorized the initiation of this administrative proceeding to seek public notification and remedial action pursuant to Sections 15(c) and (d) of the Consumer Product Safety Act (“CPSA”), as amended, 15 U.S.C. §§ 2064(c), (d), to protect the public from the substantial product hazards presented by violative children’s sleepwear garments and defective carbon monoxide detectors and hair dryers (the “Subject Products”) that were distributed by Amazon through its Fulfillment by Amazon program. In the Court’s January 19, 2022 Order on Motion to Dismiss and Motion for Summary Decision, the Court found that “Amazon meets the statutory definition of the term *distributor*” under the CPSA, Dkt. No. 27 at 27. Thereafter, in the April 26, 2022 Stipulation of the Parties, the parties stipulated that the Subject Products meet the requirements for a substantial product hazard under the CPSA, Dkt. No. 35. Therefore, only one issue remains in this proceeding: the remedies available pursuant to 15 U.S.C. §§ 2064(c) and (d) to address the substantial product hazards presented by the Subject Products.

1. The remedies set forth in the Consumer Product Safety Act – such as providing for public notification, providing refunds, and prohibiting distribution – are straightforward, are the law, and are common sense. It is axiomatic that if products present substantial product hazards, the public should be properly and fully informed of the hazards and risks posed by the products, the products should be removed from commerce, and the products should no longer be distributed.

Here, although Amazon distributed more than 400,000 Subject Products,¹ Amazon has provided inadequate notice to particular consumers and no public notification about the hazards presented by these products. Complaint Counsel therefore seeks an Order requiring Amazon to take the actions set out in 15 U.S.C. § 2064(c)(1) to provide public notification. *See, e.g., In re*

¹ Amazon’s Statement of Undisputed Material Facts, Dkt. No. 16 at Section II, ¶ 6.

Zen Magnets, LLC, CPSC Docket No. 12-2, Final Decision and Order at 53 (Oct. 26, 2017) (finding that “because Respondent sold millions of individual magnets and caregivers and medical professionals are not generally aware of the substantial risk of injury that the Subject Products present to children, public notification pursuant to 15 U.S.C. § 2064(c)(1) is required to adequately protect children from the substantial product hazard presented by the Subject Products”), *vacated on other grounds*, 2018 WL 2938326 (D. Colo June 12, 2018), *amended in part*, 2019 WL 9512983 (D. Colo. Mar. 6, 2019), *aff’d in part, rev’d in part* 986 F.3d 1156 (10th Cir. 2020) (hereinafter, “*Zen Magnets* Final Decision and Order”); *see also In re Dye and Dye*, 1989 WL 435534, at *21 (July 17, 1991) (“The Commission concludes that notice to as many members of the public that may be exposed to the hazards of the worm probes manufactured by the respondents as is feasible is required so that members of the public may take appropriate actions to protect themselves.”).

Further, because Amazon has taken inadequate measures to ensure and confirm that these hazardous Subject Products have been removed from commerce, Complaint Counsel seeks an Order requiring Amazon to take the actions set out in 15 U.S.C. § 2064(d)(1) to provide refunds in conjunction with facilitating the return and destruction of the Subject Products. *See, e.g., Zen Magnets* Final Decision and Order at 54 (finding that “because of the substantial risk of injury that the Subject Products present to children, as many as possible of these hazardous products must be removed from consumers, and, therefore, it is in the public interest that Respondent refund the purchase price of the Subject Products, less the ‘reasonable allowance for use’ deduction”); *see also id.* at 48 (explaining that “the Commission’s mission to protect the public against unreasonable risks of injury associated with consumer products and statutory authority to remove hazardous products from consumers’ hands”).

Furthermore, because the Subject Products present a substantial product hazard, it is self-evident that the Subject Products should not remain in distribution. Complaint Counsel therefore seeks an Order under 15 U.S.C. § 2064(c) requiring Amazon to cease distribution of the Subject Products. *See, e.g., Zen Magnets* Final Decision and Order at 54 (finding “that because of the substantial risk of injury such magnets pose to children, it is in the public interest that Respondent cease from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States, the Subject Products”); *see also In re Dye and Dye*, 1989 WL 435534, at *21 (July 17, 1991) (“In view of the serious hazard presented by worm probes, and the substantial risk of injury they present to the public, the Commission concludes that it is in the public interest to issue an order in this proceeding prohibiting, with respect to respondents’ worm probe, manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States.”); *see also* 15 U.S.C. § 2068(a)(2) (prohibiting any person from selling, manufacturing, distributing, or importing products subject to a Commission ordered recall).²

B. After Complaint Counsel Objected to Amazon Discovery Request Nos. 15, 19-26, Amazon Narrowed the Requests to Non-Privileged Information and Compilation Documents

On February 14, 2022, Amazon served Respondent’s First Set of Requests for Production of Documents and Things to Consumer Product Safety Commission. Ex. A.³ Request Nos. 15, 19-26, which are at issue in Amazon’s Motion to Compel, are stated below:

² Pursuant to the schedule set forth in the court’s June 7, 2022 Order, Dkt. No. 42, Complaint Counsel intends to file a motion for summary decision, which will specify in detail the remedial action that Amazon should be ordered to undertake to address the substantial product hazards presented by the Subject Products.

³ All cited exhibits are attached to the accompanying Declaration of John Eustice, dated August 8, 2022.

15. All DOCUMENTS consisting of, or containing, any standard, rule, policy, procedure, or guidance issued, considered, proposed, or adopted by YOU that explain, identify, or reflect YOUR current or previous position(s) on (i) the circumstances when a Commission order directing a company to provide notification or further notification of a recall to purchasers, consumers, or users of a product, or to the public, “is required in order to adequately protect the public” under 15 U.S.C. § 2064(c)(1); or (ii) the factors bearing on such determination.

19. All DOCUMENTS relating to YOUR position, policies, practices, or procedures pertaining to corrective actions or recalls conducted by distributors of consumer products.

20. All DOCUMENTS relating to YOUR position, policies, practices, or procedures pertaining to corrective actions or recalls conducted by manufacturers, importers, and retailers of consumer products domiciled or headquartered outside the United States.

21. All DOCUMENTS relating to YOUR position, policies, practices, or procedures pertaining to corrective actions or recalls conducted by manufacturers, importers, and retailers of consumer products domiciled or headquartered within the United States.

22. All DOCUMENTS relating to YOUR positions, policies, practices, or procedures pertaining to recall effectiveness, or the measurement, assessment, or evaluation of recall effectiveness.

23. All DOCUMENTS that consist of, or relate to, studies, analyses, or reports regarding direct recall notifications and indirect recall notifications, including without limitation any study regarding their effectiveness.

24. All DOCUMENTS relating to YOUR positions, policies, practices, or procedures pertaining to assessment, evaluation, or approval of proposed recall remedies or corrective actions, including but not limited to repairs, replacements, refunds, returns, or disposal (including self-disposal) of recalled products.

25. All DOCUMENTS relating to YOUR position on, or practices, or procedures related to, when a “recall” should be issued as opposed to a “recall alert.”

26. All DOCUMENTS that state, explain, identify, or reflect YOUR positions, policies, practices, or procedures pertaining to the circumstances when a Commission order directing a company to provide a remedy, or additional remedy, to purchasers, consumers, or users of a product is “in the public interest” within the meaning of 15 U.S.C. § 2064(d)(1), including the factors bearing on such determination.

On March 21, 2022, Complaint Counsel objected to these requests as seeking information that was neither relevant nor reasonably calculated to lead to the discovery of admissible

evidence; as calling for a legal conclusion; as overly broad, vague, and ambiguous; as overly broad and unduly burdensome for seeking documents beyond the scope of the proceeding; and as seeking documents subject to privileges or other protections. Ex. B.⁴ In Amazon’s April 13, 2022 email, Amazon counsel confirmed that they were seeking compilations, not individual Corrective Action Plans, stating, “We presume that the CPSC possesses aggregations or compilations of corrective action plan data that are responsive to the RFPs at issue, and those can be readily produced.” Ex. D at 2. On May 5, 2022, Amazon narrowed the scope of Request Nos. 15, 19-26 to non-privileged past agency actions and policies dating back to 2009. Ex. E at 2.

On May 16, 2022, Complaint Counsel confirmed that for Request Nos. 15 and 19-26, the parties had “engaged in multiple meet-and-confer negotiations, exchanged proposals for narrowing these overbroad requests, and the CPSC has engaged in a reasonable search for materials responsive to these requests.” Ex. F at ¶ 3. Complaint Counsel reiterated that “[w]e have explained, in detail, the legal and factual bases for our scope objections to Amazon’s RFP Nos. 15 and 19-26. Most importantly, while we acknowledge that discovery is appropriate as to the specific remedies we seek in this matter for the Subject Products, that does not mean that discovery may be taken of every action in which the CPSC has ever asserted that a remedy is ‘required in order to adequately protect the public’ or ‘is in the public interest.’” *Id.* at ¶ 4.

⁴ Although Amazon takes issue with Complaint Counsel’s relevance objections, Complaint Counsel properly asserted such objections as seeking material outside of the permissible bounds of Rule 26(b). It is worth noting that Amazon unilaterally limited its own search for responsive documents in stating that it “will conduct a reasonable search to collect and produce additional **relevant**, non-privileged documents responsive to this Request.” *See, e.g.*, Ex. C, Amazon’s Response to Request No. 2 (emphasis added). Amazon also lodged numerous relevance objections, taking the position that it would not search for and produce documents that are “irrelevant to the claims and defenses at issue in this proceeding.” *See, e.g.*, *id.*, Amazon’s General Objection No. 2 and Responses to Request Nos. 7 and 10.

Complaint Counsel explained that “Amazon’s requests seeking all documents and information relating to all enforcement actions of the CPSC tethered to its statutory legal standards extends far beyond the boundaries of permissible discovery.” *Id.* Nevertheless, Complaint Counsel confirmed that it had already produced “documents and information relating to dozens of recalls in which the CPSC has directed or requested a company to condition the provision of refunds to purchasers on returns or proof of destruction of a hazardous product, and we have also identified recalls that the CPSC conducted with distributors.” *Id.* at ¶ 4(a). On May 24, 2022, Complaint Counsel addressed Request Nos. 15, 19-26 and stated, “[W]e have conducted reasonable searches for relevant, responsive materials subject to our objections.” Ex. G.

Amazon asked and Complaint Counsel responded to specific questions about the Section 15 Defect Investigation Procedures Manual,⁵ materials the CPSC provided to the Government Accountability Office (“GAO”),⁶ compilations similar to the Notices of Violation spreadsheet that had been produced,⁷ and manuals or procedures from the Office of Communications.⁸

⁵ Complaint Counsel has produced the portions related to remedy and is properly withholding the irrelevant non-remedy-related portions under the law enforcement privilege, as explained below in Section III.C.

⁶ Amazon issued a subpoena to the Government Accountability Office broadly seeking documents related to GAO Report 21-56, with the exception of draft reports, individual Monthly Progress Reports from companies, or “individually identifiable manufacturer-specific or product-specific information subject to Section 6 of the CPSA, 15 U.S.C. § 2055.” Order Issuing Subpoena, Dkt. No. 33 (Mar. 22, 2022). Amazon’s document requests to CPSC did not include a comparable request for documents related to the GAO engagement. Complaint Counsel has produced documents provided to GAO during that engagement to the extent they are responsive to Request Nos. 15 and 19-26.

⁷ Although Amazon complains in its Motion to Compel that Complaint Counsel has “failed to produce such a spreadsheet for safety defect letters,” Mot. to Compel at 19, as Complaint Counsel has informed Amazon, the spreadsheet Amazon seeks does not exist.

⁸ Complaint Counsel has provided responsive materials from the Office of Communications. Although Amazon’s Motion appears to allege that certain “internal operating procedures of the Office of Communications” were submitted to the GAO during its engagement with CPSC on a variety of topics but were not provided to Amazon, Mot. to Compel at 8, those documents are not responsive to Amazon’s

Significantly, consistent with its prior representation that it was not seeking Corrective Action Plans, at no point during the many communications prior to filing its Motion to Compel did Amazon suggest that it sought specific Corrective Action Plans agreed to by other companies.

In the July 22, 2022 letter seeking a conference with Judge Grimes, Amazon stated it was seeking “an order compelling production of all non-privileged material, from 2009 to present, responsive to its discovery requests involving past CPSC actions, practices, policies, and guidance.” Ex. H at 1.

C. Amazon’s Motion to Compel Presents Six Newly Characterized Discovery Requests

On August 1, 2022, in Amazon’s Motion to Compel on Request Nos. 15, 19-26, Amazon rewrites Request Nos. 15, 19-26, for the very first time in a new manner that was never previously presented to Complaint Counsel. Specifically, Amazon now claims to be seeking:

1. Material reflecting remedies sought and finalized in other recalls and Corrective Action Plans involving children’s sleepwear, hair dryers and air brushes, and carbon monoxide detectors from 2015 to the present;
2. Material reflecting the criteria CPSC uses to select the entity (manufacturer, distributor, and/or retailer) to perform a recall, and any material reflecting the agency’s bases for those criteria or analyses of such criteria;
3. Material reflecting the criteria CPSC uses in selecting particular recall remedies and corrective actions in individual recall actions, and any material reflecting the agency’s bases for those criteria or analyses of such criteria, including related material submitted by CPSC to the Government Accountability Office;

discovery requests. Those internal operating procedures relate to how the Office of Communications plans and runs information campaigns to educate consumers about general topics – not recalls – as well as how the agency goes about uploading documents that require clearance under 15 U.S.C. § 2064(b). Those documents do not relate to the “approval and publishing of joint press releases with subject firms,” as Amazon appears to speculate. Mot. to Compel at 8.

4. Internal operating procedures relating to recall remedies for CPSC offices tasked with recall-related responsibilities, such as the Office of Communications;
5. Material reflecting CPSC's evaluation of recall remedy effectiveness from 2009 to the present, including related material submitted by CPSC to the Government Accountability Office; and
6. Material reflecting CPSC's evaluation of post-recall reporting, including monthly progress reports and the Retailer Reporting Program.

Notably, the first request seeks information from 2015 to the present, the fifth request seeks information from 2009 to the present, and the remaining four requests have no stated date restriction.

D. Complaint Counsel's Responsive Production Related to the Narrow Remedy Issue Remaining in This Proceeding

Complaint Counsel has reasonably searched for the information requested by Amazon's Request Nos. 15 and 19-26, as narrowed through the parties' negotiations. Complaint Counsel has also conducted additional searches in response to Amazon's six newly characterized discovery requests and has produced additional materials as explained in Section III.B. below. The information produced to date demonstrates that Complaint Counsel has fully met its discovery obligations.

Importantly, discovery into CPSC's internal policies and practices is not necessary to discern the agency's positions and actions with respect to remedies because CPSC goes to great lengths to make public the remedies it expects firms to take in a corrective action. Indeed, CPSC is intentionally transparent about the remedies it seeks for products that constitute substantial product hazards. Most importantly, CPSC publishes on its website a fifty-two-page Recall Handbook that walks companies in great detail through the process of conducting a recall and providing remedies to consumers. Ex. I (available at <https://www.cpsc.gov/s3fs->

[public/CPSCRecallHandbookSeptember2021.pdf](#)). The Recall Handbook explains that “the objectives of a recall are: 1) To prevent injury or death from defective or violative products; 2) To locate all such products as quickly as possible; 3) To remove such products from the distribution chain and from the possession of consumers; and 4) To communicate to the public in a timely manner accurate and understandable information about the product defect or violation, the hazard, and the corrective action.” *Id.* at 16. As the Recall Handbook expressly states, “Rarely will any two recall programs be identical.” *Id.* at 15. The Recall Handbook explains that companies developing corrective action plans “to address unsafe or potentially unsafe products should work closely with CPSC to benefit from staff’s expertise in designing and carrying out such plans.” *Id.* at 4. In addition, the Recall Handbook explains how to effectively communicate recall information, provides a checklist for required items in a recall news release, summarizes the elements required for a company’s response system to respond to consumer recall questions, and provides guidance on how to develop a recall execution plan to effectively ensure that recalled products are removed from commerce. The CPSC website also provides recall checklists, website notification guides, social media guides, and hotline questions and answers. *See* CPSC, Recall Guidance, <https://www.cpsc.gov/Business--Manufacturing/Recall-Guidance>.

Along with providing important publicly-available resources to Amazon, Complaint Counsel has also provided internal agency documents related to remedies, including, but not limited to, the Corrective Action Plan template that staff uses to document the remedies required for voluntary corrective actions, the guidelines the Office of Communications uses for recall press releases and recall alerts, the portions of the Section 15 Defect Investigation Procedures Manual [REDACTED]

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II

any basis for a claim.” *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1327 (Fed. Cir. 1990)). In that regard, Rule 26(b) is “not so liberal as to allow a party to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.” *Food Lion, Inc. v. United Food & Com. Workers Int’l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1012-13 (D.C. Cir. 1997) (internal citations and quotation omitted).

“The party seeking to compel discovery has the burden of establishing that its request satisfies the relevancy requirements of Rule 26.” *L.S.*, 2019 WL 4857990 at *2 (citation omitted). If the moving party satisfies its burden, which Amazon has not done here, then “the party opposing discovery has the burden of showing that the discovery should be prohibited, and the burden of clarifying, explaining or supporting its objections.” *Id.*(citation omitted).

III. AMAZON’S MOTION TO COMPEL SHOULD BE DENIED

A. Amazon’s Motion to Compel is Untimely

Under the Rules of Practice for Adjudicative Proceedings, Section 1025.36 governs the timing of motions to compel discovery. 16 C.F.R. § 1025.36. “If 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, or compelling inspection or production of documents, or otherwise compelling discovery. For purposes of this section, an evasive or incomplete response is to be treated as a failure to respond.” *Id.*

Although Complaint Counsel served its objections to Request Nos. 15 and 19-26 on March 21, 2022, and the parties began to meet and confer shortly thereafter, Amazon waited four months before contacting the Court pursuant to the Court’s pre-motion resolution procedure. Amazon delayed the filing of its Motion to Compel until mere weeks before the close of

discovery. “It is the policy of the Commission that adjudicative proceedings shall be conducted expeditiously Therefore, the Presiding Officer and all parties shall make every effort at each stage of any proceedings to avoid unnecessary delay.” 16 C.F.R. § 1025.2. Amazon’s delay was unnecessary, and Amazon’s motion should be denied as untimely.

B. Amazon’s Requests are Irrelevant and Disproportionate to the Narrow Issue of Remedies

Although Amazon seeks an order compelling Complaint Counsel to produce six categories of information – as described for the first time in the Motion to Compel – Amazon’s motion treats the information as one broad category of “CPSC’s policies and practices” and only vaguely resorts to arguments about its general need for such content. Mot. to Compel at 1. Because Amazon makes no attempt to satisfy its burden of proving the relevance and proportionality of each requested category of information, Amazon’s motion to compel should be denied. Set forth below, Complaint Counsel articulates why Amazon’s motion should be denied for each of its six newly formulated requests.

1. Amazon’s Newly Formulated Request No. 1: Complaint Counsel has produced responsive information regarding remedies in other recalls, and Amazon’s request for more is an improper fishing attempt to obtain statutorily protected case-specific files related to other companies, which is not proportional to the needs of this case.

Amazon’s first request seeks “material reflecting remedies sought and finalized in other recalls and Corrective Action Plans involving children’s sleepwear, hair dryers and air brushes, and carbon monoxide detectors from 2015 to the present.” This is an improper reformulation of Amazon’s discovery requests, which ignores Amazon’s prior representations to Complaint Counsel about the scope of Amazon’s requests. Prior to the Motion to Compel, Amazon’s Request Nos. 15 and 19-26 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.” This is a newly written request that is not based in Amazon’s original Request Nos. 15, and 19-26. In addition, in the parties’ meet and confer sessions, Amazon disclaimed seeking specific Corrective Action Plans agreed to by other companies.

Nonetheless, the remedies provided by other companies in recalls involving children’s sleepwear, hair dryers and air brushes, and carbon monoxide detectors are publicly available on CPSC’s website.⁹ In each recall announcement on CPSC’s website, the announcement includes a heading titled “Remedy.” *See, e.g.*, Target Recalls Children’s Cat & Jack Unicorn Cozy Pajama Sets Due to Burn Hazard, Recall No. 22-142 (June 2, 2022), *available at* <https://www.cpsc.gov/Recalls/2022/Target-Recalls-Childrens-Cat-Jack-Unicorn-Cozy-Pajama-Sets-Due-to-Burn-Hazard> (“Remedy: Consumers should immediately take the recalled pajama sets away from children and return the pajama sets to any Target store location for a full refund. Consumers who purchased the pajama sets on Target.com can contact Target to receive a prepaid return label to return the pajama set for a full refund.”). Although Amazon did not request this information earlier and although the information is equally available to Amazon through CPSC’s website, Complaint Counsel has now produced the recall announcements for children’s sleepwear, hair dryers and air brushes, and carbon monoxide detectors from 2015 to the present.

However, to the extent Amazon is now seeking to compel specific Corrective Action Plans agreed to by other companies, such information about other companies is not proportional to the needs of this case and is subject to statutory protection from disclosure pursuant to 15 U.S.C. § 2055.¹⁰

⁹ In fact, the expert report put forward by Amazon references a recall announcement from CPSC’s website for each of those product categories.

¹⁰ Section 6(a) of the CPSA, 15 U.S.C. § 2055(a), allows a manufacturer to mark information reported to CPSC under the CPSA for confidential treatment containing trade secrets/confidential business

Administrative Law Judges have rejected the attempts of respondents in administrative enforcement proceedings to gain access to other government investigations and actions related to other companies. A similar argument was recently rejected by the Administrative Law Judge in a pending CPSC administrative litigation involving residential elevators. The Respondent in *In re TK Access Solutions*, CPSC No. 21-1, subpoenaed the production of documents related to a voluntary residential elevator recall that was carried out by a different company, including the Corrective Action Plan and monthly progress reports that were filed with the Commission. The Respondent argued that the documents were “directly relevant to Complaint Counsel’s requested relief,” and the Respondent argued that it was “entitled to know if the CPSC approved remedies for the recall [in another residential elevator matter] differed from those sought from Respondent in [the pending] litigation where the Commission has characterized the potential hazard as identical” and where Respondent argued that its voluntary actions exceeded the other company’s prior recall. *In re TK Access Solutions Corp.*, No. 21-1, Order, Dkt. No. 121 (April 11, 2022) at 2.

In granting a motion to quash the Respondent’s subpoena, the ALJ explained that “CPSC has administrative discretion to determine its enforcement efforts – and potential remedies – based on the unique circumstances of each case, company, product, and agency resources. Indeed, the residential elevator products at issue are different than the Respondent’s elevators and may have different recall rates based on many factors including the number of units in the field, distribution, and installation, among other distinctions.” *Id.* at 7. The ALJ acknowledged that “CPSC’s corrective action with [one company] need not mirror that of [another company]

information, therefore preventing disclosure. Section 6(b) of the CPSA, 15 U.S.C. § 2055(b), allows advance notice and opportunity for comment by a company prior to the Commission’s public disclosure of any product specific information of an identified company.

because to do so ‘is the polar opposite of agency discretion.’” *Id.* (citation omitted). The ALJ ruled that the requested information related to a prior voluntary recall, including the requested Corrective Action Plan and MPRs, need not be produced because the information sought was “not proportional to the needs of the case.” *Id.*¹¹ The same conclusion is warranted here.

The court should similarly decline to compel production of specific Corrective Action Plans agreed to by other companies because the recall remedies provided are publicly available (and the press releases have been produced by Complaint Counsel for the requested product categories in the requested time frame), the CAPs are case specific and not proportionate to the needs of the case, and such disclosure would violate the statutory privilege afforded to such information under 15 U.S.C. § 2055. *See, e.g., In re TK Access Solutions Corp.*, No. 21-1, Order at Dkt. No. 121 (April 11, 2022) at 5 (explaining that a recalling company has a “reasonable expectation when entering into its voluntary settlement with the Commission that its CAP and MPRs, and other potentially commercially sensitive or proprietary information, would not be subject to disclosure”).

2. Amazon’s Newly Formulated Request No. 2: Amazon’s request for material regarding the entity performing a recall is irrelevant for any live issue in this matter, and Complaint Counsel has provided the responsive information identified in any event.

Amazon’s second request seeks “material reflecting the criteria CPSC uses to select the entity (manufacturer, distributor, and/or retailer) to perform a recall, and any material reflecting the agency’s bases for those criteria or analyses of such criteria.” Because the information

¹¹ The ALJ also astutely recognized that “[p]arties negotiating voluntary recalls with the Commission may be impacted if they know their CAPs and MPRs may be accessed by a party in an unrelated litigation,” which could lead to a “potential chilling effect” for future recalls. *Id.* at 6.

sought in this request does not relate to remedy, this category of information is plainly not relevant to the disposition of any remaining issue in this case.

Section 15 of the CPSA holds manufacturers, distributors, and retailers legally responsible for any consumer product distributed in commerce that presents a substantial product hazard, and any such entity may therefore be ordered to take necessary corrective action. *See* 15 U.S.C. §§ 2064(c) and (d). In this matter, the January 19, 2022 Order on Motion to Dismiss and Motion for Summary Decision determined that Amazon is a “distributor” of the Subject Products under the CPSA.

Amazon’s Answer does not assert a “selective enforcement” defense – and therefore no information Amazon seeks can be relevant to a “party’s claim or defense” under Rule 26(b). Moreover, the Commission has expressly rejected the availability of a “selective enforcement” defense in the past. In the Commission’s Final Decision in *In re Dye and Dye*, the Commission rejected arguments from a manufacturer of worm probes that it was being unfairly targeted based on the fact that a competing manufacturer “had not had a complaint brought against it.” 1989 WL 435534, at *17 (C.P.S.C. July 17, 1991). The Commission held, “the alleged defense of discriminatory enforcement . . . is not available. The Commission is entitled to use its prosecutorial discretion to decide which companies to proceed against first, or at all.” *Id.* Similarly, as the Northern District of Ohio observed in a decision rejecting document requests relating to past FTC enforcement actions that allegedly demonstrated the FTC’s “inconsistent standards,” “courts have rejected the type of ‘why me’ defense [or] an ‘everybody else is doing it’ justification.” *Federal Trade Commission v. Chemence, Inc.*, 209 F.Supp.3d 981, 985-986 (N.D. Ohio 2016).

In any event, each recall announcement on CPSC’s website notes the type of entity that is jointly conducting the recall in conjunction with CPSC. In Complaint Counsel’s Supplemental Response to Amazon’s Request for Admission No. 18, Complaint Counsel further provided a list of 37 jointly announced recalls with distributors that were issued in the last five years, Ex. J at 10-12, and Complaint Counsel correspondingly produced those press releases in its document production. Complaint Counsel has not identified additional documents responsive to Amazon’s request, and Amazon’s request should be denied as irrelevant and moot.

3. Amazon’s Newly Formulated Request No. 3: Complaint Counsel has provided the responsive information Amazon seeks governing CPSC’s criteria for recall remedies.

Amazon’s third request seeks “material reflecting the criteria CPSC uses in selecting particular recall remedies and corrective actions in individual recall actions, and any material reflecting the agency’s bases for those criteria or analyses of such criteria, including related material submitted by CPSC to the Government Accountability Office.”

As noted above, CPSC is highly transparent about recall remedies, with a wealth of publicly available information. Complaint Counsel has produced the publicly available Recall Handbook, which informs companies of the elements of a recall and what they can expect. Ex. I. Specifically, in Section VI.A., “*Preparing for a CAP*,” the Handbook suggests companies should be prepared to “[d]evelop a plan to quarantine and correct returned products. Consider how the product will be reworked, broken down for reclamation of critical components, or destroyed. Develop and implement procedures to ensure proper control and tracking of all defective materials returned in the recall and to ensure they do not reenter the stream of commerce.” *Id.* at 15. It also instructs companies to prepare a “comprehensive communications plan, including a media plan utilizing direct notice.” *Id.* Section VII., “*Communicating Recall Information*,” then

provides greater detail on CPSC expectations for the communications portion of the recall remedies. *Id.* at 17-25.

Complaint Counsel has also produced the relevant sections of the internal Section 15 Defect Investigation Procedures Manual, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Complaint Counsel has also produced to Amazon the internal template used by staff in the Office of Compliance and Operations, Division of Enforcement and Litigation [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Additionally, in Complaint Counsel's Supplemental Response to Interrogatory No. 13, Complaint Counsel has listed 115 recall press releases that were announced between January 2020 and April 2022 (when the Response was supplemented), in which a company incentivized consumers to return or provide proof of destruction of a recalled product. Ex. J at 2-8. Accordingly, Complaint Counsel has met its obligation to produce responsive materials.

4. Amazon's Newly Formulated Request No. 4: Complaint Counsel has provided the responsive material Amazon seeks regarding internal operating procedures relating to recall remedies, including the templates that govern correspondence relating to corrective actions, the corrective action plan template itself, and the content governing documents for press releases and recall alerts.

Amazon's fourth request seeks "Internal operating procedures relating to recall remedies for CPSC offices tasked with recall-related responsibilities, such as the Office of Communications."

Although, as previously explained, the best materials regarding recall remedies and recall-related responsibilities are publicly available, in supplementation of this publicly available information, Complaint Counsel has also provided numerous internal documents detailing internal agency operations. Complaint Counsel has produced sections of the internal Section 15 Defect Investigation Procedures Manual, which explains the procedures for evaluating, accepting, and monitoring corrective action plans, Ex. K; internal templates used by staff in the Office of Compliance and Operations, Division of Enforcement and Litigation [REDACTED]

[REDACTED] *see, e.g.*, Ex. L; along with internal documents used by the Office of Communications, [REDACTED]

[REDACTED] Complaint Counsel has also now produced portions of the Regulatory Enforcement Division Standard Operating Procedure that relate to remedies. Ex. O.¹²

¹² In response to additional searches following Amazon's reformulated requests, Complaint Counsel identified prior versions of the Office of Communications documents and template documents, as well as the Regulatory Enforcement Division Standard Operating Procedure, which like the Section 15 Defect Investigation Procedures Manual, is largely protected by the law enforcement privilege, but Complaint Counsel has produced the sections relating to remedies (marked as "Confidential" pursuant to the Protective Order in this case).

Complaint Counsel has conducted reasonable searches for responsive material and has provided internal operating procedures relating to recall remedies. In addition, Amazon will be deposing Patty Davis, Deputy Director of the Office of Communications, on August 17, 2022. Amazon's self-proclaimed doubts about the information provided are insufficient to grant Amazon's motion regarding this category of information.

5. Amazon's Newly Formulated Request No. 5: Although CPSC's materials regarding recall effectiveness are irrelevant to whether Amazon is required to provide public notification and remedial action under 15 U.S.C. §§ 2064(c), (d), Complaint Counsel has provided recall effectiveness materials, and Amazon's request for the data underlying the produced compilations is irrelevant, unduly burdensome, and disproportionate to the needs of this case.

Amazon's fifth request seeks "Material reflecting CPSC's evaluation of recall remedy effectiveness from 2009 to the present, including related material submitted by CPSC to the Government Accountability Office." Material regarding CPSC's evaluation of recall effectiveness from 2009 to the present is irrelevant to this administrative litigation, where Complaint Counsel is seeking remedies for the substantial product hazards posed by the Subject Products.

CPSC has nevertheless provided Amazon with materials from CPSC's Recall Effectiveness Workshop in 2017, including publicly available information from the website and internal documentation, including the presentations from the workshop. *See* CPSC, Recall Effectiveness, <https://www.cpsc.gov/Recall-Effectiveness>. Complaint Counsel has also provided Amazon with documentation related to CPSC's public request for information in the Federal Register titled "Recall Effectiveness: Announcement of Request for Information Regarding the Use of Direct Notice and Targeted Notices during Recalls." In addition, Complaint Counsel has provided Amazon with the agency's Annual Performance Reports from 2009 to the present, and

these reports provide results achieved by CPSC programs and progress made toward performance targets. *See* CPSC, Agency Reports, <https://www.cpsc.gov/About-CPSC/Agency-Reports>. Complaint Counsel has also produced the Monthly Progress Report form that contains the information that recalling Firms provide electronically to CPSC. That form, which is publicly available, informs the public on what metrics CPSC is requesting from companies. *See* CPSC, Monthly Progress Report System, <https://www.cpsc.gov/Business--Manufacturing/Recall-Guidance/monthly-progress-report-system>.

Along with publicly available information, Complaint Counsel has produced internal recall effectiveness documents, including the relevant sections of the internal Section 15 Defect Investigation Procedures Manual, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Complaint Counsel has also produced additional internal guidance on Recall Verification Guidelines issued to staff in 2021. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

To the extent that Amazon is seeking the underlying raw data that CPSC used in support of its PowerPoint presentations at the 2017 Recall Effectiveness workshop and the Annual Reports to Congress, such underlying data is irrelevant and not proportional to the needs of the case. Amazon has made no attempt to meet its burden of proof as to how the underlying data is relevant and necessary. The common sense remedies sought by Complaint Counsel are broadly described by statutes, outlined in great detail in the publicly available sources on CPSC's website, and supported by the regulations in Title 16, Part 1115. In this case, no numerical crunching is required to evaluate the effectiveness of other recall actions. Amazon nevertheless already has access to the recall effectiveness information compiled in the presentations and the reports, and it would be disproportionate to the needs of this case and unduly burdensome for Complaint Counsel to produce the underlying raw data.

6. Amazon's Newly Formulated Request No. 6: Although Complaint Counsel has provided information reflecting CPSC's evaluation of post-recall reporting, company specific reporting data is irrelevant, not proportional to the needs of this case and statutorily protected, and Amazon's request related to the Retailer Reporting Program is moot.

Amazon's sixth request seeks "material reflecting CPSC's evaluation of post-recall reporting, including monthly progress reports and the Retailer Reporting Program." The information sought in this category is not relevant to the issue of remedy in this case, and Amazon's request for information about the Retailer Reporting Program is moot. Amazon has been found to be a distributor under the CPSC. As such, Amazon is subject to the reporting

requirement set forth in 15 U.S.C. § 2064. Complaint Counsel is therefore not seeking any remedies relating to the Retailer Reporting Program.¹³

CPSC publicly explains how it monitors recalls with post-recall reporting. Section VIII of the Recall Handbook provides specific guidance to the public on this topic. Ex. I. The Handbook lists six bullet points by which CPSC monitors product recalls, including reviewing monthly progress reports, inspecting companies post-recall, assigning visits by CPSC field staff, visiting companies to follow-up on the corrective action, verifying disposal or destruction of recalled products, and assessing a company's request to cease recall monitoring. *Id.* at 26. The Handbook further states that CPSC staff maintains the right to seek additional corrective action if the plan proves ineffective. *Id.*

Complaint Counsel has already provided the Section 15 Defect Investigation Procedures Manual, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

To the extent that Amazon is seeking company-specific post-recall reporting data, so long as the relevant companies have not objected to making such data publicly available, it can be downloaded from CPSC's website. *See* CPSC Data, Monthly Progress Reports, Download MPR

¹³ The fifth item in the "Relief Sought" section of the Complaint relates to the Retailer Reporting Program, but, as indicated by Complaint Counsel's Response to Amazon's Interrogatory No. 14, Complaint Counsel is not seeking relief related to the Retailer Reporting Program. Ex. P. at 25-27.

Data, available at <https://www.cpsc.gov/Data>. Insofar as Amazon is seeking to obtain additional company-specific post-recall reporting data, such data is irrelevant, not proportional to the needs of this case, and statutorily protected from disclosure. 15 U.S.C. § 2055.

C. The Remaining Portions of the Section 15 Defect Investigation Procedures Manual and Regulatory Enforcement Division Standard Operating Procedure Are Irrelevant and Law Enforcement Privileged

To the extent that Amazon seeks to compel production of the non-remedy-related sections of the Section 15 Defect Investigation Procedures Manual and the Regulatory Enforcement Division Standard Operating Procedure, the withheld portions are not relevant to the remaining issue of remedy in this case.

Complaint Counsel has produced sections of the Section 15 Defect Investigation Procedures Manual that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Complaint Counsel has also produced sections of the Regulatory Enforcement Division Standard Operating Procedure that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Complaint Counsel has therefore produced all of the sections of the investigative manuals that relate to remedy – the only live issue in this proceeding. The remaining portions of the manuals that relate to the investigation of mandatory safety standard violations and the

substantial product hazard phase of a Section 15 investigation are plainly not relevant to this case where the parties have stipulated that the Subject Products constitute substantial product hazards. Even if the remaining non-remedy-related portions of the investigative manuals were relevant to the remaining issue in this administrative litigation – and they are not – the Court should still not compel production because the information is protected by the law enforcement privilege.¹⁴

To sustain a claim of law enforcement privilege, “three requirements must be met: (1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege.” *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988). Complaint Counsel has satisfied these three requirements. Specifically, CPSC’s Assistant Executive Director for Compliance and Field Operations, Robert Kaye, who is the head of the department with control over the Section 15 Defect Investigation Procedures Manual and Regulatory Enforcement Division Standard Operating Procedure, personally reviewed the documents and explained in the accompanying declaration how the manuals contain law enforcement information, the disclosure of which would harm governmental interests. *See Declaration of Robert Kaye*, dated August 8, 2022.

Because the law enforcement privilege is qualified, “[t]he public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information.” *In re Sealed Case*, 856 F.2d at 272. While the court may consider a number of

¹⁴ Although Amazon attempts to invoke 5 U.S.C. § 552(a)(2), a section the Freedom of Information Act (FOIA), in footnote 8 of their Motion to Compel, Amazon ignores the fact that FOIA’s nine exemptions still apply to that provision, and exemption 7 for law enforcement information protects the disclosure of the withheld portions of the investigative manuals.

factors in this determination, any balancing strongly weighs in favor of protecting the investigation manuals. *Id.* at 272 (citing as illustrative the factors identified in *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973), *superseded by rule on other grounds*, Fed. R. Evid. 509, *as recognized in Crawford v. Dominic*, 469 F.Supp 260 (E.D. Pa. 1979)). The remaining portions of the Section 15 Defect Investigation Procedures Manual and Regulatory Enforcement Division Standard Operating Procedure are law-enforcement privileged because the documents contains investigatory techniques and CPSC’s law-enforcement methods and priorities, the disclosure of which would compromise the effectiveness of CPSC’s operations. Complaint Counsel has offered evidence about how disclosure would harm governmental interests, while Amazon has provided no persuasive explanation as to why the non-produced information is necessary to litigate the remedies in this action. Simply stated, the “importance of the information sought to [Amazon’s] case,” is zero. *Id.* (quoting *Frankenhauser*, 59 F.R.D. at 344). Therefore, the court should not compel production of the law-enforcement privileged portions of the Section 15 Defect Investigation Procedures Manual and Regulatory Enforcement Division Standard Operating Procedure.

D. Amazon’s Invocation of the Administrative Procedure Act Does Not Entitle it to Access by Fiat Irrelevant Information that is Not Proportional to the Needs of this Case

Simply invoking the Administrative Procedure Act (“APA”) does not permit Amazon to turn this matter on its head.

First, pursuant to Rule 26(b), discovery must be relevant to a “party’s claim or defense.” In Amazon’s Answer, only Affirmative Defense No. 4 relies on the APA. Dkt. No. 2 at 23. It alleges that “the Complaint’s novel interpretation of the term ‘distributor,’ . . . violates the Administrative Procedure Act.” Because this defense is no longer live following the court’s

January 19, 2022 Order holding that Amazon meets the statutory definition of a “distributor,” no remaining discovery is relevant to that defense.

Second, when Amazon cites the arbitrary and capricious standard of review, Amazon is citing to the judicial standard of review that applies to a final agency action. 5 U.S.C. § 706. To state the obvious, Amazon cannot challenge any final agency action of the Commission at this time because no such decision has been handed down. Indeed, “Amazon has no way to predict how the Commission will rule.” January 19, 2022 Order, Dkt. No. 27 at 16. As the Supreme Court explained in *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 241-43, (1980), “the issuance of the complaint . . . has no legal force,” and a premature challenge to an agency’s enforcement action risks “piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.” Premature challenges in administrative adjudications “would delay resolution of the ultimate question whether the [relevant statute] was violated.” *Id.*

Third, a future “arbitrary and capricious” challenge could consider whether “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under the arbitrary and capricious standard, “a reviewing court may not set aside an agency rule that is rational, based on consideration of [] relevant factors and within the scope of authority delegated to that agency by the statute.” *Id.* at 42. Amazon makes much of the alleged notion that CPSC must treat “like cases alike,” but the cases Amazon cites do nothing more than reiterate the familiar conclusion in *State Farm* that agency actions

must be the product of “reasoned decisionmaking.” *See id.* at 53. An agency is even generally “‘free to alter its past rulings and practices,’ and even to ‘reverse its course,’” so long as it provides a “reasoned explanation” for its decision in a given case. *See E. Columbia Basin Irr. Dist. v. FERC*, 946 F.2d 1550, 1561 (D.C. Cir. 1991) (citations omitted); *see also Pocket Phone Broad. Serv., Inc. v. F.C.C.*, 538 F.2d 447, 452 (D.C. Cir. 1976) (“A regulatory agency is not bound ‘to deal with all cases at all times as it has dealt with some that seem comparable.’”) (quoting *F.C.C. v. WOKO, Inc.*, 329 U.S. 223, 228 (1946)).

Here, the remedies proposed by Complaint Counsel fall squarely within the four corners of the CPSA and reflect the long-standing goals of the agency in executing recalls, including informing consumers about hazardous products and removing such products from the stream of commerce. With the publicly available and internal agency documentation that has been produced to Amazon, Amazon has not demonstrated that the additional information it seeks is necessary for any anticipated future litigation.

Fourth, although Amazon sounds the alarm that it will never be able to seek any discovery in any future challenge to the outcome of this proceeding, Amazon is incorrect. Amazon has obtained all necessary discovery in this action, but denial of its motion would not prevent it from seeking any justifiable discovery in the future. Should Amazon decide to challenge a Final Decision and Order by the Commission, the matter would be heard by a Federal District Court, not a Federal Court of Appeals in the first instance. 15 U.S.C. § 2064(f)(1); 5 U.S.C. §§ 701-06. Before the Federal District Court, Amazon would have the opportunity to seek additional discovery. Although there is a general background rule that “courts reviewing an agency decision are limited to the administrative record,” courts have the discretion to allow for supplemental discovery in a number of circumstances, including where

“necessary to determine ‘whether the agency has considered all relevant factors and has explained its decision,’” where “the agency has relied on documents not in the record,” and “when plaintiffs make a showing of agency bad faith.” *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005); *see also Hummel v. Heckler*, 736 F.2d 91, 95 (3d Cir. 1984) (allowing additional discovery in cases where “information relating to a contention bearing on the fundamental fairness of the agency hearing is in possession of the government”). In short, denial of Amazon’s pending Motion to Compel would in no way prejudice Amazon’s ability to seek justifiable discovery in the future.

IV. CONCLUSION

For the reasons stated above, Complaint Counsel has met its discovery obligations in this case and moves the Presiding Officer to deny Amazon’s Motion to Compel.

Respectfully submitted,



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August 8, 2022

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2022, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

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