

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of

Amazon.com, Inc.

CPSC Docket No. 21-2

August 11, 2022

Order for Reply Letter Brief

The parties have briefed issues related to their dispute over Complaint Counsel’s response to Amazon’s requests for production. Complaint Counsel argues, among other things, that Amazon’s motion is untimely. Opp’n at 12–13. Complaint Counsel also asserts that if Amazon seeks “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.” *Id.* at 14, 16. Complaint Counsel further raises § 2055 as to “company-specific post-recall reporting data.” *Id.* at 24. Finally, Complaint Counsel claims that the law-enforcement privilege shields disclosure of “non-remedy-related sections of the Section 15 Defect Investigation Procedures Manual and the Regulatory Enforcement Division Standard Operating Procedure.” *Id.* at 25–27.

Because Amazon has not had the opportunity to respond to these arguments and because it would be helpful to my decisional process if Amazon were given a chance to respond, I grant Amazon until August 18, 2022, to respond to these three arguments. Amazon may respond in a five-page letter brief. In particular, it would helpful to know whether Corrective Action Plans are public documents. *This is solely an opportunity for Amazon to respond to these three arguments and not an opportunity to raise new arguments.* I will adjudicate the parties’ dispute after receiving Amazon’s response.

In the interim, the parties should consider the following. Amazon is entitled to learn, “to the fullest practicable extent,” the evidence that supports or refutes its defenses. *See United States v. Procter & Gamble Co.*, 356 U.S. 677, 682–83 (1958); *cf. Nerium Skincare, Inc. v. Olson*, No. 3:16-CV-1217-B, 2016 WL 10827701, at *4 (N.D. Tex. Oct. 26, 2016) (“Nerium International is entitled to seek discovery of evidence in support of its positions on the claims and defenses regardless of its party opponent Nerium SkinCare’s or the third-party subpoena target’s disagreement with that position”). Complaint Counsel must show that the remedies it seeks are in the public interest. *See* 15 U.S.C. § 2064(d)(1), (e)(2). If evidence tends to show that a remedy is “more or less

likely” to be in the public interest, “it is relevant.” *See United States v. Latney*, 108 F.3d 1446, 1449 (D.C. Cir. 1997).

Additionally, Amazon wishes to assert a claim under the Administrative Procedure Act that the Commission has acted in an arbitrary and capricious manner. Mot. at 10–14. This is a difficult argument to win. *See Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 215–16 (D.C. Cir. 2013) (explaining that the arbitrary-and-capricious review is similar to rational-basis in instances in which government “action does not target a suspect class or burden a fundamental right”). But it’s not impossible. *See Univ. of Tex. M.D. Anderson Cancer Ctr. v. U.S. Dep’t of Health & Hum. Servs.*, 985 F.3d 472, 480 (5th Cir. 2021) (“[I]n this case, M.D. Anderson proffered examples of other covered entities that violated the Government’s understanding of the Encryption Rule and faced zero financial penalties.”); *cf. LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (“[W]here, as here, a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument.”). And although Complaint Counsel argues that Amazon could seek discovery in district court if the Commission issues an adverse decision and Amazon seeks review of that decision, Opp’n at 29–30, because APA review is typically based on the record, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985), Amazon can’t count on that possibility. Indeed a case on which Complaint Counsel relies makes clear that the “limited exceptions” that might allow for discovery in APA-review cases “are narrowly construed and applied.” *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005); *see* Opp’n at 30. So, as Amazon asserts, this is its chance to obtain discovery relevant to this defense. Mot. at 15–16.

Finally, Complaint Counsel asserts that Amazon’s requests are not proportional to the needs of the case and are unduly burdensome. Opp’n at 13, 14, 23, 25. But a conclusory assertion does not establish the matter asserted. *See Hall v. District of Columbia*, 867 F.3d 138, 152 n.1 (D.C. Cir. 2017) (“[B]lanket, conclusory assertions are insufficient to preserve them.”); *see also Pac. Coast Surgical Ctr. v. Scottsdale Ins. Co.*, No. CV 18-3904 PSG (KSx), 2019 WL 1873228, at *2 (C.D. Cal. Apr. 24, 2019) (holding that a magistrate judge “did [not] err in concluding that Plaintiff’s request was proportional to the needs of the case given that Defendant’s only argument to the contrary is a conclusory statement”).

The parties are urged to consider the foregoing in light of their “ongoing obligation to supplement discovery.” *CMI Roadbuilding, Inc. v. Iowa Parts, Inc.*, 322 F.R.D. 350, 355 (N.D. Iowa 2017).

/s/ James E. Grimes
Administrative Law Judge