UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of **Amazon.com, Inc.**	CPSC Docket No. 21-2 January 19, 2022

Order on Motion to Dismiss and Motion for Summary Decision

The Consumer Product Safety Commission issued a complaint alleging that Respondent Amazon.com, Inc., distributed consumer products that presented or constituted a "substantial product hazard." *See* 15 U.S.C. § 2064(a)(1), (a)(2), (j); 16 C.F.R. § 1120.3(a). Amazon moved to dismiss and the Commission's Complaint Counsel moved for partial summary decision. At the parties' request, I heard oral argument on the parties' motions. This order adjudicates these motions.

1. Background

The Consumer Product Safety Act empowers the Commission to order a consumer product's manufacturers, distributors, and retailers to take certain remedial actions if the Commission "determines … that [the] product [is] distributed in commerce [and] presents a substantial product hazard."[1] 15 U.S.C. § 2064(c)–(d). In a complaint issued in July 2021, the Commission alleged that Amazon distributed "children's sleepwear garments" and carbon monoxide detectors that "create[d] a substantial risk of injury to consumers." It also alleged that Amazon distributed hair dryers that constitute a

[1] A *substantial product hazard* is either:

> (1) a failure to comply with an applicable consumer product safety rule[,] … which creates a substantial risk of injury to the public, or
>
> (2) a product defect which … creates a substantial risk of injury to the public.

15 U.S.C. § 2064(a). The Commission may by rule designate products that constitute a *substantial product hazard*. 15 U.S.C. § 2064(j).

substantial product hazard.[2] Based on these allegations, Complaint Counsel asks the Commission to determine that Amazon is a *distributor* of consumer products in commerce and that the above products are *substantial product hazards*. Complaint Counsel also seeks entry of certain remedial orders.

Complaint Counsel moves for partial summary decision on whether Amazon is a *distributor*, as the term is used in the Act.[3] *See* 15 U.S.C. § 2052(a)(8) (defining *distributor*); 16 C.F.R. § 1025.25 (motions for summary decision). Amazon opposes Complaint Counsel's motion and moves to dismiss, mainly arguing that it is not a *distributor*. *See* 16 C.F.R. § 1025.23 (governing motions). It also argues that Complaint Counsel is improperly trying to expand the meaning of the term *distributor* through adjudication, in violation of the Administrative Procedure Act, and that the Commission should instead be required to proceed by rulemaking. Finally, Amazon argues that the complaint is moot. Complaint Counsel opposes Amazon's motion.

2. *Procedural Standards*

2.1 Motion to dismiss

Although the Commission's rules of practice explain the effect of an order granting a motion to dismiss, 16 C.F.R. § 1025.23(d), the rules don't explain the basis for moving to dismiss or provide a standard by which to adjudicate a motion to dismiss. The Commission has, however, explained that its rules of practice are "patterned on the Federal Rules of Civil Procedure" and so attorneys "who are familiar with" federal practice "will already be familiar with most, if not all, procedural requirements" in Commission administrative proceedings. Rules of Practice for Adjudicative Proceedings, 45 Fed. Reg. 29,206, 29,207 (May 1, 1980). Amazon thus argues, and Complaint Counsel does not dispute, that I should adjudicate its motion under standards used to decide a motion under Rule 12(b)(1) or (6) of the rules of civil procedure. *See* Amazon's Mot. and Opp'n at 7–8; Complaint Counsel's Reply at 1–2; Amazon's Reply at 3 n.1 (disclaiming reliance on Rule 12(b)(2)).

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[2] By rule, "hand-supported hair dryers that [lack] integral immersion protection" constitute a *substantial product hazard*. 16 C.F.R. § 1120.3(a).

[3] Because the parties' filings combine affirmative motions and oppositions to their opponent's motions, the filings' titles are lengthy. For ease of reference, I will call the filings Complaint Counsel's Motion, Amazon's Motion and Opposition, Complaint Counsel's Reply, and Amazon's Reply.

Using Rule 12(b) as a guide, Amazon's motion "tests the legal sufficiency of the complaint." *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 472 (D.C. Cir. 1991). In adjudicating Amazon's motion, I must accept all factual allegations in the complaint as true and draw all reasonable inferences in Complaint Counsel's favor. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). In doing so, I am limited to considering the complaint and documents attached to it, central to it, or incorporated by reference into it.[4] *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Subaru Distributors Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 122 (2d Cir. 2005). I may also consider matters of which a court could take judicial notice. *Tellabs*, 551 U.S. at 322.

2.2 Motion for summary decision

Under the Commission's rules of practice, a motion for summary decision "shall be granted if the pleadings and" evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to" summary decision "as a matter of law." 16 C.F.R. § 1025.25(c). Because the Commission follows federal practice, *see* 45 Fed. Reg. at 29,207, the movant shoulders the burden to show that it has met the rule's requirements, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). When considering a motion for summary decision, I must view the evidence and any inferences drawn from the evidence "in the light most favorable to the [non-moving] party." *Id.*; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

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[4] Amazon asserts that because it challenges the Commission's jurisdiction over it, I "may consider publicly available facts beyond the pleadings." Amazon's Mot. and Opp'n at 7; *see Land v. Dollar*, 330 U.S. 731, 735 & n.4 (1947). To the extent Amazon presses a factual attack to jurisdiction, I agree. *See Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009). But because Amazon mainly presses a facial rather than factual attack on the Commission's jurisdiction, *see* Amazon's Mot. and Opp'n at 8 ("The Complaint … fail[s] as a matter of law because Amazon is a third-party logistics provider, not a 'distributor.'"), I am not entirely free to range at will beyond the pleadings when deciding Amazon's motion. *See Apex Digital*, 572 F.3d at 443–44; *see also Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011) ("In reviewing a facial attack to the court's jurisdiction, we draw all facts … from the complaint and from the exhibits attached thereto."). *But cf. Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992) ("[*W*]*here necessary*, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." (emphasis added)).

3. *Legal Standards*

When dealing with *substantial product hazards*, the Commission can act with respect to manufacturers, retailers, and distributors. *See* 15 U.S.C. § 2064(b)–(d). The Complaint does not allege that Amazon is a manufacturer or retailer of the relevant consumer products. So the parties focus on whether Amazon is a *distributor*. For purposes of the Act, that is 15 U.S.C. §§ 2051 through 2089, *distributor*:

> means a person to whom a consumer product is delivered or sold for purposes of *distribution in commerce*, except that such term does not include a manufacturer or retailer of such product.

15 U.S.C. § 2052(a)(8) (emphasis added). The phrases *to distribute in commerce* and *distribution in commerce*, in turn:

> mean to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.

15 U.S.C. § 2052(a)(7).

Congress has also provided a safe harbor, under which:

> [a] common carrier, contract carrier, *third-party logistics provider*, or freight forwarder shall not, for purposes of this chapter, 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.

15 U.S.C. § 2052(b) (emphasis added). The parties' filings, and this order, particularly focus on whether Amazon qualifies as a *third-party logistics provider* (no one argues that Amazon is a common carrier, contract carrier, or freight forwarder). 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.

15 U.S.C. § 2052(a)(16) (emphasis added). The parties also focus on the word *solely* in Paragraph (16). Whether *solely* means what you might think it means is discussed below.

4. Discussion

As noted, when adjudicating Amazon's motion to dismiss, I must accept all factual allegations in the complaint as true and draw all reasonable inferences in Complaint Counsel's favor. But I must construe the evidence and inferences in Amazon's favor when adjudicating Complaint Counsel's motion for summary decision. Given these competing standards, I deal with each motion separately, below.

4.1 Amazon's motion to dismiss is denied

4.1.1 Facts established for purposes of Amazon's motion to dismiss

Solely for purposes of Amazon's motion to dismiss, I deem the following facts established.[5] Amazon operates a well-known website, Amazon.com, on which consumer products are offered for sale. Although some of the products offered on Amazon.com are actually sold by Amazon, and others are offered by and shipped directly from separate retailers, the products at issue in this case travel to consumers through the Fulfillment by Amazon program (the Program or "FBA").

To access Amazon.com, and the potential consumers who purchase products there, a merchant business must enter into an agreement with Amazon and follow Program policies and requirements. Answer ¶ 9.

For its part, Amazon offers Program merchants several services. Amazon stores Program products at its facilities and stocks and maintains an inventory of Program products. It also provides sorting and shipping services, which involve categorizing, labeling, and moving products through the distribution process. Amazon additionally retrieves products from its inventory of Program merchants' products, places the products in shipping containers, and delivers them directly to consumers using Amazon delivery vehicles or carriers with whom Amazon contracts. To facilitate this process, Amazon assigns each product an Amazon Standard Identification Number, also called an ASIN.

When a consumer orders a Program product, an Amazon employee retrieves the product from an Amazon facility and ships or causes it to be shipped to the consumer.

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[5] Unless stated, I take these facts from the complaint. For purposes of the motion to dismiss, there is no question that the products in question are consumer products that presented or constituted a *substantial product hazard*. The only issue is whether Amazon is a *distributor*.

Amazon provides round-the-clock customer service and processes all returns for Program products. As part of the Program, consumers return products to Amazon, not the participating Program seller. On receiving a returned product, Amazon inspects it and decides whether it can be resold. If so, Amazon returns the product to Amazon's inventory.

Amazon retains authority over several other aspects of Program merchants' interactions with consumers. Amazon enforces a Fair Pricing Policy, under which Amazon may "take action against merchants" whose "pricing practices … harm consumer trust" by, for instance, offering a product at "significantly higher than recent prices offered on or off Amazon." Complaint ¶ 17.

Amazon also controls how product listings are displayed to consumers on Amazon.com. It may reject products for certain specified reasons and may require sellers to communicate with customers only through Amazon's platform. Amazon also processes payments for all product purchases, charges consumers for purchases, and pays sellers minus service fees due under each seller's contract with Amazon.

The children's sleepwear products described in the complaint were offered for sale on Amazon.com during an 11-month window. Consumers bought the products on Amazon.com and Amazon fulfilled the consumers' orders. Answer ¶¶ 25–27.

The carbon monoxide detectors alleged in the complaint were offered for sale on Amazon.com. Answer ¶ 34. Consumers bought over 23,000 of the carbon monoxide detectors. Answer ¶ 36. Amazon provided Program logistics services for these sales; it stored the carbon monoxide detectors and delivered them. Answer ¶¶ 34–37.

The hair dryers were offered for sale on Amazon.com. Answer ¶ 43. Consumers bought roughly 395,000 of the hair dryers. Answer ¶ 45. Amazon "fulfilled" the consumers' orders of these hair dryers. Answer ¶¶ 39, 43.

4.1.2 Amazon has not carried its burden to show that as a matter of law, it is a third-party logistics provider rather than a distributor

As noted, Amazon's motion hinges on the distinction between a *distributor* and a *third-party logistics provider*; the Commission has jurisdiction over the former but not the latter. The language used by Congress is the starting point for resolving whether, as a matter of law, Amazon is a *third-party logistics provider* and not a *distributor*. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

In the Act's definition section, Congress identified several terms, which it placed in quotation marks followed by the words "means" or "mean." 15 U.S.C. § 2052(a). When Congress does that, when it places a "term … in quotations followed by 'means'[,] Congress ma[kes] absolutely clear that" the term "is a term of art defined by" what "follow[s]." *Biskupski v. Attorney Gen.*, 503 F.3d 274, 280 (3d Cir. 2007). And we must "follow that definition, even if it varies from [the defined] term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000); *see W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502 (1945) ("[S]tatutory definitions of terms … prevail over colloquial meanings.").

Amazon says that the Act's plain text shows that it is not a *distributor*. For purposes of the motion to dismiss and based on facts established for purposes of the motion, I disagree. As noted, a *distributor* is a "person[6] to whom a consumer product is delivered or sold for purposes of *distribution in commerce*." 15 U.S.C. § 2052(a)(8). Because the complaint doesn't allege that anyone sold Amazon the products, the question is whether the consumer products were delivered[7] to Amazon "for purposes of *distribution in commerce*."

Congress also defined *distribution in commerce*: "to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce." 15 U.S.C. § 2052(a)(7). Amazon argues that it is not a seller and it does not introduce or deliver the products for introduction into commerce. Amazon's Mot. and Opp'n at 10. Instead, it says, the third-party vendors are the sellers who introduce or deliver the products for introduction into commerce. *Id*. Accepting these assertions for purposes of the motion to dismiss—Complaint Counsel does not address them—the question is whether the complaint alleges that Amazon "hold[s]" the products "for sale *or* distribution after introduction into commerce." 15 U.S.C. § 2052(a)(7) (emphasis added).

The answer is yes. Even if Amazon does not hold the products for sale, the complaint alleges that Amazon (1) stores the merchants' products at its

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6 Amazon qualifies as a person. *See* 1 U.S.C. § 1.

7 There is no issue as to whether the products were delivered to Amazon. That's what the complaint alleges, Complaint ¶ 19, and Amazon argues that this alleged fact aligns with its status as a *third-party logistics provider*, Amazon's Mot. and Opp'n at 18. In any event, with no allegations that Amazon is a manufacturer and given the allegations that Amazon stored the merchants' products in its facilities, it is evident that the products were "take[n] and hand[ed] over," *Deliver*, Merriam-Webster, https://www.merriam-webster.com /dictionary/deliver, to Amazon, and thus delivered to it.

facilities, (2) retrieves them from its inventory of Program merchants' products, (3) places the products in shipping containers, and (4) delivers them directly to consumers by Amazon delivery vehicles or by carriers with whom Amazon contracts. Complaint ¶¶ 11–13. Drawing all reasonable inferences in Complaint Counsel's favor, *Browning*, 292 F.3d at 242, these factual allegations are enough to allege distribution of the products. *See United States v. Cortes-Caban*, 691 F.3d 1, 17 n.17 (1st Cir. 2012) ("[T]he ordinary meaning of 'distribution,' … is … '[t]he act or process of apportioning or giving out'" (quoting Black's Law Dictionary 543 (9th ed. 2009))). So the complaint sufficiently alleges that Amazon is a distributor because it alleges that "a consumer product [was] delivered" to Amazon "for purposes of distribution in commerce."[8] 15 U.S.C. § 2052(a)(8).

Amazon, however, argues that because it "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*." Amazon's Mot. and Opp'n at 10 (emphasis added). But Amazon hasn't established its premise that it doesn't distribute Program products. According to Amazon, *because* it does not take title to the products, it cannot be a *distributor*. *Id.* at 10–12. In other words, Amazon argues that (1) retrieving products from its inventory of Program merchants' products, (2) placing the products in shipping containers, and (3) delivering them directly to consumers by Amazon delivery vehicles or by carriers with whom Amazon contracts—taking all actions necessary to transfer the products from Amazon's facilities to consumers—is not distribution because Amazon does not own the products. Nothing, however, supports the idea that taking title to a product is necessary to being the product's *distributor*.

Starting with the statutory definition, neither Paragraph (7) nor (8) include any requirement that an entity must own a product to be its distributor. 15 U.S.C. § 2052(a)(7)–(8). Amazon, however, says *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018), supports its assertion that title is required before an entity can be a *distributor*. Amazon's Mot. and Opp'n at 10–12. But *Eberhart*, a diversity case in which a court interpreted and applied New York law, 325 F. Supp. 3d at 396–97, neither interpreted Section 2052 nor held that title is necessary in New York for an entity to be a distributor. Rather, it held that title was necessary to impose strict liability on a distributor. *Id.* at 397–98 (explaining that "for any

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[8] Given my resolution of this issue, there is no need to wade into the parties' debate about whether *distributor* should be interpreted broadly to give effect to the public-protection purpose of the Consumer Product Safety Act. *See* Complaint Counsel's Mot. at 10–11; Amazon's Mot. and Opp'n at 14.

'manufacturer, retailer or distributor' of a defective product, strict liability applies only to those entities that are 'within the distribution chain,'" and holding that "the failure to take title to a product places that entity on the outside" the chain of distribution). Amazon's other cases interpreting state law products liability requirements are similarly inapposite.[9] Amazon's Mot. and Opp'n at 12–13.

Citing two advisory opinions issued by the Commission's General Counsel, Amazon asserts that the Commission "has previously interpreted the term 'distributor' as an entity that purchases (*i.e.*, takes title to) consumer products."[10] But opinions of the Commission's General Counsel are not, unless specifically stated, opinions of the Commission.[11] And even putting aside whether I should view the opinions as binding or authoritative, a question the parties do not address, the opinions do not help Amazon. Neither opinion interpreted *distributor*, mentioned Paragraphs (7) or (8), or stated that transfer of title is a prerequisite to being a distributor. Rather, the opinions simply restated the hypothetical facts described in letters sent to the General Counsel.[12]

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9 *See State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213, 216 (9th Cir. 2020) (holding that Amazon "is not a 'seller' under Arizona's strict liability law"); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 140–43 (4th Cir. 2019) (holding that under Maryland products-liability law, Amazon was not a seller and that Maryland would not imposes strict liability on distributors who did not take title to a product); *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-cv-2738, 2018 WL 3546197, at *5–13 (D.N.J. July 24, 2018) ("Amazon is not a 'product seller'" under New Jersey's Products Liability Act); *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 104 (Tex. 2021) (holding that Amazon is not a seller of third-party products under Texas products-liability law.).

10 *See* Amazon's Mot. and Opp'n at 10–11 (citing Letter from Theodore J. Garrish, Gen. Counsel, to Kim D. Mann (Nov. 4 1977) (Advisory Op. No. 255), https://www.cpsc.gov/s3fs-public/pdfs/blk_media_255.pdf, and Letter from Michael A. Brown, Gen. Counsel, to Henry Y. Ota (Apr. 9, 1976) (Advisory Op. No. 238), https://www.cpsc.gov/s3fs-public/pdfs/blk_media_238.pdf).

11 *See Office of General Counsel Advisory Opinions*, Consumer Product Safety Commission, https://www.cpsc.gov/Regulations-Laws--Standards /Advisory-Opinions. ("The views expressed in … Advisory Opinions are those of the Office of the General Counsel. Unless indicated otherwise in the Opinion, they have not been reviewed or approved by the Commission.").

12 To the extent that Amazon argues that there is a background understanding that ownership is necessary for an entity or person to be a

Amazon argues that it falls within the terms of the safe harbor for a *third-party logistics provider*. Amazon's Mot. and Opp'n at 9–15. Recall that no "common carrier, contract carrier, *third-party logistics provider*, or freight forwarder" will become a *distributor* "*solely* by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder." 15 U.S.C. § 2052(b) (emphasis added). And a *third-party logistics provider* is "a person who *solely* receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product." 15 U.S.C. § 2052(a)(16) (emphasis added).

The parties focus on the word *solely*, which stands out when reading the definition of a *third-party logistics provider*. *Solely* means "to the exclusion of all else," *Solely*, Merriam-Webster, https://www.merriam-webster.com /dictionary/solely, or "alone," *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018) (quoting Webster's Third New International Dictionary 2168 (2002)). It "'leaves no leeway' for anything more." *Penobscot Nation v. Frey*, 3 F.4th 484, 492 (1st Cir. 2021) (quoting *Helvering v. Sw. Consol. Corp.*, 315 U.S. 194, 198 (1942)). This means that if an entity *is* a *third-party logistics provider*, the entity cannot be considered a *distributor* based only on the fact that it "receiv[ed] or transport[ed] a consumer product in the ordinary course of its business as such a carrier or forwarder." 15 U.S.C. § 2052(b). And if an entity only, or to the exclusion of all else, "receives, holds, or otherwise transports a consumer product in the ordinary course of *its business as such a carrier or forwarder*," *id*. (emphasis added), that entity is a *third-party logistics provider* as to that consumer product. The question, therefore, is whether Amazon did "anything more" than receive, hold, or otherwise transport the subject products.

The answer to this question is not as clear as it might appear. In its filings, Complaint Counsel argues that *solely* means what it says. Under this reading, an entity hoping to fit within the exception for *third-party logistics providers* is strictly limited to receiving, holding, or transporting. During argument on the parties' motions, however, Complaint Counsel was less certain. When I asked Complaint Counsel whether, along with receiving, holding, or transporting, an entity could inspect products, Complaint Counsel resisted

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distributor, I reject Amazon's argument. Section 2052 is not the only definition of *distributor* or *distribution* that omits an ownership requirement. *See* 15 U.S.C. § 2821(16); 21 U.S.C. §§ 360eee(5), 387(7), 802(11); 42 U.S.C. §§ 247d-6d(*i*)(3), 6291(14). And on the less frequent occasions when Congress has wanted to include ownership in a definition of the term *distributor*, it has shown that it knows how to do so. *See* 15 U.S.C. § 2801(6)(A).

answering. Tr. 18–19. Presumably this is so because sticking to a strict interpretation and thus saying that an entity could not verify that it has received the correct products or that they are undamaged is somewhat silly.[13]

So I don't adopt Complaint Counsel's unqualified perspective. A third-party logistics provider must be able perform activities ancillary to receiving, holding, or transporting while still fitting within the terms of the exception. Otherwise, no entity could fit in the exception.

Drawing the line between ancillary, closely associated activities and those that don't supplement receiving, holding, or transporting will require case-by-case determinations. But even permitting third-party logistics providers to engage in ancillary activities does not, under the facts alleged in the complaint and reasonable inferences based on those facts, help Amazon. Along with receiving, holding, and transporting consumer products—things *a third-party logistics provider* can do without becoming a *distributor*—Amazon operates a website that brings merchants who want to sell consumer goods together with consumers who want to buy those goods. And after a consumer purchases a Program product, Amazon provides round-the-clock customer service and processes all returns for Program products. Consumers return products to Amazon, not the Program-participating seller. On receiving a returned product, Amazon, not the seller, decides whether the product can be resold.

Amazon also retains some authority over the prices Program merchants charge for products. Amazon enforces a Fair Pricing Policy, under which Amazon may "take action against merchants" who offers a product at prices "significantly higher than recent prices offered on or off Amazon."

Finally, Amazon, not the sellers, processes payments for all product purchases, charges consumers for purchases, and pays sellers minus a service fee due under each seller's contract with Amazon.

Given these activities, Amazon does not *solely*—only and to the exclusion of all else—"receive[], hold[], or otherwise transport[]" the consumer products alleged in the complaint. It does more.[14] It is thus not possible to say as a

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13 Other examples come to mind. For example, if a third-party logistics provider discovers that a container holding consumer goods is leaking fluid, the provider must be able to inspect and examine the container and goods in it. And the provider must then be able to respond after discovering the source of the leak.

14 *Cf. Erie Ins.*, 925 F.3d at 142 (recognizing that "Amazon's services were extensive in facilitating the sale").

matter of law that Amazon is a *third-party logistics provider* as to the consumer products at issue in the complaint.

Amazon observes, however, that Section 2052(b)'s safe harbor previously protected only common carriers, contract carriers, and freight forwarders; Congress did not add *third-party logistics providers* to this list until 2008. Amazon's Mot. and Opp'n at 15; *see* Consumer Product Safety Improvement Act of 2008, Pub. L. 110-314, § 235(c)(1), 122 Stat. 3016, 3074. Relying on this sequence and the interpretive canon that counsels against interpretations that render statutory language superfluous, Amazon posits that by adding *third-party logistics providers*, Congress must have intended "to reach entities providing services beyond those of common carriers, contract carriers, or freight forwarders." Amazon's Mot. and Opp'n at 15; *see Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020).

There are a few problems with this argument, at least at this point. First, Amazon's preferred canon is not inflexible. As the Supreme Court has recognized, "redundancies are common in statutory drafting." *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020). "[S]ometimes" they result from "a congressional effort to be doubly sure" and "'[s]ometimes the better overall reading of the statute contains some redundancy.'" *Id.* (quoting *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019)). Other times, "Congress may amend a statute … 'purely to make what was intended all along even more unmistakably clear.'" *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004) (quoting *United States v. Montgomery Cty.*, 761 F.2d 998, 1003 (4th Cir. 1985)); *see NCNB Tex. Nat. Bank v. Cowden*, 895 F.2d 1488, 1500 (5th Cir. 1990) ("A number of courts have recognized that 'changes in statutory language need not *ipso facto* constitute a change in meaning or effect.'" (quoting *Montgomery Cty.*, 761 F.2d at 1003)).

Second, statutory words are known by the company they keep. *Yates v. United States*, 574 U.S. 528, 543 (2015). In this context, this interpretative canon means that one would expect a *third-party logistics provider* to be similar in kind to a common carrier, contract carrier, or freight forwarder. One would not expect it to mean an entity that also provides all the other services described above that Amazon provides. *See McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) ("While 'not an inescapable rule,' this canon 'is often wisely applied where a word is capable of many meanings in order to avoid … giving … unintended breadth to … Acts of Congress.'" (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961))).

Indeed, in subsection (b), Congress told us that a *third-party logistics provider is* similar in kind to a common carrier, contract carrier, or freight forwarder. Congress provided that an entity falling in any of four categories—

a common carrier, contract carrier, third-party logistics provider, or freight forwarder—would not become a manufacturer, distributor, or retailer "by reason of receiving or transporting a consumer product in the ordinary course of its business *as such a carrier or forwarder*." 15 U.S.C. § 2052(b) (emphasis added). The only possible antecedent for the word *such* is the group of four categories. Congress thus made clear that all four categories are made up of carriers or forwarders. And this means they are similar. Amazon's preferred canon must therefore give way.

Amazon asserts that "'solely' must be read in the context of the statutory provision, which addresses whether an entity is engaged in 'distribution.'" Amazon's Mot. and Opp'n at 20. It argues that in context, § 2052(b) applies to "entities who engage in activities beyond receiving, holding, or transporting goods, but that do *not* constitute distribution within the meaning of the statute."[15] *Id.* at 21. The main problem with this argument is that although Congress could have written the statute this way, it didn't do so. Amazon adds that

> *Without* the word "solely," a distributor could engage in activity that indisputably would be covered by the [Act], 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.

Id. Maybe this is so, but how this point helps Amazon is unclear. *With* the word *solely*, Congress made clear that a distributor who does more than receive, hold, or transport goods cannot qualify as a *third-party logistics provider*.

Amazon observes that it is widely recognized as providing third-party logistics services. Amazon's Mot. and Opp'n at 16. I have no reason to doubt this, but this recognition means neither that Amazon *only* provides those services nor that I should ignore the facts alleged in the complaint and

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15 In other words:

> 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.

Amazon's Mot. and Opp'n. at 21.

established for purpose of Amazon's motion. Similarly, Amazon argues that the complaint "repeatedly refers to activities falling squarely within the scope of logistics services." *Id.* at 17; *see also id.* at 18. This is true, but the complaint does not allege those activities to the exclusion of others. Indeed, it alleges other activities, as well.

Amazon says Complaint Counsel's preferred interpretation renders superfluous the concluding phrase in Paragraph (16), "but who does not take title to the product." Amazon's Reply at 6. But this phrase qualifies the rest of Paragraph (16); entities that would otherwise qualify as third-party logistics providers will not qualify if they take title to a product. As the parties' briefing makes clear, it is possible to imagine circumstances in which entities described subsection (b) take title incident to performing the functions listed in Paragraph (16).

Given the above, Amazon has not carried its burden to show that it is not a *distributor* under the Act. It has thus not shown that the complaint should be dismissed.

4.1.3 Amazon's Administrative Procedure Act, due process, and retroactivity arguments are premature

Amazon challenges the Commission's decision to choose adjudication over rulemaking on the question of whether Amazon meets the statutory definition of *distributor*. Amazon's Mot. and Opp'n at 25–28. Since at least the 1940s, the Supreme Court has recognized that administrative agencies have the discretion to choose between rulemaking and adjudication. *SEC v. Chenery (Chenery II)*, 332 U.S. 194, 201–03 (1947); *see* 5 U.S.C. §§ 553, 554; *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294–95 (1974). In particular, when dealing with issues "not previously … confronted," agencies are not "forbidden from utilizing [a] particular proceeding for announcing and applying a new standard of conduct." *Chenery II,* 332 U.S. at 203. And the fact that an administrative adjudication "might have a retroactive effect" is of no moment. "Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency." *Id.*; *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Scalia, J.) (concurring) ("Adjudication *deals* with what the law was; rulemaking deals with what the law will be.").

Rulemaking is generally more appropriate when agencies confront "broad applications of more general principles rather than case-specific individual determinations." *Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017). But even under "[t]his maxim … an agency" has the discretion "to develop a body of regulatory law and policy either through case-by-case decisionmaking … or

through rulemaking." *Id.* (quoting *Am. Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 731 (D.C. Cir. 1992)).

An administrative agency can abuse its discretion by proceeding through adjudication, however, if the agency simply uses the adjudicative process to avoid the requirements of notice-and-comment rulemaking. An agency thus abuses its discretion if its adjudicative order doesn't actually adjudicate a proceeding and instead uses a proceeding to make a "broad policy announcement" without setting forth "adjudicative facts having any particularized relevance to the" parties. *First Bancorporation v. Bd. of Governors of the Fed. Reserve Sys.*, 728 F.2d 434, 438 (10th Cir. 1984); *see Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1339 (Fed. Cir. 2017) (en banc) (Reyna, J., concurring) ("This is particularly true in this case because the rule articulated … contains no adjudicative facts specifically relevant to the circumstances of the petitioner or patent owner"). The basis for this sort of challenge to agency action, however, cannot arise until the agency issues a final decision in which it fails to adjudicate the matter before it.

With these principles in mind, Amazon argues that "Complaint Counsel's attempt to use" the Commission's adjudicatory authority "to expand the [Act's] definition of 'distributor' and vitiate the … 'third-party logistics provider' exception violates the [Administrative Procedure Act]." Amazon's Mot. and Opp'n at 25. It adds that because the Commission has issued no guidance or regulations about the "terms 'distributor' and 'third-party logistics provider' as applied to e-commerce websites," the Administrative Procedure Act "bars Complaint Counsel from proceeding by adjudication to regulate online logistics providers as 'distributors.'" *Id.*

According to Amazon, the Commission is prohibited from expanding the reach of the Act through "a novel interpretation announced [through] adjudication." *Id.* at 27. It claims that "[r]ulemaking and policy reform by adjudication also violates the Due Process Clause," noting that it is a "'fundamental principle … that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.'" *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)).

There are several problems with Amazon's arguments; most importantly they are premature. As noted, agencies enjoy discretion to decide whether to proceed through adjudication or rulemaking and have the authority to announce new standards through adjudication.[16] But Amazon cites no case—

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[16] Complaint Counsel does not dispute that the Commission has authorized administrative law judges—who exercise delegated authority—to resolve

and I'm aware of none—in which a court has held that an agency abused its discretion by *bringing* an administrative complaint.[17] *See* Amazon's Mot. and Opp'n at 26 ("*The Complaint* aims to create new policy ….") (emphasis added). It also cites no case in which a court found an abuse of discretion based on arguments made by agency counsel rather than on pronouncements issued by the agency. *See id.* ("*Complaint Counsel* is attempting to significantly expand the scope of the CPSIA by adjudication.") (emphasis added). Instead, the cases involving an adjudication that Amazon cites involved a final agency decision.

Even putting this problem aside, Amazon has no way to predict how the Commission will rule.[18] Its argument for dismissal based on what it anticipates might happen is not supported by the cases on which it relies. Necessarily, cases such as *First Bancorporation* and *Aqua Products*, in which courts found abuses of discretion when agencies failed to adjudicate cases before them, *see* Amazon's Mot. and Opp'n at 26–27, do not apply at this point.

Amazon relies on the Supreme Court's admonition that while regulated parties might be expected "to conform their conduct to an agency's [announced] interpretations … it is … another [thing] 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." *Id.* at 27–28 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158–59 (2012)). While I don't doubt this is true, *SmithKline* involved ambiguous agency regulations and an agency's uncertain interpretation of those regulations. No regulations, ambiguous or otherwise,

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disputes about the Commission's decision to proceed through adjudication rather than rulemaking. So I will adjudicate Amazon's challenge.

[17] During oral argument, Amazon cited *CPSC v. Anaconda Co.*, 593 F.2d 1314 (D.C. Cir. 1979), as case in which a court held that, before an agency issued a final order, it abused its discretion when it brought an administrative action. Tr. 107–08. But *Anaconda* didn't involve an agency adjudication. Rather, it involved an appeal from a district court's grant of summary judgment in an action brought by the Commission.

[18] Amazon notes Acting Chairman Adler's reluctance to approve the complaint in this case. That reluctance is not a basis to dismiss this proceeding. *Cf. Busse Broad. Corp. v. FCC*, 87 F.3d 1456, 1463 (D.C. Cir. 1996) (rejecting an abuse-of-discretion argument, which was based on the fact that "two Commissioners … advocated dealing with" an "issue through rulemaking").

are involved in this case.[19] Nor will this proceeding involve an interpretation of anything but the Act. Any decision I reach on the merits will be based only on the Act. And basing a decision on the Act, even if the agency has not previously interpreted the provisions at issue, does not violate the Administrative Procedure Act or the Due Process Clause.[20] *See Chenery II,* 332 U.S. at 203; *cf. Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) ("The general principle is that when as an incident of its adjudicatory function an agency interprets a statute, it may apply that new interpretation in the proceeding before it.").

Amazon points to *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972), which discussed factors used to evaluate whether to permit retroactive application of administrative orders. Amazon's Mot. and Opp'n at 28–29. But because Amazon points to no Commission decision that changed course from a previous decision, *Retail, Wholesale* doesn't apply. Indeed, even if a type of retroactivity analysis could be applied to a complaint, unlike in *Retail, Wholesale*, "this *is* … a case of first, [not] of second impression." 466 F.2d at 390 (emphasis added).

Amazon also relies on *Ford Motor Co. v. FTC*, Amazon's Mot. and Opp'n at 27, in which a court held that an agency abused its discretion by promulgating a new rule through adjudicative proceedings, where the new rule changed a standard of substantive liability, making illegal an industry practice that had been considered lawful. 673 F.2d 1008, 1010 (9th Cir. 1981). In contrast, here there is no prior agency decision one way or the other. Unlike in

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[19] Amazon has not pointed to inconsistent past agency conduct. Amazon's reliance on *Doe v. Tenenbaum*, 127 F. Supp. 3d 426, 453–54 (D. Md. 2012), which involved the decision to publish a report, not the decision to adjudicate, is thus misplaced. Amazon's Mot. and Opp'n at 26. This case also does not involve published agency guidance that fails to provide notice of what the agency requires. *See United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998) ("Chrysler cannot be required to recall cars for noncompliance with Standard 210 if it had no notice of what [the agency] now says is required under the standard."); Amazon's Mot. and Opp'n at 28 (citing *Chrysler*).

[20] To the extent that Amazon argues that an agency cannot enforce a statute through adjudication without first promulgating regulations dealing with the issues that are the subject of the administrative enforcement action, I reject Amazon's argument because no case Amazon cites supports it. *See* Amazon's Mot. and Opp'n at 25.

Ford, Amazon has not relied on a previous agency interpretation that it was not subject to the Act; the Commission has never said that it isn't.[21]

Amazon also argues that the Commission "cannot impose its brand-new policy retroactively on Amazon's past conduct, relating to products that are not currently listed on Amazon.com." Amazon's Mot. and Opp'n at 28. This argument fails because Amazon cannot point to any order or rule that the Commission is trying to apply retroactively. Instead, Amazon's argument rests on the fact the Commission issued the complaint. But the complaint merely contains a set of allegations; it does not establish a rule or policy.

Additionally, the alleged actions that undergird the complaint occurred years after Congress placed the terms *distributor* and *third-party logistics provider* in the Act. *See* Complaint ¶¶ 25, 34, 43; *see also* Complaint ¶¶ 85 (alleging that Amazon distributed the sleepwear products), 90 (alleging that Amazon distributed the carbon monoxide detectors), 95 (alleging that Amazon distributed the hair dryers). Because the complaint's distribution allegations do not turn on any Commission rule or order interpreting these statutory terms, Amazon's liability will depend only on the meaning of those statutory terms. Since Congress defined those terms before Amazon allegedly distributed the products at issue, Amazon's retroactivity argument fails.

4.1.4 Contrary to Amazon's argument, the complaint is not moot

The Act gives the Commission the authority to order manufacturers, distributors, and retailers to take certain remedial actions as to any product the Commission determines is or constitutes a *substantial product hazard*. 15 U.S.C. § 2064(c), (d). Relying on this authority, Complaint Counsel seeks seven

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[21] For similar reasons, Amazon cannot rely on *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996). Amazon's Mot. and Opp'n at 27; *see Pfaff*, 88 F.3d at 748 (holding that an agency abuses its discretion to proceed by adjudication "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").

To the extent that Amazon argues that it has relied on the fact that the Commission has not previously enforced the Act against Amazon or entities like it, I reject Amazon's argument. Amazon has not asserted or shown affirmative misconduct, a prerequisite when asserting estoppel against the government—assuming estoppel can lie against the government. *See Tovar-Alvarez v. U.S. Attorney Gen.*, 427 F.3d 1350, 1353–54 (11th Cir. 2005).

categories of relief, the last five of which are remedial orders.[22] Complaint 18–20.

Amazon challenges several of Complaint Counsel's remedial requests as moot. Before considering Amazon's argument, I must first consider whether the concept of mootness applies in this forum. Because mootness is an Article III concept, it does not necessarily apply to administrative-agency adjudications. *See RT Commc'ns, Inc. v. FCC*, 201 F.3d 1264, 1267 (10th Cir. 2000); *Tenn. Gas Pipeline Co. v. Federal Power Commission*, 606 F.2d 1373, 1379–80 (D.C. Cir. 1979). Administrative agencies retain "'substantial discretion' to decide whether to hear issues which might be precluded [in an Article III court] by mootness." *RT Commc'ns*, 201 F.3d at 1267. Administrative agency decisions are reviewed in federal courts, however, which cannot decide moot cases. And because federal courts must "vacate agency orders they decline to review on grounds of mootness," *Am. Family Life Assurance Co. of Columbus v. FCC*, 129 F.3d 625, 630 (D.C. Cir. 1997), the best course is to decline to adjudicate a moot case, even if Article III considerations do not govern agency adjudications. *See* § 13C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3533.10.3 (3d ed. Apr. 2021 update); *cf. RT Commc'ns*, 201 F.3d at 1267 (holding that when deciding whether to adjudicate a moot case, agencies should consider whether "judicial economy weigh in favor of present resolution").[23]

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[22] I call the remedial requests request three through request seven. Request three, which includes three subparts, seeks an order to cease distribution of the subject and functionally identical products and issuance of Commission approved direct notices and a press release. Request four, which includes four subparts, seeks an order that Amazon "facilitate the return and destruction of the Subject Products," issue refunds, destroy products in Amazon's inventory, and provide two types of monthly progress reports about these matters. Request five seeks another type of monthly progress reports. Request six seeks an order prohibiting Amazon from distributing the subject products or their equivalents. And request seven seeks an order that Amazon "take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with" two statutes.

[23] Amazon argues that mootness concepts apply in administrative proceedings. Amazon's Mot. and Opp'n at 30 & n.28. In opposing Amazon's motion, Complaint Counsel says nothing about whether mootness concepts apply or whether I have authority to decide whether its complaint is moot, instead arguing that the matter is not moot. Because mootness is not jurisdictional in the administrative agency context, parties can waive arguments about it. Here, Complaint Counsel has, by not arguing that

The Supreme Court has explained that a "*case* becomes moot only when it is impossible for a court to grant 'any effectual relief whatever to the prevailing party.'" *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (emphasis added) (quoting *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). As a result, if "the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* at 307–08 (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 442 (1984)).

Amazon argues that discrete aspects of Complaint Counsel's remedial requests are moot. But if even a small part of a case is live, the *case* is not moot. *See id.* at 307–08. So even if Amazon carries its initial burden—assuming it has the burden—Complaint Counsel need only show that one of its remedial requests is live.

Amazon argues that Complaint Counsel fails to adequately allege that Amazon's direct notifications were inadequate "or that further notification is necessary to 'adequately protect the public from . . . substantial products hazards created by' the" products. Amazon's Reply at 22–24. But in paragraph 50, the complaint alleges that Amazon's "unilateral" actions, described in paragraphs 47 through 49, "are insufficient to remediate the hazards posed by the … [p]roducts and do not constitute a fully effectuated Section 15 mandatory corrective action ordered by the Commission." *See also* Complaint Counsel's Reply at 31–32 n.14 (arguing that the carbon monoxide notices were inadequate). And the Commission has the right to "specify the form and content of any notice" it "require[s] to be given" under Section 2064(c). *See* 15 U.S.C. § 2064(c) ("Any such order shall specify the form and content of any notice required to be given under such order."). The complaint makes plain that the Commission did not approve the notices Amazon issued and the complaint seeks to invoke the Commission's right to do so.[24] The complaint is thus not moot.

Although Amazon has not shown that the entire case is moot, Amazon's arguments raise issues about whether some of Complaint Counsel's remedial

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mootness concepts do not apply or that I lack the authority to decide the issue, waived these arguments.

[24] In its reply, Amazon asserts that the Act "does not require companies to receive Commission approval before notifying consumers of a safety issue or furnishing a remedy." Amazon's Reply at 20. Complaint Counsel has not argued, however, that companies need Commission approval before notifying consumers about safety issues. Companies are free to notify consumers at any time. But if the Commission finds a company's notification inadequate, it may require the company to provide more notifications.

requests are available. Complaint Counsel premises the need to order Amazon to provide refunds on the need to give customers an incentive to return the products so that they can be destroyed. Complaint Counsel's Reply at 32 n.15. As noted, however, Complaint Counsel concedes that Amazon has already given full refunds to all the affected customers. So Amazon can't be ordered to provide refunds. Given that refunds are the proposed incentive for returning products for destruction, destruction of products in consumers' possession is an end that cannot be achieved, at least not by the means Complaint Counsel proposes. Going forward, the parties should be prepared to discuss the consequences of the fact that Complaint Counsel tied destruction of products in consumers' possession to an event, providing full refunds, which has concededly already occurred.[25]

4.2 Complaint Counsel's motion for partial summary decision is granted

4.2.1 Facts established for purposes of Complaint Counsel's motion for summary decision

Solely for purposes of Complaint Counsel's motion for summary decision, the following material facts are undisputed.[26] Unless noted, these findings only apply to Amazon's activity under the Program. Amazon operates Amazon.com, "a website on which third-party sellers can list and sell consumer products." Complaint Counsel Statement ¶ 1. Through the Program, third-party sellers sell products on Amazon.com. Participation in the Program "is governed by a Business Services Agreement and other policies." *Id.* ¶ 5.

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[25] Amazon has not argued that the Commission lacks the power to order destruction of the subject products. *See* 15 U.S.C. § 2064(d) (listing remedial actions Commission can order). Because it has not argued otherwise, I have assumed for purposes of this order that the Commission has that power in an administrative proceeding. *Cf.* 15 U.S.C. § 2071 (injunctive enforcement and seizure); 16 C.F.R. § 1115.20(a)(1)(vi) (providing that a "subject firm" may agree, in a "corrective action plan," to dispose of *substantial product hazards* by destroying them).

[26] For purposes of Complaint Counsel's motion, I consider established any of Complaint Counsel's factual assertions that Amazon described as "undisputed" or any portion of a factual assertion that Amazon did not dispute. Along with responding to Complaint Counsel's statement, Amazon set forth its own statement of undisputed material facts. Because Complaint Counsel did not dispute Amazon's asserted facts, I also consider them established for purposes of this motion. I thus take the facts from Amazon's response to Complaint Counsel's statement of undisputed facts and Amazon's statement of undisputed material facts.

A third-party seller does not send its products to customers who order products through Amazon.com. Instead, the third-party sellers send their products to Amazon. Amazon "stor[es] third-party sellers' products in Amazon fulfillment centers; us[es] technology to track, move, and ship products to customers; process[es] product returns; and deliver[s] or arrang[es] for delivery [of Program products] to customers." *Id.* ¶ 8. Under the Program's terms, third-party sellers retain title to their products while the products are in the Program. And Amazon does not manufacture, sell, or hold title to the products at issue in the Complaint. Instead, the Third-Party Sellers retain title to the products.

After Amazon "receiv[es] and stor[es] third-party sellers' products," it "fulfills orders placed by customers for products sold by third-party sellers on Amazon.com." *Id.* ¶ 11. When carrying out this fulfillment activity, Amazon may combine "multiple products ordered by a customer from different third-party sellers … in one shipment to that customer." *Id.* ¶ 12. Amazon provides round-the-clock customer service. Amazon promises its third-party sellers that "[i]f there are any issues, Amazon's top-rated customer service staff is standing by 24/7 to support all [Program] orders." *Id.* ¶ 14. It promises Program participants that it "will be responsible for all customer service issues relating to packaging, handling and shipment, and customer returns, refunds, and adjustments related to Amazon Fulfillment Units." *Id.* It also retains the authority to "determine whether a customer will receive a refund, adjustment or replacement for any Amazon Fulfillment Unit and … will require [Program participants] to reimburse" Amazon if it "determine[s]" that the participant is responsible under the Agreement for reimbursing it. *Id.*

Amazon "applies a Fair Pricing Policy to prices charged by third-party sellers using [the P]rogram." *Id.* ¶ 21. This policy permits "Amazon to take action against third-party sellers whose pricing practices may harm customer trust." *Id.* And this includes when a seller "set[s] a price … [on Amazon.com] that is significantly higher than recent prices offered on or off Amazon." *Id.*

Under the Program, a participating merchant must "promptly notify [Amazon] of any recalls or potential recalls, or safety alerts of any of [the merchant's] Products." Amazon's Response to Statement ¶ 22. Amazon retains the authority to end a merchant's participation in the Program if the merchant fails to follow this requirement. Amazon retains the "authority to 'refuse registration in [the Program] of any product," if the product is an "Excluded Product or … violates applicable Program Policies." *Id.* ¶ 23 (internal quotation marks omitted).

If a third-party seller needs to communicate with a customer about the customer's order, the seller must do so exclusively through Amazon's

platform.[27] Some "customer returns of third-party sellers' goods are shipped to Amazon for processing, and thereafter may be returned to the third-party seller, handled by Amazon in accordance with the third-party seller's instructions, or transferred by the third-party seller to Amazon for later sale through the 'Amazon Warehouse' program." Complaint Counsel Statement ¶ 16.

Third-party sellers who participate in the Program pay Amazon for Program services, including storage of consumer products and delivery of products to customers. Amazon does not take title to consumer products under the Program. Fees Amazon charges Program participants include fulfillment fees, monthly inventory storage fees, long-term storage fees, removal order fees, returns processing fees, and unplanned service fees.

At times, Amazon "provide[s] certain labeling services to some third-party sellers for some products for which Amazon fulfills orders through the" program. *Id.* ¶ 9. As part of the Program, Amazon "generally maintains electronic records to track products, including products belonging to third-party sellers, at Amazon warehouses and facilities." *Id.* ¶ 10.

When Amazon processes customer payments, it "charg[es] the payment instrument designated in the customer's account, and remits … agreed-upon [funds] to the third-party seller minus … [Program] fees set forth in [its] contract" with the Program participant. *Id.* ¶ 20.

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[27] Complaint counsel asserted this fact in its statement of undisputed facts, citing Amazon.com's Seller Central web page. Complaint Counsel's Statement ¶ 15. During a prehearing conference, I explained that Amazon's opposition to the motion for summary decision must "include a separate document responding to Complaint Counsel's statement of material facts and [that] the responsive statement should address each numbered paragraph in Complaint Counsel's statement and include citations to evidence establishing the existence of a genuine question of material fact or agreeing that the asserted fact is undisputed." Prehearing Tr. at 19. I also warned "that any asserted fact that is not disputed will be deemed admitted." *Id.*

In response to Complaint Counsel's statement, Amazon states that the fact asserted in paragraph 15 of Complaint Counsel's Statement is "[d]isputed to the extent that [it] contravenes any of the" pages cited in Amazon's Seller Central. Amazon's Responsive Statement ¶15. Because I decline Amazon's invitation to root around its Seller Central web page to compare Complaint Counsel's statement with Amazon's Seller Central, I consider Complaint Counsel's statement undisputed.

A Commission analyst bought three of the smoke detectors at issue in the Complaint. The products were sold by a third party but "fulfilled by Amazon." Amazon confirmed the purchase by e-mail and processed payment for the purchase. About nine months later, the analyst received an e-mail from Amazon informing the analyst that Amazon had "learned of a potential safety issue that may impact your Amazon purchase(s)." *Id.* ¶ 31. The e-mail listed the order identifier of the carbon monoxide detectors and said that either the Commission or Amazon's "Product Safety team" had identified the product as "posing a risk of exposure to potentially dangerous levels of Carbon Monoxide" because of the potential failure of its alarm. *Id.* The e-mail stated that there was no need to return the product and informed the analyst that Amazon had applied a refund to the analyst's account.

The children's sleepwear garments, carbon monoxide detectors, and hair dryers, discussed above, are consumer products. With limited exceptions, they were sold by third-party sellers on Amazon.com and the orders for these products "were fulfilled by Amazon" through the Program. Amazon provided Program logistics services to the product's sellers "by picking, packing, shipping, and delivering the [products] to purchasers." Amazon's Statement ¶ 10. Amazon removed the subject products from Amazon.com after the Commission contacted Amazon about possible product safety or noncompliance issues with the products. The subject products are not currently listed or available for purchase on Amazon.com. Amazon applied a refund of each product's purchase price to the purchasers' accounts.

After learning about the products' safety issues, Amazon e-mailed a "direct consumer safety notification" to all the products' purchasers. *Id.* ¶ 19. The notifications "urge[d]" the purchasers to "stop using [the products] immediately and dispose of" them. *Id.* ¶ 21. They also included the request that, if the purchaser had purchased the product for another person, the purchaser immediately inform the other person and "let them know they should dispose of the item." *Id.* Each notification identified the safety risk relevant to the product the consumer purchased. In the e-mails, Amazon also explained that it had applied refunds to the purchasers' accounts.

4.2.2 Complaint Counsel is entitled to partial summary decision on the question of whether Amazon is a distributor

Complaint Counsel moves for partial summary decision on whether Amazon is a *distributor*. In deciding Complaint Counsel's motion, I reference the statutory analysis discussed in adjudicating Amazon's motion to dismiss.

Just as with Amazon's motion, Complaint Counsel's motion hinges on the distinction between a *distributor* and a *third-party logistics provider*. And the

language used by Congress is still the starting point for resolving the question. *See GTE Sylvania*, 447 U.S. at 108.

As noted, a *distributor* is a "person to whom a consumer product is delivered or sold for purposes of *distribution in commerce*." 15 U.S.C. § 2052(a)(8). The undisputed facts show that the consumer goods at issue were delivered to Amazon. In fact, that's part of how the Program works; the third-party sellers send their products to Amazon so that Amazon can store the products and then ship them to consumers. So the question is whether the third-party sellers delivered, or caused to be delivered, the products "for purposes of *distribution in commerce*." *See id*.

The phrase *distribution in commerce* can be broken down into five activities: "to" (1) "sell in commerce," (2) "introduce … for introduction into commerce, (3) "deliver for introduction into commerce," (4) "hold for sale … after introduction into commerce," *or* (5) "hold for … distribution after introduction into commerce." 15 U.S.C. § 2052(a)(7).[28] Because Paragraph (7) lists these activities in the disjunctive, using the word *or*, only one of the five must occur for Paragraph (7) to apply. *See Awad v. Gonzales*, 494 F.3d 723, 726 (8th Cir. 2007); *Fed. Compress & Warehouse Co. v. NLRB*, 398 F.2d 631, 634 (6th Cir. 1968). During oral argument, Amazon contended that an "introduction into commerce" occurs before Amazon receives the consumer goods sent from third-party sellers. Tr. 49–50. Accepting this contention, only the fourth and fifth activities are implicated. But both occur under the Program. *See* Tr. 50.

Again, under the Program, third-party sellers send their products to Amazon. Amazon stores the products until a consumer buys the product after the consumer sees it on Amazon.com and places an order. Once the consumer buys the product, Amazon ships it to the consumer. So Amazon holds the product while it waits for a consumer to purchase it. This meets the requirements of the fourth activity; it constitutes "hold[ing] for sale … after introduction into commerce." 15 U.S.C. § 2052(a)(7).

Alternatively, Amazon stores a product until a customer buys it after the consumer sees it on Amazon.com and then places an order. Once the consumer

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[28] As noted, Paragraph (7) says:

> The terms "to distribute in commerce" and "distribution in commerce" mean to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.

places an order, Amazon "deliver[s] or arrang[es] for delivery [of a Program product] to [the] customer[]." Complaint Counsel Statement ¶ 8. So Amazon holds the product in anticipation of delivery. In other words, it holds for distribution. This meets the requirements of the fifth activity; it constitutes "hold[ing] for … distribution after introduction into commerce."[29] 15 U.S.C. § 2052(a)(7).

This brings us to the safe harbor and the term *third-party logistics provider*. I plowed much of this ground in deciding the motion to dismiss. In the context of Complaint Counsel's motion, however, the question is whether the undisputed facts show that Amazon is not a *third-party logistics provider*. In other words, do the undisputed facts show that Amazon is not 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"? 15 U.S.C. § 2052(a)(16) (emphasis added).

Recall that in adjudicating Amazon's motion, I concluded that a third-party logistics provider must be able to perform some ancillary activities that don't conflict with the word *solely*. Ancillary activity closely related to receiving, holding, or transporting must logically be activities that a third-party logistics provider can perform. And Amazon performs several activities that, while strictly beyond merely receiving, holding, or transporting, are sufficiently closely related to those activities that they would not take Amazon out of the *third-party logistics provider* safe harbor.

But Amazon also engages in other activities that are more than ancillary to receiving, holding, or transporting consumer goods. The most important activity is the one that brings customers and third-party sellers together in the first place: Amazon's operation of "a website on which third-party sellers can list and sell consumer products." Complaint Counsel Statement ¶ 1.

Amazon also provides round-the-clock customer service. While customer service related simply to receiving, holding, and transporting consumer goods might not take Amazon out of the safe harbor, Amazon does much more. It processes refunds and adjustments. It retains the authority to decide what to do about a return. Amazon has unilateral authority to decide "whether a customer will receive a refund, adjustment[,] or replacement." *Id.* ¶ 14. And it can "require [a Program participant] to reimburse" it if it decides that the participant has to do so. *Id.*

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[29] For the reasons discussed in deciding Amazon's motion to dismiss, I reject Amazon's argument that ownership is a prerequisite to being a distributor.

Finally, Amazon "applies a Fair Pricing Policy to prices charged by third-party sellers using [the P]rogram." *Id.* ¶ 21. Under this policy, Amazon can "take action against third-party sellers whose pricing practices may harm customer trust." *Id.* Violative practices include "setting a price … [on amazon.com] that is significantly higher than recent prices offered on or off Amazon." *Id.*

During the oral argument, Amazon argued that its return and refund activities merely constitute reverse logistics. Maybe this is so for some of its return and refund activities, but processing refunds and retaining unilateral authority to make the decisions above is more than just reverse logistics.

Also during oral argument, Amazon likened itself to the operator of a physical shopping mall. Tr. 78–79. Although this analogy has initial appeal, it does not hold up under closer scrutiny. While both a mall and Amazon.com provide a venue that brings customers and merchants together, that's where the comparison ends. Mall operators do not generally provide customer service as to products bought from stores in the mall. They also don't process returns or decide whether a customer will receive a refund, adjustment, or replacement. And because mall operators do not process returns, they cannot mandate reimbursements from stores.

Undisputed facts show that Amazon meets the statutory definition of the term *distributor* and does not fall within the terms of the safe harbor for *third-party logistics providers*. Complaint Counsel's partial motion for summary decision is granted.

5. Schedule

I adopt the parties' proposed schedule. I will set a location for the hearing by later order after consultation with the parties.

February 3, 2022:	Deadline to file proposed confidentiality order.
February 14, 2022:	Deadline to serve party discovery requests.
	Deadline to serve initial disclosures required by Federal Rule of Civil Procedure 26(a).
March 7, 2022:	Deadline to file application for issuance of third-party subpoenas pursuant to 16 C.F.R. § 1025.38(c).
April 29, 2022:	Target date for substantial completion of document productions.
May 9, 2022:	Deadline for principal expert disclosures.
May 31, 2022:	Deadline for expert rebuttal disclosures.
June 21, 2022:	Discovery cutoff.
July 18, 2022:	Deadline to file motions for summary decision.
August 8, 2022:	Deadline to file oppositions to motions for summary decision.
August 29, 2022:	Deadline to file replies in support of motions for summary decision.

I will establish a hearing schedule following my order resolving any motions for summary decision. I expect to adhere to the following framework:

20 days following order on motions:	Deadline to file prehearing evidentiary disclosures.
30 days:	Prehearing conference.
50 days:	Deadline to file prehearing briefs pursuant to 16 C.F.R. § 1025.22.
60 days:	Hearing begins.

I adopt the parties' proposal to follow certain discovery rules from the Federal Rules of Civil Procedure. As the parties have agreed, Rule 26(a)(2), (b)(4), and (e)(2) will govern expert discovery and trial preparation and Rule 26(b) will govern the scope of discovery. The schedule adopted above will govern timing. Rule 30 will govern depositions by oral examination, Rule 31 will govern depositions by written questions, and Rule 33 will govern interrogatories.

/s/ James E. Grimes
Administrative Law Judge