UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

IN RE:	CPSC DOCKET NO.: 21-1
THYSSENKRUPP ACCESS CORP.	
Respondent.	

MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO STRIKE

Pursuant to 16 C.F.R. § 1025.23, Respondent TK Access Solutions Corp., formerly known as thyssenkrupp Access Corp. ("the Company"), by and through its undersigned counsel, respectfully moves this Court to strike from the Complaint in the above-captioned action certain portions of subparagraph C(3) and the entirety of Paragraph D of the "RELIEF SOUGHT" in said Complaint on the ground that the relief sought is beyond the authority of the U.S. Consumer Product Safety Commission ("CPSC" or "the Commission") and the Commission cannot order said relief pursuant to Section 15 of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064.

CPSC Cannot Order Retrospective Reimbursement.

In subparagraph C(3) of the Complaint, Complaint Counsel, in relevant part, requests that the Commission "order Respondent to . . . reimburse consumers, for any reasonable and foreseeable expenses incurred . . ., including previous purchases of space guards or other safety devices, and all costs associated with those purchases, whether or not they were part of the homeSAFE campaign." The sole authority Complaint Counsel cites for the order the Complaint seeks is "Section 15(e)(1) of the CPSA, 15 U.S.C. § 2064(e)(1).

Section 15(e)(1) reads, in total:

> "No charge shall be made to any person (other than a manufacturer, distributor, or retailer) who **avails** himself of any remedy **provided under an order issued under subsection (d)**, and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or retailer) who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person **in availing himself of such remedy**." 15 U.S.C. § 2064(e)(1) (emphasis added).

Section 15(e)(1) is phrased unambiguously prospectively. A consumer cannot "avail himself" of any remedy reflected in an order that has not been issued, and the provision for reimbursement of expenses is tied to such availment and does not authorize or require reimbursement for expenses incurred for any other purpose. Thus, Section 15(e)(1) does not authorize CPSC to seek or order retrospective reimbursement, nor does any language elsewhere in the CPSA.

"Generally, where the text of a statute is unambiguous, the statute should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." *FTC v. Shire ViroPhrama, Inc.*, 917 F.3d 147, 156 (3d Cir. 2019) (citation omitted) (holding that statute authorizing FTC to sue in district court, rather than administrative proceeding, where a person "is violating, or is about to violate" applicable law unambiguously did not authorize suits for past conduct). Even so, reference to the legislative history of the CPSA provides no basis for inferring authority to order retrospective reimbursement. Section 15(e)(1) remains as it was originally enacted, and the report of the House Committee on Interstate and Foreign Commerce of the bill that contained the language that was enacted as Section 15(e)(1) only paraphrased the legislative text, adding no suggestion that

retrospective reimbursement was contemplated. *See* H. Rep. No. 92-1153, at 43 (1972); *see also* H. Rep. 92-1593, at 53 (1972) (reflecting Senate's receding to House language).

The prospective character of Section 15(e)(1) is underscored by reference to other statutes, such as the National Traffic and Motor Vehicle Safety Act ("MVSA"), where Congress expressly has authorized or required such reimbursement. *See* 49 U.S.C. § 30120(d) ("A manufacturer's remedy program shall include a plan for reimbursing an owner or purchaser who incurred the cost of the remedy within a reasonable time in advance of the manufacturer's [recall] notification.").

Notably, this retrospective-reimbursement provision was added to the MVSA with the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Pub. L. No. 106-414, § 6(b), 114 Stat. 1800, 1804 (2000). Prior to this amendment, the MVSA was, like the CPSA is now, prospective, requiring that a recalling manufacturer provide the appropriate remedy "without charge." *See* Motor Vehicle and Schoolbus Safety Amendments Act of 1974, Pub. L. No. 93-492, § 154(a)(1), 88 Stat. 1470, 1472-73. Congress need not have enacted the TREAD Act's retrospective reimbursement provision if the MVSA had previously authorized or required such reimbursement. Here, Congress has not altered the original, prospective reimbursement provision of the CPSA.

Additionally, assuming *arguendo* for the purposes of this motion that the residential elevators are "consumer products" within the meaning of the CPSA and that CPSC has authority to order notification and recall pursuant to Section 15, CPSC had the opportunity to request or, after opportunity for hearing, order such reimbursement prospectively in connection with its prior investigation into the same improvements to realty and alleged hazard that are the subject of the Complaint. However, in closing that investigation, CPSC wrote that it "acknowledges the

corrective action measures the Firm has undertaken [including] partially subsidizing the cost of space guard for consumer whose elevators were installed out of specification." Letter from Jonathan Thron to Jay Doyle (June 19, 2014). CPSC did not require provision of space guards without charge or reimbursement for expenses, such as the cost of installation, in 2014, and there is no provision in the CPSA that would allow CPSC to revisit its determination that, to the extent any hazard existed, the Company's corrective action was adequate for the period between the agency's closing of that investigation and the presumptive issuance of an order in the present matter.

Accordingly, CPSC is without authority to order the retrospective reimbursement requested in subparagraph C(3) of the Complaint and that request should be stricken from the Complaint.

CPSC Cannot Order "other and further actions."

In paragraph D of the Complaint, Complaint Counsel seeks an "Order that Respondent take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA." However, Section 15 of the CPSA does not authorize the Commission to issue such an open-ended and vague order.

Section 15(c), concerning "Notice of Defect or Failure to Comply; Mail Notice," authorizes CPSC to "order . . . any one or more *of the following actions*," and lists a series of specific forms of notice CPSC may order, including stopping distribution. 15 U.S.C. § 2064(c) (emphasis added). There is no open-ended "catch-all" authorization for "other and further actions."

Similarly, Section 15(d), concerning "Repair; Replacement; Refunds; Action Plan," authorizes CPSC to "order . . . any one or more *of the following actions*," and lists "repair the

defect," "replace such product with a like or equivalent product . . . which does not contain the defect," and "refund the purchase price of such product." 15 U.S.C. § 2064(d)(1) (emphasis added). Again, there is no open-ended "catch-all" authorization for "other and further actions."

With the inclusion of the qualifier "of the following actions" and the absence of any language conferring discretion to demand other actions, Section 15 only authorizes the Commission, following a hearing and a determination that a consumes product contains a defect which presents a substantial product hazard, to order that a company cease distributing the product determined to be defective, provide notice of the defect to a variety of parties, and either repair, replace, or refund the product.

As discussed above, a plain and unambiguous statute should be enforced as written. *See Shire*, 917 F.3d at 156. Here, Section 15 plainly and unambiguously authorizes the Commission to issue one or more of a limited, enumerated orders and nothing else. Should Congress wish to empower the Commission to order other actions following its determination that a consumer product contains a hazardous defect, Congress may amend the statute. The Commission cannot do so.

As such, the Commission cannot order the "other and further actions" that Paragraph D of the Complaint seeks, and that Paragraph should be stricken from the Complaint.

July 27, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2021, true and correct copies of the foregoing MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO STRIKE were served via U.S. Mail and/or electronic mail on the Secretary of the U.S. Consumer Product Safety Commission and all parties and participants of record in these proceedings in the following manner:

Original and three copies by U.S. Mail, first-class and postage prepaid, and one copy by electronic mail, to the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills:

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As no Presiding Officer has been appointed as of this date, one copy by U.S. Mail, first-class and postage-prepaid, to the Presiding Officer in the care of the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills, at the above address.

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