UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
THYSSENKRUPP ACCESS CORP.	)	CPSC DOCKET NO.: 21-1
Respondent.	)	

COMPLAINT COUNSEL'S OPPOSITION TO
NON-PARTY PATRICK M. BASS'S MOTION TO QUASH SUBPOENA

Pursuant to 16 C.F.R. § 1025.38(g), Complaint Counsel respectfully opposes non-party Patrick M. Bass's Motion to Quash. The motion to quash should be denied because: (1) the information sought by Complaint Counsel is relevant and necessary for this proceeding as Mr. Bass served as President and CEO of Respondent thyssenkrupp Access Corp. ("TKA"), thyssenkrupp North America Inc., and Executive Vice President Research and Development for thyssenkrupp Elevator ("TKE"); (2) the deposition of Mr. Bass would not be unreasonably duplicative of depositions from different cases involving different parties and claims; and, (3) the deposition is not unduly burdensome.

I. THE LAW SUPPORTS DENIAL OF THE MOTION TO QUASH

In this proceeding, "[p]arties may obtain discovery regarding any matter, not privileged . . . relevant to the subject matter involved. . . ." 16 C.F.R. § 1025.31(c)(1). Pursuant to 16 C.F.R. § 1025.28(g), the person to whom a non-party subpoena is directed must set forth "the reasons why the subpoena should be withdrawn." Although this court is not bound by the Federal Rules of Civil Procedure, many administrative proceedings have looked to them for guidance on

construing applications for which there is not an exact administrative mechanism. *See, e.g., In re Healthway Shopping Network*, Exch. Act Rel. No. 89374, 2020 WL 4207666, at *2 (July 22, 2020) (SEC administrative proceeding guided by Federal Rules for interpretation of its Rules of Practice).

The practice under the Federal Rules and as emphasized by the U.S. Supreme Court is that discovery is "accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). "In general, discovery is permissible with respect to 'any nonprivileged matter that is relevant to any party's claim.'" *Kelley v. Microsoft Corp.*, No. C07-0475MJP, 2008 WL 5000278, at *1 (W.D. Wash. Nov. 21, 2008) (quoting Fed. R. Civ. P. 26(b)(1)). "Although not unlimited, relevance, for purposes of discovery, is an extremely broad concept." *Copantitla v. Fiskardo Estiatorio, Inc.*, No. 09 CIV. 1608 RJH JCF, 2010 WL 1327921, at *9 (S.D.N.Y. Apr. 5, 2010) (quotation marks and citation omitted).

"Once the party issuing the subpoena has demonstrated the relevance of the requested documents, the party seeking to quash the subpoena bears the burden of demonstrating that the subpoena is over-broad, duplicative, or unduly burdensome." *Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers LLP*, No. 03 CIV. 5560 (RMB) HBP, 2008 WL 4452134, at *4 (S.D.N.Y. Oct. 2, 2008) (citation omitted). Decisions to limit discovery "are left to the sound discretion of the trial judge." *Corbett v. eHome Credit Corp.*, No. 10-CV-26 (JG) (RLM), 2010 WL 3023870, at *3 (E.D.N.Y. Aug. 2, 2010). However, "[c]ourts should not bar a relevant deposition 'absent extraordinary circumstances' as such a prohibition would 'likely be in error.'" *Kelley*, 2008 WL 5000278, at *1 (quoting *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)); *see also Motsinger v. Flynt*, 119 F.R.D. 373, 378 (M.D.N.C. 1988) ("Absent a strong

showing of good cause and extraordinary circumstances, a court should not prohibit altogether the taking of a deposition.")

II. THE MOTION TO QUASH SHOULD BE DENIED BECAUSE THE DEPOSITION SEEKS RELEVANT INFORMATION AND IS NEITHER DUPLICATIVE NOR BURDENSOME

A. The Information Sought is Relevant

Mr. Bass served as Executive Vice President Research and Development for TKE. He designed residential elevators, including the Destiny and LEV elevators. He also trained residential elevator installation mechanics and himself served as an elevator installation mechanic. Further, Mr. Bass served as vice chair of the American Society for Mechanical Engineers ("ASME") A17 Residence Elevator Committee, responsible for proposing safety standards for residential elevators, when that committee was debating changing the width of the gap space between car doors and hoistway doors and how that space is measured. Mr. Bass's knowledge of the subject elevators, hazardous gap space, and relevant safety standards is relevant to whether the elevators present a substantial product hazard.

Moreover, Mr. Bass served as President and CEO of TKA from at least December 2015 to June 2018, and thyssenkrupp North America, Inc. from at least January 2015 to February 2020, during which time Respondent carried out its homeSAFE campaign. Complaint Counsel believes that Mr. Bass has knowledge regarding Respondent's operations after it exited the U.S. residential elevator market and ceased supporting the homeSAFE campaign. Thus, Mr. Bass may have key information and may provide key testimony on TKA's actions concerning whether to remedy the hazard posed by Respondent's residential elevators. In fact, Mr. Bass does not even contest in his motion to quash that his testimony is relevant to this matter. As noted above, "relevance, for purposes of discovery, is an extremely broad concept." *Copantitla,* 2010 WL

1327921, at *9. Mr. Bass's knowledge of facts bearing on whether the elevators are a substantial product hazard is clearly relevant to this proceeding.

B. The Information Sought is Not Unreasonably Duplicative

Mr. Bass argues that his deposition in this matter would be entirely duplicative of two prior depositions he gave in two cases brought by families of children killed or permanently and grievously injured when they became entrapped in the hazardous space between the hoistway and car doors of the elevators. Mr. Bass says these depositions are the "best-available evidence" regarding his knowledge of these incidents. However, as described more fully below, Mr. Bass's testimony would not be duplicative because this case involves different causes of action, different products, and different parties.

1. This Case Involves Different Causes of Action

The prior depositions were given pursuant to entirely different causes of action than those at issue here. Specifically, the previous actions were cases by private litigants bringing negligence and product liability claims under Georgia and Arkansas state law. Counsel in prior depositions of Mr. Bass sought to establish, for example, that Respondent had a duty of care to the individual plaintiffs and that Respondent breached that duty.[1] Such elements of proof are entirely distinct from those in this case, where Complaint Counsel seeks an Initial Decision and Order that various models of residential elevators manufactured and distributed by Respondent present a "substantial product hazard" under 15 U.S.C. § 2064(a)(2), a finding that requires

[1] "Under Georgia law, to state a claim for negligence, the following elements are essential: (1) A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risk of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and, (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty." *Pappas Rest., Inc. v. Welch*, 2021 WL 5898809, at *2 (Ga. Ct. App. Dec. 14, 2021).

establishing a "defect" that poses a "substantial risk of injury to the public" under federal law.[2] This is a different legal analysis and finding than that which is required to establish the breach of a duty of care under state law.

2. This Case Involves Different Products

The prior matters narrowly focused on only a subset of Respondent's residential elevator models, not the wider range of products relevant in this case. Specifically, the attorneys who previously deposed Mr. Bass did so to establish claims relating to only two of Respondent's residential elevators, the Destiny and LEV models that were involved in each specific incident. Complaint Counsel's inquiry and evidence goes far beyond these two; alleging that not only the Destiny and LEV models present a substantial product hazard, but that the Chaparral, LEV II, LEV II Builder, Volant, Windsor, Independence, and Flexi-Lift models do as well. Complaint ¶ 11. Moreover, these additional models have different instructions and warnings, the efficacy of which were not litigated in the private actions brought by the two families. Further, the individual families that filed suit against TKA sought compensation for their specific incidents; whereas, here, Complaint Counsel is seeking a recall to protect all consumers from future, potentially deadly incidents.

Discovery is not duplicative when the subject matter of the later subpoena is broader than that of the first. Courts routinely deny motions to quash where, as here, the information sought is "inherently divergent" from the prior matter. *Flanagan v. Wyndham Int'l Inc.*, 231 F.R.D. 98, 105 (D.D.C. 2005) (denying motion to quash non-party subpoena where prior depositions of the non-party took place before the current action was initiated and therefore, prior depositions did

[2] A "substantial product hazard" is "a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public." 15 U.S.C. § 2064(a)(2).

not seek "information specific to these plaintiffs and these cases"); *see also Willis v. Big Lots, Inc.*, Civ. Action. 2:12-cv-604, 2017 WL 2608960, *5 (S.D. Ohio June 6, 2017) (denying motion to quash even though "other discovery may exist on these topics" and observing that limiting the deposition would mean that "'no litigant could ever revisit a topic in discovery.'") (citation omitted).

3. This Case Involves Different Parties

This action was brought by the Government, not a private litigant. The Supreme Court has recognized that the Government and private litigants are not in the same position because, among other things, the claims at issue for Government litigation necessarily involve matters of substantial public importance. *See United States v. Mendoza*, 464 U.S. 154, 162-63 (1984) (holding the doctrine of nonmutual offensive collateral estoppel did not operate against the Government, noting "[t]he conduct of government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the government").

Mr. Bass is essentially seeking to collaterally estop Complaint Counsel from taking testimony and *Mendoza* stands for the proposition broadly that Government actions brought in the public interest cannot be limited in the same way that private litigants are constrained by the law of preclusion. *See, e.g., Securities and Exchange Commission v. Seahawk Deep Ocean Tech.*, 166 F.R.D. 268, 271 (D. Conn. 1996) (denying motion to quash in SEC enforcement action, noting "the testimony is highly relevant to the underlying case and there is a strong public interest in favor of the litigation of such claims. The SEC brings securities enforcement actions in the public interest of preventing widespread securities fraud and, on the facts of this case, that

interest outweighs any interest the movant might have in not disclosing the verification testimony at issue"). In the same manner, Complaint Counsel is bringing this action in the public interest, seeking to protect a nation of consumers from defective and unsafe elevators, and, as such, the subpoena should not be quashed.

Even if some of Complaint Counsel's inquiries overlap with those asked by *other* parties in *other* cases, overlap alone is not enough to make the subpoena unreasonably duplicative, unduly burdensome, or disproportionate to its evidentiary value. *See Cuviello v. Feld Entm't, Inc.*, No. 5:13-CV-03135-LHK, 2014 WL 12607811, at *2 (N.D. Cal. Nov. 14, 2014) (holding that there was "no merit" to the contention that subpoenas for deposition "are unduly burdensome simply because they may solicit testimony that overlaps with previous testimony"). It bears repeating that the question is not whether Complaint Counsel's subpoena is duplicative of prior discovery in other actions, but rather "whether the [current subpoena] is *unreasonably* duplicative." *UniRAM Tech., Inc. v. Monolithic Sys. Tech., Inc.*, 2007 WL 915225, at *2 (N.D. Cal. 2007) (emphasis in original). Complaint Counsel's subpoena is not unreasonably duplicative of prior discovery because it relates to different causes of action, different products, and different parties than prior matters. Complaint Counsel here is seeking a recall to protect all consumers, a remedy much broader than what was sought by the two families in the prior TKA matters.

C. The Information Sought is Not Unduly Burdensome

Whether a subpoena imposes an "undue burden" upon a witness is a case specific inquiry that turns on factors such as relevance, the need of the party for the discovery, the breadth of the request, the time period covered by it, the particularity with which the request is described, and the burden imposed. *Am. Elec. Power Co. v. United States*, 191 F.R.D. 132, 136 (S.D. Ohio 1999).

The information sought by Complaint Counsel's non-party subpoena request for Mr. Bass is relevant. Mr. Bass designed certain models of the subject elevators and is uniquely familiar with the elevators and the hazards they pose. This information is undoubtedly relevant to whether those elevators present a substantial product hazard. As Executive Vice President Research and Development for TKE, Mr. Bass took part in the committee that debated changes to the standards governing the hazardous gap space in these elevators. Thus, Mr. Bass may be able to comment not only on the dangers posed by excessive gap spaces, but how those dangers relate to the subject elevators. Also, Mr. Bass served as President and CEO of Respondent and thyssenkrupp North America Inc. for several years, including when Respondent administered and eventually ceased supporting its homeSAFE campaign, and when two incidents related to the subject elevators occurred: a child's death in 2017 and another child's hospitalization in 2019. Consequently, Mr. Bass may be familiar with Respondent's business operations after it left the residential elevator market, Respondent's homeSAFE campaign and decision to end it, and Respondent's response to the tragic events caused by its elevators. Respondent's knowledge of the hazard and failure to take appropriate corrective action is relevant to whether corrective action is warranted here. As a result, Mr. Bass's testimony is relevant to establishing the existence of a substantial product hazard and need for corrective action.

Further, the request for Mr. Bass's subpoena covers the appropriate time period. As stated, Mr. Bass served as President and CEO of TKA and thyssenkrupp North America Inc. when Respondent conducted and then ended its homeSAFE campaign and when the 2017 and 2019 incidents occurred. Mr. Bass also designed certain models of the elevators that are the subject of this action during his employment with Respondent, and he participated in the A17 Residence Elevator Committee while serving as Executive Vice President Research and

Development for TKE. As a result, the subpoena request is tailored to Mr. Bass's involvement with Respondent and related thyssenkrupp entities, and Respondent's elevators during the dates of his employment with those companies.

The subpoena of Mr. Bass is needed to obtain the relevant information. As discussed, because the issues in this case and the previous actions do not completely overlap, there are several relevant topic areas that have not been discussed in those prior depositions, including elevator models not at issue in the two prior private state law cases, the relationship between Respondent and other thyssenkrupp affiliated entities, Respondent's actions after the 2017 and 2019 incidents, and the homeSAFE unilateral campaign as it relates to the public interest in consumer safety broadly.

The subpoena request is not overbroad, is described with particularity, and does not impose an undue burden on Mr. Bass. Because Mr. Bass asserts that he has no documents in his possession, custody, or control from his time with Respondent, Complaint Counsel's request is, essentially, a request for deposition. The deposition pertains specifically to information or knowledge in Mr. Bass's possession that will assist in Complaint Counsel's determination that the subject elevators present a substantial product hazard, which is the very subject of this action. Due to the current ongoing issues with COVID-19, Complaint Counsel has proposed that the deposition take place virtually. Thus, the burden imposed on Mr. Bass in this case is particularly low and should not weigh in favor of quashing this subpoena request.

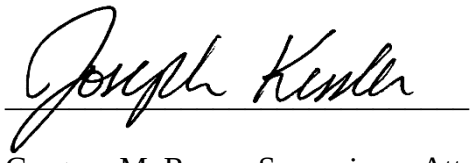
III. CONCLUSION

Complaint Counsel seeks to ask Mr. Bass about his tenure as President and CEO of Respondent and thyssenkrupp North America Inc. and Executive Vice President Research and Design of TKE, as well as his role in the design, manufacture, and sale of TKA's residential

elevators—inquiries that are indisputably relevant to this matter. Mr. Bass's claim that "[a]ny current testimony could only be duplicative of [his] prior deposition testimony" is belied by the fact that this action is brought by different parties litigating different legal claims involving a different group of products. Complaint Counsel's subpoena is not unreasonably duplicative and even incidental overlap does not warrant quashing discovery. Thus, Complaint Counsel respectfully requests that this court deny Mr. Bass's motion.

Dated this 7th day of February 2022

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2022, I served Complaint Counsel's Opposition to Non-Party Patrick M. Bass's Motion to Quash Subpoena as follows:

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