UNITED STATES OF AMERICA
CONSUMER PRODUCTS SAFETY COMMISSION

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

Order Denying Motion to Quash Subpoena for Kevin L. Brinkman

Upon consideration of the Motion to Quash Non-Party Subpoena, and Complaint Counsel's Opposition, it is hereby ordered that the Motion to Quash Non-Party Subpoena filed by Kevin L. Brinkman is denied.

On January 27, 2022, U.S. Consumer Product Safety Commission ("CPSC") Complaint Counsel served a *subpoena duces tecum* on non-party, Kevin L. Brinkman. On February 1, 2022, Mr. Brinkman, through counsel, filed a Motion for Extension of Time to Quash Subpoena. I granted additional time until February 18, 2022. On February 17, 2022, Mr. Brinkman filed a Motion to Quash Non-Party Subpoena. On February 25, 2022, Complaint Counsel filed its Opposition.

In his Motion to Quash, Mr. Brinkman represents that he served as Vice President of Operations in the National Wheel-O-Vator Division of and Vice President of Quality and Code Compliance and Vice President of Engineering and Quality for Thyssenkrupp Access Corp., now known as TK Access Solutions Corp. (Respondent) from April 2008, through March 2013, and now works as a consultant in the vertical transportation industry. He represents that all documents he retained regarding the issue of this dispute have been produced to opposing

counsel as have transcripts of the five depositions he provided in two prior civil litigation matters, and that the more contemporaneous depositions are the best evidence of his knowledge of the topics raised including design, gap space, installer instructions, installation locations, and applicable safety codes. He concludes that any further testimony will be duplicative as well as burdensome and harassing.

Complaint Counsel argues that Mr. Brinkman's testimony is relevant and necessary for this proceeding due to his various leadership roles in National-Wheel-O-Vator, the Respondent, and later as a consultant to Respondent in connection with its homeSAFE program. Complaint Counsel also notes that the proposed deposition would not be unreasonably duplicative of different cases involving different parties and claims, and the request for production of documents is not unduly burdensome.

The proffered facts and argument support Complaint Counsel's *subpoena duces tecum* because the deposition seeks relevant, non-duplicative information from Mr. Brinkman. It is also not unduly burdensome to him. Discovery under the Federal Rules is "accorded broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) Relevance is also an extremely broad concept. *Copantitla v. Fiskardo Estiatorio, Inc*. No. 09 CIV. 1608 RJH JCF, 210 WL 1327921, at *9 (S.D.N.Y. Apr. 5, 2010). In this case, Complaint counsel has proffered facts to support relevance, including Mr. Brinkman's five years of upper-level management roles with the Respondent, starting with National Wheel-O-Vator, where he oversaw operations, then with Respondent where he oversaw quality and code compliance for all lines of elevators, plus engineering positions. He later served as a consultant to the Respondent on its homeSAFE program, including the design and production of space guards. Mr. Brinkman also trained elevator installers on safety standards, including relating to the "gap space" and reviewed

potential design changes for code compliance. Finally, Mr. Brinkman was significantly involved in the ASME A17 Residence Elevator Committee, which established recommended standards for residential elevators. All of these facts support the relevance of Mr. Brinkman's testimony on whether the elevators at issue are a "substantial product hazard" under 15 U.S.C. §2064(a)(2).

With relevance shown, Mr. Brinkman now 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). Mr. Brinkman argues that the testimony would be duplicative because the five depositions given in the prior two civil litigation matters pertained to the same potential hazards raised in the Complaint here. He further argues that the burden of complying with the subpoena is "necessarily disproportionate to its evidentiary value." Motion to Quash, at 3. He also notes that he is not a party to this matter, has a different set of expectations, and that the "unwanted burden thrust upon him as a non-party is a factor entitled to special weight in evaluating the balance of completing needs." *Cusumano v. Microsoft Corp.* 162 F.3d 708, 171 (1st Cir. 1998). Moreover, Mr. Brinkman argues that the facts in this dispute have already been discovered in the five prior depositions and the legal theory or cause of action make no difference. He further argues that the issue is the "gap space," which makes no difference as to which brand of elevators are considered. Next, Mr. Brinkman argues that he is a fact witness, so it makes no difference who the parties are, whether government or private. Finally, Mr. Brinkman asks in the alternative that any order limit his testimony to new issues not covered in the five prior depositions discussed above.

While it is true that the five prior depositions of Mr. Brinkman addressed many of the same products and safety issues, the civil actions brought in State courts addressed the duty of

care to the individual plaintiffs and whether Respondent breached that duty. The elements to prove liability in those cases was, briefly: duty, breach, causation, and damages. The elements of proof in the current case differ: whether the residential elevator products manufactured and distributed by Respondent present a "substantial product hazard", which requires establishing a "defect" that "poses a substantial risk of injury to the public" under federal statute. 15 U.S.C.§2064(a)(2) The two legal claims are different and require different proof such that the testimony of Mr. Brinkman is not necessarily duplicative. Complaint Counsel notes that "the facts surrounding the 'gap space' and how installers were instructed to measure the space between the hoistway and car doors necessarily differs between the models, and potentially, year of manufacture" and is a subject in which Mr. Brinkman's testimony is sought and not duplicative of prior depositions. Oppos., at 6. I agree.

The two prior civil actions addressed only two elevator models, whereas this case involves up to nine models, each of which contains different instructions and warnings. Seven of the models were not addressed in the State court litigation. The remedy sought also differs between the State cases and this federal enforcement proceeding, which likely will result in the examination of Mr. Brinkman on topics not addressed in the State court litigation. The fact that this action seeks a recall to protect all consumers from potentially deadly incidents, unlike the more circumscribed State court actions of product liability, further support that the areas of inquiry will likely not be as duplicative as Mr. Brinkman argues. Furthermore, Mr. Brinkman's involvement as a consultant in the Respondent's homeSAFE program, as well as his representation of the Respondent on the A17 Residence Elevator Committee, particularly during the time-period the committee debated changes to the allowable "gap space" are not duplicative

and are tailored to Mr. Brinkman's involvement with the Respondent's elevators during his dates of employment and then subsequently as a consultant to it.

The subpoena is thus not unreasonably duplicative because the subject matter is broader than in the earlier State cases and the information sought is inherently divergent. *Flanagan v. Wyndham Int'l Inc.*, 231 F.R.D. 98, 105 (D.D.C. 2005). The fact of overlap alone is insufficient to make a subpoena unreasonably duplicative or unduly burdensome.

Complaint Counsel also argues convincingly that this litigation involves a matter of public interest and seeks to protect consumers from substantial risk of injury. It argues that Mr. Brinkman's Motion essentially seeks to collaterally estop the deposition. But access to potential evidence through discovery cannot be constrained in the same manner as private litigants. *United States v. Mendoza*, 464 U.S. 154, 162-63 (1984); *Securities and Exchange Comm'n v. Seahawk Deep Ocean Tech.*, 166 F.R.D. 268, 271 (D. Conn. 1996).

With respect to being overly burdensome, Mr. Brinkman argues that he has provided all responsive documents in his possession to Complaint Counsel. Compliant Counsel states that it is not in a position to confirm the production is complete without further discussions with Respondent. It is particularly focused on whether Mr. Brinkman has any further installation materials in his possession, which is not overly burdensome to produce as he has indicated that he has already produced all responsive documents. Finally, to reduce the burden on Mr. Brinkman, Complaint Counsel has agreed to depose virtually.

In conclusion, the *subpoena duces tecum* appears relevant, not duplicative, not unduly burdensome, and tailored to this witness. This is supported by the various management positions held by the witness during specific timeframes of employment and the subsequent consultant

services for the Respondent involving its homeSAFE program provided by Mr. Brinkman, as well as his participation during relevant periods on the ASME A17 Residence Elevator Committee. The facts sought in the deposition relate to many more elevator models and installation materials than the two models involved in the State court cases and involve different causes of action with different elements of proof. The fact that the two State court cases involved limited parties, in a private matter, compared to this federal enforcement action also supports the finding that there is limited duplication, and likely only incidental. Finally, a virtual deposition reduces the burden on Mr. Brinkman as does the limited, if any, document production because he states that he has already produced all relevant records.

After considering the Motion and Opposition filed, I hereby DENY the Motion to Quash Non-Party Subpoena to Mr. Kevin L. Brinkman.

So ordered.

Done and dated March 1, 2022
Arlington, VA

Mary F. Withum -S
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Mary F. Withum
Administrative Law Judge