

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
)	
)	
TK ACCESS SOLUTIONS CORP., f/k/a)	
THYSSENKRUPP ACCESS CORP.)	CPSC DOCKET NO.: 21-1
)	
)	
Respondent.)	
)	

**RESPONDENT’S SURREPLY BRIEF IN OPPOSITION TO COMPLAINT COUNSEL’S
MOTION TO COMPEL DISCOVERY**

Pursuant to 16 C.F.R. § 1025.23(c) and the Presiding Officer’s order of April 19, 2022, Respondent TK Access Solutions Corp., f/k/a thyssenkrupp Access Corp. (“TKASC” or “the Company”), submits its Surreply Brief in Opposition to Complaint Counsel’s Motion to Compel Discovery. As described below, Complaint Counsel’s Reply Brief (“Reply”) is flatly wrong on both fact and law. As such, for the reasons stated herein and in Respondent’s Memorandum in Opposition to Complaint Counsel’s Motion to Compel Discovery (“Opposition”),¹ Complaint Counsel’s Motion to Compel Discovery (“Motion”) should be DENIED.

I. Complaint Counsel Is Wrong on the Facts.

Complaint Counsel makes several incomplete or incorrect statements of fact, including:

First, Complaint Counsel cites “a screenshot of [TKASC’s] purported funding . . .

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER,” Reply at 4, but ignores the description of the

¹ In short, “**CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER**”, the discovery that the Motion seeks would only add to the already undue, disproportionate discovery burden Complaint Counsel has placed on Respondent. Accordingly, Respondent requests that the Presiding Officer DENY the Motion.” Opposition at 2 (Apr. 15, 2022).

common business practice of cash-pooling reflected in Respondent’s Memorandum in Opposition, *see* CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER as well as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER³ This evidence, far from “support[ing]” any theory of “a shell corporation, comingling funds,” Reply at 4-5, demonstrates that, while CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER, those funds remain available to TKASC and only TKASC.⁴

Second, Complaint Counsel cites Mauro Carneiro’s testimony CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

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² Attached as Confidential Exhibit A.

³ Attached as Confidential Exhibits B, C.

⁴ Despite Complaint Counsel’s insinuations, cash-pooling is a standard finance technique, *see, e.g.*, Kathleen Ferrell et al., “ABA Section of Taxation 2016 Joint Fall CLE Meeting: Managing Cash in an Ever Changing World,” 2016 ABATAX-CLE 0930054 (Sept. 30, 2016), attached as Exhibit D, that “is a transparent and efficient liquidity management tool [that] leaves a sufficient audit trail that . . . would satisfy even a conservative . . . tax audit.” NeuGroup, “Cash Pooling,” attached as Exhibit E.

⁵ Relevant excerpts attached as Confidential Exhibit F. *See also id.* at CONFIDENTIAL - 5.

Third, Complaint Counsel alleges that, in Respondent’s First Supplemental Response to Complaint Counsel’s Interrogatory No. 28, “[f]or the first time . . . Respondent admitted that its homeSAFE campaign ‘CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER.’” Reply at 4 (emphasis added). This allegation is demonstrably false; the language Complaint Counsel quotes *appears verbatim* in Respondent’s Objections and Answers to Complaint Counsel’s First Set of Interrogatories to Respondent, filed November 12, 2021.⁷ *Id.* at 35.

II. Complaint Counsel Is Wrong on the Law.

In pursuing the extraordinary step of “veil-piercing,”⁸ Complaint Counsel cites “prior litigations under Section 15 [that] considered financial status or corporate structure to ensure that any relief ordered is properly funded.” Reply at 2. However, Complaint Counsel cites no *statutory* language that would permit means-testing a Section 15 action, and the cited cases (if they even bear on this matter)⁹ do not support the Motion.

⁶ Relevant excerpts attached as Confidential Exhibit F; *see also* CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER, attached as Confidential Exhibit G.

⁷ Relevant excerpts attached as Confidential Exhibit H.

⁸ Complaint Counsel asserts its demands are “no different than any other type of litigation.” Reply at 2. For the reasons stated in the Opposition, this assertion is incorrect, *see id.* at 21, and the cases Complaint Counsel cites are utterly inapposite. *Int’l Fin. Servs. Corp. v. Chromas Techs. Canada, Inc.*, 356 F.3d 731 (7th Cir. 2004), centered on whether veil-piercing was a legal question for a judge or fact question for a jury. In *Bangor Punta Operations v. Bangor & A.R. Col.*, 417 U.S. 703 (1974), the Court considered whether a party, estopped from suing in its own name, could “avoid the command of equity through the guise of proceeding in the name of respondent corporations which it owns and controls.” *Bangor* at 713.

⁹ These cases’ precedential value is limited, at best, as both were settled before even Initial Decisions (let alone Final CPSC or district court orders) were issued. *See* Consent Agreement, *M&O*, CPSC Docket No. 12-1 (Apr. 30, 2014); U.S. Consumer Prod. Safety Comm’n, “CPSC, American Household Inc., (Formerly Sunbeam Corp.) Announce Recall of Star ME-1 Dry Fire Sprinklers” (“Sprinkler Release”), CPSC Press Release No. 02-116 (Apr. 25, 2003), attached as Exhibit I.

First, Complaint Counsel states, in “*In the Matter of Maxfield and Oberton Holdings, LLC [M&O]*, CPSC Docket No. 12-1 . . . financial status and corporate organization were key considerations,” Reply at 3, yet ignores crucial facts.¹⁰ Complaint Counsel notes that M&O “dissolved.” Reply at 3. Of course, TKASC has not dissolved. Further, Complaint Counsel fails to note that M&O’s counsel withdrew because the company no longer existed, Dkt. No. 24, CPSC Docket No. 12-1 (Dec. 27, 2012), and that M&O had stopped communicating with Complaint Counsel. Dkt. No. 29a, CPSC Docket No. 12-1 (Feb. 11, 2013). TKASC exists as a well-funded legal entity with which CPSC, including Complaint Counsel, has been actively engaged in a matter that has gone on for nearly a decade, including through this litigation.

Second, Complaint Counsel describes *In the Matter of Chemetron Corp. f/k/a Chemetron Invest. Inc. et al. (“SCM”)*, CPSC Docket No. 02-1, as involving a company, SCM, that “maintained no active business operations.” Reply at 3. Again, this is only part of *SCM*’s facts. As that Presiding Officer noted, SCM’s parent “admit[ted] that SCM is its ‘defunct subsidiary’” and that the parent “owns a number of *family-run* businesses.” Order, *SCM* at 2. TKASC is neither family-run nor defunct; it is actively conducting the business of its Home Elevator Safety Program (“Program”).¹¹ As with *M&O*, *SCM* turned on facts that are nothing like the facts in this matter.

¹⁰ Complaint Counsel concedes that the question in *M&O* was the “responsible corporate officer” (“RCO”) doctrine, not piercing veils. Reply at 3. However, Complaint Counsel is silent as to why *M&O* would nonetheless be relevant here, and, even if *M&O* were more broadly read as setting a bar for the use of *any* extraordinary theories (whether RCO or veil-piercing), that bar is not met on these facts.

¹¹ Complaint Counsel maligns the Program as “the bare minimum.” Reply at 1 N. 1. However, Complaint Counsel is well aware that the remedies in three recent recalls by other residential elevator component manufacturers, **CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER** are, at most, no more robust than TKASC’s Program. See **CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER**

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Because of their readily distinguishable facts, *M&O* and *SCM* not only fail to support granting Complaint Counsel’s Motion but in fact support denying that Motion.

Conclusion

Respondent has voluntarily provided ample evidence to satisfy Complaint Counsel’s demands (unsupported by case law or statute) and to establish that TKASC, and only TKASC, is the proper party in this matter and is amply funded. There is no factual need¹² or legal basis to imperil the timely conclusion of this matter by further indulging Complaint Counsel’s seemingly inexhaustible appetite for discovery tied to questions that have been asked and answered. Thus, Complaint Counsel’s Motion to Compel Discovery should be DENIED.

Dated: April 25, 2022



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¹² “TKASC exists as a legal, functioning entity that CPSC has engaged with on the issue of excessive Gap Space for nearly a decade (without questioning TKASC’s resources) and that has launched two separate efforts to address the potential hazard associated with Gap Space (created by improper installation) that is the focus of the Complaint.” Resp’t’s Mem. in Opp. to Complaint Counsel’s Mot. for Leave to File Reply Br., CPSC Docket No. 21-1, N. 3 (Apr. 19, 2022). Through its Home Elevator Safety Program, the Company is providing “that portion of the remedies the Complaint seeks that are within CPSC’s authority and offering as much as or more than four other manufacturers ‘recalls.’” *Id.* Complaint Counsel criticizes Respondent’s use of the term “approval” regarding the homeSAFE Campaign, Reply at 1 N. 1, but any reasonable reader would interpret CPSC’s “acknowledg[ing]” that Campaign, TKAS_CPSC21-1_51475, and citing it favorably in the Briefing Package, *see, e.g.*, TKAS_CPSC21-1_51540-41, as “approval.” In fact, offering space guards remains the central “remedy” for improper installation that allows an excess Gap Space in all subsequent “corrective actions,” regardless of manufacturer.

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CERTIFICATE OF SERVICE

Pursuant to 16 C.F.R. § 1025.16, as adopted by the Presiding Officer in CPSC Docket No. 21-1, I hereby certify that on April 25, 2022, a true and correct copy of the foregoing Respondent's Surreply Brief in Opposition to Complaint Counsel's Motion to Compel Discovery was filed with the Secretary of the U.S. Consumer Product Safety Commission and served on all parties and participants of record in these proceedings in the following manner:

By electronic mail to the Secretary of the U.S. Consumer Product Safety Commission:

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The Honorable Mary Withum, Administrative Law Judge
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A handwritten signature in blue ink, appearing to read "Sheila A. Millar", is enclosed in a thin black rectangular border. The signature is written in a cursive style with a long, sweeping underline.

Sheila A. Millar