UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

IN THE MATTER OF THYSSENKRUPP ACCESS CORP., Respondent.	CPSC DOCKET NO.: 21-1

MOTION TO QUASH NON-PARTY SUBPOENA TO KEVIN L. BRINKMAN

Non-party Kevin L. Brinkman, through the undersigned counsel and pursuant to 16 C.F.R. § 1025.38(g), hereby moves to quash the subpoena served on him by U.S. Consumer Product Safety Commission ("CPSC") Complaint Counsel on January 27, 2022. The grounds for this motion are set forth below.

Mr. Brinkman served as Vice President of Operations for 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. ("the Company"), from April, 2008 through March, 2013. Currently, Mr. Brinkman works as a consultant in the vertical transportation industry.

At his departure from the Company, Mr. Brinkman did retain documents regarding the issues of this dispute. However, all of the documents he retained were produced directly to opposing counsel or to the Company's counsel in the lawsuit related to the incident described at Paragraphs 74-75 of the Complaint herein; and the documents produced to the Company's counsel were thereafter produced to opposing counsel excluding certain privileged documents that were listed in a privilege log which was also produced to opposing counsel. More importantly, upon

information and belief, all of the Brinkman documents have already been produced to Complaint Counsel in this case.

Further, Mr. Brinkman was deposed five times in two prior civil litigation matters pertaining to the potential hazards that are the subject of the Complaint in this matter. These depositions were given on May 17, 2012, June 26, 2012, June 27, 2012 and July 16, 2012 (pertaining to the incident described at Paragraphs 67-73 of the Complaint), and on July 3, 2018 (pertaining to the incident described at Paragraphs 74-75 of the Complaint).

Those depositions, which were necessarily more contemporaneous to all of the issues in the above-captioned matter than current testimony would be, involved the same issues as the instant action. These depositions are thus the best available evidence regarding Mr. Brinkman's knowledge of topics including, but not limited to:

- the design, manufacture, and distribution, through dealers, of the Company's residential elevators;
- the Company's knowledge of locations in which its dealers or their agents installed the elevators;
- the Company's instructions for professional installers' installation of its residential elevators;
- the "Gap Space" adjoining a residential elevator installation;
- the potential hazards associated with excessively large "Gap Spaces;" and
- the Safety Codes applicable to residential elevator installations at the time the Company offered products.

Any current testimony could only be duplicative of Mr. Brinkman's prior deposition testimony. Upon information and belief, Complaint Counsel has also received copies of the

complete transcripts of these depositions, with exhibits, and thus has access to this best-available evidence.

As Mr. Brinkman can provide no additional documents or information responsive to Complaint Counsel's subpoena, the burden of complying with that subpoena would necessarily be disproportionate to its evidentiary value. Moreover, that burden would fall on a person who is not a party to this matter. Non-parties to any litigation "have no dog in that fight. Although discovery is by definition invasive, parties to a law suit must accept its travails as a natural concomitant of modern civil litigation. Non-parties have a different set of expectations. Accordingly, concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs." Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998), citing Haworth, Inc. v. Herman Miller, Inc., 998 F.2d 975, 978 (Fed. Cir.1993); Dart Indus. Co. v. Westwood Chem. Co., 649 F.2d 646, 649 (9th Cir.1980); Addamax Corp. v. Open Software Found., Inc., 148 F.R.D. 462, 468 (D.Mass.1993). See also Nitcsh v. DreamWorks Animation SKG Inc., No. 5:14-cv-04062, 2017 WL 930809, at *2 (N.D. Cal. Mar. 9, 2017) (citing United States v. Columbia Broadcasting Sys., Inc., 666 F.2d 364, 371 (9th Cir. 1982) where the court stated, "Nonparty witnesses are powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of the costs of a litigation to which they are not a party.").

As the Court knows, similar Motions to Quash were filed by non-parties, Patrick Bass and Jurrien Van Den Akker, and Complaint Counsel filed oppositions to those motions. Thus, Mr. Brinkman will next address the expected arguments of Complaint Counsel as to their need to obtain additional deposition testimony from Mr. Brinkman on the issues of this case. Although the

information sought is relevant – as evidence by the five depositions Mr. Brinkman has already provided – it most assuredly is duplicative, burdensome, and harassing.

Mr. Brinkman is a non-party fact witness. His testimony on the facts of this dispute have already been discovered *ad nauseum,* and it makes no difference what the legal theory or cause of action Complaint Counsel is pursing in this matter. The facts are the facts, and it is left to Counsel to argue the facts to support their theory of liability.

As for the facts of note, they are listed above and Mr. Brinkman has already provided hours and hours of testimony on all of them. Despite Complaint Counsel's suggestions to the contrary, it makes no difference what residential elevators are being considered; the issue here is "gap space."

Complaint Counsel also tries to distinguish the prior cases in which Mr. Brinkman testified by stating that this action was brought by the Government, not a private litigant. Since we are considering a fact witness and his documents, it again makes no difference who the parties are. The fact and documents discovered in the prior cases through Mr. Brinkman have not changed and will not change. All of this is simply duplicative.

In the alternative to quashing the entire Subpoena Duces Tecum, Mr. Brinkman requests the Court for an Order limiting his testimony to new issues not covered in the prior depositions referred to above.

For the foregoing reasons, Mr. Brinkman respectfully requests the Presiding Officer to quash the subpoena.

Dated: February 17, 2022

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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 February 17, 2022, true and correct copies of the foregoing Motion to Quash Subpoena were 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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By electronic mail to the Presiding Officer:

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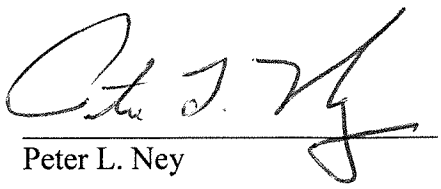

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