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.	)	

DECISION AND ORDER GRANTING NON-PARTY OTIS ELEVATOR COMPANY'S MOTION TO QUASH SUBPOENA DUCES TECUM

Upon consideration of the Non-Party Otis Elevator Company's Motion to Quash Subpoena Duces Tecum and Memorandum in Support thereof, and Respondent, TK Access Solutions Corp.'s Opposition, it is hereby ordered that the Motion to Quash Non-Party Subpoena filed by Otis Elevator Company is granted.

On March 22, 2022, Respondent served a *subpoena duces tecum* on non-party Otis Elevator Company ("Otis"). On March 30, 2022, Otis filed a Motion to Quash Subpoena Duces Tecum. On March 31, 2022, Respondent TK Access Solutions Corp. filed an Opposition. Otis subsequently filed a Reply on April 6, 2022.

Briefly, Otis argues that its voluntary recall has no relevance to this litigation, the subpoena defies notions of agency enforcement discretion, and the subpoena will have a chilling effect with parties negotiating voluntary recalls with the Consumer Product Safety Commission ("CPSC" or "Commission") on voluntary recalls. In its Opposition, Respondent counters that Otis's Motion is untimely, the requested documents are relevant and necessary for this

proceeding, the Complaint Counsel has declined to provide the requested documents, the production is not unduly burdensome to Otis, and Respondent is not a competitor to Otis.

With respect to the arguments raised, Respondent has subpoenaed three categories of documents from Otis related to Otis's December 2020 voluntary recall of certain private residential elevators including Otis's corrective action plan ("CAP") and monthly progress reports ("MPRs") filed with the Commission. Respondent argues that these documents are directly relevant to the remedy sought by Complaint Counsel with regard to a recall. Respondent notes that even if Complaint Counsel proves that Respondent's residential elevator components present a "substantial product hazard" under the statute, Complaint Counsel must also prove that "the steps the Company is already taking through its Program are insufficient to remedy that 'substantial product hazard' and that the relief the Complaint seeks is thus necessary." Respondent's Opposition, at 7.

Respondent further notes that the Commission has described the potential hazard posed by the excessive gap space issue as "Industry-wide", that elevator components from all residential elevator companies pose the same "hazard", and that both the alleged hazard and remedy in the Otis recall are almost identical. Respondent asserts that the Otis CAP and MPRs are directly relevant to Complaint Counsel's requested relief and says it is entitled to know if the CPSC approved remedies for the recall in Otis differed from those sought from Respondent in this litigation where the Commission has characterized the potential hazard as identical; and Respondent has a Program that it argues exceeds the Otis recall in some respects. Finally, Respondent disputes that its Program is inadequate and that there is no substantial difference between a recall and its Program, but rather, the difference is a term of art, which the MPR data will reflect. Respondent's Opposition, at 8-11.

Respondent concludes its relevancy argument by noting that, in addition to being relevant, the documents were not produced by Complaint Counsel, and are not burdensome for Otis to produce. Respondent's Opposition, at 7.

Otis argues that the CAPs and MPRs are not relevant to the current case and that Respondent's request goes beyond even the liberal standard of relevancy. Otis's and Respondent's corrective actions are "neither intertwined nor related in any way; rather, they are a product of separate enforcement matters and corporate decisions, each with unique facts and circumstances that may warrant different outcomes." Otis Motion, at 4. Otis also notes that its CAP, which sets the terms of its voluntary recall, has nothing to do with any claims about the adequacy of Respondent's safety program. Otis argues that there is no reasonable basis to believe its recall response rates will be useful in predicting future recall rates for Respondent's products and that its elevator products are different that the elevator models at issue in this proceeding. Otis asserts that the Respondent is no more entitled to its CAP and MPRs than it is to the same information from any other non-elevator company's recalled product. In its Reply, Otis argues that the standard of relevance advanced by Respondent in its Opposition is mistaken and not as broad as alleged. Otis notes the current standard requires that the information sought must relate to the parties' claims or defenses in the litigation and be proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1).

Otis further argues that administrative enforcement discretion would be defeated if it must produce the subpoenaed documents. It asserts that neither the law nor practice requires that "CPSC's approach to one corrective action must mirror or substantially resemble all others" and that federal agencies have flexibility, that is, administrative enforcement discretion, to determine "whether or when to initiate an enforcement action against a third party for alleged violation(s)

of a law the agency is charged with administering." Otis Motion, at 5. It further argues that Respondent's premise that what CPSC did with regard to Otis may have a bearing on what the CPSC might do with regard to Respondent. Otis then notes that its voluntary recall "reflect[s] bespoke negotiations with the CPSC and company considerations unique to Otis, its deliberative process, and its busines model, are necessarily disparate from those sought by Complaint Counsel" against Respondent in this matter and shows that presence of any "industry-wide" issue does not change CPSC's enforcement discretion here. Otis Motion, at 6. Otis further notes that the disclosure would have a chilling effect on cooperation with the Commission on voluntary recalls because it provided much information to the agency on the expectation that it would not be subject to public disclosure pursuant to Section 6(a)2 of 15 U.S.C. § 2055(a)(2) and FOIA Exemption 4. Otis argues that direct competitors could obtain competitive information of business rivals simply by issuing a subpoena. Otis Motion, at 7.

Respondent argues that its request poses no chilling effect because it has requested the documents from Otis, not the Commission; the statute does not preclude Otis's production of the same documents; CPSC's limitations on disclosure do not disturb discovery between parties, and the limitations on CPSC apply to public disclosure pursuant to the Freedom of Information Act ("FOIA"), and that it is bound by the Protective Order of October 12, 2021. Further, Respondent argues that it is not in direct competition because it is no longer in the residential elevator business, nor is Otis. Respondent's Opposition, at 14-16.

DECISION

The proffered facts and argument support Otis's Motion to Quash the *subpoena duces tecum*. While relevance is broadly construed, it is not without limits. The standard of relevance after the 2015 amendments to Federal Rule of Civil Procedure 26 is more limited than before the

amendments and more limited than Respondent urges. It instructs that "discovery requests are not relevant simply because there is a possibility that the information may be relevant to the general subject matter of the action." *Cole's Wexford Hotel, Inc. v. Highmark Inc.*, 209 F. Supp. 3d 810, 812 (W.D. Pa. 2016). The standard cited by the Respondent in its briefing is the prior standard, which does not support disclosure of the requested documents for a number of reasons.

As a threshold matter, a key factor is that Otis is a non-party and has a different set of expectations as the parties in the litigation; and the unwanted burden thrust upon it is a factor entitled to special weight in evaluating the balance of competing needs. *Cusumano v. Microsoft Corp.*, 162 F.3d 717 (1st Cir. 1998) *citing Haworth Inc. v. Herman Miller, Inc.*, 998 F.2d 975, 978 (Fed. Cir. 1993). This is true even where, as here, the specific number of documents in the aggregate may not pose an undue physical or logistical burden to produce. Respondent's Opposition, at 12 (citing approximately fewer than 20 documents to produce). When considering the expectations of a non-party here, Otis argues it relied upon expectations of confidentiality and protections from disclosure pursuant to Section 6(a)2 of 15 U.S.C. § 2055(a)(2) and FOIA Exemption 4. While Respondent is correct that those disclosure rules apply to the Commission, Otis had a reasonable expectation when entering into its voluntary settlement with the Commission that its CAP and MPRs, and other potentially commercially sensitive or proprietary information, would not be subject to disclosure. As noted by Otis, the FOIA exemption was intended to protect not only the interests of government but also those who submit information, such as non-party Otis here. *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767-770 (D.C. Cir. 1974). Strong protection from disclosure of commercially sensitive information, such as a corrective action plan, is likely a factor weighed by those who choose to enter into such voluntary agreements with the Commission.

A closely related issue discussed by both Otis and Respondent relates to the potential chilling effect on parties, particularly industry competitors, by the requested disclosure. Parties negotiating voluntary recalls with the Commission may be impacted if they know their CAPs and MPRs may be accessed by a party in an unrelated litigation via subpoena at a later date, rather than through the formal FOIA disclosure process. Further, while Respondent argues that it is no longer a direct competitor with Otis in the residential elevator industry, Otis argues that it is entitled to keep confidential the information as to its business practices, client lists, corrective measure, etc. with respect to its voluntary recall even if it is no longer in the business. There is nothing in the cases cited by Respondent to support that a non-party to a litigation loses its rights to protect confidential business information provided to an enforcement authority because it has left the industry.

Another issue that arises from the requested disclosure of the CAP and MPRs is whether the CAP and MPRs, standing alone, would be sufficient disclosure for Respondent's purposes and whether Respondent would seek additional foundational, primary source records from Otis including background negotiation information not included in the documents. The requested disclosure thus risks expanding the discovery. This is not the time to re-open or re-litigate the merits of Otis's recall agreement with the Commission. Moreover, given that Otis's recall was in December 2020, it is possible that Respondent could have sought this information from Otis sooner, particularly once Complaint Counsel denied its initial request.

Respondent further argues as a basis against Otis's Motion that Complaint Counsel refused to disclose the CAP and MPRs from Otis. Respondent's Opposition, at 1. There has been no Motion to Compel made for these documents by Respondent and, apparently, no FOIA request.

The arguments regarding agency enforcement discretion and the uniqueness of each case also favor the granting of the Motion to Quash by Otis. Otis noted in its Motion that the Commission's Handbook notes that "rarely will any two recall programs be identical." U.S. Consumer Prod. Safety Comm'n, Product Safety Planning, Reporting, and Recall Handbook (Aug. 2021) at 15. Otis further argues that the terms and circumstances of its voluntary recall "reflect bespoke negotiations with the CPSC and company considerations unique to Otis, its deliberative process, and its business model.. . ." Otis Motion, at 1 & 6. Respondent disputes Otis's cited legal authority and claims that CPSC does not have the discretion to impose more burdensome obligations on one company as compared to others. Respondent's Opposition, at 12-13. As Otis noted in its Reply Brief, CPSC's corrective action with Otis need not mirror that of Respondent because to do so "is the polar opposite of agency discretion." Otis Reply, at 3. CPSC has administrative discretion to determine its enforcement efforts – and potential remedies – based on the unique circumstances of each case, company, product, and agency resources. Indeed, the residential elevator products at issue are different than the Respondent's elevators and may have different recall rates based on many factors including the number of units in the field, distribution, and installation, among other distinctions. Otis Motion, at 4. For this reason, the information sought is not proportional to the needs of the case, and Otis is not required to produce the documents requested in the *subpoena duces tecum*, including the CAP and MPRs, related to its voluntary recall. Furthermore, the fact that an Order transmitting the requested *subpoena duces tecum* was issued does not equate to a decision on the merits of the substance of the subpoena, nor does it bind this Court now. Otis could have responded to the request without opposition given that it is no longer in the residential elevator business. Respondent's Opposition, at Exhibits B-F.

As to the issue of timeliness raised by Respondent against the Motion to Quash, the matter was addressed in the April 4, 2022 Order Granting Non-Party Otis Elevator Company's Motion for Leave to File a Reply Brief in Support of its Motion to Quash, as there appeared to be no prejudice to the parties by the one-day late filing.

After considering Otis's Motion to Quash and the Respondent's Opposition thereto, I hereby GRANT the Motion to Quash Subpoena Duces Tecum on Otis Elevator Company.

So ordered.

Done and dated April 11, 2022
Arlington, VA

Mary F. Withum -S
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Date: 2022.04.11 16:56:21 -04'00'

Mary F. Withum
Administrative Law Judge