UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

**COMPLAINT COUNSEL'S MOTION FOR PROTECTIVE ORDER REGARDING THE DEPOSITION OF NON-PARTY ROBERT S. ADLER**

Pursuant to 16 C.F.R. § 1025.23 and 1025.31(d), Complaint Counsel respectfully moves the Presiding Officer to enter a just and appropriate protective order that the deposition of non-party Robert S. Adler "not be had."

## I. INTRODUCTION

On July 7, 2021, Complaint Counsel filed an Administrative Complaint against Respondent alleging that residential elevators ("Elevators") manufactured and distributed by Respondent contain defects that create a substantial product hazard under section 15(a)(2) of the Consumer Product Safety Act ("CPSA"). More specifically, the Complaint alleges that the Elevators are defective because they contain defects in the "contents, construction, finish, packaging, warnings, and/or instructions," through Respondent's engineering drawings and instructional materials, including installation, design, and planning guides ("Installation Materials"), and the Elevators contain design defects. Compl. ¶¶ 40-65. The parties are in the midst of conducting discovery, having both served and provided responses to written discovery requests.

On January 25, 2022, Respondent filed an application for the issuance of a non-party subpoena on the former Acting Chair of the U.S. Consumer Product Safety Commission ("CPSC"), Hon. Robert S. Adler. According to the application, Respondent seeks to ask Mr. Adler questions about a 2017 rulemaking petition about residential elevators generally, for which a substantial public record exists, and which does not pertain to the issue in this litigation; namely, whether Respondent's Elevators are defective under section 15 of the CPSA. Second, Respondent seeks to inquire about a lunch purportedly attended by Mr. Adler in 2013, almost 10 years before the Complaint in this matter was authorized and filed, based on three emails produced in discovery not involving Mr. Adler. Respondent suggests that his attendance at a lunch means he has "unique knowledge" of a 2013 investigation that was subsequently closed by the Office of Compliance and Field Operations in 2014.

For the reasons detailed herein, Complaint Counsel requests a just and appropriate protective order be entered, so that the discovery requested by Respondent's non-party subpoena "shall not be had." *See* 16 C.F.R. § 1025.31(d)(1).

## II. LEGAL STANDARD

A party may seek a protective order to preclude the deposition of a party or non-party upon a showing of "good cause" to the Presiding Officer. 16 C.F.R. § 1025.31(d); *see also* Fed. R. Civ. P. 26(c). The party seeking the order bears the burden of showing "good cause" as demonstrated by specific facts. *Alexander v. F.B.I.*, 186 F.R.D. 1, 3 (D.D.C. 1998). Generally, "good cause" for a protective order exists "when justice requires the protection of a party or a person from any annoyance, embarrassment, oppression, or undue burden or expense." *Id.* As explained below, good cause exists here because depositions of high-ranking government officials are discouraged under the *Morgan* doctrine.

## III. THE LAW SUPPORTS THE GRANTING OF A PROTECTIVE ORDER

### A. The *Morgan* Doctrine Protects Current and Former High-Ranking Officials from Deposition Absent Extraordinary Circumstances

Under what is known as the *Morgan* doctrine, depositions of high-ranking officials "should be discouraged." *In re U.S.*, 985 F.2d 510, 512 (11th Cir. 1993) (citing *U.S. v. Morgan*, 313 U.S. 409 (1941)). "The *Morgan* doctrine recognizes that, left unprotected, high-ranking government officials would be inundated with discovery obligations involving scores of cases where the public official would have little or no personal knowledge of material facts." *U.S. v. Wal-Mart Stores, Inc.*, No. CIV.A PJM-01-CV-152, 2002 WL 562301, at *1 (D. Md. Mar. 29, 2002). Further, thought processes and discretionary acts of high-ranking government officials are protected by the mental process privilege. *Id.*

Case law clearly provides that a Commissioner of the CPSC qualifies as a "high-ranking official" under the *Morgan* doctrine. *See U.S. v. Miracle Recreation Equip. Co.*, 118 F.R.D. 100, 105–06 (S.D. Iowa 1987) (protective order barring deposition of Terrance Scanlon, Chairman of the CPSC at the time); *see also Wal-Mart Stores*, 2002 WL 562301, at *5 (protective order barring deposition of former CPSC Chair Ann Brown).

Courts require that the party seeking a deposition of a high-ranking official show an extraordinary or exceptional circumstance compelling such testimony. *See In re U.S.*, 985 F.2d at 512; *see also Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) ("[T]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions."); *In re Office of Inspector General*, 933 F.2d 276, 278 (5th Cir. 1991) (agreeing with the holding in *Simplex* and noting that courts must "remain mindful of the fact that exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted").

Under the *Morgan* doctrine, the burden of demonstrating that an extraordinary circumstance exists to take the deposition of a high-ranking government official rests upon the proponent of the deposition—Respondent in this circumstance. *See, e.g.*, *Alexander*, 186 F.R.D. at 3.

Showing an extraordinary or exceptional circumstance is a high bar—courts generally require a showing that the high-ranking official has firsthand knowledge of information relevant and material to the issues, that cannot be obtained from another source or through a less burdensome means of discovery. *Lederman v. New York City Dept. of Parks and Recreation*, 731 F.3d 199, 203 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1510 (2014); *see also U.S. v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 322–23 (D.N.J. 2009) (stating that the purported testimony must be *essential* to the case at hand, forming a key component of the party's claim or defense).

Importantly, some minimal level of personal knowledge is insufficient to show extraordinary circumstances. *Miracle Recreation*, 118 F.R.D. at 105. In *Miracle Recreation*, the record suggested that CPSC Chair Scanlon had "some personal knowledge of the relevant facts," including attending and participating in a meeting where the Commission rejected a settlement offer. *Id.* Nevertheless, this minimal personal knowledge was insufficient to overcome the high bar of the *Morgan* doctrine, especially where alternative sources of information exist to obtain the same information. *Id.*

Courts have extended the *Morgan* doctrine to prohibit discovery where a party is seeking the deposition of *former* high-ranking officials. *See, e.g.*, *Federal Deposit Ins. Corp. v. Galan-Alvarez*, 2015 WL 5602342 (D.D.C. 2015); *Moriah v. Bank of China Ltd.*, 72 F. Supp. 3d 437 (S.D.N.Y. 2014); *Sargent v. City of Seattle*, 2013 WL 1898213 (W.D. Wash. 2013); *Dobson v. Vail*, 2011 WL 4404146 (W.D. Wash. 2011); *Thomas v. Cate*, 715 F. Supp. 2d 1012 (E.D. Cal.

2010); *Sensient Colors*, 649 F. Supp. 2d at 316–17; *Gil v. County of Suffolk*, 2007 WL 2071701 (E.D.N.Y. 2007); *Bey v. City of New York*, 2007 WL 3010023 (S.D.N.Y. 2007); *Wal-Mart Stores*, 2002 WL 562301.

In *Wal-Mart Stores*—which involved the requested deposition of *former CPSC Chair*, Ann Brown—the court held that "the *Morgan* doctrine, which protects high-ranking government officials from being subjected to deposition in the absence of a showing of extraordinary circumstances, is applicable to protect said officials to the same degree upon their departure from public service." 2002 WL 562301 at *5. The court in *Wal-Mart Stores* noted that "[i]f the immunity *Morgan* affords is to have any meaning, the protections must continue upon the official's departure from public service." *Id.* at *3 (stating further that "[s]ubjecting former officials decision-making processes to judicial scrutiny and the possibility of continued participation in lawsuits years after leaving public office would serve as a significant deterrent to qualified candidates for public service").

The *Wal-Mart Stores* court elaborated that "the party seeking to depose a former high-ranking official must still demonstrate the existence of extraordinary circumstances or the personal involvement of the former official in a *material* way." *Id.* (emphasis added). Although not defining the bounds of personal involvement, the court recognized that high-ranking officials "will be privy to a wide range of information due solely to their positions," but that there is "a point when their involvement becomes less supervisory and directory and more hands-on and personal, that it is considered so intertwined with the issues in controversy that fundamental fairness requires the discovery of factual information held by the official by way of deposition." *Id.*

In this matter, Respondent has not argued that any extraordinary circumstance exists requiring the deposition of Mr. Adler. Further, and as detailed below, the facts belie any personal involvement by Mr. Adler "so intertwined with the issues in controversy" here.

### B. Respondent Has Not Demonstrated Any Extraordinary Circumstances or Material Personal Involvement to Permit the Deposition of Mr. Adler

Respondent's application for the issuance of a non-party subpoena ostensibly offers two subject areas about which it proposes to depose former Commissioner and Acting Chairman of the CPSC, Hon. Robert S. Adler. First, Respondent seeks to ask Mr. Adler questions about a 2017 rulemaking petition about residential elevators generally, for which a substantial public record exists, and any non-public information involving Mr. Adler would be confidential and subject to the mental process privilege. Further, the purpose of the petition was for the Commission to take *prospective* rulemaking to regulate the entire residential elevator industry; unlike the issue in this matter, which seeks a recall of Respondent's Elevators that pose a substantial product hazard. Second, Respondent seeks to inquire about a lunch purportedly attended by Mr. Adler in 2013, almost 10 years ago, based on three emails produced in discovery not involving Mr. Adler, and years before the Complaint in this matter was authorized and issued. Respondent suggests that his attendance at a lunch means he has "unique knowledge" of a 2013 investigation that was subsequently closed in 2014.

Each of these subject areas are too far afield from the issues in this case, and fall far short of the heightened relevancy and materiality requirements under the *Morgan* doctrine to permit the exceptional step of allowing Mr. Adler to be deposed.

#### 1. The Facts Surrounding the 2017 Rulemaking Briefing Package Do Not Warrant the Deposition of Former Acting Chair Adler

In its application, Respondent first suggests that because Mr. Adler was a former Commissioner and Acting Chair of the CPSC, he "has direct knowledge of CPSC's policies and

practices, its handling of this matter, and the facts surrounding this action, including, but not limited to, the agency's 2017 denial of a petition seeking adoption of a mandatory rule governing residential elevators and agency staff's statement that they "'could not identify any specific elevator models or manufacturers whose installation revealed design defects or installation defects that caused a substantial product hazard resulting from an excess space gap between the car door and hoistway [door].'"[1]

This is simply incorrect. This quoted sentence is from one page of a 64-page Briefing Package prepared by CPSC agency staff submitted to the Commission for the petition.[2] Even holding aside that the Briefing Package makes it clear that the issue before the Commission was whether to conduct a *prospective* rulemaking for an entire industry, and not the consideration of whether an individual product creates a substantial product hazard action under Section 15 of the CPSA as is the issue here,[3] Respondent has proffered no basis to suggest that Mr. Adler possesses any knowledge of a single sentence from a Briefing Package that he neither drafted nor edited. As with any Commissioner who took part in the evaluation of the Petition, Mr. Adler's role as a Commissioner was to review the Briefing Package and vote on the Petition. Respondent has not, and cannot, demonstrate that there is even a remote possibility that Mr. Adler would provide any relevant testimony about a document Mr. Adler had no role in writing, reviewing, or editing. Under this broad theory, any Commissioner—sitting or former—would perpetually be

[1] Respondent's Application for the Issuance of a Subpoena on Non-Party Robert S. Adler, January 25, 2022 at 2 (Resp. Application).
[2] *See* Briefing Package, Petition CP 15-01: Petition for Residential Elevators, at 14 (Mar. 15, 2017), available at https://www.cpsc.gov/s3fs-public/Petition-CP-15-1-Requesting-Rulemaking-on-Residential-Elevators-March-Redacted.pdf.
[3] *Id.* at 4 n.1 (stating that although the rulemaking petition requested a recall, such remedial action was only appropriate under a Section 15 substantial product hazard case, and "only the request for rulemaking on residential elevators was docketed as a petition.").

subject to depositions in any litigation involving the more than 15,000 consumer products regulated by the Commission.

This is the exact type of unduly burdensome discovery request that is precluded by the *Morgan* doctrine—CPSC's policies and practices and the handling of investigations by Commissioners are squarely within the purview of the mental process privilege. *See Wal-Mart Stores*, 2002 WL 562301, at *1 ("*Morgan* has come to stand for the notion that as for high-ranking government officials, their thought processes and discretionary acts will not be subject to later inspection under the spotlight of deposition.").

Moreover, aside from the *Morgan* doctrine, Respondent's non-party subpoena does not satisfy the relevancy standard in 16 C.F.R. § 1025.31(c)(1). The subject matter involved in these proceedings concerns whether Respondent's Elevators are defective and create a substantial product hazard under Section 15 of the CPSA, 15 U.S.C. § 2064. The information Respondent seeks relating to the rulemaking petition is neither relevant to the subject matter involved in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Put simply, the Commission's determination approximately five years ago not to consider possible industry-wide performance standards for *prospective* residential elevator installations is not relevant to the Court's analysis of whether Respondent's Elevators in consumers' homes present a substantial product hazard under Section 15 of the CPSA, 15 U.S.C. § 2064, or applicable regulations, including 16 C.F.R. Part 1115.

### 2. Respondent's Claim that Mr. Adler Had "Unique Knowledge" of a Prior Investigation Based on an Email is Unfounded

Respondent asserts that a singular email chain produced by Complaint Counsel "suggest[s] that Mr. Adler held at least one direct, private, previously undisclosed meeting with representatives of the law firm Cash, Krugler & Fredericks, LLC, in or about 2013 . . . [and] [a]s

such, Mr. Adler has unique knowledge of the facts and circumstances surrounding the 2013 investigation, which the agency subsequently closed."[4]

There are no facts to support this baseless claim. First, Respondent mischaracterizes the emails as establishing that Mr. Adler held a meeting with representatives from a law firm. However, even a cursory review shows that the "meeting" was in fact merely a lunch event held during a public conference sponsored by the Safety Institute in Chicago in July 2013.[5] The emails cited by Respondent were neither received nor sent by Mr. Adler. The principal email in the chain was written by Andrew Cash, a private attorney, who was writing to Jonathan Thron, a former CPSC Compliance Officer, all of which is hearsay.[6] Respondent's claim that Mr. Adler should be deposed concerning his presence at a lunch occurring almost 10 years before the Complaint does not withstand the unique knowledge test under *Morgan*.

Additionally, the *Morgan* doctrine is clear that a high-ranking official's testimony should be prevented where there are alternative sources for the proffered information. *Miracle Recreation*, 118 F.R.D. at 105. Here, there are other, alternative sources of information for this line of questioning, notwithstanding the limited relevancy and materiality of this topic to whether Respondent's Elevators create a substantial product hazard.

Based on these emails, Respondent takes speculative information about a lunch and makes an illogical leap: that Mr. Adler has "unique knowledge" of the CPSC investigation that was closed in 2014. However, the reasons for the closing of the 2014 investigation are already known to the Respondent, documented in a closing letter.[7] Respondent has sought, and

[4] Resp. Application at 2.
[5] Email from Andrew B. Cash to Jonathan Thron, Jun. 3, 2014 2:59 p.m., "Re: Residential elevators presentation," CPSC_21-1_024693-94 at 93 (Exhibit 1).
[6] *Id.*
[7] *See* Letter from Jonathan Thron to Jay Doyle re: CPSC File No. CA140069 (Jun. 19, 2014) (Exhibit 2).

Complaint Counsel has provided, written discovery responses regarding persons with knowledge of the closing letter.[8] As such, any further questioning related to this topic is not reasonably calculated to lead to the discovery of admissible evidence under 16 C.F.R. § 1025.31(c)(1). Thus, Respondent has no basis in fact to suggest Mr. Adler is a proper witness to testify about an investigation in which he did not participate, or any of the thousands of cases which were handled in Compliance during his tenure at the Commission.

## IV. CONCLUSION

For the foregoing reasons, Complaint Counsel requests the Presiding Officer enter a just and appropriate protective order that the deposition of non-party Robert S. Adler "not be had." A proposed Order is attached.

[8] *See* Complaint Counsel's Objections and Responses to Respondent's First Set of Interrogatories to Consumer Product Safety Commission, Response to Interrogatory No. 2, at 7–8 (Exhibit 3) (identifying Jonathan Thron, Kelly Moore, Marc Schoem, Renae Rauchschwalbe and Matthew Lee as persons with knowledge of the June 19, 2014 Closing Letter). In response to further inquiries by Respondent, Complaint Counsel represented that Mary Boyle, DeWayne Ray, Mark Kumagai, and Hope Nesteruk did not have any involvement in the compliance decision to close the prior investigation. *See* Letter from Frederick Millett to Sheila Millar, at 4–5 (Jan. 11, 2022) (Exhibit 4). Mr. Adler has not been identified as a person with knowledge of the Closing Letter in any communications from Complaint Counsel.

Dated this 2nd day of February, 2022.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2022, I served Complaint Counsel's Motion for Protective Order Regarding the Deposition of Non-Party Robert S. Adler as follows:

*By email to the Secretary*:

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Secretary
U.S. Consumer Product Safety Commission
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*By email to the Presiding Officer*:

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*By email to Counsel for Respondent*:

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**[PROPOSED] PROTECTIVE ORDER PREVENTING THE DEPOSITION OF NON-PARTY ROBERT S. ADLER**

This matter, having come before the Presiding Officer on Complaint Counsel's Motion for Protective Order Regarding the Deposition of Non-Party Robert S. Adler, dated February 2, 2022, it is hereby ORDERED that the Motion is GRANTED.

Accordingly, the deposition of non-party Robert S. Adler "shall not be had." 16 C.F.R. § 1025.31(d)(1).

Done and dated February __ 2022

Arlington, VA

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Mary F. Withum
Administrative Law Judge

**Exhibits 1-4** have been filed *in camera* pursuant to the Court's October 12, 2021 Protective Order.