UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION TO STRIKE

Pursuant to 16 C.F.R. § 1025.23, Complaint Counsel respectfully submits its Opposition to Respondent thyssenkrupp Access Corp., now known as TK Access Solutions Corp.'s ("Respondent"), Motion to Strike.

I. INTRODUCTION

On July 27, 2021, Respondent filed a Motion to Strike and a Memorandum in Support of Respondent's Motion to Strike (collectively, "Motion to Strike"). Respondent argues that (1) paragraph C(3) of the Complaint's "Relief Sought" should be stricken because the Consumer Product Safety Act ("CPSA") does not permit retrospective reimbursement and (2) paragraph D of the Complaint's "Relief Sought" should be stricken because the CPSA does not provide for any "catch-all" relief.

Respondent's Motion to Strike should be denied. First, a motion to strike is an improper procedural mechanism upon which to contest the relief sought. Second, even if it were appropriate to address the merits, Respondent's contention about the limits of the CPSA's remedial provisions are incorrect as a matter of law.

II. BACKGROUND

On July 7, 2021, Complaint Counsel filed an Administrative Complaint ("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 CPSA. Compl. ¶¶ 40–65, 102–111, 119–121.

The relief sought by the Complaint includes, among other things, that the Consumer Product Safety Commission ("CPSC"): determine that the Elevators present a substantial product hazard; order extensive notification to protect the public; order Respondent to remedy the defective Elevators; and order that Respondent take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA. Compl. at 15–17, ¶¶ A–D.

On July 27, 2021, Respondent answered the Complaint, generally denying that the Elevators are defective or present a substantial product hazard. Answer ¶¶ 117–121. Respondent also denied that CPSC is entitled to any relief. Answer at 36. In addition, Respondent asserted numerous affirmative defenses, including an affirmative defense that the CPSC is not entitled to an order that Respondent reimburse consumers for repair expenses and one that the CPSC is not entitled to relief that can be granted. Answer at 38 (Fourth Affirmative Defense), 44 (Nineteenth Affirmative Defense).

III. RESPONDENT'S MOTION TO STRIKE IS PROCEDURALLY DEFECTIVE

The administrative rules governing this proceeding—the Rules of Practice For Adjudicative Proceedings, 16 C.F.R. § 1025 *et. seq.* ("Rules of Practice")—do not specifically provide for a motion to strike. Rather, parties can generally file motions seeking an "order, ruling or action" under 16 C.F.R. § 1025.23. While the Rules of Practice also do not specifically

reference the Federal Rules of Civil Procedure ("Federal Rules"), those rules can provide guidance to these proceedings because there is a well-developed body of precedent regarding how courts should address motions to strike. *See* 16 C.F.R. § 1025.2 (noting that administrative proceedings under the CPSA should be conducted with "due regard to the rights and interests of all persons affected"); *see also In re Fresh Prep, Inc.*, 58 Agric. Dec. 683, 1999 WL 138222, at *4 (U.S.D.A. March 11, 1999) (stating that the Federal Rules can provide guidance with respect to administrative rules of practice). Although this court is not bound by the Federal Rules, many administrative proceedings have looked to them for guidance on construing motions for which there is not an exact administrative mechanism. *See, e.g.*, *In re Healthway Shopping Network*, Exch. Act Rel. No. 89374, 2020 WL 4207666, at *2 (July 22, 2020) (SEC administrative proceeding guided by Federal Rules for interpretation of its Rules of Practice).

Under Rule 12(f) of the Federal Rules, a party may move to strike "from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). As a general matter, courts addressing motions to strike have noted they are "narrow in scope, disfavored in practice, and not calculated readily to invoke the court's discretion." *Boreri v. Fiat, S.p.A.*, 763 F.2d 17, 23 (1st Cir. 1985); *see also Blake v. Batmasian*, 318 F.R.D. 698, 700–01 (S.D. Fla. 2017) (noting that a motion to strike will be granted only if the matter sought to be omitted has no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party.").

By the plain language of the Rule, motions to strike only pertain to a pleading's insufficient defense or "redundant, immaterial, impertinent, or scandalous matter." Respondent is not seeking to strike any of the Commission's "defenses" so the first prong of Rule 12(f) is inapplicable. Moreover, Respondent is not arguing that the Relief Sought is redundant or

immaterial, nor is Respondent suggesting that it is "impertinent" or "scandalous." *See Oaks v. City of Fairhope, Ala.*, 515 F. Supp. 1004, 1032 (S.D. Ala. 1981) (noting that an allegation is immaterial if it has no value in developing the issues of the case and an allegation is impertinent if it is irrelevant to the issues or is not properly in issue between the parties); *Blake*, 318 F.R.D. at 700 n.4 (noting that a matter is scandalous if it is both grossly disgraceful (or defamatory) and irrelevant to the action or defense).

When measured against these standards governing a motion to strike, Respondent's Motion to Strike should be denied. A motion to strike is not a legally recognized procedural vehicle for contesting the Relief Sought in the Complaint.

IV. THE CPSA PERMITS THE RELIEF SOUGHT IN THE COMPLAINT

Respondent asks this court to strike paragraph C(3) of the Complaint's Relief Sought that requests, among other things, an Order requiring Respondent to reimburse consumers for expenses, including previous purchases of space guards or other safety devices, and all costs associated with those purchases. Respondent argues that the plain language of the CPSA does not permit this type of relief. This argument is without merit and should be rejected.

Congress announced unambiguously that the overall purpose of the CPSA is "to protect the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. § 2051(b)(1), and courts have "liberally construed" the CPSA "in accordance with the stated purposes of this legislation, i.e., the protection of consumers from injury due to unsafe products." *United States v. One Hazardous Prod. Consisting of a Refuse Bin*, 487 F. Supp. 581, 584 (D.N.J. 1980); *see also Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (noting "familiar canon of statutory construction" that remedial legislation "should be construed broadly to effectuate its purposes"). Further, any exemption from remedial legislation, like the CPSA, "must . . . be

narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

The Complaint cites Sections 15(d) and 15(e)(1) of the CPSA, 15 U.S.C. § 2064(d), (e)(1), as authority for the reimbursement relief sought. Section (e)(1) provides that:

> (e) Reimbursement (1) No charge shall be made to any person (other than a manufacturer, distributor, or retailer) who avails himself of any remedy provided under an order issued under subsection (d), and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or retailer) who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy.

The CPSC is seeking reimbursement not only for consumers who are unknowingly exposed to the deadly elevator hazard that is the subject of the Complaint in their homes, but also for consumers who learned of the hazard created by Respondent's defective elevators and took action independently to make their home safe by for example, purchasing space guards, or paying for professional inspections and/or installation of space guards for one of Respondent's defective Elevators in order to remove the dangerous hazard from their home. Respondent did not freely provide such safety devices to consumers, but required that consumers pay for 75% of such devices through their homeSAFE campaign, and some consumers may have paid for repairs independent of any program offered by Respondent. Under the CPSA, consumers are not forced to suffer financially for taking self-help measures to correct Respondent's substantial product hazard, nor should Respondent avoid paying for those expenses simply because the consumer was knowledgeable enough to engage in self-help, or worse, by creating delay and allowing defective and hazardous products to remain in commerce.

A plain reading of subpart (e)(1) shows that it is designed not to limit the Commission's ability to grant relief to affected consumers, but to prevent any order limiting relief in a manner that would result in consumers being charged. Indeed, Congress specifically intended to limit

the Commission's authority to charge consumers for remedies—"no charge shall be made." And certainly nothing in (e)(1) expressly excludes a reimbursement remedy. The Complaint cites Section 15(d) of the CPSA as the statutory basis for the issuance of broad actions to remediate a consumer product that presents a substantial product hazard. Based on the broad remedial powers in Section 15(d), and in consideration of the underlying purposes of the CPSA, Congress plainly provided for firms, like Respondent, to provide remedies to all impacted consumers at no charge.

Respondent's tortured reading of the statute, in which the verb tense "avail" is construed to mean only at a time after a mandatory recall is ordered, is without merit. To the contrary, subsection (e)(1)'s description of a consumer who "avails" themselves of a remedy does not specifically mention the timeframe of that expenditure. The only reasonable interpretation of this part of the statute, consistent with the statute's purpose, is that a consumer could "avail" themselves of a remedy either before or after a mandatory recall.

Not permitting reimbursement of expenses paid by consumers, to remedy the defect in advance of the conclusion of litigation seeking a mandatory recall that could span years, would run counter to Congress's intent to protect consumers from unreasonable risk of injury due to consumer products. Indeed, it would discourage consumers from promptly taking safety conscious remedial efforts to remediate hazards when manufacturers refuse to fully fund those actions, as was the case here. *See* Compl. ¶ 95 (alleging Respondent only distributed 422 space guards as part of homeSAFE campaign).

Respondent also cites to a statute entirely unrelated to the CPSA, the National Traffic and Motor Vehicle Safety Act ("MVSA") as purported support for the proposition that this Complaint's request for reimbursement is invalid. However, although the MVSA's statutory

language is more specific with regard to reimbursements for expenses prior to recalls, Respondent offers no other support for its argument that the CPSA should be interpreted consistent with the MVSA. The CPSA and MVSA are two entirely different statutes, involving regulation of different products, containing differing standards regarding identification and reporting of defects, and Congress's drafting of one statute in a different manner is not binding on another. *See, e.g.*, *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008) (noting that while there may be some commonalities between different statutes, parties should not "apply rules applicable under one statute to a different statute without careful and critical examination."). In *Holowecki*, the Supreme Court was examining a case involving an age discrimination suit under the Age Discrimination in Employment Act ("ADEA"). Before getting to the specific questions involved in that case, the Court explained that while there were commonalities between the ADEA and Title VII of the Civil Rights Act of 1964, parties could not rely on certain rules being applicable to both. *Id.* Similarly, although both the CPSC and the National Highway Transportation Safety Administration, which enforces the MVSA, have a safety mission, they have unique statutory authority and recall mechanisms, and a superficial comparison of the statutes does not support the drastic relief urged by Respondent—which is, not surprisingly, unsupported by any legal authority. As such, this court should deny Respondent's Motion to Strike.

Respondent also requests that this court strike paragraph D of the Complaint's Relief Sought. That part of the Complaint asked for an order "that Respondent take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA." Compl. at 17, ¶ D. Again, Respondent's hyper-technical view of the statutory remedies under Section 15 is completely undercut by the underlying purpose of the CPSA as

constructed by Congress, as detailed *supra*. *See U.S. v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 495 (2001) (noting that "courts whose equity powers have been properly invoked indeed have discretion in fashioning injunctive relief (in the absence of a statutory restriction)"); *see also Weinberger v. Romero–Barcelo*, 456 U.S. 305, 313 ("Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles."). In this case there is no express CPSA statutory restriction on the exercise of traditional equitable relief.

All that Respondent posits in support of its argument is the absence of a statutory express catch-all provision. Yet a "catch-all" request for relief is a traditional and well-accepted norm for complaints in all forums. It permits an adjudicator to conform the relief sought to the evidence presented at trial without pigeon-holing and artificially limiting the complaint's Relief Sought. *See, e.g.*, Fed. R. Civ. P. 54(c) (stating that "[e]very other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings"); Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice.").

Respondent's argument against the availability of catch-all relief would lead to absurd results. If, for example, the evidence presented at trial suggested that a "light curtain" sensor or other mechanism would be the appropriate remedial fix as opposed to space guards that are specifically mentioned in the Relief Sought, this Court and the Commission should have the discretion and ability to fashion the relief that is most appropriate based on the facts and evidence.

V. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that Respondent's Motion to Strike be denied.

Dated this 6th day of August, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021, I served Complaint Counsel's Opposition to Respondent's Motion to Strike upon all parties and participants of record in these proceedings as follows:

An original and three copies by U.S. mail, postage prepaid, and one copy by email, to the Secretary:

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