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 NON-PARTY JURRIEN VAN DEN AKKER'S MOTION TO QUASH SUBPOENA

Pursuant to 16 C.F.R. § 1025.38(g), Complaint Counsel respectfully opposes non-party Jurrien van den Akker's Motion to Quash. The motion to quash should be denied because: (1) the information sought by Complaint Counsel is relevant and necessary for this proceeding as Mr. van den Akker served as President of Respondent, thyssenkrupp Access Corp. ("TKA") for more than 4 years; (2) the deposition of Mr. van den Akker would not be unreasonably duplicative of depositions from different cases involving different parties and claims; and, (3) the deposition is not unduly burdensome.

I. THE LAW SUPPORTS DENIAL OF THE MOTION TO QUASH

In this proceeding, "[p]arties may obtain discovery regarding any matter, not privileged . . . relevant to the subject matter involved. . . ." 16 C.F.R. § 1025.31(c)(1). Pursuant to 16 C.F.R. § 1025.28(g), the person to whom a non-party subpoena is directed must set forth "the reasons why the subpoena should be withdrawn. . . ." Although this court is not bound by the Federal Rules of Civil Procedure, many administrative proceedings have looked to them for guidance on construing applications 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).

The practice under the Federal Rules and as emphasized by the U.S. Supreme Court is that discovery is "accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). "In general, discovery is permissible with respect to 'any nonprivileged matter that is relevant to any party's claim.'" *Kelley v. Microsoft Corp.*, No. C07-0475MJP, 2008 WL 5000278, at *1 (W.D. Wash. Nov. 21, 2008) (quoting Fed. R. Civ. P. 26(b)(1)). "Although not unlimited, relevance, for purposes of discovery, is an extremely broad concept." *Copantitla v. Fiskardo Estiatorio, Inc.,* No. 09 CIV. 1608 RJH JCF, 2010 WL 1327921, at *9 (S.D.N.Y. Apr. 5, 2010) (quotation marks and citation omitted).

"Once the party issuing the subpoena has demonstrated the relevance of the requested documents, the party seeking to quash the subpoena bears the burden of demonstrating that the subpoena is over-broad, duplicative, or unduly burdensome." *Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers LLP*, No. 03 CIV. 5560 (RMB) HBP, 2008 WL 4452134, at *4 (S.D.N.Y. Oct. 2, 2008) (citation omitted). Decisions to limit discovery "are left to the sound discretion of the trial judge." *Corbett v. eHome Credit Corp.*, No. 10-CV-26 (JG) (RLM), 2010 WL 3023870, at *3 (E.D.N.Y. Aug. 2, 2010). However, "[c]ourts should not bar a relevant deposition 'absent extraordinary circumstances' as such a prohibition would 'likely be in error.'" *Kelley*, 2008 WL 5000278, at *1 (quoting *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)); *see also Motsinger v. Flynt,* 119 F.R.D. 373, 378 (M.D.N.C. 1988) ("Absent a strong showing of good cause and extraordinary circumstances, a court should not prohibit altogether the taking of a deposition.")

II. THE MOTION TO QUASH SHOULD BE DENIED BECAUSE THE DEPOSITION SEEKS RELEVANT INFORMATION AND IS NOT DUPLICATIVE NOR BURDENSOME

A. The Information Sought is Relevant

Mr. van den Akker served as President of TKA from November 1, 2011 to December 24, 2015. In that position, for at least a portion of that time period, Mr. van den Akker oversaw Respondent's business operations designing, manufacturing, and selling residential elevators. His knowledge of TKA's operations is clearly relevant to Complaint Counsel's action for an Initial Decision and Order determining that various models of residential elevators manufactured and distributed by Respondent present a substantial product hazard. During his time at TKA, Mr. van den Akker oversaw operations when Respondent, as alleged in the Complaint, manufactured and distributed potentially thousands of residential elevators that pose a substantial product hazard.

Moreover, Mr. van den Akker also oversaw TKA after it wound down its residential elevator business, and Complaint Counsel believes he has knowledge regarding Respondent's operations after it exited the market, including, but not limited to, its first unilateral campaign, homeSAFE. Thus, Mr. van den Akker may have key information and may provide key testimony on TKA's actions concerning whether to remedy the substantial product hazard posed by the residential elevators. That this testimony is relevant is not even contested by Mr. van den Akker in his motion to quash. As noted above, "relevance, for purposes of discovery, is an extremely broad concept." *Copantitla,* 2010 WL 1327921, at *9. Mr. van den Akker's knowledge of facts bearing on whether the elevators are a substantial product hazard is clearly relevant to this proceeding.

B. The Information Sought is Not Unreasonably Duplicative

Mr. van den Akker argues that his deposition in this matter would be entirely duplicative of two prior depositions he gave in two cases brought by families of children killed or

permanently and grievously injured when they became entrapped in the hazardous space between the hoistway and car doors of TKA's elevators. Mr. van den Akker says these depositions are the "best available evidence" regarding his knowledge of these incidents. However, as described more fully below, Mr. van den Akker's testimony would not be duplicative because this case involves different parties, different products, and entirely different causes of action.

First, the prior depositions were given pursuant to entirely different causes of action than those at issue here. Specifically, the previous actions were cases by private litigants bringing negligence and product liability claims under Georgia and Arkansas state law. Counsel in prior depositions of Mr. van den Akker sought to establish, for example, that Respondent had a duty of care to the individual plaintiffs and that Respondent breached that duty.[1] Such elements of proof are entirely distinct from those in this case, where Complaint Counsel seeks an Initial Decision and Order that various models of residential elevators manufactured and distributed by Respondent present a "substantial product hazard" under 15 U.S.C. § 2064(a)(2), a finding that requires establishing a "defect" that poses a "substantial risk of injury to the public" under federal law.[2] This is a different legal analysis and finding than that which is required to establish the breach of a duty of care under state law.

Second, the prior matters narrowly focused on only a subset of Respondent's residential elevator models, not the wider range of products relevant in this case. Specifically, the attorneys who previously deposed Mr. van den Akker did so to establish claims relating to only two of

[1] "Under Georgia law, to state a claim for negligence, the following elements are essential: (1) A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risk of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and, (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty." *Pappas Rest., Inc. v. Welch*, 2021 WL 5898809, at *2 (Ga. Ct. App. Dec. 14, 2021).

[2] A "substantial product hazard" is "a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public." 15 U.S.C. § 2064(a)(2).

Respondent's residential elevators, the Destiny and LEV models that were involved in each specific incident. Complaint Counsel's inquiry and evidence goes far beyond these two; alleging that not only the Destiny and LEV models present a substantial product hazard, but that the Chaparral, LEV II, LEV II Builder, Volant, Windsor, Independence, and Flexi-Lift models do as well. Complaint ¶ 11. These additional models have different instructions and warnings that were not litigated in the private actions brought by the two families. Further, the individual families that filed suit against TKA sought compensation for their specific incidents; whereas, here, Complaint Counsel is seeking a recall to protect all consumers from future and potentially deadly incidents.

Discovery is not duplicative when the subject matter of the later subpoena is broader than that of the first. Courts routinely deny motions to quash where, as here, the information sought is "inherently divergent" from the prior matter. *Flanagan v. Wyndham Int'l Inc.*, 231 F.R.D. 98, 105 (D.D.C. 2005) (denying motion to quash non-party subpoena where prior depositions of the non-party took place before the current action was initiated and therefore, prior depositions did not seek "information specific to these plaintiffs and these cases"); *see also Willis v. Big Lots, Inc.*, Civ. Action. 2:12-cv-604, 2017 WL 2608960, *5 (S.D. Ohio June 6, 2017) (denying motion to quash even though "other discovery may exist on these topics" and observing that limiting the deposition would mean that "'no litigant could ever revisit a topic in discovery.'") (citation omitted).

The Supreme Court has recognized that the Government and private litigants are not in the same position because, among other things, the claims at issue for Government litigation necessarily involve matters of substantial public importance. *See United States v. Mendoza*, 464 U.S. 154, 162-63 (1984) (holding the doctrine of nonmutual offensive collateral estoppel did not

operate against the Government, noting "[t]he conduct of government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the government").

Mr. van den Akker is essentially seeking to collaterally estop Complaint Counsel from taking testimony and *Mendoza* stands for the proposition broadly that Government actions brought in the public interest cannot be limited in the same way that private litigants are constrained by the law of preclusion. *See, e.g.*, *Securities and Exchange Commission v. Seahawk Deep Ocean Tech.*, 166 F.R.D. 268, 271 (D. Conn. 1996) (denying motion to quash in SEC enforcement action, noting "the testimony is highly relevant to the underlying case and there is a strong public interest in favor of the litigation of such claims. The SEC brings securities enforcement actions in the public interest of preventing widespread securities fraud and, on the facts of this case, that interest outweighs any interest the movant might have in not disclosing the verification testimony at issue"). In the same manner, Complaint Counsel is bringing this action in the public interest, seeking to protect consumers from defective and unsafe elevators, and, as such, the subpoena should not be quashed.

Even if some of Complaint Counsel's inquiries overlap with those asked by *other* parties in *other* cases, overlap alone is not enough to make the subpoena unreasonably duplicative, unduly burdensome, or disproportionate to its evidentiary value. *See Cuviello v. Feld Entm't, Inc.*, No. 5:13-CV-03135-LHK, 2014 WL 12607811, at *2 (N.D. Cal. Nov. 14, 2014) (holding that there was "no merit" to the contention that subpoenas for deposition "are unduly burdensome simply because they may solicit testimony that overlaps with previous testimony"). It bears repeating that the question is not whether Complaint Counsel's subpoena is duplicative

of prior discovery in other actions, but rather "whether the [current subpoena] is *unreasonably* duplicative." *UniRAM Tech., Inc. v. Monolithic Sys. Tech., Inc.*, 2007 WL 915225, at *2 (N.D. Cal. 2007) (emphasis in original). Complaint Counsel's subpoena is not unreasonably duplicative of prior discovery because it relates to different parties, different products, and different causes of action than prior matters. Complaint Counsel here is seeking a recall to protect all consumers, a remedy much broader than what was sought by the two families in the prior TKA matters.

C. The Information Sought is Not Unduly Burdensome

Whether a subpoena imposes an "undue burden" upon a witness is a case specific inquiry that turns on factors such as relevance, the need of the party for the discovery, the breadth of the request, the time period covered by it, the particularity with which the request is described, and the burden imposed. *Am. Elec. Power Co. v. United States*, 191 F.R.D. 132, 136 (S.D. Ohio 1999).

Complaint Counsel's non-party subpoena request for Mr. van den Akker is tailored to his involvement with Respondent and Respondent's elevators during the dates of his employment with Respondent. As a former President of Respondent, Mr. van den Akker has unique knowledge of the issues in this case. Since Respondent is no longer in the residential elevator business, there are no current corporate officers of Respondent that have the type of information that Mr. van den Akker possesses. As Mr. van den Akker was President of Respondent during the time period immediately after one of the incidents described in the Complaint, and during the time when Respondent released its homeSAFE campaign, his testimony is particularly relevant to Complaint Counsel's discovery strategy.

As discussed above, because the issues in this case and the previous actions do not completely overlap, there are several relevant topic areas that have not been discussed in those

prior depositions, including elevator models not at issue in the two prior private state law cases, Mr. van den Akker's role in a prior recall involving a different defect and hazard concerning Respondent's elevators, the relationship between Respondent and other thyssenkrupp affiliated entities, and the homeSAFE unilateral campaign as it relates to the public interest in consumer safety broadly.

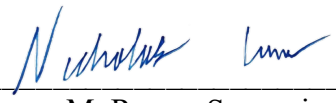
Because Mr. van den Akker asserts that he has no documents in his possession, custody, or control from his time with Respondent, Complaint Counsel's request is, essentially, a request for deposition. Due to the current ongoing issues with COVID-19, Complaint Counsel has proposed that the deposition take place virtually. Thus, the burden imposed on Mr. van den Akker in this case is particularly low and should not weigh in favor of quashing this subpoena request.

III. CONCLUSION

Complaint Counsel seeks to ask Mr. van den Akker about his tenure as President of TKA and his role in the design, manufacture, and sale of TKA's residential elevators—inquiries that are indisputably relevant to this matter. Mr. van den Akker's claim that "[any] current testimony could only be duplicative of [his] prior deposition testimony" is belied by the fact that this action is brought by different parties litigating different legal claims involving a different group of products. Complaint Counsel's subpoena is not unreasonably duplicative and even incidental overlap does not warrant quashing discovery. Thus, Complaint Counsel respectfully requests that this Court deny Mr. van den Akker's motion.

Dated this 3rd day of February 2022

Respectfully submitted,



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I hereby certify that on February 3, 2022, I served Complaint Counsel's Opposition to Non-Party Jurrien Van Den Akker's Motion to Quash Subpoena as follows:

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