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 KEVIN L. BRINKMAN'S MOTION TO QUASH SUBPOENA

Pursuant to 16 C.F.R. § 1025.38(g), Complaint Counsel respectfully opposes non-party Kevin L. Brinkman'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. Brinkman served from April 2008 through March 2013 in various leadership roles for Respondent, including Vice President of Operations for the National Wheel-O-Vator Division (having worked for the National Wheel-O-Vator Company from 1990-2008), Vice President of Quality and Code Compliance, and Vice President of Engineering and Quality, and later served as a consultant to Respondent in connection with its unilateral homeSAFE outreach effort; (2) the deposition of Mr. Brinkman would not be unreasonably duplicative of depositions from different cases involving different parties and claims; and, (3) the deposition and request for production of documents are 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1025.28(g), the person to whom a non-party subpoena is directed must set forth "the reasons why the subpoena should be withdrawn."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 (Jul. 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 NEITHER DUPLICATIVE NOR BURDENSOME

A. The Information Sought is Relevant

Mr. Brinkman served in several management and other important roles for Respondent. He joined the National Wheel-O-Vator Company in 1990, which was later merged into Respondent in 2008. Mr. Brinkman was involved in the design, engineering, and production of the Destiny model residential elevator, the specific elevator model involved in *two of the three incidents* in this proceeding. After Respondent merged with National Wheel-O-Vator in 2008, Mr. Brinkman became Vice President of Operations for the National Wheel-O-Vator Division, where he oversaw the production of Destiny model elevators. Mr. Brinkman then became Vice President of Quality and Code Compliance and assumed responsibility for quality control with respect to all of Respondent's manufacturing facilities, as well as code compliance for *all lines of elevators* designed and manufactured by Respondent. He later served as Vice President of Engineering and Quality and gained responsibility over the engineering of Respondent's elevators.

As part of his employment with Respondent, Mr. Brinkman trained elevator installers on the applicable safety standards, including how to measure the gap space between car doors and hoistway doors, and educated them on the hazard posed by excessive gap spaces. He also reviewed potential design changes to Respondent's elevators and attempted to ensure that the changes complied with the relevant standards. After his employment with Respondent ended in

2013, Mr. Brinkman, through his consulting company Kevin Brinkman & Associates, served as project administrator for the homeSAFE website and provided consulting services to Respondent in connection with its unilateral homeSAFE outreach effort, including the design and production of space guards.

Further to his employment with Respondent, Mr. Brinkman represented Respondent on the American Society for Mechanical Engineers ("ASME") A17 Residence Elevator Committee, which develops safety standards for residential elevators. He had significant involvement on the committee, having served as chairman from 2011 to 2014, vice chairman for the preceding 3-4 years, and a consulting member for several years afterward. He previously represented National Wheel-O-Vator on the committee. During his membership, the committee discussed changes to the width of the hazardous gap space and how that space is measured, and Mr. Brinkman at times served as Task Group Leader for the group in charge of changes to the gap space rule.

Mr. Brinkman's roles within Respondent likely gave him knowledge of the design and production of the subject elevators, including with respect to the hazardous gap space that is the subject of this action, and Respondent's unilateral homeSAFE outreach effort. He is also familiar with the training and instructions that Respondent provided to installers with respect to the gap space. Further, Mr. Brinkman's lengthy membership and significant involvement in the ASME A17 Residence Elevator Committee likely gave him knowledge of the hazard posed by excessive gap spaces. This information is undoubtedly relevant to whether the subject elevators, whether through their design or Respondent's installation instructions, present a substantial product hazard. As noted above, "relevance, for purposes of discovery, is an extremely broad concept." *Copantitla*, 2010 WL 1327921, at *9. Mr. Brinkman'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. Brinkman argues that his deposition in this matter would be entirely duplicative of 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 the elevators. Mr. Brinkman says these depositions are the "best available evidence" regarding his knowledge of these incidents. However, as described more fully below, Mr. Brinkman's testimony would not be unreasonably duplicative because this case involves different causes of action, different products, and different parties.

1. This Case Involves Different Causes of Action

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. Brinkman 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]

[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*, 867 S.E.2d 155, 159 (Ga. Ct. App. 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).

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.

Mr. Brinkman argues that "it makes no difference what . . . legal theory or cause of action" is being pursued, that the "facts are the facts" and that the universal factual issue of "gap space" will be the same no matter what residential elevators are in dispute. Brinkman Mot. at 4. That is incorrect. Respondent produced engineering drawings, manuals, and design guides ("Installation Materials") for some, but not all,[3] residential elevator models involved in this proceeding. Each model contains slightly different instructions and guidelines in the Installation Materials. For example, each elevator model for which Complaint Counsel has been provided Installation Materials specifies slightly different measurements and specifications for the "gap space" and provides different references (or lack thereof) to ASME A17.1. Some Installation Materials for the same model also vary from year to year. Thus, the facts surrounding the "gap space" and how installers were instructed to measure the space between the hoistway and car doors necessarily differs between the models, and potentially, the year of manufacture. And for the elevator models that Respondent has not provided Installation Materials for, Complaint Counsel seeks to ask Mr. Brinkman about these models and any references to measurements concerning the "gap space" regarding these models.

[3] During CPSC's PI170085/CA210007 investigation of Respondent's residential elevators, CPSC requested Installation Materials related to all model elevators under investigation. Respondent provided some, *but not all*, of these Installation Materials, and justified the limited production by noting "TKA does not have sufficient information to determine whether these documents represent all such documents created while TKA was in the business of manufacturing residential elevators." Letter from Sheila A. Millar to Gregory M. Reyes, at 2 (Jun. 4, 2020). Respondent confirmed that statement when responding to Complaint Counsel's discovery request for all Installation Materials in this proceeding, noting that it "previously advised Complaint Counsel that it cannot provide assurances that it has the referenced Documents for each year of distribution." Respondent's Objections and Responses to Complaint Counsel's First Set of Requests for Production of Documents and Things to Respondent, at 31-32 (Nov. 12, 2021).

2. This Case Involves Different Products

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. Brinkman did so to establish claims relating to only two of 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. Compl. ¶ 11. Moreover, as discussed above, these additional models have different instructions and warnings, the efficacy of which 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, 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 Jun. 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).[4]

3. This Case Involves Different Parties

This action was brought by the Government, not a private litigant. 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. Brinkman 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

[4] Complaint Counsel is reticent to accept Mr. Brinkman's proposal that his testimony be limited to only new issues not covered in his prior depositions. Complaint Counsel of course will plan to review Mr. Brinkman's prior deposition testimony and endeavor to not ask questions that Mr. Brinkman previously provided answers for, but Complaint Counsel must have some leeway to establish the facts and foundation needed to present its legal theories in this case. Because of the topics and elevator models involved here, some overlap is inevitable. Thus, Complaint Counsel cannot agree to Mr. Brinkman's limitation request absent further discussions on the topic.

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 a nation of 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.*, No. C 04-1268 VRW (MEJ), 2007 WL 915225, at *2 (N.D. Cal. Mar. 23, 2007) (emphasis in original). Complaint Counsel's subpoena is not unreasonably duplicative of prior discovery because it relates to different causes of action, different products, and different parties 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).

The information sought by Complaint Counsel's non-party subpoena request for Mr. Brinkman is relevant. As stated, Mr. Brinkman served in important leadership roles for Respondent and at times had authority over the design, production, engineering, quality control, and code compliance of Respondent's elevators. Mr. Brinkman also helped to develop Respondent's unilateral homeSAFE outreach effort. As a result, he likely has unique insight into several subjects as they relate to the hazardous gap space, including the manufacture and design of Respondent's elevators, Respondent's instructions to installers, Respondent's efforts to comply with safety standards, and Respondent's unilateral homeSAFE outreach effort. Further, Mr. Brinkman is uniquely familiar with the hazard posed by excessive gap spaces by virtue of his leadership of the A17 Residence Elevator Committee, having presided over debates concerning proposed changes to the standard governing the hazardous gap space. This information is undoubtedly relevant to whether the subject elevators present a substantial product hazard.

The subpoena of Mr. Brinkman is needed to obtain the relevant information. As discussed, 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. Such topic areas include elevator models not at issue in the prior private state law cases and the design and manufacture of those elevators as they relate to the hazardous gap space, along with the training and instructions provided to installation mechanics of all models of subject elevators. Contrary to Mr. Brinkman's argument that "it makes no difference what residential elevators are being considered," it is important to question Mr. Brinkman about these other elevator models

because each model is designed, manufactured, and installed differently. Complaint Counsel also seeks to question Mr. Brinkman about Respondent's unilateral homeSAFE outreach effort as it relates to all models of subject elevators and to the general public's interest in consumer product safety, topics that were not at issue in the prior cases. Mr. Brinkman's argument that "[h]is testimony on the facts of this dispute have already been discovered *ad nauseum*" should be rejected, because new lines of questioning pertaining to the topics discussed above will yield new facts that have not been previously discovered.

Further, the request for Mr. Brinkman's subpoena covers the appropriate time period. Mr. Brinkman was employed by Respondent and had authority over key areas, such as engineering, quality control, and compliance with safety standards, when Respondent was producing the subject elevators. In fact, he served as Vice President of Quality and Code Compliance when the elevator involved in a child's 2017 death was manufactured. Further, Mr. Brinkman represented Respondent on the A17 Residence Elevator Committee and even presided over the committee when it was debating changes to the allowable gap space and how it is measured. As a result, the subpoena is tailored to Mr. Brinkman's involvement with Respondent's elevators during the dates of his employment with Respondent.

The subpoena request is not overbroad, is described with particularity, and does not impose an undue burden on Mr. Brinkman. The document request pertains specifically to information in Mr. Brinkman's possession that will assist in Complaint Counsel's determination that the subject elevators present a substantial product hazard. Complaint Counsel is willing to work with counsel for Mr. Brinkman to determine whether any documents retained by the witness are duplicative of what Complaint Counsel has received from Respondent. Unfortunately, Complaint Counsel is not in a position to confirm that all of Mr. Brinkman's

documents were produced by Respondent without further discussions. As discussed above, Respondent has not provided Installation Materials for all elevator models at issue in this proceeding. If Mr. Brinkman has Installation Materials in his possession, custody, or control related to certain elevator models for which Respondent did not produce Installation Materials (or elevator models which were not the subject of those prior lawsuits and therefore not responsive to those prior document requests), Complaint Counsel would seek production of those documents from Mr. Brinkman. Further, counsel for Mr. Brinkman discusses a "privilege log" that was purportedly prepared by Respondent in the prior lawsuits. Brinkman Mot. at 1. Complaint Counsel has not received any privilege log from Respondent and, indeed, on a prior meet and confer regarding Respondent's discovery deficiencies, Respondent stated that it did not plan to provide any privilege log to Complaint Counsel. *See* Letter from Frederick C. Millett to Sheila A. Millar, at 2 (Jan. 11, 2022) (Exhibit 1).

The deposition request pertains specifically to Mr. Brinkman's knowledge of the subject elevators during the relevant time period he worked for National Wheel-O-Vator and Respondent that will assist in Complaint Counsel's determination of a substantial product hazard, which is the very subject of this action. 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. Brinkman in this case is low and should not weigh in favor of quashing this subpoena request.

III. CONCLUSION

Complaint Counsel seeks to ask Mr. Brinkman about his tenure as Vice President of Operations for the National Wheel-O-Vator Division, Vice President of Quality and Code Compliance, Vice President of Engineering and Quality, and consultant to Respondent, as well as his role in the design, production, engineering, quality control, and standards compliance of

TKA's residential elevators; the development of relevant safety standards; and Respondent's training and instructions provided to elevator installation mechanics—inquiries that are indisputably relevant to this matter. Complaint Counsel also seeks non-duplicative discovery of Mr. Brinkman's relevant files. Mr. Brinkman's claim that "[a]ny 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 broader group of products. Complaint Counsel's subpoena is not unreasonably duplicative and incidental overlap does not warrant quashing discovery. Thus, Complaint Counsel respectfully requests that this court deny Mr. Brinkman's motion.

Dated this 25th day of February 2022

Respectfully submitted,

Gregory M. Reyes, Supervisory Attorney
Michael J. Rogal, Trial Attorney
Frederick C. Millett, Trial Attorney
Joseph E. Kessler, Trial Attorney
Nicholas J. Linn, Trial Attorney

Division of Enforcement and Litigation
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7809

Complaint Counsel for
U.S. Consumer Product Safety Commission

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2022, I served Complaint Counsel's Opposition to Non-Party Kevin L. Brinkman's Motion to Quash Subpoena as follows:

By email to the Secretary:

Alberta E. Mills
Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
Email: AMills@cpsc.gov

By email to the Presiding Officer:

Hon. Mary F. Withum, Administrative Law Judge
c/o Alberta E. Mills
Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
Email: AMills@cpsc.gov

By email to Counsel for Respondent:

Sheila A. Millar
Steven Michael Gentine
Eric P. Gotting
Taylor D. Johnson
Anushka N. Rahman
Keller and Heckman LLP
1001 G Street, NW, Suite 500 West
Washington, DC 20001

Email: millar@khlaw.com
gentine@khlaw.com
gotting@khlaw.com
johnsont@khlaw.com
rahman@khlaw.com

Michael J. Garnier
Garnier & Garnier, P.C.
2579 John Milton Drive
Suite 200
Herndon, VA 20171

Email: mjgarnier@garnierlaw.com

Meredith M. Causey
Quattlebaum, Grooms & Tull PLLC
111 Center Street
Suite 1900
Little Rock, AR 72201

Email: mcausey@qgtlaw.com

By email to Counsel for Patrick Bass, Jurrien Van Den Akker and Kevin Brinkman:

Peter L. Ney
Rendigs, Fry, Kiely & Dennis, LLP
600 Vine Street, Suite 2650
Cincinnati, Ohio 45202

Email: pney@rendigs.com

Joseph E. Kessler
Complaint Counsel for
U.S. Consumer Product Safety Commission

Exhibit 1 has been filed *in camera* pursuant to the Court's October 12, 2021 Protective Order.