

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
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)	
TK ACCESS SOLUTIONS CORP. f/k/a)	CPSC DOCKET NO.: 21-1
THYSSENKRUPP ACCESS CORP.)	
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Respondent.)	
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**RESPONDENT’S OPPOSITION TO NON-PARTY OTIS ELEVATOR COMPANY’S
MOTION TO QUASH SUBPOENA**

Pursuant to 16 C.F.R. § 1025.38(g), Respondent TK Access Solutions Corp., formerly known as thyssenkrupp Access Corp. (“the Company”), respectfully opposes non-party Otis Elevator Company’s (“Otis”) Motion to Quash.

The Motion to Quash should be denied for the following reasons: First, Otis’s Motion is untimely. Second, the documents Respondent seeks are relevant and necessary for this proceeding because (a) Complaint Counsel has put at issue the effectiveness of the multiple efforts the Company has made to alert homeowners to the potential hazards associated with improper *in situ* installations of residential elevator components by trade professionals that failed to comply with applicable industry or governmental codes, (b) Complaint Counsel has contended that such efforts are less effective than a recall announced by the U.S. Consumer Product Safety Commission (“CPSC” or “the Commission”) would be, and (c) the documents sought by Respondent would bear on this contention. Third, although CPSC possesses the documents sought by Respondent, Complaint Counsel has declined to provide these documents. Fourth, the production requested is not unduly burdensome. Finally, Respondent is not Otis’s competitor; the

Company has not been actively involved in the residential elevator business in the U.S. for nearly ten years (and Otis itself asserts that it is also not in the residential elevator business in the U.S.), and in any event has committed to maintain any documents produced in response to this subpoena from disclosure, pursuant to the terms of the Protective Order issued by the Presiding Officer on October 12, 2021.

Background

Respondent's subpoena seeks a limited set of readily identifiable documents, namely the final Corrective Action Plan ("CAP")¹ and Monthly Progress Reports ("MPRs") associated with Otis's December 17, 2020, recall of certain of its residential elevator components to address an alleged entrapment hazard.² This recall – including the public description of both the hazard and the remedy specified – was virtually *identical* to the hazard and remedies publicly described in recalls by three other manufacturers of residential elevator components that were announced on January 11, 2022.³ Notably, that same day the Commission issued a statement describing this

¹ Voluntary "Corrective Action Plans" are described under CPSC's rules at 16 C.F.R. § 1115.20. Notably, nothing in those rules requires that firms characterize such actions as a "recall," and the rules stress the voluntary nature of the action. The rules specify that a CAP does not constitute an admission by a firm that a product is defective or poses a substantial product hazard. 16 C.F.R. § 1115.20(a)(1)(xiii). Thus, firms may decide to cooperate with CPSC in corrective action, but they are not required to do so.

² "Otis Elevator Company Recalls to Inspect Private Residence Elevators Due to Entrapment Hazard; Risk of Serious Injury or Death to Young Children" ("Otis Recall Announcement"), (Dec. 17, 2020), *available at* <https://www.cpsc.gov/Recalls/2021/Otis-Elevator-Company-Recalls-to-Inspect-Private-Residence-Elevators-Due-to-Entrapment-Hazard-Risk-of-Serious-Injury-or-Death-to-Young-Children>.

³ See U.S. Consumer Prod. Safety Comm'n, "Bella Elevator Recalls Residential Elevators Due to Child Entrapment Hazard; Risk of Serious Injury or Death to Young Children" (Jan. 11, 2022), *available at* <https://www.cpsc.gov/Recalls/2022/Bella-Elevator-Recalls-Residential-Elevators-Due-to-Child-Entrapment-Hazard-Risk-of-Serious-Injury-or-Death-to-Young-Children>; U.S. Consumer Prod. Safety Comm'n, "Inclinators Company of America Recalls Residential Elevators Due to Child Entrapment Hazard; Risk of Serious Injury or Death to Young Children" (Jan. 11, 2022), *available at* <https://www.cpsc.gov/Recalls/2022/Inclinators-Company-of-America-Recalls-Residential-Elevators-Due-to-Child-Entrapment-Hazard-Risk-of-Serious-Injury-or-Death-to-Young-Children>; U.S. Consumer Prod. Safety Comm'n, "Residential Elevators Recalled by Savaria Corporation Due to Child Entrapment Hazard; Risk of Serious Injury or Death to Young Children" (Jan. 11, 2022), *available at*

alleged hazard as an “Industry-Wide” issue.⁴ The remedies in these four recalls largely mirror those the Company is providing to homeowners through its Home Elevator Safety Program (“Program”), launched on February 16, 2021, namely free inspections of their elevator installations and, as needed, free installation of free Space Guards.

Upon information and belief, the CAP for the Otis and other corrective actions would have memorialized the terms of that company’s agreement with CPSC to implement a CAP, including defining the alleged hazard, describing the remedy for that hazard, and setting forth the company’s obligations to report to CPSC the progress of its voluntary corrective action in cooperation with CPSC. The MPRs would inform CPSC of, among other data points, the number of homeowners who have been contacted and, of those, how many have chosen to participate in the corrective action.

Because of the relevance of Otis’s CAP and MPRs to the claims and defenses of the parties to this matter, Respondent first **CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER**

[REDACTED]⁵ Respondent, pursuant to 16 C.F.R. § 1025.38(c), submitted an application to the Presiding Officer, requesting that the Presiding Officer forward to the Commission the subpoenas submitted concurrently with

<https://www.cpsc.gov/Recalls/2022/Inclinator-Company-of-America-Recalls-Residential-Elevators-Due-to-Child-Entrapment-Hazard-Risk-of-Serious-Injury-or-Death-to-Young-Children>.

⁴ U.S. Consumer Prod. Safety Comm’n, “CPSC and Three Leading Elevator Manufacturers Announce Recalls of Residential Elevators Due to Industry-Wide Issue of Child Entrapment Hazard; Risk of Serious Injury or Death to Young Children” (Jan. 11, 2022), *available at* <https://www.cpsc.gov/Recalls/2022/CPSC-and-Three-Leading-Elevator-Manufacturers-Announce-Recalls-of-Residential-Elevators-Due-to-Industry-Wide-Issue-of-Child-Entrapment-Hazard-Risk-of-Serious-Injury-or-Death-to-Young-Children>.

⁵ *See, e.g.*, **CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER**

[REDACTED], relevant excerpts attached as Confidential Exhibit A.

that application (including the Otis subpoena).⁶ The Presiding Officer duly ordered that the application and subpoenas be transmitted to the Commission,⁷ and the Commission ordered that the subpoenas be issued.⁸ The Otis subpoena⁹ was served on March 22, 2022.¹⁰

Otis has moved to quash the subpoena.¹¹ However, as discussed below, in addition to Otis's untimely filing of its motion, the information contained in the CAP and the MPRs pertaining to the Otis recall are relevant to the claims and defenses at issue in this matter, and the Motion to Quash should be denied.

I. Otis's Motion to Quash is Untimely.

As noted, Respondent served the subpoena on Otis on March 22, 2022. Under CPSC's rules of practice, a motion to quash or limit must be filed "[w]ithin five (5) days of receipt of a subpoena."¹² Further, CPSC's rules of practice provide that this period began the day after service (namely, March 23, 2022), and that all days except "Saturdays, Sundays, and legal holidays" should be included in calculating the end of Otis's five-day window.¹³ March 23, 24,

⁶ Respondent's Application for the Issuance of Subpoenas Duces Tecum on Non-Parties Otis Elevator Company, Bella Elevator LLC, Inclinator Company of America, and Savaria Corporation (Mar. 4, 2022), attached (without exhibits) as Exhibit B.

⁷ Order Transmitting Respondent's Application for the Issuance of Subpoenas Duces Tecum on Non-Parties Otis Elevator Company, Bella Elevator LLC, Inclinator Company of America, and Savaria Corporation (Mar. 8, 2022), attached as Exhibit C.

⁸ U.S. Consumer Prod. Safety Comm'n, Order Issuing Subpoena Duces Tecum on Otis Elevator Company (Mar. 18, 2022), attached as Exhibit D.

⁹ Subpoena Duces Tecum to Otis Elevator Company (Mar. 18, 2022), attached as Exhibit E.

¹⁰ Affidavit of Process Server, attached as Exhibit F.

¹¹ Non-Party Otis Elevator Company's Motion to Quash Subpoena Duces Tecum and Memorandum in Support Thereof, 2-5 (Mar. 30, 2022), attached as Exhibit G.

¹² 16 C.F.R. § 1025.38(g).

¹³ 16 C.F.R. § 1025.15(a).

25, 28, and 29 are all countable days, and thus Otis’s Motion to Quash was timely if filed no later than March 29, 2022. Otis filed and served its motion on the sixth day after service, on March 30, 2022. This date was beyond the five-day window provided in the rules, and thus Otis’s motion is untimely.

II. Case Law Supports Denial of Otis’s Motion to Quash.

CPSC’s Rules of Practice provide that, “Parties may obtain discovery regarding any matter, not privileged, which is within the Commission’s statutory authority and is relevant to the subject matter involved in the proceedings, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.”¹⁴ Further, “It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”¹⁵

As noted by Complaint Counsel when it sought to enforce three subpoenas seeking deposition testimony from former Company employees who had already been deposed on the subject of this action multiple times: “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.’”¹⁶ Further, “In general, discovery is permissible with respect to ‘any nonprivileged matter that is relevant to any party’s claim.’”¹⁷ Additionally, “Once the party issuing the subpoena has demonstrated the relevance of the requested documents, the party seeking to quash the subpoena

¹⁴ 16 C.F.R. § 1025.31(c)(1).

¹⁵ *Id.*

¹⁶ Complaint Counsel’s Opposition to Non-Party Jurrien Van Den Akker’s Motion to Quash Subpoena (“JVDA Opposition”), 2 (Feb. 3, 2022), *quoting Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

¹⁷ JVDA Opposition at 2, *quoting Kelley v. Microsoft Corp.*, No. C07-0475MJP, 2008 WL 5000278, at *1 (W.D. Wash. Nov. 21, 2008).

bears the burden of demonstrating that the subpoena is over-broad, duplicative, or unduly burdensome.”¹⁸

The Fourth Circuit has held that “[t]he standard of relevancy is a liberal, discovery-type standard.”¹⁹ Given that framework, “information is relevant if it is germane and ‘has any bearing on the subject matter of the case.’”²⁰ As discussed below, the information reflected in Otis’s CAP and MPRs (and those associated with the three other recalls) does bear on the subject matter of this case.

III. The Production Sought Is Relevant, Has Not Been Produced by Complaint Counsel, and Is Not Burdensome.

Otis primarily argues that its CAP and MPRs are not relevant to this matter.²¹ On the contrary, not only are they relevant, but they are not presently available elsewhere and their production would not be burdensome to Otis.

a. These Documents Are Relevant.

Relying on conclusory assertions – but no specific facts – that Otis’s and Respondent’s residential elevator components are materially different, Otis asserts that “Otis’s recall, and associated paperwork [namely, Otis’s CAP and MPRs], is not germane to the CPSC’s administrative litigation against TK Access [Solutions]. Otis’s and TK Access [Solutions]’

¹⁸ JVDA Opposition at 2 (internal quotation marks omitted), *quoting 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).

¹⁹ *Walter N. Yoder & Sons, Inc. v. N.L.R.B.*, 754 F.2d 531, 535 (4th Cir. 1985), *quoting N.L.R.B. v. Acme Indus. Co.*, 385 U.S. 432, 437 & N. 6 (1967).

²⁰ *Yoder*, 754 F.2d at 535, *quoting Local 13, Detroit Newspaper Printing and Graphic Communications Union v. N.L.R.B.*, 598 F.2d 267, 271 (D.C. Cir. 1979).

²¹ *See* Exhibit G at 2-5.

corrective actions are neither intertwined nor related in any way.”²² On the contrary, through both actions of the Commission and statements by Complaint Counsel, the Otis corrective action (and its “associated paperwork”) is directly relevant to the allegations of this Complaint and the purported relief the Complaint seeks.

Assuming, *arguendo*, that the Company’s residential elevator components were or are “consumer products” within the meaning of the Consumer Product Safety Act (“CPSA”), and assuming that they contain a “defect” which presents a “substantial risk of injury to the public” and, thus, they present a “substantial product hazard,”²³ Complaint Counsel still must 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.

The Commission has described the potential hazard associated with improper installations²⁴ of residential elevator components in a manner that creates excessive Gap Space as one that is “Industry-Wide.”²⁵ Indeed, the Commission’s Chair has alleged that residential

²² Exhibit G at 4.

²³ See, e.g., 15 U.S.C. § 2052(a)(5) and § 2064(a)(2). Respondent continues to deny each of these assumptions, as well as Complaint Counsel’s assertion that residential elevators installed outside of specifications by professionals in the trade are “consumer products” within the meaning of the CPSA, and each remains Complaint Counsel’s burden to prove.

²⁴ As the public notice for the Otis recall notes, “Children can become entrapped in the space between the exterior landing (hoistway) door and the interior elevator car door or gate, and suffer serious injuries or death when the elevator is called to another floor.” That space is a function of installation, not of residential elevator components themselves, and neither Otis nor Complaint Counsel has articulated any facts that would distinguish Otis’s components from any others as regards such installation or space.

²⁵ U.S. Consumer Prod. Safety Comm’n, “CPSC and Three Leading Elevator Manufacturers Announce Recalls of Residential Elevators Due to Industry-Wide Issue of Child Entrapment Hazard; Risk of Serious Injury or Death to Young Children” (Jan. 11, 2022), *available at* <https://www.cpsc.gov/Recalls/2022/CPSC-and-Three-Leading-Elevator-Manufacturers-Announce-Recalls-of-Residential-Elevators-Due-to-Industry-Wide-Issue-of-Child-Entrapment-Hazard-Risk-of-Serious-Injury-or-Death-to-Young-Children>.

elevator components from “all of the elevator companies . . . pose the same [hazard],” referring expressly to this litigation.²⁶ Another Commission statement asserted that the January 11, 2022, recalls “come after a December 2020 recall of other residential elevators [namely, the Otis recall], as well as CPSC’s filing of a lawsuit against [TKASC] in July 2021 when the company refused to initiate a recall.”²⁷

The “Hazard” identified in the Otis recall is described in virtually identical terms to the hazard alleged in this complaint:

- The Otis recall describes the “Hazard” as follows: “Children can become entrapped in the space between the exterior landing (hoistway) door and the interior elevator car door or gate, and suffer serious injuries or death when the elevator is called to another floor.”²⁸
- The Complaint alleges that “children could become entrapped between the hoistway and elevator car doors”²⁹ and that “a child [who] is in that [alleged] Hazardous Space when the elevator is called to another floor [is] at risk of crushing injuries.”³⁰

²⁶ *Id.* at ¶ 5.

²⁷ U.S. Consumer Prod. Safety Comm’n, “CPSC Announces Additional Steps Towards Eliminating Child Entrapment Hazard in Residential Elevators; Three Recalls and One Warning Issued; Consumers Warned to Check Residential Elevators, including at Rental Homes” (Jan. 11, 2022), *available at* <https://www.cpsc.gov/Newsroom/News-Releases/2022/CPSC-Announces-Additional-Steps-Towards-Eliminating-Child-Entrapment-Hazard-in-Residential-Elevators-Three-Recalls-and-One-Warning-Issued-Consumers-Warned-to-Check-Residential-Elevators-including-at-Rental-Homes>.

²⁸ Otis Recall Announcement.

²⁹ Complaint, ¶ 103.

³⁰ Complaint, ¶ 106.

As Otis concedes, “Otis voluntarily recalled a private residential elevator with the same [alleged] hazard as the one sought to be recalled here.”³¹

Similarly, the “Remedy” publicly identified in the Otis recall and the relief sought by complaint counsel are likewise almost identical.

- The Otis remedy is “a free inspection and the installation of space guard(s), if necessary.”³²
- Complaint Counsel seeks an Order that Respondent, *inter alia*, “provid[e] a free inspection” and “Install, at no cost to consumers, a free space guard.”³³

The alleged hazard and purported remedy reflected in both the publicly announced Otis recall and the Complaint are the same. The publicly announced remedy Otis is offering is described in terms virtually identical to the elements of the voluntary Program the Company has been offering to homeowners for over a year. Consequently, the Otis CAP and MPRs are directly relevant to this litigation, and in particular to Complaint Counsel’s prayer for relief and the Company’s defenses. Respondent is entitled to know if the CPSC approved remedies in the Otis recall that differ from the relief Complaint Counsel demands in this matter. Any such differences are plainly relevant to Complaint Counsel’s claim that it is entitled to differing relief for an alleged hazard that Complaint Counsel and the Chair have characterized as “identical” and which *Respondent is already addressing* in a Program that not only appears to have the same elements, but also includes additional public awareness efforts not reflected in the Otis announcement.

³¹ Exhibit G at 2.

³² Otis Recall Announcement.

³³ Complaint, ¶ C.

Further, Complaint Counsel has repeatedly argued (including during recent depositions) that the Company's actions (namely the current Program and its predecessor, the homeSAFE Campaign, launched in 2014) are inadequate.³⁴ More specifically, Complaint Counsel's primary point appears to be that the Company's efforts do not constitute a "recall" in conjunction with CPSC under the CPSA,³⁵ and Complaint Counsel notes that, [REDACTED]

[REDACTED]³⁶ Putting aside CPSC's approval of Respondent's non-recall corrective action in 2014, and its failure then and now to make consumers aware of opportunities to mitigate a hazard associated with improper elevator installation through Respondent's programs – an issue known to the Commission since 2012 – Complaint Counsel has simply asserted that a "recall" would, axiomatically, be more effective than any action not termed a "recall." Complaint Counsel does so without regard to the lack of

³⁴ See, e.g., Complaint Counsel's Opposition to Respondent's Motion to Dismiss, 6 (Aug. 6, 2021), docket number 11 ("Respondent only distributed approximately 422 total space guards" under the homeSAFE Campaign); [REDACTED]

[REDACTED], relevant excerpts attached as Confidential Exhibit H; [REDACTED]
[REDACTED]
[REDACTED], attached as Confidential Exhibit I.

³⁵ See, e.g., Confidential Exhibit H at ¶ 21 [REDACTED]
[REDACTED]
[REDACTED], relevant excerpts attached as Confidential Exhibit J.

³⁶ See, e.g., Confidential Exhibit J at 102. See also, [REDACTED]
[REDACTED], relevant excerpts attached as Confidential Exhibit K.

any substantive difference between the two, and regardless of the fact that the statute does not mandate that firms offering “corrective action” characterize such actions as a “recall.”³⁷

As noted, the Otis recall and the Complaint allege the same hazard. Further, the Otis recall and the Program offer the same remedy for that alleged hazard, with the key difference between them being the term of art, “recall.” Thus, the data reflected in Otis’s MPRs will bear directly on Complaint Counsel’s claim that this term of art is potentially necessary for corrective action to be effective.

In sum, Otis’s suggestion that Respondent “is no more entitled Otis’s CAP and MPRs than it is to those records from a non-elevator company that has recalled an entirely different product”³⁸ is wholly without merit. Neither the Otis recall, the Complaint, nor Otis’s motion allege any factual basis to consider Otis’s and Respondent’s elevator components only “somewhat similar,” and indeed CPSC’s own statements treat the “products” and the alleged hazard identically and identify identical remedies. As such, how CPSC treated these alleged hazards and remedies under the CPSA in Otis’s situation (and those of the other three companies) is plainly relevant to any claims Complaint Counsel makes regarding how Respondent’s situation should be treated under the CPSA, and thus Otis’s motion should be denied and Respondent’s subpoena enforced.

b. Otis’s Production of the Requested CAP and MPRs Is Necessary because Complaint Counsel Has Declined to Provide These Documents.

As CPSC and Otis were parties to the CAP, and as Otis submitted its MPRs to CPSC, the CAP and MPRs are necessarily within CPSC’s possession and thus within Complaint Counsel’s

³⁷ **CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER**. See Confidential Exhibit J at 32.

³⁸ Exhibit G at 5.

ability to produce. However, **CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER**

[REDACTED]³⁹ To the best of Respondent's knowledge, Otis is the only entity from which Respondent can obtain these relevant documents.

c. The Requested Production Is Minimally Burdensome.

Upon information and belief, the final CAP is a single document that was entered into on or about December 17, 2020, that should be readily identifiable in Otis's documents. Notably, Respondent is not requesting draft documents, but simply the final CAP. Similarly, upon information and belief, each MPR is a one- or two-page document that Otis will likely have submitted on a monthly basis beginning shortly after the recall was announced, potentially up to the present.⁴⁰ Thus, Respondent seeks a narrowly tailored production of probably less than twenty recent documents that Otis should be able to locate with minimal effort. The requested production, in short, is not burdensome, and Respondent notes that Otis does not allege the contrary.

IV. Agency Discretion Is Not at Issue.

Otis alleges that requiring it to produce its CAP and MPRs would "defeat" CPSC's enforcement discretion, citing *Heckler v. Chaney*.⁴¹ However, *Chaney* considered the availability of judicial review of "agency refusals to institute investigative or enforcement proceedings,"⁴² not the credibility of an agency's claims across multiple proceedings on the same issue. *Chaney*

³⁹ See, e.g., Confidential Exhibit A at 9-10.

⁴⁰ Otis states that it "continues to provide" CPSC with information "reflected in its CAP and MPRs." Exhibit G at 6.

⁴¹ 470 U.S. 821 (1985).

⁴² *Id.* at 838.

stands for the proposition that courts should not compel agencies to act, not that courts should not require that agencies are justified in their actions.

Complaint Counsel has put at issue the “remedy” a manufacturer must provide under the CPSA if it were determined that residential elevator components are “consumer products” and that *in situ* installation of those components in a manner that creates an excessive Gap Space represents a “defect” that presents a “substantial product hazard.” Far from being an intrusion on a matter committed to CPSC’s discretion, the very purpose of the administrative hearing and the function of the Presiding Officer (and, potentially, judicial review) is to determine the extent to which Complaint Counsel has met its burden to prove each of these elements, including proving that the specific relief it seeks is warranted.⁴³ That determination will be informed by the documents the subpoena requires, and thus the subpoena is tied directly to a matter that is expressly amenable to judicial review.

Moreover, nothing in the CPSA suggests that, where CPSC uses identical terms to describe an alleged hazard across multiple companies – and even dubs that alleged hazard “Industry-Wide” – the agency has the “discretion” to approve or require disparate remedies or more onerous conditions on different companies. Such an interpretation would not only be inconsistent with principles of due process and reasoned decision-making, but it would also suggest that CPSC has the “discretion” to give some consumers more or less protection against purported “defects” than it gives other consumers, or to impose more burdensome obligations on one company as compared to others. This would be entirely contrary to the agency’s mission and to all notions of fairness and due process.⁴⁴

⁴³ See 15 U.S.C. § 2064(f), 16 C.F.R. § 1025.42; *see also* 5 U.S.C. § 554, 5 U.S.C. §§ 701-06.

⁴⁴ 15 U.S.C. § 2051(b).

V. Respondent's Subpoena Poses No Threat of a "Chilling" Effect.

Otis argues that the production the subpoena requires "would end-run [the CPSC's] enshrined protections" against agency disclosure of information and would "risk chilling of future industry cooperation with the CPSC."⁴⁵ Further, Otis argues that "[c]ompanies would be left no choice but to understand that competitors might obtain competitive information of their business rivals simply by subpoenaing them."⁴⁶ Both the premises and suggestion of a "chilling" effect are mistaken.

First, Respondent's subpoena requests documents from Otis, not from CPSC. While Respondent does not concede that, in the context of this litigation, the CPSC's limitations would preclude Complaint Counsel's production of the documents the Otis subpoena seeks,⁴⁷ the statute plainly does not preclude Otis's direct production of the same documents. The CPSC provisions Otis cites expressly pertain only to disclosures **by CPSC**. For example, "not less than 15 days prior to **its** public disclosure of any information obtained under [the CPSC]," CPSC must take certain procedural steps.⁴⁸ Similarly, if the agency determines that information is improperly marked as confidential or trade-secret, "**the Commission** shall notify [the relevant] person in writing that **the Commission** intends to disclose" that information.⁴⁹ The limitations the CPSC

⁴⁵ Exhibit G at 7.

⁴⁶ *Id.*

⁴⁷ Disclosure of certain documents by CPSC requires adherence to a process specified at 15 U.S.C. § 2055(b)(1), **CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER** [REDACTED].

⁴⁸ 15 U.S.C. § 2055(b)(1) (emphasis added).

⁴⁹ 15 U.S.C. § 2055(a)(5) (emphasis added).

places on CPSC's ability to disclose information in no way pertain to Respondent's ability to obtain that information through discovery from Otis or any other entity.⁵⁰

Second, and stemming from the fact that the CPSA's information protections pertain only to disclosures by CPSC, companies already understand (or should understand) that any party to any litigation may obtain information those companies submit to CPSC, where that information is, as here, relevant to the litigation at issue. Multiple courts have expressly held that the CPSA's limitations on CPSC's disclosure do not disturb discovery between other parties.⁵¹

Further, even if they extended to discovery among non-CPSC litigants, the limitations the CPSA places on CPSC apply to "public disclosure."⁵² The term "public disclosure" has been interpreted to apply both to agency press releases and to CPSC's disclosures pursuant to the Freedom of Information Act (FOIA),⁵³ but, in both of those instances, CPSC is providing information to persons in no way bound to treat that information as confidential.

Apart from the fact that, as noted, this subpoena does not request or require that CPSC produce anything at all, the production it does require from Otis is manifestly **not** a "public disclosure." Respondent is bound by the Presiding Officer's Protective Order of October 12,

⁵⁰ By contrast, the CPSA expressly forbids discovery of reports furnished under Section 37 of the CPSA (15 U.S.C. § 2084), pertaining to companies' reports to CPSC of settled or adjudicated civil actions. 15 U.S.C. 2055(e)(2) ("Any report furnished under [Section 37] shall be immune from legal process and shall not be subject to subpoena or other discovery in any civil action in a State or Federal court or in any administrative proceeding.").

⁵¹ See *Winstanley v. Royal Consumer Info. Prod., Inc.*, No. CV-06-281-PHX-DGC, 2006 WL 1789115 (D. Ariz. June 27, 2006), citing *Lawson v. Fisher-Price, Inc.*, 191 F.R.D. 381, 383 (D. Vt. 1999) ("this statutory protection neither governs disclosure by a private party nor limits the power of a court to restrict or order discovery"), *Roberts v. Carrier Corp.*, 107 F.R.D. 678, 682 (N.D. Ind. 1985) ("this court reads a restriction directed only at the CPSC as restricting only the CPSC"), *Lamitie v. Emerson Elec. Co.*, 535 N.Y.S.2d 650, 653 (N.Y.App.Div. 1988).

⁵² See, e.g., 15 U.S.C. § 2055 – "Public disclosure of information."

⁵³ See *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

2021, which provides that information or documents identified as confidential “shall not be used or disclosed by the Parties, counsel for the Parties or any other persons identified in [the Order] for any purpose other than in this proceeding or any appeals thereof.”⁵⁴ Further, the subpoena expressly specifies that any documents produced in response to the subpoena will be treated as confidential within the meaning of the Presiding Officer’s October 12, 2021, Protective Order.⁵⁵ Thus, the documents the subpoena requires cannot be “publicly” disclosed by virtue of their production in this matter, as the parties are bound by the provisions of the Order.

Additionally, as part of its “chilling” argument, Otis asserts that the subpoena should be quashed because Respondent is purportedly Otis’s “direct competition.”⁵⁶ However, in the same memorandum, Otis concedes that “Otis, unlike TK Access [Solutions], is no longer even in the business of selling and installing home residential elevators in the U.S.”⁵⁷ This statement defeats Otis’s argument twice-over. First, if Otis is no longer participating in a market it at one time shared with TKASC, then TKASC cannot be a competitor in that market to Otis, whether direct or otherwise. Second, TKASC itself ceased manufacturing and distributing residential elevator components for *in situ* installation in 2012.⁵⁸ Neither TKASC *nor* Otis participates in that market, and thus the companies cannot be competitors in that market, and in any event the Protective Order restrictions apply.

VI. Conclusion

⁵⁴ Protective Order, ¶ 5(a).

⁵⁵ Exhibit E at 2.

⁵⁶ Exhibit G at 8.

⁵⁷ Exhibit G at 5.

⁵⁸ *See, e.g.*, Respondent’s Answer to Complaint, ¶ 31 (July 27, 2021).

For the foregoing reasons, Respondent respectfully requests that the Presiding Officer DENY Otis's Motion to Quash and ORDER that Otis comply with the subpoena.

Dated: March 31, 2022



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QUATTLEBAUM, GROOMS & TULL PLLC
111 Center Street
Suite 1900
Little Rock, AR 72201
(501) 379-1700
ATTORNEYS FOR RESPONDENT,

TK Access Solutions Corp.

CERTIFICATE OF SERVICE

Pursuant to 16 C.F.R. § 1025.16, as adopted by the Presiding Officer in CPSC Docket No. 21-1, and 16 C.F.R. § 1025.38(f), I hereby certify that on March 31, 2022, true and correct copies of the foregoing Respondent's Opposition to Non-Party Otis Elevator Company's Motion to Quash Subpoena were filed with the Secretary of the U.S. Consumer Product Safety Commission and served on all parties and participants of record in these proceedings in the following manner:

By electronic mail to the Secretary of the U.S. Consumer Product Safety Commission:

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

By electronic mail to the Presiding Officer:

The Honorable Mary Withum, Administrative Law Judge
c/o Alberta E. Mills
Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
amills@cpsc.gov

By electronic mail to Complaint Counsel:

Mary B. Murphy
Complaint Counsel
Director
Division of Enforcement and Litigation
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
mmurphy@cpsc.gov

Gregory M. Reyes, Trial Attorney
Michael J. Rogal, Trial Attorney

Frederick C. Millett, Trial Attorney
Joseph E. Kessler, Trial Attorney
Nicholas J. Linn, Trial Attorney
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Additionally, by electronic mail to Counsel for Otis Elevator Company:

Scott Winkelman
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Sheila A. Millar

CPSC Docket No. 21-1
Exhibit A to
Respondent's Opposition to Non-Party
Otis Elevator Company's Motion to
Quash Subpoena
March 31, 2022

[REDACTED]

[REDACTED]

CPSC Docket No. 21-1
Exhibit B to
Respondent's Opposition to Non-Party
Otis Elevator Company's Motion to
Quash Subpoena
March 31, 2022

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
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THYSSENKRUPP ACCESS CORP.)	CPSC DOCKET NO.: 21-1
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)	
)	
Respondent.)	
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**RESPONDENT’S APPLICATION FOR THE ISSUANCE OF
SUBPOENAS DUCES TECUM ON NON-PARTIES OTIS ELEVATOR COMPANY,
BELLA ELEVATOR LLC, INCLINATOR COMPANY OF AMERICA, AND
SAVARIA CORPORATION**

Pursuant to 16 C.F.R. § 1025.38, which requires the issuance of subpoenas *duces tecum* to any non-party for the purpose of compelling the production of documents, Respondent TK Access Solutions Corp., formerly known as thyssenkrupp Access Corp. (“the Company”), respectfully requests that the Presiding Officer forward, and that the U.S. Consumer Product Safety Commission (“the Commission” or “CPSC”) issue, the subpoenas submitted concurrently with this Application.¹ The non-parties named in the subpoenas are Otis Elevator Company (“Otis”), Bella Elevator LLC (“Bella”), Inclinator Company of America (“Inclinator”), and Savaria Corporation (“Savaria”).

By way of background, Respondent has engaged with CPSC since 2013 regarding home elevator components that may have been installed by construction-trade professionals outside of Respondent’s specifications and applicable elevator and other safety code requirements. Respondent offered an information safety campaign and made available discounted space guards for purchase from 2014 to 2017 (a program approved by the Commission as a “non-recall”

¹ In filing this Application, Respondent does not admit, and reserves all rights to deny, any matters of fact or law, including jurisdiction.

corrective action in 2014). Respondent then established a new program with free space guards, supported by free measurement assistance and free installation support, or a “do-it-yourself” option, beginning February, 2021. The hazard alleged is one that CPSC has described as “Industry-Wide,”² and the Commission’s Chair has alleged that residential elevator components from “all of the elevator companies . . . pose the same [hazard],” referring expressly to the above-referenced matter.³

Respondent believes that each of the above-referenced non-parties has in its possession, custody, or control information relevant to the above-captioned matter, and specifically the relief sought by Complaint Counsel against Respondent. In the underlying Complaint, Complaint Counsel, *inter alia*, requests that the Commission impose various notice and repair requirements on Respondent related to an alleged entrapment hazard associated with elevator components sold by Respondent for residential elevators installed through 2012, when Respondent ceased active business operations.

On December 17, 2020, Otis agreed to conduct a voluntary recall⁴ of its private residential elevators purchased before 2012 and CemcoLift private residential elevators purchased from 1999 to 2012, which, like the Company’s Home Elevator Safety Program (“Program”) and like the relief sought in the Complaint, offers free inspection and installation of space guards to reduce the potential hazards associated with excessive Gap Spaces. Respondent believes that, as part of the

² U.S. Consumer Prod. Safety Comm’n, “CPSC and Three Leading Elevator Manufacturers Announce Recalls of Residential Elevators Due to Industry-Wide Issue of Child Entrapment Hazard; Risk of Serious Injury or Death to Young Children” (Jan. 11, 2022), included as Exhibit A.

³ *Id.* at ¶ 5.

⁴ U.S. Consumer Prod. Safety Comm’n, “Otis Elevator Company Recalls to Inspect Private Residence Elevators Due to Entrapment Hazard; Risk of Serious Injury or Death to Young Children” (“Otis Release”) (Dec. 17, 2020), included as Exhibit B.

Corrective Action Plan (“CAP”) that memorialized Otis’s agreement to conduct the voluntary recall, Otis must file monthly progress reports (“MPRs”) related to the recall with the Commission.

On January 11, 2022, months after it filed this action, CPSC announced similar recalls by Bella, Inclinator, and Savaria to address the same alleged industry-wide hazard. However, unlike the Company’s Program, the common remedy is for each company to send free Space Guards to consumers for self-installation, with professional installation assistance available only on request.⁵ On information and belief, as in Otis’s recall, each of these recent recalls would have been announced pursuant to a CAP, and each recalling firm must file MPRs. On information and belief, these CAPs and MPRs contain information regarding what “remedy” the Commission deemed adequate to address what the agency purports to be a common, industry-wide hazard, as well as the extent to which each “recall” prompted a response from homeowners through the MPRs each company has submitted to date and will submit going forward.

Just as CPSC has alleged an industry-wide hazard, CPSC has also expressly linked these other recalls to this administrative lawsuit.⁶ Together, CPSC’s public statements have acknowledged that the agency’s position is as follows: the alleged hazard is common across all elevators, regardless of make or model. Thus, information in the above-referenced non-parties’ possession regarding the alleged hazard and the nearly identical, Commission-approved “remedy” in each of these recalls is relevant to this matter and to the relief Complaint Counsel seeks against

⁵ See U.S. Consumer Prod. Safety Comm’n, “Bella Elevator Recalls Residential Elevators Due to Child Entrapment Hazard; Risk of Serious Injury or Death to Young Children” (Jan. 11, 2022), included as Exhibit C; U.S. Consumer Prod. Safety Comm’n, “Inclinator Company of America Recalls Residential Elevators Due to Child Entrapment Hazard; Risk of Serious Injury or Death to Young Children” (Jan. 11, 2022), included as Exhibit D; U.S. Consumer Prod. Safety Comm’n, “Residential Elevators Recalled by Savaria Corporation Due to Child Entrapment Hazard; Risk of Serious Injury or Death to Young Children” (Jan. 11, 2022), included as Exhibit E.

⁶ U.S. Consumer Prod. Safety Comm’n, “CPSC Announces Additional Steps Toward Eliminating Child Entrapment Hazard in Residential Elevators; Three Recalls and One Warning Issued; Consumers Warned to Check Residential Elevators, including at Rental Homes,” ¶ 5 (Jan. 11, 2022), included as Exhibit F (“These [three recall] actions come after a December 2020 recall of [Otis] residential elevators for the same hazard, as well as CPSC’s filing of a lawsuit against thyssenkrupp Access Corp. in July 2021.”).

Respondent. Specifically, such information is relevant to, *inter alia*: any claim by Complaint Counsel that the Company's Home Elevator Safety Program, which offers free inspections of residential elevator component installations and, as needed, free installation of free space guards, as well as a "do it yourself" option, is inadequate;⁷ any claim by Complaint Counsel regarding expected response rates in the event of a "recall;" and any defense Respondent may raise regarding the extent to which Complaint Counsel may seek disparate remedies for an alleged "defect" that the agency has asserted is an industry-wide issue, to the extent Complaint Counsel meets its burden of proof in that regard.

Respondent has requested this information from Complaint Counsel, who has declined to provide it.⁸ As such, Respondent is seeking to obtain these documents from the non-party companies. Moreover, upon information and belief, the Company expects that each non-party's review of its records and production in response to its subpoena would be minimally burdensome, as each would involve no more than a handful of specific, narrow, and clearly specified documents that should be readily identifiable, and all documents produced in response to this limited subpoena that are marked as confidential would be treated as confidential under the Protective Order entered in this case.⁹ Respondent is not requesting deposition testimony.

Accordingly, as the subpoenas Respondent seeks are necessary for Respondent to obtain discovery of relevant evidence and would impose minimal burdens on the non-parties identified,

⁷ The Otis recall asked consumers to "contact Otis to schedule a free inspection and the installation of space guard(s), if necessary." Otis Release at heading "Remedy."

⁸ See Complaint Counsel's Objections and Responses to Respondent's Second Set of Requests for Production of Documents and Things to Consumer Product Safety Commission, CPSC Docket No.: 21-1, ¶¶ 5-7 (Feb. 22, 2022), attached as Exhibit G (marked as Confidential pursuant to the Presiding Officer's Protective Order of Oct. 12, 2021, and redacted accordingly).

⁹ Protective Order, CPSC Docket No. 21-1, docket no. 25 (October 12, 2021).

Respondent requests that the Presiding Officer forward this Application and the subpoenas *duces tecum* to the Commission for appropriate action.¹⁰

Dated: March 4, 2022



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(703) 237-2010

Meredith M. Causey (AR Bar 2012265)
501-379-1743 (direct dial)

¹⁰ This court approved electronic filing and service at the October 20, 2021 Initial Pre-Hearing Conference. The court also noted at the pre-hearing conference that the parties have no objection to providing one electronic copy of the subpoena (instead of triplicate as prescribed by 16 C.F.R. § 1025.38).

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QUATTLEBAUM, GROOMS & TULL PLLC
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(501) 379-1700

ATTORNEYS FOR RESPONDENT,

TK Access Solutions Corp.

CERTIFICATE OF SERVICE

Pursuant to 16 C.F.R. § 1025.16, as adopted by the Presiding Officer in CPSC Docket No. 21-1, I hereby certify that on March 4, 2022, true and correct copies of the foregoing Respondent's Application for the Issuance of Subpoenas Duces Tecum on Non-Parties Otis Elevator Company, Bella Elevator LLC, Inclinator Company of America, and Savaria Corporation were filed with the Secretary of the U.S. Consumer Product Safety Commission and served on all parties and participants of record in these proceedings in the following manner:

By electronic mail to the Secretary of the U.S. Consumer Product Safety Commission:

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

By electronic mail to the Presiding Officer:

The Honorable Mary Withum, Administrative Law Judge
c/o Alberta E. Mills
Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
amills@cpsc.gov

By electronic mail to Complaint Counsel:

Mary B. Murphy
Complaint Counsel
Director
Division of Enforcement and Litigation
Office of Compliance and Field Operations
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Michael J. Rogal, Trial Attorney
Frederick C. Millett, Trial Attorney
Joseph E. Kessler, Trial Attorney
Nicholas J. Linn, Trial Attorney
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Sheila A. Millar

CPSC Docket No. 21-1
Exhibit C to
Respondent's Opposition to Non-Party
Otis Elevator Company's Motion to
Quash Subpoena
March 31, 2022

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

)	
In the Matter of)	
)	
TK ACCESS SOLUTIONS CORP. f/k/a)	CPSC DOCKET NO.: 21-1
THYSSENDRUPP ACCESS CORP.)	
)	
Respondent.)	
)	

ORDER TRANSMITTING RESPONDENT’S APPLICATION FOR THE ISSUANCE OF
SUBPOENAS DUCES TECUM ON NON-PARTIES OTIS ELEVATOR COMPANY,
BELLA ELEVATOR LLC, INCLINATOR COMPANY OF AMERICA, AND
SAVARIA CORPORATION

This matter, having come before me with the March 4, 2022 filing by Respondent an Application for the Issuance of Subpoena Duces Tecum on Non-Parties Otis Elevator Company, Bella Elevator LLC, Inclinator Company of America, and Savaria Corporation, the Application is hereby transmitted, pursuant to 16 C.F.R. §1025.38(c), to the Secretary so it may be forwarded to the Commission.

Done and dated March 8, 2022
Arlington, VA

Mary F. Withum
Administrative Law Judge

CPSC Docket No. 21-1
Exhibit D to
Respondent's Opposition to Non-Party
Otis Elevator Company's Motion to
Quash Subpoena
March 31, 2022

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
)	
)	
THYSSENKRUPP ACCESS CORP.)	CPSC Docket No: 21-1
)	
)	
Respondent.)	
)	

ORDER ISSUING SUBPOENA DUCES TECUM ON OTIS ELEVATOR COMPANY

Section 27(b)(3) of the Consumer Product Safety Act (“CPSA”) authorizes the Commission to issue subpoenas for the production of all documentary and physical evidence relating to the execution of its duties. 15 U.S.C. § 2076(b)(3). The Commission’s Rules of Practice for Adjudicative Proceedings require a subpoena for any person not a party to the proceedings for the purpose of compelling attendance, testimony, and the production of documents. 16 C.F.R. § 1025.38(a). The Commission’s regulations further state that a subpoena duces tecum shall specify the books, papers, documents, or other materials or data compilations to be produced. 16 C.F.R. § 1025.38(b).

On March 4, 2022, the Respondent filed on the docket in this matter an Application for Issuance of Subpoenas Duces Tecum on Non-Parties Otis Elevator Company, Bella Elevator LLC, Inclinator Company of America, and Savaria Corporation. On March 8, 2022, the Presiding Officer issued an Order pursuant to 16 C.F.R. § 1025.38(c) transmitting Respondent’s Application to the Commission.

For the reasons stated in the Application, IT IS HEREBY ORDERED BY THE COMMISSION:

1. That the attached subpoena duces tecum to Otis Elevator Company be issued, and
2. That the Secretary of the Commission is authorized to sign and date the subpoena duces tecum to Otis Elevator Company as set forth in 16 C.F.R. § 1025.38(d).

SO ISSUED this 18th day of March, 2022.

FOR THE COMMISSION,

Alberta Mills

Alberta E. Mills

Secretary

Consumer Product Safety Commission

CPSC Docket No. 21-1
Exhibit E to
Respondent's Opposition to Non-Party
Otis Elevator Company's Motion to
Quash Subpoena
March 31, 2022

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

TO: OTIS ELEVATOR COMPANY
c/o CT Corporation System
67 Burnside Ave.
East Hartford, CT 06108

OTIS ELEVATOR COMPANY
c/o Judy Marks, CEO and President
One Carrier Place
Farmington, CT 06032

SUBPOENA DUCES TECUM

Complaint Counsel in the above-captioned matter is seeking an Initial Decision and Order determining that components manufactured by Respondent thyssenkrupp Access Corp. (now known as TK Access Solutions Corp.), and used to install various residential elevators through 2012, present a substantial product hazard. In the underlying Complaint, Complaint Counsel seeks a recall and certain relief, including the imposition of notice and repair requirements on Respondent related to an alleged Elevator Hazard associated with residential elevators. Respondent believes the Otis Elevator Company has in its possession, custody, or control information relevant to this matter and, in particular, the nature and scope of the requested relief.

The U.S. Consumer Product Safety Commission (“CPSC”) has authorized the issuance of this Subpoena *duces tecum* in this matter pursuant to Sections 15 and 27(b)(3) & (4) of the

Consumer Product Safety Act, 15 U.S.C. §§ 2064 and 2076(b) (3) & (4), and 16 C.F.R. part 1025.

The Subpoena requires that you produce certain documents as requested below. All documents produced in response to this Subpoena that are marked as confidential will be considered confidential within the meaning of the Protective Order entered on October 12, 2021, by the Presiding Officer in this matter.

I. GENERAL INSTRUCTIONS

A. This Subpoena shall be answered by you.

B. Each document production request seeks production of all documents described herein, and any attachments thereto, in your possession, custody, or control, or in the possession, custody, or control of any of your attorneys, employees, agents, or representatives, and all documents and any attachments that you or any of your attorneys, employees, agents, or representatives have the legal right to obtain, or have the ability to obtain from sources under your or their control.

C. These requests shall be read, interpreted, and answered in accordance with these instructions and the definitions set forth herein, as well as 16 C.F.R. § 1025.38. If the meaning of any word or phrase used herein is unclear, you are requested to contact Respondent's counsel for the purpose of resolving any ambiguity. If any request cannot be answered in full after exercising the required diligence, it shall be answered to the extent possible with a full statement of all efforts to fully answer and of all reasons a full answer cannot be made.

D. Produce each document requested herein in its entirety, without deletion, redaction, or excision.

E. Please provide all responsive Documents, including hardcopy, electronic and e-mail Documents in electronic format on CD or DVD. Document level searchable text, all fielded

data, and metadata should be delivered in a Relativity-compatible load file (DAT and OPT) accompanied by Bates-numbered single page Group IV TIFF images representing each page of production.

F. To the extent that you withheld, based upon a claim of privilege, any information, or documents (including electronic records) that would have been responsive to any information or document production requests contained in the Subpoena, provide the following information: for any document withheld, specify the privilege claimed and the factual basis you contend supports the assertion of the privilege, and identify the document as follows: (a) state the date, nature, and subject matter of the document; (b) identify each author of the document; (c) identify each preparer of the document; (d) identify each person who is an addressee or an intended recipient of the document; (e) identify each person from whom the document was received; (f) state the present location of the document and all copies thereof; (g) identify each person who has, or ever had, possession, custody, or control of the document or any copy thereof; (h) state the number of pages, attachments, appendices, and exhibits; and (i) provide all further information concerning the document and the circumstances upon which the claim of privilege is asserted.

G. In an affidavit accompanying the response to the Subpoena, you must include a statement, signed under oath or affirmation, indicating that a diligent search of all files, records, and databases for responsive information and documents has been made, that the information contained in the responses to the questions is complete and accurate, and that you have produced true copies of all the documents requested in the Subpoena.

H. Your obligation to respond to the Subpoena is a continuing one. As additional information becomes available to you that is responsive to the Subpoena, you must submit that information immediately.

II. DEFINITIONS

For the purposes of the Subpoena the following definitions apply:

A. "Otis" means Otis Elevator Company, with its principal place of business located at One Carrier Place, Farmington, CT, 06032, including any agent, parent, subsidiary, affiliate, successor, or predecessor entity, as well as past and present officers, directors, representatives, agents, and employees of Otis.

B. "Document(s)" shall be interpreted as the term is used in Federal Rule of Civil Procedure 34 and includes electronically stored information.

C. "Elevator Hazard" means the child entrapment hazard posed by the installation of the Elevators.

D. "CAP" refers to the final Corrective Action Plan entered into between Otis and the CPSC related to the "recall" to inspect home elevators announced on December 17, 2020.

E. "MPR" means any monthly progress report filed with the CPSC as part of the "recall" to inspect home elevators announced on December 17, 2020.

F. "Recall" refers to the CPSC's announcement on December 17, 2020 requiring Otis to inspect private residential elevators due to an alleged Elevator Hazard. See [Otis Elevator Company Recalls to Inspect Private Residence Elevators Due to Entrapment Hazard; Risk of Serious Injury or Death to Young Children | CPSC.gov](#) (CPSC Recall No. 21-056).

III. SUBPOENA DUCES TECUM

You are ordered to produce and permit inspection of the following documents and things in your possession, custody, or control at the offices of Keller and Heckman, LLP, 1001 G St. NW, Washington, DC 20037 c/o Sheila A. Millar or through some other mutually convenient means within thirty days of service hereof.

1. The final CAP as approved by the CPSC.
2. Copies of all MPRs submitted to the CPSC related to the “recall to inspect” home elevators announced on December 17, 2020 (CPSC Recall No. 21-056).
3. A copy of any closing letter issued by the CPSC related to the recall and any additional communications between Otis and CPSC in response to or following up on any such closing letter by CPSC.

BY ORDER OF THE COMMISSION

The undersigned, an authorized official of the U.S. Consumer Product Safety Commission, has hereto set her hand and caused the seal of the Commission to be affixed at Bethesda, MD, this 18th day of March, 2022

Alberta Mills

Alberta E. Mills
Secretary
U.S. Consumer Product Safety Commission

CPSC Docket No. 21-1
Exhibit F to
Respondent's Opposition to Non-Party
Otis Elevator Company's Motion to
Quash Subpoena
March 31, 2022

AFFIDAVIT OF PROCESS SERVER

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

In the Matter of Thyssenkrupp Access Corp.

Respondent,

VS.

Attorney: *****

Keller and Heckman LLP
1001 G St., NW, #500 West
Washington DC 20001



276366

Case Number: CPSC Docket No.: 21-1

Legal documents received by Same Day Process Service, Inc. on **03/22/2022** at **11:07 AM** to be served upon **Otis Elevator Company, by serving CT Corporation System at 67 Burnside Ave., East Hartford, CT 06108**

I, **Jason Douglas**, swear and affirm that on **March 22, 2022** at **1:25 PM**, I did the following:

Served **Otis Elevator Company, by serving CT Corporation System** by delivering a conformed copy of the **Order Issuing Subpoena Duces Tecum on Otis Elevator Company; Subpoena Duces Tecum to Gary Scappini as Intake Specialist & Authorized Agent of Otis Elevator Company, by serving CT Corporation System at 67 Burnside Ave. , East Hartford, CT 06108.**

Description of Person Accepting Service:

Sex: Male Age: 50-60 Height: 5ft9in-6ft0in Weight: 161-200 lbs Skin Color: Caucasian Hair Color: Gray

Supplemental Data Appropriate to this Service:

I declare under penalty of perjury that the foregoing information contained in this affidavit is true and correct and that I am a professional process server over the age of 18 and have no interest in the above legal matter.


Jason Douglas
Process Server
Same Day Process Service, Inc.
1413 K St., NW, 7th Floor
Washington DC 20005
(202)-398-4200
info@samedayprocess.com

Internal Job
ID:276366



CPSC Docket No. 21-1
Exhibit G to
Respondent's Opposition to Non-Party
Otis Elevator Company's Motion to
Quash Subpoena
March 31, 2022

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of

THYSSENKRUPP ACCESS CORP.

Respondent.

CPSC DOCKET NO.: 21-1

**NON-PARTY OTIS ELEVATOR COMPANY’S MOTION TO QUASH
SUBPOENA DUCES TECUM AND MEMORANDUM IN SUPPORT THEREOF**

In its Recall Handbook, the U.S. Consumer Product Safety Commission (“the Commission” or “CPSC”) observes that “[r]arely will any two recall programs be identical.”¹ This is because consumer products, even within the same industry or product category, typically differ in manifold ways – in their design, manufacture, marketing, distribution chain and beyond. Products are sold by companies of different sizes in different geographies in different ways and at different price points. The population of a given product sold to consumers can vary over time, and visibility into the product’s distribution may be extensive or be non-existent. Even when two products pose a similar hazard, they may call for different corrective actions based on the above stated factors and other underlying facts and circumstances. Simply put, the choice of corrective action for one company’s product, and the manner in which it is effectuated, can often have nothing to do with that of another company even if the recalled product is substantially similar.

Notwithstanding these realities, respondent TK Access Solutions Corp. (“TK Access”) has subpoenaed three categories of documents from non-party Otis Elevator Company (“Otis” or “the Company”) related to Otis’ voluntary recall of certain private residential elevators in

¹ U.S. Consumer Prod. Safety Comm’n, Product Safety Planning, Reporting, and Recall Handbook (Aug. 2021) at 15.

December 2020 (the “Subpoena”). TK Access—a direct and primary competitor of Otis—maintains that because Otis voluntarily recalled a private residential elevator with the same hazard as the one sought to be recalled here, it is somehow entitled to discover Otis’ corrective action plan (“CAP”) and monthly progress reports (“MPRs”).²

The Subpoena should be quashed. The materials requested are not relevant whatsoever to the claims or defenses in the underlying litigation; the request defies settled notions of agency enforcement discretion; required production could chill industry’s cooperation with the CPSC on voluntary corrective action; and commercially sensitive material such as that sought here should not be ordered produced by a third party to its direct competitor barring exceptional cause, of which none exists.

ARGUMENT

In this administrative litigation, “[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. § 1025.38(g), the person to whom a non-party subpoena is directed must set forth “the reasons why the subpoena should be withdrawn” Otis’ reasons follow.

I. The Subpoena Should be Quashed Because Otis’ Voluntary Recall Has No Relevance to this Litigation.

On December 17, 2020, Otis voluntarily recalled to inspect certain private residential elevators that the Company sold to independent third-party contractors and consumers from 1999 to 2012.³ Otis worked cooperatively with the CPSC for the better part of a year to fashion its

² TK Access seeks a third category of documents, “a copy of any closing letter issued by the CPSC related to the recall and any additional communications between Otis and CPSC in response to or following up on any such closing letter by CPSC.” Otis has no documents responsive to this request.

³ U.S. Consumer Prod. Safety Comm’n, “Otis Elevator Company Recalls to Inspect Private Residence Elevators Due to Entrapment Hazard; Risk of Serious Injury or Death to Young Children” (Dec. 17, 2020). *See* Resp. App. at Exh. B.

detailed CAP that memorialized the terms and conditions of Otis' voluntary recall. For each month since announcing its recall, Otis has filed MPRs with the Commission pursuant to the CAP.

TK Access's application for issuance of a subpoena maintains that Otis "has in its possession, custody, or control information relevant to the above-captioned matter, and specifically the relief sought by Complaint Counsel against Respondent." *See* Resp. Appl. at 2. Specifically, TK Access requests that Otis produce the aforementioned CAP and MPRs, claiming that such information is relevant to

"any claim by Complaint Counsel that the Company's Home Elevator Safety Program, which offers free inspections of residential elevator component installations and, as needed, free installation of free space guards, as well as a "do it yourself" option, is inadequate; any claim by Complaint Counsel regarding expected response rates in the event of a "recall;" and any defense Respondent may raise regarding the extent to which Complaint Counsel may seek disparate remedies for an alleged "defect" that the agency has asserted is an industry-wide issue, to the extent Complaint Counsel meets its burden of proof in that regard."

Id. at 4.

This is not so. Neither the Company's CAP nor its MPRs is relevant to any party's claim or defense in this litigation. Although "the standard of relevancy [in discovery] is a liberal one," it is "not so liberal as to allow a party to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so." *Food Lion, Inc. v. United Food & Com. Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1012-13 (D.C. Cir. 1997) (internal citations omitted). Indeed, under the 2015 amendments to Federal Rule of Civil Procedure 26, "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)

(rejecting part of special master’s report and recommendation where relevancy was considered to “be as broad as the subject matter, which is broader than the scope of discovery contemplated by Rule 26”).⁴

Otis’ recall, and associated paperwork, is not germane to the CPSC’s administrative litigation against TK Access. Otis’ and TK Access’ corrective actions are neither intertwined nor related in any way; rather, they are the product of separate enforcement matters and corporate decisions, each with unique facts and circumstances that may warrant different outcomes. Otis’ CAP, which sets the terms of its agreed-upon voluntary recall, has nothing whatsoever to do with Complaint Counsel’s claims regarding the adequacy of TK Access’s current home elevator safety program.

To the point, the Complaint in this matter focuses on TK Access, speaks of TK Access conduct, and seeks relief against TK Access. It says not a thing about Otis’s voluntary corrective action. Its lone reference to Otis is to a letter from 2003—*nearly two decades ago*. See Complaint ¶¶ 82-84.

Nor is there reason or basis in fact to believe Otis’ recall response rates over time will be useful in predicting those rates for any future corrective action involving TK Access’ residential elevator(s). Recall effectiveness rates can vary—even for a substantially similar product—based on a myriad of factors, such as the number of units in the field and visibility into their distribution, and here, installation.

Nor are Otis’s documents relevant to any potential remedy that Complaint Counsel may seek. As noted above, the Complaint in this case is tailored to TK Access, and seeks relief

⁴ As recently noted by Complaint Counsel in its Opposition to Non-Party Patrick M. Bass’s Motion to Quash Subpoena, “[a]lthough 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.” Opp. at 1-2 (Dkt. No. 64) (internal citations omitted).

strictly and solely as to TK Access. Otis's recalled private residential elevators (Otis and Cemco Lift) are different than the subject products (Chaparral, Destiny, LEV, LEV II, LEV II Builder, Rise, Volant, Windsor, Independence, and Flexi-Lif residential elevators) in this administrative litigation and the terms and conditions of Otis's CAP with the agency address issues *unique* to Otis's past and current businesses. Indeed, Otis, unlike TK Access, is no longer even in the business of selling and installing home residential elevators in the U.S.

TK Access is not entitled to documents related to private residential elevators from non-parties simply because those non-parties once, years ago, made somewhat similar products. Indeed, TK Access is no more entitled to Otis's CAP and MPRs than it is to those records from a non-elevator company that has recalled an entirely different product.

II. The Subpoena Defies Settled Notions of Agency Enforcement Discretion.

An order requiring production of these documents means in effect that administrative enforcement discretion is defeated: that is, that recalls within a particular industry or product line must take the same form and have the same particulars, and that the CPSC's approach to one corrective action must mirror or substantially resemble all others. This is not, and has never been, the law, or how practice before the CPSC works.

Federal agencies, such as the CPSC, generally have flexibility to determine whether and when to initiate an enforcement action against a third party for alleged violation(s) of a law the agency is charged with administering—in this case, the Consumer Product Safety Act (“CPSA”). This notion is commonly referred to as “administrative enforcement discretion.” The United States Supreme Court has “recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” *Heckler v. Chaney*, 470 U.S. 821, 831

(1985) (internal citations omitted). The Court in *Heckler* noted that agency enforcement decisions involve a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise including,

“... whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.”

Id.

This bedrock principle applies here. The core premise of TK Access's request for issuance of a subpoena is that what the agency said and did as to Otis has some bearing on what this tribunal might say and do as to TK Access. This is incorrect factually, and doctrinally, and nothing in the petition demonstrates otherwise.

The terms and circumstances of Otis's voluntary recall reflect bespoke negotiations with the CPSC and company considerations unique to Otis, its deliberative process, and its business model, all necessarily disparate from those sought by Complaint Counsel here for TK Access's compliance matter. The presence of an “industry-wide” issue is dispositive of nothing, for it does not alter settled principles of enforcement discretion.

III. The Subpoena Should be Quashed to Avoid A Chilling Effect on Cooperation with the Commission on Voluntary Recalls.

Reasons of public policy also favor quashing of the Subpoena.

As part of Otis's voluntary corrective action, the Company has provided (and continues to provide) the Commission with sensitive business information, some of which is reflected in its CAP and MPRs. For example, Otis's CAP includes information concerning the details of the accepted remedy and methods through which Otis agreed to provide notice to potential

consumers and other third parties, while its MPRs include market information such as the number of products remedied by the Company each month as a result of the recall; the physical location of the products subject to recall; and information about Otis customers.

Otis agreed to voluntarily provide much of this information to the agency on its understanding that the information would not be subject to public disclosure (and certainly not to direct competitors) pursuant to Section 6(a)(2) of the CPSA (15 U.S.C. §2055 (a)(2)) and FOIA Exemption 4. Section 6(a)(2) of the CPSA provides that “[a]ll information reported to or otherwise obtained by the Commission...under this Act which information contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, or subject to section 552(b)(4) of title 5, [United States Code] ... shall be considered confidential and shall not be disclosed.” Exemption 4 of FOIA steps in separately to protect “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. 552(b)(4). This exemption is intended to protect the interests of both the government and submitters of information. *See, e.g., Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 767-70 (D.C. Cir. 1974) (concluding the legislative history of the FOIA “firmly supports an inference that [Exemption 4] is intended for the benefit of persons who supply information as well as the agencies which gather it”).

The subpoena TK Access seeks would end-run these enshrined protections. It would also risk chilling of future industry cooperation with the CPSC. Companies would be left no choice but to understand that competitors might obtain competitive information of their business rivals simply by subpoenaing them. This is no mere hypothetical: it is precisely what is happening right here, right now, TK Access and Otis being direct competitors. Customary negotiations with the agency over potential corrective action would have companies looking over their

shoulders wondering whether the fruits of their efforts become fair game, readily available to their direct competition. The ordered production of information could thus also have the corollary effect of spurring additional, needless litigation, as companies consider whether the risk of ordered disclosure per subpoena outweighs the benefits of consensual outcomes. These risks, however one estimates them, stand against no case presented of relevance or good cause for the requested subpoena.

CONCLUSION

Respectfully, the Court should quash the subpoena served on Otis by TK Access in this administrative litigation.

March 30, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Matthew Cohen, hereby certify that on March 30, 2022, a copy of the foregoing document was filed with the Secretary of the U.S. Consumer Product Safety Commission pursuant to 16 CFR 1025.16 and served on all parties in this proceeding as follows:

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By electronic mail to the Presiding Officer:

The Honorable Mary Withum
Administrative Law Judge
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CPSC Docket No. 21-1
Exhibit H to
Respondent's Opposition to Non-Party
Otis Elevator Company's Motion to
Quash Subpoena
March 31, 2022

[REDACTED]

[REDACTED]

[REDACTED]

CPSC Docket No. 21-1
Exhibit I to
Respondent's Opposition to Non-Party
Otis Elevator Company's Motion to
Quash Subpoena
March 31, 2022

CPSC Docket No. 21-1
Exhibit J to
Respondent's Opposition to Non-Party
Otis Elevator Company's Motion to
Quash Subpoena
March 31, 2022

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

CPSC Docket No. 21-1
Exhibit K to
Respondent's Opposition to Non-Party
Otis Elevator Company's Motion to
Quash Subpoena
March 31, 2022

