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 REPLY BRIEF IN SUPPORT OF ITS MOTION TO QUASH SUBPOENA DUCES TECUM

On March 30, 2022, non-party Otis Elevator Company ("Otis" or "the Company") filed a motion to quash a subpoena served on it by respondent TK Access Solutions Corp. ("TK Access") ("the Motion"). In its opposition filed March 31, 2022 ("Opposition"), TK Access newly asserts a standard for discovery that is no longer law; confirms despite itself that the subpoena is a frontal assault on agency discretion; offers new assurances on confidentiality that are not reassuring; and never gets around to establishing relevance for the third-party incursion it seeks.

1. TK Access Invokes an Obsolete Standard of Relevance.

TK Access, for the first time, articulates its proposed standard for assessing the relevance of the discovery that it seeks from Otis. Opp. at 5-6. According to TK Access, "information is relevant if it is germane and 'has any bearing on the subject matter of the case.'"[1] *Id.* at 6. For this standard, TK Access invokes case law from 1967, 1979, 1985, and 2008. *Id*. at 5-6.

TK Access' recitation of the standard is mistaken, as law has evolved in the decades since TK Access's case law citations. Nowadays, the information sought must relate to a party's claim(s) or defense(s) in the litigation and be proportional to the needs of the case. Fed. R. Civ.

[1] *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).

P. 26(b)(1). "Rule 26's expression of the scope and limits of discovery has evolved over the last thirty years or so. Each time the language and/or structure of the 'Discovery Scope and Limits' section of the rule was changed, *it was to rein in popular notions that anything relevant should be produced*…" *Noble Roman's, Inc. v. Hattenhauer Distrib. Co.*, 314 F.R.D. 304, 307 (S.D. Ind. 2016) (emphasis added). Specifically, the 2015 amendment to Rule 26(b)(1) "deleted the 'subject matter involved in the action' from the scope of discovery, *i.e.*, deleted a court's authority to order discovery of matter relevant to the subject matter of a case." *Cole's Wexford Hotel, Inc. v. Highmark Inc.*, 209 F. Supp. 3d 810, 823 (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).

Thus, under *current* Rule 26, Otis' CAP and MPRs are not intrinsically "relevant" simply because they bear on a voluntary recall of private residential elevators—the subject matter of the underlying litigation. The requested records must relate to a party's claim(s) or defense(s) in the litigation, which is not the case here.

2. TK Access' Sole Relevance Argument Flouts Agency Discretion and Practical Reality.

Objecting to Otis' observation that the subpoena requested runs headlong into settled principles of agency discretion, the Opposition unwittingly confirms the point. TK Access argues that Otis' CAP and MPRs are relevant because Complaint Counsel has put at issue the effectiveness of TK Access' recent efforts to alert homeowners to the potential hazards of residential elevator installations. Opp. at 1, 6-11. TK Access asserts that because Otis' voluntary corrective action involved a "nearly identical" hazard and remedy, it is "entitled to know if the CPSC approved remedies in the Otis recall…differ from the relief Complaint Counsel demands in this matter." *Id.* at 9. TK Access thus maintains that two separate

corrective actions conducted by unrelated companies, resulting from separate enforcement efforts and separate negotiations with a federal agency, must mirror one another. In other words, TK Access wants discovery of Otis because, in its view, how the CPSC dealt with Otis on corrective action is how CPSC must also deal with TK Access.

This is the polar opposite of agency discretion. TK Access then doubles down, asserting that "disparate remedies" and an agency's exercise of "discretion" would run afoul of "all notions of fairness and due process." *Id.* at 13. For this notion, TK Access cites no law.

The movant's sole theory of relevance is thus doctrinally incorrect. It also departs from standard CPSC practice whereby the agency endorses or requires disparate remedies in the ordinary course.[2] And it fails as a matter of fact and common sense, since the corrective action practices of different companies selling different elevator products through distinct distribution streams during different time periods are not likely to reveal deep (or relevant) truths about the other's—and movant does not demonstrate otherwise.

3. Third Parties Like Otis Have A Compelling Interest in Maintaining Confidences, as Does Public Policy.

TK Access now says that production of Otis' CAP and MPRs to it should cause no concern because this would not be a "public" production by the Commission. This is cold comfort indeed. TK Access wants competitive business information to be handed to it. This is the point: it becomes "public" to a direct Otis competitor. The intrusion this commands, and the

[2] *See*, for example, three recent voluntary recalls of adult portable bed rails whereby the recalling firms offered consumers different remedies, including refunds and/or repairs, to address the same alleged hazard. Essential Medical Supply Recalls Adult Portable Bed Rails Due to Entrapment and Asphyxia Hazard; One Death Reported | CPSC.gov; Compass Health Brands Recalls Carex Adult Portable Bed Rails After Three Deaths; Entrapment and Asphyxiation Hazards | CPSC.gov; and Drive DeVilbiss Healthcare Recalls Adult Portable Bed Rails After Two Deaths; Entrapment and Asphyxiation Hazards | CPSC.gov.

chill it portends for future agency negotiations and corrective actions, are evident and explained in Otis's opening submission.

CONCLUSION

Respectfully, the Court should quash the subpoena served on Otis by TK Access.

April 6, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Matthew Cohen, hereby certify that on April 6, 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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