UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

IN RE:	CPSC DOCKET NO.: 21-1
THYSSENKRUPP ACCESS CORP.	
Respondent.	

MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

Pursuant to 16 C.F.R. § 1025.23, Respondent TK Access Solutions Corp., formerly known as thyssenkrupp Access Corp. ("the Company"), by and through its undersigned counsel, respectfully moves this Presiding Officer to dismiss the above-captioned action on the grounds that:

- The U.S. Consumer Product Safety Commission ("CPSC" or "the Commission") lacks jurisdiction over the Company as an installed elevator using elevator components that the Company manufactured and distributed, at the selection of and for on-site installation as improvements to realty by professionals in the trade (hereinafter collectively the "Components"), were not and are not "consumer products" within the meaning of Section 2(a)(5) of the Consumer Product Safety Act ("CPSA" or "the Act"), 15 U.S.C. § 2052(a)(5);
- This action is moot as the Company is already taking all of the actions the Complaint seeks to compel, except those actions that are beyond the Commission's authority to order;
- This action is moot as the CPSC already took final agency action in 2014 and again in 2017 addressing the same issues raised in this action, and has failed to adequately explain why that final agency action should be disturbed;

- This action violates due process as no fair notice was provided to the Company that CPSC would seek to apply retroactively the voluntary standard that is the basis of the Complaint's theory of "defect;" and
- This action violates both the CPSA's prohibition on retroactive mandatory rules and the presumption against retroactive application of a standard that was adopted years after the Company exited the residential elevator market.

STATEMENT OF FACTS

Until 2012, the Company, through several brands, manufactured residential elevator Components for distribution to and installation by or through local dealers. Decl. of Mauro Carneiro ("Affidavit"), TK_000001-06, ¶ 3. These non-consumer dealers were not laymen but learned-intermediary, non-consumer third parties. While the Company furnished the Components, other parties would be involved in selecting those components based on the requirements and desires of homeowners. Those other third parties could include, without limitation, architects, builders, remodelers, and other contractors (hereinafter the "Trade Professionals). Affidavit ¶ 8. The Components were installed on-site by trained, professional, non-consumer installers, most often third parties, who were subject to and presumptively knowledgeable about applicable codes and requirements governing elevators in residences in the locale of the installation. Residential elevators are installed in a shaft or hoistway. Affidavit ¶ 10. This hoistway is set off from the rest of the residence by a "hoistway door" that is not manufactured or supplied by the Company. Affidavit ¶ 10. Importantly, non-Company third parties in every instance were responsible for constructing the elevator hoistway in which the elevator was to be installed, and these non-Company third parties were also responsible for

selecting and installing the hoistway doors that separate the elevator from the adjacent living quarters. Affidavit ¶ 11-12.

The space between the hoistway door and the sill, and the hoistway door and the car door, is collectively known as the "Gap Space." Affidavit ¶ 13. Where this Gap Space is sufficiently large, a child may be able to open the hoistway door (if it is unlocked), enter the Gap Space, and close the hoistway door. Affidavit ¶ 14 . If the elevator is then called to another floor, the magnetic lock will engage, and the child will be unable to open the hoistway door to exit the Gap Space, and may suffer serious, potentially fatal injuries. Affidavit ¶ 15.

Residential elevator installations are governed by state and local building codes, generally drawing upon the relevant voluntary standard, the American Society of Mechanical Engineers' ("ASME") A17.1, *Safety Code for Elevators and Escalators*. Affidavit ¶ 16-17. To guard against the serious potential hazards associated with installations that create excessive Gap Spaces, A17.1 contains a provision instructing installers as to the appropriate limit for the Gap Space. Affidavit ¶ 18. *See, e.g.*, ASME A17.1-2007 § 5.3.1.7.2. Throughout the entire period that is the subject of the Complaint (and indeed for years after), this provision limited the space between the hoistway door and the edge of the elevator landing to not more than three inches and the space between the hoistway door and the car door or gate to not more than five inches (the "3-Inch/5-Inch Rule"). Affidavit ¶ 20 . *See, e.g., id.* Where excessive Gap Spaces exist, they may be reduced by the installation of a "space guard," a rigid attachment that is installed on the elevator-facing side of the hoistway or hallway door to prevent the door from being shut if the Gap Space is occupied. Affidavit ¶ 21-22 .

In 2012, the Company exited the U.S. residential elevator market. Affidavit ¶ 4. The Company ceased manufacture and distribution of Components under all of its brands. Affidavit ¶ 4.

In 2013, after receiving a report of an incident associated with the Gap Space created by the improper third-party installation of a Company Component, CPSC opened an investigation. In response, the Company informed CPSC of its intent to create a campaign, called "homeSAFE" that would communicate the hazards associated with the improper installations of elevators and hoistway doors through both public messaging and direct notice to dealers and other professionals. Affidavit ¶ 23 . Even though the Company had manufactured and distributed the Components under then-in-force versions of ASME A17.1 that established the 3-Inch/5-Inch rule as the appropriate measure for Gap Space, ongoing discussions suggested that Gap Spaces of ¾ inches from the hoistway door to the sill and four inches from the hoistway door to the interior gate might add an additional margin of safety (above the already protective Gap Space installation standard in the then-in-force version of ASME A17.1). The Company then recommended applying this Gap Space standard for the homeSAFE campaign.

The Company advised CPSC that it would also subsidize the purchase of space guards for homeowners whose Components and adjoining hoistway doors had been improperly installed in a way that created an excessive Gap Space. The homeSAFE campaign was formally launched with a press release on June 25, 2014, and included a website detailing the potential hazards associated with improper third-party installations of elevators and hoistway doors and the availability of space guards to reduce excessive Gap Spaces. Space guards are installed on the hoistway door and serve to reduce the Gap Space at the hoistway door to sill portion of the installation. Three industry associations, the National Association of Elevator Contractors

("NAEC"), the Accessibility Equipment Manufacturer's Association ("AEMA"), and the National Association of Elevator Safety Authorities ("NAESA"), joined in supporting the homeSAFE campaign, which was entirely underwritten by the Company. Affidavit ¶27 .

On June 19, 2014[1], CPSC informed the Company that it had closed its investigation. *See* Letter from Jonathan Thron to Jay Doyle ("Closing Letter"), ¶ 3 (June 19, 2014), attached as **Exhibit A**, TK_000007-09. In the Closing Letter, CPSC wrote that the Company had "indicated that it voluntarily implemented a corrective action plan to address the reported problem," which CPSC described as "elevators [that] were *installed out of specification.*" *Id.* ¶ 3 (emphasis added). CPSC expressly "acknowledge[d]" the homeSAFE campaign's education and space-guard components." *Id.*

In 2014, the Safety Institute, Carol Pollack-Nelson, and the law firm of Cash Krugler ("Safety Institute *et al.*") filed a petition seeking adoption of a mandatory standard for elevator safety and also requested that CPSC order a recall to retrofit existing elevators ("Elevator Petition"), attached as **Exhibit B**, TK_000010-24. The Petition expressly referenced the homeSAFE campaign. Elevator Petition at 7. CPSC accepted the Elevator Petition for review and published a Federal Register notice soliciting public comments. 80 Fed. Reg. 3226 (January 22, 2015), attached as **Exhibit C**, TK_000025-26.

In 2016, ASME published a version of its code, A17.1-2016, formally adopting Gap Space provisions reducing the allowed distance from the hoistway door to the sill from 3 inches to ¾ inches, a reduction of 2 ¼ inches, and the distance from the hoistway door to the interior car door to 4 inches, a reduction of 1 inch from the earlier 5-inch standard.

[1] Current Acting Chairman Robert S. Adler served as Acting Chairman at the time the Closing Letter was issued.

In 2017, the Commission denied the Elevator Petition, *see* Record of Commission Action at 1 (Mar. 24, 2017), attached as **Exhibit D**, TK_000027, as recommended by CPSC's technical staff. *See* Briefing Package – Petition CP 15-01: Petition for Residential Elevators ("Briefing Package"), 16 (Mar. 15, 2017), excerpted and attached as **Exhibit E**, TK_000028-91.

CPSC did not consider the Elevator Petition's request for a recall of installed elevators, as the agency noted that recalls may be conducted only under Section 15 of the CPSA rather than under CPSC's petition regulations at 16 C.F.R. § 1051.1(a). Briefing Package at 4 n.1. Notably, however, in the Briefing Package, CPSC technical staff expressly wrote that it had not requested any recalls, saying: "*CPSC staff could not identify any specific elevator models or manufacturers whose installations revealed design defects or installation defects that caused a substantial product hazard.*" Briefing Package at 14 (emphasis added). At the time of this evaluation, staff had previously investigated the incident described in Paragraphs 67- 73 of the Complaint which resulted in the 2014 Closing Letter, so the statement confirms that no defect was identified in that investigation.

Staff's recommendation to deny the Elevator Petition was based on its determination that ASME A17.1-2016 would adequately address the hazards associated with excessive Gap Spaces resulting from improper installation in new installations and that there would be substantial compliance with ASME A17.1-2016. Staff repeatedly acknowledged the homeSAFE campaign in the Briefing Package, *see, e.g.*, Briefing Package at 13, although still had not and did not subsequently publicly promote or support it as an available solution for homeowners. CPSC also noted that the then-pending revision of a separate but related standard, ASME A17.3, *Safety Code for Existing Elevators and Escalators*, to align its Gap Space provision with that of A17.1 "would address potential entrapment hazards on existing elevators." Briefing Package at 13.

Regarding the nature of the potential hazard, CPSC staff wrote:

> Hoistway doors are generally not manufactured or supplied by the elevator manufacturer. Elevator dealers or installers work with home remodeling contractors (if the elevator is being retrofitted into an existing home) and home builders (if the elevator is being installed in new construction) to design and build the hoistway or shaft in which the elevator will be installed. *The contractor involved in building or modifying the house to accommodate the elevator hoistway or shaft would be responsible for building or installing the hoistway door and sill.* Briefing Package at 7 (emphasis added).

The Briefing Package also noted the role of three major trade associations in disseminating information to its members related to the Gap Space hazards. *See, e.g.*, Briefing Package at 13.

The Commission adopted the staff's recommendation and rejected the Elevator Petition. CPSC stated in its letter to the Petitioners notifying them of the denial: "CPSC staff expects to work with ASME to alert the state regulatory bodies of the latest version of the voluntary standard, which will help increase compliance with the voluntary standard." *See* Letter from Todd Stevenson to Elevator Petitioners, April 26, 2017, p. 3, attached as **Exhibit F**, TK_000092-95.

CPSC did not endorse or promote the earlier homeSAFE campaign, although the Petitioners mentioned the campaign in the 2014 Elevator Petition, *see* Elevator Petition at p. 7, and the homeSAFE campaign was referenced in the Staff Briefing Package denying that petition, *See* Briefing Package at 13. CPSC also never provided a link to the homeSAFE campaign website or referenced the then-available toll-free number in consumer-facing communications.

Unfortunately, despite the Company's efforts, including through its homeSAFE campaign, the Company is aware of two subsequent incidents associated with installations of Components and hoistway doors that failed to comply with the Gap Space provisions of the then-in-force versions of ASME A17.1. One, in 2017, resulted in a tragic fatality, while the other, in 2019, thankfully resulted in no permanent injury.

The Company is not aware of any efforts by the Commission or any Commissioner or staff to alert or notify state regulatory or other state governmental bodies of hazards associated with improperly installed elevators until August, 2019, when then-Acting Chairman Ann Marie Buerkle wrote to the governors of all states, warning that, "*In some installations*, the space between the elevator car door and hoistway door is large enough to allow children to fit between the doors." Letter from Ann Marie Buerkle to Governor ("Buerkle Letter") ¶ 1 (Aug. 6, 2019) (emphasis added), attached as **Exhibit G**, TK_000096-97. "*Given the critical role of installers*," Buerkle urged governors to ensure their states adopted ASME A17.1-2016 and required inspections of installed elevators. *Id.* at para. 3 (emphasis added). The Acting Chairman's office issued a press release announcing her letter to the governors, joined by the Accessibility Equipment Manufacturers Association ("AEMA") and the National Association of Elevator Contractors ("NAEC"). Press Release ("Buerkle Release"), Safety Alert to Protect Children from a Deadly Gap between Doors of Home Elevators (Aug. 1, 2019), attached as **Exhibit H**, TK_000098-99. Days later, the Commission as a whole issued a news release that included the caution that "*Elevator installers* should never allow any gap greater than four inches deep to exist in an elevator entryway." Press Release ("2019 Release"), U.S. Consumer Prod. Safety Comm'n, CPSC Alert: Protect Children from a Deadly Gap between Doors of Home Elevator Release ¶ 3 (Aug. 8, 2019), attached as **Exhibit I**, TK_000100-102 (emphasis added).

In February, 2021, the Company voluntarily launched an enhanced Home Elevator Safety Program ("Program") through a new website at http://www.homelevator-safety.com. The Program was launched with a nationwide press release, including dissemination of a toll-free telephone number and website URL to allow homeowners to register for a free measurement visit, free space guards, and free space guard installation assistance. The website also includes an animated video that dynamically illustrates the potential hazard and describes how to measure the Gap Space, provides detailed FAQs, offers instructions on how to measure the Gap Space, and provides a registration form for homeowners to register for a free measurement visit and for free installation of free space guards. The video and other materials were produced with input from experts in human factors and other relevant professional fields, and these materials illustrate how homeowners and others can easily measure the Gap Space using a tape measure.

In addition, the Company has:

- sent traditional mail and email notices to all of its former dealers;
- sent additional follow-up mail and email notices to former dealers except those whose initial mailing or email was returned as undeliverable;
- sent notices to all known, current residential elevator dealers, regardless of manufacturer affiliation;
- sent notices to all affected homeowners for whom it has or is provided by dealers with active contact information;
- sent notices to the Governors of all U.S. states and territories, including the District of Columbia;
- sent notices to the insurance commissioners (or equivalent officers) of all U.S. states and territories, including the District of Columbia;

- purchased paid search engine advertising ("SEA") to promote the program using a detailed list of search terms; and
- launched Facebook and Twitter pages for the Program. *See* collectively Home Elevator Safety Program Materials attached at **Exhibit O**, TK_000118-184.

Details of the Home Elevator Safety Campaign were shared with CPSC staff.

Additionally, the Company has sent or is sending notices to the following associations and organizations, and will post these communications on its website:

- Home-rental companies Airbnb, Vrbo, Tripadvisor, and Booking.com;
- The National Association of Elevator Safety Authorities ("NAESA");
- The Association of Members of the Accessibility Industry ("AEMA");
- The National Association of Home Builders ("NAHB");
- The National Association of the Remodeling Industry ("NARI");
- The American Society of Home Inspectors ("ASHI");
- The American Association of Retired Persons ("AARP");
- The American Association of People with Disabilities ("AAPD"); and
- The National Association of Elevator Contractors ("NAEC"). *See* collectively Home Elevator Safety Program Materials attached at **Exhibit O**, TK_000185-217.

Likewise, the Commission, despite its multiple recent communications on elevator safety, including communications issued after this Complaint was filed, has not referenced the current Home Elevator Safety Program website or toll-free number, or referred to the Company's voluntary offer of free inspections and, as needed, free installation of free space guards to reduce

the hazards associated with any improper third-party installations of hoistways or hoistway doors adjoining Components.

For example, on June 24, 2021, the Commission issued a news release warning about potential hazards associated with improper elevator installations in vacation rental homes. Press Release ("2021 Release"), U.S. Consumer Prod. Safety Comm'n, Vacation Rental Homes Can Pose a Deadly Hazard – Kids Can Be Crushed to Death in Dangerous Home Elevator Gaps ¶ 2, attached as **Exhibit J**, TK_000103-106. In that release, CPSC wrote, "*Elevator installers should never allow any gap greater than four inches deep to exist in an elevator entryway,* as measured in accordance with ASME A17.1-2016[,] Safety Code for Elevators and Escalators." *Id.* ¶ 5 (emphasis added).

See also Press Release, CPSC Urges Vacation Rental Platforms, AirBnB [*sic*], Vrbo, TripAdvisor [*sic*] and Others to Require Owners to Disable Home Elevators Immediately (July 20, 2021); Press Release, As Family Vacations Resume, CPSC Warns of Safety Hazards in Vacation Rental Homes (July 13, 2021); and Press Release, CPSC Sues [TK Access Solutions Corp.] over Deadly Gap Hazard in Residential Elevators (July 7, 2021); Letter from Acting Chairman Robert Adler (July 20, 2021). *See* **Exhibits K-N**, TK_000107-117 respectively.

ARGUMENT

As discussed below, there are multiple grounds for the dismissal of this action.

CPSC Lacks Jurisdiction Because the Elevator Components Are Not Consumer Products

The Commission does not have jurisdiction over the Components[2] under the authority provided by the CPSA.

[2] Throughout, this Memorandum may use the word "product" as a term of convenience. However, as discussed in this section, the term "consumer product," as used in the CPSA, does not include the Components, and no such uses of or references to the word "product" within this Memorandum or any other document should be construed to the contrary.

CPSC is charged with, in part, "protect[ing] the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. § 2051(b)(1). The CPSA defines a "consumer product" as

> ". . . any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise."

15 U.S.C. § 2052(a)(5).

However, the CPSA expressly excludes from that definition – and thus from CPSC's jurisdiction – "any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer." 15 U.S.C. § 2052(a)(5)(A). Moreover, "Housing is not a 'consumer product,'" *Consumer Prod. Safety Comm'n v. Anaconda Co.*, 593 F.2d 1314, 1320 (D.C. Cir. 1979), as CPSC has conceded in prior litigation. *Id* at n20.

The leading cases addressing when improvements to realty meet this definition and may be considered consumer products for CPSA purposes are *Anaconda* and *ASG Indus., Inc. v. Consumer Prod. Safety Comm'n*, 593 F.2d 1323 (D.C. Cir. 1979). In these cases, decided the same day, the D.C. Circuit drew a line between, respectively, "**component parts** of an aluminum branch circuit wiring system [that the consumer] then puts together [as a] system himself [where] the resulting product is not within the definition of a consumer product," *Anaconda*, 593 F.2d at 1321 (emphasis added), and residential glazing products that "are customarily marketed as **distinct articles of commerce** [and thus] qualify as 'consumer products.'" *ASG*, 593 F.2d at 1328 (emphasis added).

Based on these cases, the critical consideration in determining the applicability of the CPSA to any improvement to realty, such as an installed elevator, is whether the improvement was "produced or distributed as a distinct article of commerce, rather than [as] any physical entity that might exist only at an intermediate stage of production." *Anaconda*, 593 F.2d at 1319. Distinct articles, such as windows, are consumer products, *See ASG*, 593 F.2d at 1328; components that are later assembled and integrated into a structure, as with home elevators, are not consumer products. *See Anaconda, 593 F.2d* at 1321.

Here, the Company did not manufacture or distribute complete home elevators, as key elements of the installation, such as the hoistway door and sill, were made or built on site by others. The Company manufactured and distributed home elevator Components, and site-specific subsets of those Components were installed on-site by Trade Professionals within a hoistway built by and using a hoistway door selected by the builder or contractor, all of whom were and are obligated to know and adhere to state and local building codes. CPSC is well aware that the Gap Space hazard exists primarily when Trade Professionals install the hoistway door at too great a distance from the Components, a matter that is within the hands of those responsible for the installation. The Company did not manufacture or distribute hoistway doors – an essential component of elevator installations – let alone select and install them for a particular occupancy.

Further, the *Anaconda* court rejected CPSC's argument that its "jurisdiction extends to every component part of a dwelling [as that] would seem to ignore a contrary congressional intention and potentially raises significant problems of federalism in areas of building construction currently regulated extensively by local jurisdictions." *Id* at 1320. The Complaint's implied argument in this instance has the same limitless sweep,[3] and indeed local jurisdictions

[3] This sweep could also ensnare owners of Components with hoistway doors that were improperly installed by third parties in a manner that created excessive Gap Space, as the relief sought in the Complaint could forbid these

have extensively regulated the installation of residential elevators, promulgating building codes that, in relevant part, limit the size of the Gap Space. *See, e.g.*, 524 Mass. Code Regs. 35.5.3 ¶ 5.3.1.7.2 (2018) (limiting Gap Spaces to three inches rather than ASME's four). CPSC technical staff noted this reality in the Staff Briefing Package. Staff Briefing Package at 13.

Installed home elevators are, like the wiring considered by the *Anaconda* court, not consumer products. Treating the Components as "consumer products" would be inconsistent with the text, legislative history, and subsequent interpretation of the CPSA and would intrude upon matters properly left to state and local governments. As such, the Company respectfully requests that the Presiding Officer hold that the Components are not "consumer products" within the meaning of 15 U.S.C. § 2052(a)(5) and dismiss this action as beyond the scope of CPSC's statutory authority and its jurisdiction. *See* 5 U.S.C. § 706(2)(A), (C).

This Action Is Moot.

This action is moot on two grounds and should be dismissed.

The Relief Sought Is Moot.

"The hallmark of a moot case or controversy is that the relief sought can no longer be given or is no longer needed." *Incumaa v. Ozmint*, 507 F.3d 281, 287 (4th Cir. 2007) (citation omitted); *see also Whiting v. Krassner*, 391 F.3d 540, 544 (3d Cir. 2004) (a case is moot if "changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief."). The mootness doctrine stems from the Constitution's "case" and "controversy" language and thus courts cannot ignore it "for convenience's sake." *Incumaa*,

homeowners from selling their homes, pursuant to the CPSA's prohibition on the sale of recalled goods, as installed home elevators are improvements to realty and an integral part of the home itself. *See* 15 U.S.C. § 2068(a)(2). Under Complaint Counsel's theory, CPSC could at any time determine that an updated building, electrical, fire, or other code prospectively applicable to new home construction should be retroactively applied to existing residences, demand a recall, and effectively bar sales of homes that have not been updated to meet later-adopted code revisions.

507 F.3d at 286 (citation omitted). If a court were to issue an order resolving a moot case, that order would be an impermissible advisory opinion and a waste of judicial resources. *Id.* at 287.

Moreover, the mootness doctrine applies where the defendant has voluntarily ceased the offending conduct and there is "no reasonable expectation that the wrong will be repeated." *Incumaa*, 507 F.3d at 288 (citation and internal quotation marks omitted). As discussed below, the Company not only stopped manufacturing and distributing elevator components in 2012, but also is currently conducting the Home Elevator Safety Program, which provides all of the relief requested by the Complaint, and the Company has publicly committed to maintaining that Program for at least five years, or until December 31, 2025. As such, this court cannot grant any effectual relief to CPSC going forward.

Specifically, the Complaint, in Paragraphs B and C, respectively, requests that the Commission order notification pursuant to Section 15(c) of the CPSA, 15 U.S.C. § 2064(c), and installation of and reimbursement for space guards pursuant to Section 15(d) of the CPSA, 15 U.S.C. 2064(d). But at the time this Complaint was filed, Complaint Counsel were aware that the Company was offering a free measurement visit, free space guards, and free installation of space guards on external hoistway doors, with instructions for self-inspection and self-installation for homeowners who are COVID-sensitive.

Moreover, in Paragraph B, the Complaint seeks a Commission order for two types of notice: (i) direct notice to persons to whom the "products" that are the subject of the Complaint have been distributed,[4] as well as state and local public health officials; and (ii) indirect notice,

[4] This prong of the "Relief Sought" is likely further moot as it seeks notification that directs recipients "to immediately cease distribution." The Company ceased manufacturing and delivering the "products" that are the subject of the Complaint in 2012. Components were delivered as needed to fill site-specific orders for installation sites. While the Company is without sufficient knowledge or information to attest to dealers' inventories, the Company has not heard that any former dealer has any of the Components remaining in inventory, which is to be expected as the Company has not offered the Components for nearly a decade, and there is no credible basis to consider that any such inventory remains. Any notification to "cease distribution" of installed home elevators would

including through the Company's website and social media. As noted above, however, Complaint Counsel was aware at the time this Complaint was filed that the Company, through its Home Elevator Safety Program, had provided multiple notices to dealers and, where contact information was available, to homeowners. Thus, the Company has provided notification of the potential hazard that is the subject of the Complaint that meets or exceeds the scale of notification the Commission would have the authority to order under Section 15(c).

Similarly, in Paragraph C, the Complaint seeks a Commission Order for a "repair" that includes free inspection, free space guards and installation, reimbursement of homeowners for their reasonable and foreseeable expenses incurred in obtaining the space guards, and reimbursement of space guard installers for their reasonable and foreseeable expenses incurred in installation. As noted above, the Complaint seeks to compel the Company to "repair" a product – the hoistway door – it did not design, manufacture, sell, distribute, or install, when in fact Complaint Counsel know it is already offering to do so voluntarily.[5] [6]

As such, the Complaint seeks no further relief that this action could bring about, and the action is therefore moot and should be dismissed. *See* 5 U.S.C. § 706(2)(B).

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necessarily have to be directed to homeowners and, as noted above, could essentially bar them from selling or otherwise transferring ownership of a home with an installed home elevator.

[5] Indeed, the Company is exceeding the relief sought by providing complete instructions for measurement and, as needed, installation of free space guards for those homeowners who, because of COVID-19 or other concerns, may not wish to have a contractor visit their home.

[6] Complaint Counsel also seeks reimbursement of "previous purchases of space guards or other safety devices, and all costs associated with those purchases, whether or not they were part of [the Company's] homeSAFE campaign [launched in 2014]," as reflected in Subparagraph C(3), and "an Order that Respondent take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA," as reflected in Paragraph D. However, for the reasons described in the Company's MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO STRIKE, which is hereby incorporated by reference as if set forth in full herein, the Commission is without authority to order either remedy. Further, Complaint Counsel's request for an "Order that Respondent . . . comply with the CPSA," Compl. ¶ D, while not precluded by the text of the CPSA, is inconsistent with applicable case law. In the Fourth Circuit, requests for injunctive relief that do nothing more than enjoin a defendant from violating the law are "disfavored." *EEOC v. Enoch Pratt Free Library*, 509 F. Supp. 3d 467, 481 (D. Md. 2020) (denying injunctive relief and holding that it would be "tantamount to the kind of 'obey the law' injunctions that are disfavored as unnecessary exercises of judicial power.") (citations omitted).

The Action Is Moot as It Is Precluded by CPSC's Prior Action.

As discussed above, in 2013, CPSC opened an investigation into the "Alleged Hazard" that "Children can become entrapped between the hoistway door and the elevator car door." *See* Closing Letter ¶ 3. In 2014, CPSC closed that investigation, expressly noting that the Company had "voluntarily implemented a corrective action plan" and that CPSC "acknowledges the [voluntary] corrective action measures [including] establishing two (2) websites to educate consumers about the hazard and partially subsidizing the cost of space guards for consumers whose elevators were *installed out of specification*." *Id.* at 1 (emphasis added). Accordingly, the CPSC determined that:

- the Components did not contain a defect which presented a substantial product hazard;
- to the extent any hazard existed, it was the result of installation of the Components, construction of the hoistway, and selection and installation of the hoistway doors "out of specification," *id.*; and
- to the extent any hazard existed, the Company was voluntarily taking adequate corrective action.

Had CPSC not reached all three of these determinations, it would not have closed the investigation, even if elevator installations containing the Components were a "consumer product."[7]

CPSC also received the Elevator Petition, relating to the identical industry-wide Gap Space issue, in November 2014. Staff's re/view of that petition included, but was not limited to,

[7] The Closing Letter also implies that CPSC assumes jurisdiction over the Components, which, as noted above, the Company disputes under the CPSA and applicable precedents.

the facts of the incident resulting in the 2014 Closing Letter. The policies CPSC adopted in denying the Elevator Petition were identical to the determinations described above in its Closing Letter. In particular, while a four-inch distance from the hoistway door to the interior gate adds a margin of safety over a five-inch standard, the revision to ASME A17.1 establishing the four-inch provision would adequately address new installations. Moreover, a combination of consumer and Trade Professional education – with CPSC expressly referencing the Company's homeSAFE Campaign, *see, e.g.*, Briefing Package at 13; Briefing Package Tab E: Assessment of Existing Standards and Practices Related to Residential Elevators, 7 (Feb. 13, 2017) – and space guard installation would reduce any risks from existing installations by filling the hoistway door-to-sill Gap Space.[8] The Briefing Package expressly acknowledged the homeSAFE campaign.

Now, Complaint Counsel requests that the Commission reverse all of CPSC's prior determinations. However, where an agency seeks to change a final agency action, it "is obligated to supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Foremost in this reasoned analysis is that "[the agency] display awareness that it *is* changing position [as a]n agency may not . . . depart from a prior policy *sub silentio*." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also* 5 U.S.C. § 706(2)(A) (allowing courts to set aside arbitrary and capricious decision-making).

Here, the Complaint does not acknowledge that, through adjudication rather than rulemaking, it is departing from the agency's prior policies, reflected in both the Closing Letter and the agency's no-defect finding as part of its denial of the Elevator Petition. In particular, the

[8] Space guards are 3 inches in thickness, and, with the addition of spacers, can fill an excess Gap Space between the hoistway door and sill of up to approximately 4 ½ inches.

Complaint does not explain why it seeks to apply the four-inch hoistway door-to-car gate measurement from the revised ASME A17.1-2016 standard to Components manufactured and installed prior to that standard's adoption. This is an example of back-door rulemaking. Because of its *sub silentio* departure from those policies, the Complaint does not allege, let alone prove, the existence of changed circumstances that would warrant reversing those policies and findings. Indeed, such allegation would be inconsistent with the facts. As the Company exited the U.S. residential elevator business in 2012, neither the Components nor their warnings and instructions could have changed since either CPSC's 2014 determination to close its investigation, reflecting agreement that neither the Components nor their warnings and instructions were defective or its 2017 conclusion that staff found no defects.

Although additional incidents have occurred and the applicable voluntary standard has been revised since the Company exited the business, neither of these would provide sufficient basis to revisit CPSC's 2014 and 2017 actions, even if the Complaint had so pled.

First, any additional incidents are not grounds under the CPSA. The Act defines a "substantial product hazard" as one "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). Here, none of those factors that CPSC had previously found lacking are altered by the occurrence of additional incidents that relate solely to improper installation. The pattern of the alleged hazard mechanism has not changed, the role of Trade Professionals in installing hoistways, hoistway doors, and home elevators is the same, the potential risk is the same, and, because the Company has been out of

business since 2012, it has not introduced additional "products" in the more than seven years since CPSC closed its prior investigation.[9]

Second, the revision of a voluntary standard after the manufacture of a product to which that voluntary standard might have applied cannot be a basis for revisiting final agency action as such revision cannot be the basis for any CPSC determination that a product contains a defect. Here, the applicable voluntary standard, ASME A17.1, was revised in 2016 to incorporate the ¾-inch/four-inch Gap Space limitation the Complaint repeatedly cites and relies upon. As noted, the Company ceased manufacturing residential elevators for Trade Professionals' installation in 2012. Thus, all of the products that are the subject of the Complaint predated the provision on which the Complaint relies by years or even decades, depending on the sale and installation date. Moreover, in its denial of the Elevator Petition, the Commission declined to adopt a mandatory Gap Space standard even for new installations.

As discussed below, CPSC is also without authority to apply any mandatory or voluntary standard retroactively. The agency acknowledged as much in 1992 when it properly disclaimed that its identification of two instances in which it had "relied upon" voluntary standards carried any retroactive effect on products that were covered by those standards but were "already manufactured," such as "subject[ing those products] to recalls." 57 FR 34,201, at 34,224 (Aug. 4, 1992). *See* 5 U.S.C. § 706(2)(C) (allowing courts to set aside unlawful agency action). Similarly, as discussed below, CPSC cannot use the revised standard as evidence that "products" manufactured before the revision are defective.

[9] Further, to the extent CPSC argues that subsequent incidents can justify revisiting a hazard determination associated with a consumer product properly under its jurisdiction, this would seem to contradict the agency's own interpretive rules, which focus the analysis on the possibility of incidents, not their actual occurrence. *See* 16 C.F.R. § 1115.6(a) (companies "should not wait for [incidents] to actually occur before reporting).

Neither the occurrence of additional incidents nor the fact that the standard was revised can reasonably be a basis for revisiting that final agency action, and that final agency action precludes and therefore moots CPSC's present action. *See* 5 U.S.C. § 706(2)(B).

This Action Violates Due Process as CPSC Did Not Give Fair Notice That It Would Hold Conduct Ceasing in 2012 to the 2016 ASME Standard.

The Commission's issuance of this Complaint violates the Due Process clause of the Fifth Amendment to the United States Constitution.

"Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d, 1, 3 (D.C. Cir. 1987). Fair notice exists where the regulated party, by reviewing the regulation and other public comments made by the agency, could with "ascertainable certainty" discern the standards with which the agency expects the party to conform. *Fabi Constr. Co., Inc. v. Sec'y of Labor*, 508 F.3d 1077, 1088 (D.C. Cir. 2007) (citation omitted). Conversely, an agency may have failed to give fair notice where industry manuals and codes existing at the time of the alleged misconduct are inconsistent with the agency's newfound position. *Id.* at 1088-89.

In this instance, prior to this action and the investigation that preceded it, CPSC had not provided fair notice that it would seek either to enforce compliance with the version of the applicable voluntary standard, ASME A17.1-2016, that formally adopted the ¾-inch/four-inch Gap Space provision or to impose that standard's policy as evidence of defect. Moreover, CPSC had certainly not provided fair notice that it would seek such enforcement[10] or application of the

[10] As noted above, staff did state that any recalls, if merited, would have to proceed "under [S]ection 15 of the CPSA," rather than through the petition process and that the request for a recall was not even "docketed as a petition." Briefing Package at 4. However, explaining the proper procedural context for recalls as a matter of law is not fair notice that any particular recall might be merited as a matter of fact, let alone a recall improperly based on the retrospective application of a standard, particularly where the same Briefing Package noted the absence of a

revised Gap Space standard retrospectively, since, as discussed below, CPSC is without authority to do so. Indeed, all of the Commission's public and private statements, as well as its actions, were to the contrary.

First, as discussed above, CPSC's Closing Letter and its denial of the 2017 Elevator Petition both determined that there were no defects in the Components and/or that the creation of excessive Gap Space is the result of the failure of Trade Professionals to adhere to specifications, state and local building codes, and voluntary and mandatory standards.[11] These determinations underlie CPSC's long-held conclusion that, if and to the extent the Components are "consumer products," those products do not contain a "defect" under 15 U.S.C. § 2064. *See* Briefing Package at 14.

Second, staff's analysis addressing the Elevator Petition, as approved by the Commission without amendment, also signaled again that CPSC understood that any excessive Gap Space and any resulting hazard stemmed from actions by parties other than manufacturers of elevator components, as "*[t]he contractor involved in building or modifying the house* to accommodate the elevator hoistway or shaft *would be responsible* for building or installing the hoistway door and sill." Briefing Package at 7 (emphasis added). Again, this signaled that the Commission's policy was that, to the extent an installation did present a "substantial product hazard," the

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defect in the elevators. Briefing Package at 4 n.1; Briefing Package at 14. However, the specific statement in the Briefing Package that no defect was found in any elevator establishes that no basis for such retroactive action exists.

[11] The Complaint also alleges a "defect" in the failure to provide "a measurement tool." *Id.* at 119(a)(iv). This is an implicit reference to provisions in ASME A17.1 that employ a four-inch ball to test the Gap Space. As with the ¾-inch/four-inch Gap Space provision itself, however, this tool was introduced with ASME A17.1-2016. Additionally, as with the ¾-inch/four-inch Gap Space provision, the concept of this tool was before the Commission in the Petition, *see* Briefing Package at 11-12, and the Commission rejected the Petition's request for a mandatory rule. Notably, the video available at the Company website, https://www.homelevator-safety.com, illustrates how easy it is for any contractor or handyman – or even a consumer – to measure the hoistway door to sill and hoistway door to interior car door or gate.

responsibility of remedying that installation would lie with the contractor or installer installing Components outside of specifications.

The Commission in 2019 further reiterated its policy that excessive Gap Spaces were the result of improper installation. Then-Acting Chairman Buerkle wrote to the governors that a Gap Space large enough to allow children to fit could exist "[i]*n some installations*," Buerkle Letter at para. 1 (emphasis added), urging the governors to require inspections of installed elevators because of "the critical role of installers." *Id.* at para. 3. The Commission's subsequent press release advised that "*Elevator installers* should never allow any gap greater than four inches." News Release 1, at para. 3 (emphasis added).

Again, in 2021, just 13 days before commencing this action, the Commission further reiterated its policy that installation was the source of any hazard, reminding those involved in the installation to "never allow any gap greater than four inches." 2021 Release (June 24, 2021).

The Commission did not provide the Company fair notice of the policy the Complaint purports to enforce. In fact, the Commission, even as it prepared to issue the Complaint, provided ample public notice of contrary policies, with two final agency actions in particular (the Closure Letter and denial of the Elevator Petition) being wholly consistent with the prior version of ASME A17.1.

This Action Is Unlawful as CPSC Is Applying ASME A17.1 Retroactively.

This action is also unlawful as it retroactively applies the revised ASME A17.1 standard contrary to the CPSA and the general presumption in this country against retroactive application of regulatory standards. The CPSA authorizes the Commission to "promulgate consumer product safety standards." 15 U.S.C. § 2056(a). However, it must do so "in accordance with the provisions of section 2058 of [Title 15]." *Id.* Section 2058 provides, in relevant part, that "Each

consumer product safety rule shall specify the date such rule is to take effect [but] in no case may the effective date be set at a date which is earlier than the date of promulgation" and that "[a] consumer product safety standard shall be applicable only to consumer products manufactured after the effective date." 15 U.S.C. § 2058(g)(1).

In this instance, the Complaint is attempting to force a "recall" of installed residential elevators on the basis of a standard adopted years after the products were manufactured, indeed years after the manufacturer ceased making the products. The Complaint is attempting to give retroactive effect to a standard in violation of the public policy spelled out in 15 U.S.C. § 2058(g)(1). That the standard the Complaint seeks to enforce is voluntary does not alter the inherently unfair nature of its attempt here to enforce that standard retroactively as to the Company only, particularly in the face of a history of examining elevator safety and declining to adopt the standard prospectively, and of the acknowledged role of builders, contractors, and installers in assembling an elevator on site. The effect of such purported action would be to hold a manufacturer liable as a perpetual guarantor for later-adopted standards long after its products are manufactured. As noted above, the Company is indeed taking the actions for which Complaint Counsel seeks a Commission order; it simply declines to mischaracterize its actions as a "recall."

It is also immaterial that CPSC is proceeding through adjudication rather than purporting to adopt a retroactive standard. While agencies generally may use the adjudication mechanism to establish policy, *see SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947), CPSC may not use adjudication to establish policy in a manner that its rulemaking authority expressly prohibits. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 762-66 (1969) ("There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention."). An

action such as this Complaint purporting to arise under Section 15 cannot be an end-run around Section 9. If CPSC is permitted to compel recalls on the basis of subsequently issued standards, the effect would be the same as making standards retroactive. As noted above, CPSC has recognized the illegality of subjecting a product to a recall because of a later-issued standard. *See* 57 Fed. Reg. at 34,224.

Similarly, the fact that Complaint Counsel avoided citing ASME A17.1-2016 as its basis for asserting that a Gap Space larger than four inches presents a substantial product hazard cannot repair the Complaint's defects. The Commission has publicly cited that 2016 revision as the agency's basis in 2019 for urging installers to limit the Gap Spaces in their installations to four inches. *See, e.g.*, 2019 Release; 2021 Release. Although the Complaint cites no basis for its assertion that a Gap Space greater than four inches represents a "Hazardous Space," Compl. ¶ 31, there are no other grounds for CPSC to make such an assertion.

To the extent Complaint Counsel argues that this action does not seek to enforce ASME A17.1-2016 but only to use it as evidence to support CPSC's newly adopted position that a Gap Space larger than four inches represents a defect, this use would be inconsistent with Rule 407 of the Federal Rules of Evidence. That rule bars introduction of evidence of subsequent remedial measures ("SRM") to prove negligence, culpability, defect, or need for warning. As noted by the Advisory Committee, Rule 407 "rests on two grounds: [a flawed understanding of relevance that improperly treats SRM as admissions and] [A] social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of safety." Fed. R. Evid. 407 advisory committee's note to 1972 adoption.

To use ASME A17.1-2016 as evidence of defect in products manufactured as much as twenty years prior to that standard's adoption would create the same risk of chilling innovation

in safety that Rule 407 seeks to prevent. Manufacturers would face a strong disincentive to participate in voluntary standards activities if they believed CPSC would weaponize those efforts to allege defects in pre-existing products or attempt to make them perpetual guarantors of compliance (including third parties' compliance) with newly adopted standards.

Finally, CPSC's reliance on ASME A17.1-2016 also runs afoul of the strong presumption against retroactive application of a legal standard. As the Supreme Court has held, "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988). Indeed, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). Moreover, the Supreme Court in *Landgraf* held that a court need not even bother with the presumption if the underlying statute clearly prohibits retroactive application, as the CPSA does in this case. 511 U.S. at 280.

Here, even setting aside 15 U.S.C. § 2058, CPSC has cited to no provision in the CPSA indicating that Congress clearly intended for the statute to apply retroactively in these circumstances. *See id.* at 280 ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."). In fact, Congress explicitly provided for retroactive application in other provisions of the CPSA, none of which apply to this case. *Compare, e.g.*, 15 U.S.C. § 2057 (authorizing CPSC, where no feasible product safety standard would adequately protect the public, to declare "a consumer product [that] *is being* . . . distributed in Commerce" to be a banned hazardous product) (emphasis added), *and* 15 U.S.C. § 2057c (making it unlawful to "manufacture for sale,

offer for sale, [or] distribute in commerce" products containing specified phthalates as of a date certain, regardless of the date of manufacture), *with* 15 U.S.C. § 2063(3)(A) (establishing requirement for testing and certification to a children's product only for "any children's product manufactured more than 90 days after the Commission has established and published notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with a children's product safety rule to which such children's product is subject."). Where Congress has made its intent explicit in one part of a statute, but not another, this strongly suggests that a presumption against retroactivity is warranted. *See, e.g.*, *Bowen*, 488 U.S. at 213.

There is no doubt in the instant case that CPSC is attempting to apply ASME A17.1-2016 retroactively to the entire industry through actions such as these rather than through rulemaking. Retroactive effect exists where "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Id. at 280. In its complaint, CPSC alleges that the Company's products are defective and present a substantial hazard where no such liability would have been found before. As discussed above, prior to exiting the residential elevator business in 2012, the Company complied with the then existing Gap Space standard. But now, almost a decade later and without warning, CPSC seeks to impose on the Company a significant new legal burden.

As the Complaint seeks the equivalent of the adoption of a retroactive mandatory rule, it is barred by 15 U.S.C. § 2058(g)(1), as well as the presumption against retroactive application of regulatory standards. The Complaint is thus both not in accordance with law and in excess of CPSC's statutory authority. *See also* 5 U.S.C. 706(2)(A), (C).

CONCLUSION

For the foregoing reasons, the Company, through its undersigned counsel, respectfully requests that this court DISMISS the Complaint in the above-captioned action.

July 27, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2021, true and correct copies of the foregoing MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS were served via U.S. Mail and/or electronic mail on the Secretary of the U.S. Consumer Product Safety Commission and all parties and participants of record in these proceedings in the following manner:

Original and three copies by U.S. Mail, first-class and postage prepaid, and one copy by electronic mail, to the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills:

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As no Presiding Officer has been appointed as of this date, one copy by U.S. Mail, first-class and postage-prepaid, to the Presiding Officer in the care of the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills, at the above address.

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Because of file-size limitations, the electronic copies of the **Affidavit and Exhibits** to this Memorandum were served via file-sharing service.

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