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.

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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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