UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS

Pursuant to 16 C.F.R. § 1025.23, Complaint Counsel respectfully submits its Opposition to Respondent thyssenkrupp Access Corp., now known as TK Access Solutions Corp.'s ("Respondent"), Motion to Dismiss.

I. INTRODUCTION

On July 27, 2021, Respondent filed a Motion to Dismiss and a Memorandum in Support of Respondent's Motion to Dismiss (collectively, "Motion to Dismiss"). Respondent's Motion to Dismiss argues that: (1) the U.S. Consumer Product Safety Commission ("CPSC" or "Commission") lacks jurisdiction over the Elevators because they are not a consumer product as that term is defined in the CPSA; (2) this action is moot, because the Respondent is already taking the actions the Complaint seeks to compel; (3) this action is moot as CPSC has taken final agency action; (4) this action violates due process as it seeks to apply retroactively the American Society for Mechanical Engineers A17.1 voluntary standard; and, (5) and this action violates the CPSA's prohibition on retroactive rulemaking.

Respondent's Motion to Dismiss should be denied because it is procedurally defective—while styled as a motion to dismiss, it impermissibly seeks to have this court take into account facts and evidence outside of the four corners of the Complaint's well-pled allegations. Moreover, the arguments raised in the Motion to Dismiss are wrong as a matter of law:

1. Under the plain language of the CPSA and applicable case law, the Elevators are a consumer product as that term is defined in the CPSA and are subject to the Commission's jurisdiction.

2. The Complaint is not moot due to Respondent's voluntary and unilateral actions. Respondent misinterprets the law of mootness, which does not foreclose claims that are subject to continuing dispute where, as here, Respondent's voluntary and unilateral actions are not co-extensive with the relief sought in the Complaint, and could cease at any time.

3. Respondent's second "mootness" argument with respect to the 2014 closed investigation and 2017 rulemaking petition denial is actually a factually meritless attempt to assert estoppel against the Government.

4. Respondent had fair notice of this action through the CPSA and the Commission's clear and unambiguous regulations regarding substantial product hazard determinations. Respondent also had fair notice because it had known for over a decade that even the five-inch Hazardous Space recommended by the voluntary ASME A17.1 industry standard posed serious entrapment dangers and was causing serious injuries and death to children. No prior "policy" by the Commission established anything to the contrary.

5. The Commission is not applying a legal standard retroactively. ASME A17.1 is a voluntary industry standard, not a mandatory rule or regulation, and thus not the legal premise of the Complaint. Rather, the Complaint properly pleads that the Elevators present a Section 15

substantial product hazard. *See* 15 U.S.C. § 2064(a)(2). Accordingly, it is not surprising that the cases cited by Respondent are inapplicable and completely silent regarding how a voluntary industry standard could be applied "retroactively."

II. BACKGROUND

Respondent, and companies acquired by or merged into Respondent, manufactured and distributed at least 16,872 Elevators through 2012. Compl. ¶¶ 6–8, 12–14. The Elevators include, but are not limited to, the following models: Chaparral, Destiny, LEV, LEV II, LEV II Builder, Rise, Volant, Windsor, Independence, and Flexi-Lift. Compl. ¶ 11. Most, if not all, of the Elevators manufactured and distributed by Respondent were installed by third parties based upon guidance and instructions contained in materials created and provided by Respondent. Compl. ¶ 15. These materials include engineering drawings and instructional materials, including installation, design, and planning guides (collectively herein, "Installation Materials."). Compl. ¶ 16.

The Installation Materials disseminated by Respondent required installers to install the Elevators in an elevator shaft, also known as a hoistway. Compl. ¶ 18. Access to the hoistway is restricted at each floor by a hoistway door, which looks like a typical door in a consumer's residence. Compl. ¶ 19. Access to the Elevator is further restricted by the elevator car door or gate, which could be a scissor gate or an accordion door. Compl. ¶ 21. Accordion doors contain a V-shaped design space between the peak, which is closest to the hoistway door, and the valley, which is furthest away from the hoistway door, which creates additional space. Compl. ¶ 22–23. Elevator car doors and gates can also deflect when pressure is exerted upon them, creating additional space. Compl. ¶ 25–26. Children ages 2-years-old and older, some of whom have a

head breadth less than 5 inches, can fit in the space between the hoistway door and the elevator car door or gate if that space is greater than 4 inches ("Hazardous Space"). Compl. ¶ 27, 31, 42.

When an Elevator is not operating, a child can open the unlocked hoistway door, step into the Hazardous Space, and close the hoistway door. Compl. ¶ 33. The Elevators are designed with interlocks, which automatically lock the hoistway door when the Elevator is in operation. Compl. ¶ 34. As a result, if a child is in the Hazardous Space while the Elevator is called to another floor, the child will be trapped and unable to escape. Compl. ¶ 35–36. Children can suffer, and have, suffered serious injuries or death when entrapped in the Hazardous Space while the Elevator is moving between floors. Compl. ¶¶ 38–39, 66–80.

As alleged in detail in the Complaint, Respondent's Elevators contain defects in the Installation Materials, and the Elevators themselves contain design defects. Compl. ¶¶ 40–65, 119. Specifically:

- The Installation Materials direct, cause, or fail to adequately prevent installation of the Elevators in a manner that creates a Hazardous Space between the hoistway door and elevator car doors in which children can become entrapped, including by:
    - failing to contain adequate and correct instructions on how to measure the space between the hoistway door and elevator car door to avoid creating the Hazardous Space based on the elevator car door type;
    - failing to contain adequate instructions on how to avoid the creation of a larger Hazardous Space based on the deflection of the elevator car door;
    - failing to state that the measurement between the hoistway door and the elevator car door is safety-critical or expressly warn about the entrapment hazard; and

- failing to require the use of, or provide, a measurement tool to ensure precise measurement and avoid the creation of a Hazardous Space.

- The design of the Elevators fails to require safety features that prevent a child from becoming entrapped in the Hazardous Space and that prevent the Elevator from moving between floors if a child is entrapped in the Hazardous Space.

Compl. ¶¶ 40–65, 119.

As a result of these defects, at least three children have been involved in incidents with the Elevators. Compl. ¶¶ 66–80. On December 24, 2010, a 3-year-old boy became entrapped in the Hazardous Space of a Destiny Elevator, and suffered a catastrophic brain injury when the Elevator moved between floors. Compl. ¶¶ 67–69. The child is permanently disabled and will require constant care for the rest of his life. Compl. ¶¶ 69–71. The Hazardous Space between the hoistway door and the peak of the accordion door was between 4.875 inches and 5 inches, which complied with Respondent's Installation Materials requiring the installer to measure 5 inches from the hoistway door to the "outside" or peak of the accordion door. Compl. ¶¶ 72–73.

Further, on February 1, 2017, a 2-year-old boy died when he became entrapped in the Hazardous Space between the hoistway door and accordion door of an LEV Elevator that was moving between floors. Compl. ¶ 74. On November 28, 2019, a 4-year-old boy was trapped in the Hazardous Space between the hoistway door and accordion door of a Destiny Elevator. Compl. ¶ 76. The child fell to the basement and was pinned by the Elevator. Compl. ¶¶ 77. The child was deprived of oxygen for some period of time and was hospitalized as a result of this incident. Compl. ¶ 80.

Respondent has been well aware of the deadly dangers posed by the Hazardous Space while it was manufacturing and distributing the Elevators. Compl. ¶¶ 81–101. In 2003,

Respondent received a bulletin from the Otis Elevator Company that highlighted that installing space guards, a remedial safety device, would greatly reduce the likelihood of entrapment and serious injury or death to children. Compl. ¶¶ 82–84. By 2006, various representatives and employees for Respondent attended meetings as members of the A17 Residence Elevator Committee for the American Society for Mechanical Engineers A17.1 *Safety Code for Elevators and Escalators*. Compl. ¶¶ 85–86. During meetings, some committee members raised concerns, including:

- That 5 inches between an elevator door and hoistway door could present an entrapment hazard;
- The potential for discrepancies in measuring to peaks versus valleys of accordion doors; and
- The ability for accordion doors to be significantly more flexible due to deflection.

Compl. ¶¶ 85–89. Despite these concerns, which directly implicated Respondent's Elevators, Respondent made no changes to the Elevators or its Installation Materials. Compl. ¶ 90.

Further, in or about 2014, Respondent launched an information campaign for the Elevators known as homeSAFE (Safety Awareness For Elevators). Compl. ¶ 91. As part of the homeSAFE campaign, Respondent offered space guards to consumers; however, consumers had to pay 75% of the cost per space guard. Compl. ¶¶ 92–93. Given that homes with Elevators have multiple floors, purchasing space guards could cost consumers hundreds of dollars. Compl. ¶¶ 94. Not surprisingly, Respondent only distributed approximately 422 total space guards, despite manufacturing and distributing at least 16,872 Elevators. Compl. ¶¶ 13, 95.

Additionally, as part of the homeSAFE campaign, Respondent began recommending that "the space between the hoistway door and the cab gate is no more than four inches . . . [and]

taking measurements from the hoistway door to the back or rear post of the car gate." Compl. ¶ 96. However, by the time the homeSAFE campaign began, most, if not all, of Respondent's Elevators would have already been installed with the defective Installation Materials that allowed for a Hazardous Space greater than 4 inches and did not recommend a precise measurement to the valley of the accordion door. Compl. ¶ 97. In or about 2018, Respondent unilaterally stopped supporting the homeSAFE campaign. Compl. ¶ 98.

On July 7, 2021, Complaint Counsel filed an Administrative Complaint ("Complaint") against Respondent, alleging that residential elevators ("Elevators") manufactured and distributed by Respondent contain defects that create a Substantial Product Hazard under section 15(a)(2) of the Consumer Product Safety Act ("CPSA"). Compl. ¶¶ 40–65, 102–111, 119–121.

The relief sought by the Complaint includes, among other things, that the Commission: determine that the Elevators present a substantial product hazard; order extensive notification to protect the public; order Respondent to remedy the defective Elevators; and 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. Compl. at 15–17, ¶¶ A–D.

III. STANDARD OF REVIEW

The administrative rules governing this proceeding—the Rules of Practice For Adjudicative Proceedings, 16 C.F.R. §1025 *et. seq.* ("Rules of Practice")—do not specifically provide requirements for filing or responding to a motion to dismiss. Rather, parties can generally file motions seeking an "order, ruling or action" under 16 C.F.R. § 1025.23. While the Rules of Practice also do not specifically reference the Federal Rules of Civil Procedure ("Federal Rules"), those rules can provide guidance to these proceedings because there is a well-developed body of precedent regarding how courts should address dismissal motions. *See* 16

C.F.R. § 1025.2 (noting that administrative proceedings under the CPSA should be conducted with "due regard to the rights and interests of all persons affected"); *see also In re Fresh Prep, Inc.*, 58 Agric. Dec. 683, 1999 WL 138222, at *4 (U.S.D.A. March 11, 1999) (stating that the Federal Rules can provide guidance with respect to administrative rules of practice). Although this court is not bound by the Federal Rules, many administrative proceedings have looked to them for guidance on construing applications for which there is not an exact administrative mechanism. *See, e.g.*, *In re Healthway Shopping Network*, Exch. Act Rel. No. 89374, 2020 WL 4207666, at *2 (July 22, 2020) (SEC administrative proceeding guided by Federal Rules for interpretation of its Rules of Practice).

Federal Rule 8(a) requires that a pleading contain a "short and plain" statement of the court's jurisdiction, a "short and plain" statement showing that the pleader is entitled to relief, and a demand for the relief sought. Fed. R. Civ. P. 8(a). On a motion to dismiss pursuant to Rule 12(b), the court "must take all of the factual allegations in the complaint as true . . . ." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition, the court is required to construe "the pleadings in the light most favorable to the nonmoving party." *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1208 (9th Cir. 2020). To survive a motion to dismiss, a complaint need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard is not a "probability requirement" and a plaintiff need only "plea[d] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *see also Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 189 (2d Cir. 2012) ("[O]n a Rule 12(b)(6) motion it is not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives. Assuming that [plaintiff] can adduce sufficient

evidence to support its factual allegations, the choice between or among plausible interpretations of the evidence will be a task for the factfinder.").

When measured against these standards, Respondent's motion to dismiss must be denied. As discussed more fully herein, Respondent's motion does not take the Complaint's factual allegations as true. Moreover, it asks this court to look beyond the four corners of the Complaint and evaluate evidence it has submitted in 47 exhibits containing approximately 200 pages of documents. With only limited exceptions not applicable here, a court should not consider record evidence at the motion to dismiss stage. *See U.S. v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003) ("When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers evidence outside the pleadings, it must ordinarily convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to respond"); *Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1426 (3rd Cir. 1997) ("As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings.").

IV. RESPONDENT'S BASIS FOR DISMISSAL FAILS AS A MATTER OF LAW

As detailed further below, the arguments raised in the Motion to Dismiss have no merit and fail as a matter of law because: (1) Under the plain language of the CPSA, Respondent's Elevators are a consumer product as defined in the CPSA, and thus subject to the Commission's jurisdiction; (2) This action is not moot, as precedent does not foreclose claims that are subject to continuing dispute where, as here, Respondent's voluntary and unilateral actions are not co-extensive with the relief sought in the Complaint; (3) This action is not moot as prior actions taken by the Commission do not preclude this action or the relief sought in the Complaint; (4) There is no due process violation here, as Respondent had fair notice of the CPSA and the

Commission's regulations regarding a substantial product hazard; and, (5) The Commission is not applying a legal standard retroactively as ASME A17.1 is a voluntary industry standard, not a mandatory rule or regulation.

Additionally, as noted above, Respondent's Motion to Dismiss is procedurally defective, as it relies upon facts and evidence that fall outside the four corners of the Complaint and thus, the Motion to Dismiss should be denied on this reason alone. However, without waiving any objections, and to facilitate a prompt resolution of this matter to seek relief for consumers, Complaint Counsel is responding to Respondent's improper arguments.

A. THE ELEVATORS ARE CONSUMER PRODUCTS AND ARE SUBJECT TO THE COMMISSION'S JURISDICTION

Respondent's argument that the Elevators are not consumer products because they are components integrated into a structure is meritless, and Respondent misconstrues, and in one instance, completely ignores, applicable case law. Whether the Elevators are consumer products under the CPSA begins "'where all such inquiries must begin: with the language of the statute itself.'" *Caraco Pharm. Lab., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 412 (2012) (*citing United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 (1989)). Under section 3(a)(5) of the CPSA, a consumer product is defined 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).

Conversely, "any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer," is not a consumer product. 15 U.S.C. § 2052(a)(5)(A). Courts have noted that "most unequivocal expression of congressional intent . . .

is that the definition of 'consumer product' be construed broadly to advance the [CPSA's] articulated purpose of protecting consumers from hazardous products." *CPSC v. Chance Mfg. Co., Inc.*, 441 F. Supp. 228, 231 (D.D.C. 1977) (holding that amusement park ride was a "consumer product" under the CPSA); *United States v. One Hazardous Prod. Consisting of a Refuse Bin*, 487 F. Supp. 581, 584 (D.N.J. 1980) (holding that refuse bins were a "consumer product" under the CPSA and noting that "[t]he statutory definition is to be liberally construed in accordance with the stated purposes of this legislation, i.e., the protection of consumers from injury due to unsafe products"); *see also Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (noting "familiar canon of statutory construction" that remedial legislation "should be construed broadly to effectuate its purposes"). Further, any exemption from remedial legislation, like the CPSA, "must . . . be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

When measured by these standards, the Elevators fit squarely within the definition of a consumer product as that term is defined in the CPSA. Respondent's Elevators are "articles" or "component part[s] thereof"—i.e. various models of *residential* elevators—that were manufactured and distributed in U.S. commerce, and offered for sale to consumers for their use in or around a permanent or temporary household or residence, school, in recreation or otherwise. The actual text of the CPSA provides no support for Respondent's argument, as the definition of consumer product contains no limitation stating that components assembled into a structure are not consumer products. *See* 15 U.S.C. § 2052(a)(5). Indeed, components are expressly included in the statutory definition in Section 3(a)(5): "any article, *or component part thereof*." *Id.* (emphasis added).

Ignoring the plain language of the CPSA, Respondent relies on *CPSC v. Anaconda Co.*, 593 F.2d 1314 (D.C. Cir. 1979) and *ASG Indus., Inc. v. CPSC*, 593 F.2d 1323 (D.C. Cir. 1979) to advance its contention that the Elevators are not consumer products. Respondent asserts that Anaconda stands for the proposition that "components that are later assembled and *integrated into a structur*e, as with home elevators, are not consumer products." Mem. in Supp. of Resp't Mot. to Dismiss 13 (hereinafter "Resp't Mem.") (emphasis added) (citations omitted). Respondent's argument is without merit and is not supported by the CPSA or applicable case law.

In *Anaconda*, the court was considering whether aluminum branch circuit wiring, as a component to housing, was a consumer product under the CPSA. *Anaconda*, 593 F.2d at 1318–19. The D.C. Circuit never ruled on whether aluminum branch wiring was a consumer product, and instead remanded the matter back to the district court to determine whether the Commission had made the appropriate jurisdictional findings. *Id.* at 1322. Respondent's argument that Elevators are not consumer products hinges on the misinterpretation of one sentence in the opinion. The court noted that "when a consumer buys all of the component parts of an aluminum branch circuit wiring system, and then puts together the system himself, for his own use, the resulting product is not within the definition of 'consumer product.'" *Anaconda*, 593 F.2d at 1321; *see also* Resp't Mem. 12.

The court in *Anaconda* was not stating, as Respondent erroneously claims, that components, purchased individually and later assembled into a structure, are not consumer products. Instead, as the citation in the footnote makes clear, the court was referring to the legislative history of the CPSA, which noted that the definition of a consumer product "does not include products produced *solely by an individual* for his own personal use, consumption or

enjoyment." *Anaconda,* 593 F.2d at 1321 n.21 (emphasis added). That is a common-sense approach, as products produced solely by an individual for his or her sole use, consumption, or enjoyment would not typically implicate the need for interstate regulation. *See* 15 U.S.C. § 2051(a)(6) ("The Congress finds that . . . regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this Act.").

Again, the actual text of the CPSA provides no support for Respondent's components argument, as the definition of consumer product contains no limitation stating that components assembled into a structure are not consumer products, and the text expressly includes components in the statutory definition. *See* 15 U.S.C. § 2052(a)(5). Additionally, Respondent's Elevators were not produced solely by an individual for his or her own personal use, consumption, or enjoyment. The Elevators were manufactured and distributed in U.S. commerce by Respondent, marketed and sold to consumers, and installed by third parties. Compl. ¶¶ 10–28. Further, Respondent seemingly ignores discussion in the same paragraph of the *Anaconda* opinion where the court noted that the wiring systems could be a consumer product if they were bought separately by consumers and installed by electricians. *Anaconda*, 593 F.2d at 1321. The court in *Anaconda* did not hold that components, eventually installed in a structure, were not consumer products. In fact, the court noted that it was "inappropriate to take judicial notice of the nonexistence of such a jurisdictional fact," and "that the determination should be made in the first instance by the agency." *Id.* at 1322.

Additionally, *ASG*, decided by the D.C. Circuit on the same day as *Anaconda*, further discredits Respondent's components argument. *ASG,* 593 F.2d at 1325–28. In that case, the Petitioners claimed that architectural glazing materials, such as wired glass, "belong[ed] to a category of construction materials," or as Respondent would say, "components," that were not

within the definition of consumer product. *Id.* at 1327. The court flatly rejected this argument, noting that the glazing materials, like the Elevators at issue here, were "customarily marketed as distinct articles of commerce for sale to consumers or for the use of consumers in or around a household or residence," making them consumer products. *Id.* at 1328. Thus, even the case law cited by Respondent in its Motion to Dismiss demonstrates that the Elevators are consumer products.

Respondent suggests that *Anaconda* and *ASG* are the "leading cases" for addressing whether housing components are a consumer product. Resp't Mem. 12. However, Respondent glaringly failed to cite another circuit court case that completely undercuts its argument. In *Kaiser Aluminum & Chem. Corp. v. CPSC*, 574 F.2d 178 (3d Cir. 1978), the Third Circuit held that under the plain language of the CPSA, aluminum branch circuit wiring—the same product at issue in *Anaconda*—was a consumer product under the Act. First, the court rejected the manufacturer's argument that the wiring was not an "article" but was instead building supply material intended for incorporation into a residence. *Id.* at 180. The court specifically noted that it found "*nothing in the plain language of the [CPSA]* suggesting that the word 'article,' a noun denoting any material thing, *excludes components incorporated in a residence if they otherwise fit within the definition*." *Id.* (emphasis added). The court made the practical observation that under the manufacturer's interpretation, many consumer products in common use, such as furnaces, water heaters, dishwashers, and lighting fixtures would be excluded from coverage in the CPSA. *Id.*

Second, the court dismissed the manufacturer's contention that the branch wiring was building material intended for electricians and not an article for the personal use or enjoyment of a consumer in a household or residence. *Id.* The court noted that once installed, the wiring was

enjoyed by consumers whenever they turned on an electric switch and the fact that "it was first used in a different way by those who erected the building does not negate the plain fact that consumers later use and enjoy it." *Id.* Finally, the court rejected the manufacturer's argument that the branch wiring was not a consumer product because it was sold primarily to electrical wholesalers who then sold it directly to electrical contractors. *Id.* at 181. The court stated "[t]he method of distribution chosen by a manufacturer for its product cannot, however, determine whether the product falls within the statutory definition." *Id.*

Kaiser is directly on point and defeats Respondent's contention that components that are later assembled and integrated into a structure are not consumer products. As discussed by the *Kaiser* court, Respondent's interpretation would lead to absurd results, where something clearly within the definition of a consumer product, for example a ceiling fan, could be somehow excluded because it was made of separate components integrated into a residence. Similarly, the fact that "Trade Professionals" and contractors installed Respondent's Elevators, Resp't Mem. 13, is irrelevant to whether the Elevators are consumer products. Again, there is no support for this in *Anaconda* or *ASG*, and the court in *Kaiser* specifically rejected a similar claim by the manufacturer in that case, noting that the method of distribution, and the fact that the products were sold to third parties like wholesalers and contractors, cannot determine whether a product is a consumer product under the CPSA. *Kaiser*, 574 F.2d at 181.

Respondent also argues that the potential "limitless sweep" of classifying the Elevators as consumer products would intrude into areas that are handled by local jurisdictions. Resp't Mem. 13–14. Respondent's argument would require the court to evaluate facts and evidence outside the allegations of the Complaint, but in any event this policy argument about the potential breadth of the CPSA has no support in the applicable case law. Indeed, the court in *Kaiser*

specifically reviewed the text of the CPSA, and the legislative history of the Act, and dismissed the argument that the legislative history of the CPSA evinces "an intention to leave matters of specification, composition, and design . . . entirely to local building codes." *Kaiser*, 574 F.2d at 181–182.

The *Kaiser* court went on to list various building or construction components that were contemplated as being a consumer product, and thus subject to the Commission's jurisdiction. *See id.* (noting that consumer product includes "any component, equipment, or appliance sold with or used in or around a mobile home," and listing products "the safety of which should be assured at the design stage," such as certain "'Home Structures (and) Construction Materials'" including "insulation materials, windows and window glass, and floors and flooring materials," and certain "'Home Furnishings and Fixtures'" including "electrical outlets, built-in wiring devices, and distribution systems for use in or around the household, as well as gas meters, electric meters, and attached electric light fixtures") (citations omitted).

Finally, the *Anaconda* court noted that a jurisdictional determination should be made in the first instance by the Commission. *Anaconda*, 593 F.2d at 1322. In the case of residential elevators, the Commission has over the course of many years recognized and asserted its jurisdiction over residential elevators.[1] In fact, just recently the Commission and a different manufacturer recalled residential elevators for the same hazard that is presented in this matter—children being crushed or pinned by residential elevators after becoming entrapped in the Hazardous Space.[2] Moreover, in 2012, Respondent conducted a Fast-Track recall in cooperation

[1] *See* CPSC Urges Vacation Rental Platforms, AirBnB, Vrbo, TripAdvisor and Others to Require Owners to Disable Home Elevators Immediately (July 20, 2021), https://cpsc.gov/Newsroom/News-Releases/2021/CPSC-Urges-Vacation-Rental-Platforms-AirBnB-Vrbo-TripAdvisor-and-Others-to-Require-Owners-to-Disable-Home-Elevators-Immediately (Listing and linking to various residential elevator recalls).

[2] *See* 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), https://cpsc.gov/Recalls/2021/Otis-Elevator-Company-

with the Commission—in which Respondent voluntarily reported to CPSC and recalled some of the Elevators that are at issue in this matter—for a separate defect.[3]

For the reasons stated above, the Elevators are consumer products and Respondent's Motion to Dismiss should be denied.

B. THE RELIEF SOUGHT BY THE COMPLAINT, WHICH INCLUDES MANDATORY NOTICE, INSPECTIONS, AND REPAIRS, IS NOT MOOT

Respondent argues that the relief sought by the Complaint is moot and this case should be dismissed because it has voluntarily and unilaterally provided all of the relief that the CPSC is requesting. Respondent claims that its current voluntary and unilateral program for Elevator safety, the Home Elevator Safety Program, "provides all of the relief requested by the Complaint." Resp't Mem. 14. Respondent further claims that "this court cannot grant any effectual relief to CPSC going forward." *Id.*

Respondent's reliance on the doctrine of mootness is misplaced. In addition, Respondent's suggestion that its voluntary and unilateral actions provide all of the relief sought in the Complaint is patently false. Also, Respondent's argument that this court and the Commission are powerless to impose a remedy disregards the authority Congress provided to the Commission in the CPSA and the discretionary and remedial powers of this court under the Rules of Practice.

First, Respondent misconstrues the law of mootness. As the Supreme Court explained in *Chafin v. Chafin*, under the Constitution, federal courts only have power to decide cases or controversies and a litigant "must have suffered, or be threatened with, an actual injury traceable

Recalls-to-Inspect-Private-Residence-Elevators-Due-to-Entrapment-Hazard-Risk-of-Serious-Injury-or-Death-to-Young-Children.

[3] *See* Residential Elevators Recalled for Repair by ThyssenKrupp Access Manufacturing Due to Fall Hazard (Sept. 20, 2012), https://cpsc.gov/Recalls/2012/Residential-Elevators-Recalled-for-Repair-by-ThyssenKrupp-Access-Manufacturing-Due-to-Fall-Hazard (recalling the LEV II, Volant, and Rise Elevators for a fall hazard).

to the defendant and likely to be redressed by a favorable judicial decision." 568 U.S. 165, 171–72 (2013); *see also Knox v. Serv. Emp. Intern. Union*, 567 U.S. 298, 307 (2012) (challenge to union dues was not rendered moot after union refunded fees: "The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed."). Additionally, Respondent bears a high burden of showing that its conduct would not resume in the future. *See U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (noting the "burden is a heavy one" to "demonstrate that 'there is no reasonable expectation that the wrong will be repeated'") (citation omitted); *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) ("'[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'") (citation omitted).

In *Chafin*, the Supreme Court was clear in detailing the limits of the mootness doctrine, noting that "a case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party' and '[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" *Chafin*, 568 U.S. at 172 (citations omitted). The Court vacated and remanded a lower court ruling that a lawsuit involving a child custody dispute was moot because the child had been returned to the parent seeking custody. *Id.* at 180 (noting that "such return does not render this case moot; there is a live dispute between the parties over where their child will be raised, and there is the possibility of effectual relief for the prevailing parent. The courts below therefore continue to have jurisdiction to adjudicate the merits of the parties' respective claims"). *Id.* at 172. In sum, the

Supreme Court concluded that the dispute that formed the basis of the case in *Chafin* was not moot, but rather "is still very much alive." *Id.* at 173.

In this matter, the dispute between the Commission and Respondent is very much alive. Respondent claims that it is already providing the relief sought in the Complaint; however, that is simply not the case. As elaborated upon below, the Complaint is seeking a mandatory order requiring Respondent to provide notice and a remedy to all consumers—a concrete interest that does not make this matter moot. A mandatory order would, for example, prevent Respondent from terminating any voluntary campaign as it has done previously, Compl. ¶¶ 91–98, and subject Respondent to civil penalties or other enforcement actions for failing to comply with such an order. The fact that this court can grant this requested relief demonstrates that there are live issues to adjudicate, and thus the case is not moot.

Additionally, the authorities cited by Respondent regarding mootness are distinguishable. Respondent cites *Incumaa v. Ozmint*, in which a state prisoner in a maximum-security unit brought a civil rights action under 42 U.S.C. § 1983 alleging that the prison's policy of barring inmates from receiving publications via the mail violated his First Amendment rights. Resp't Mem. 14–15 (citing *Incumaa v. Ozmint*, 507 F.3d 281 (4th Cir. 2007)). The court found that the case was moot after the prisoner was released because "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Incumaa*, 507 F.3d at 286. *Incumaa* is distinguishable from this matter because despite Respondent's unilateral actions, there are live issues regarding the Commission's interest in seeking mandatory (as opposed to mere voluntary) public notification and remedial action under Section 15 of the CPSA. A mandatory recall ensures that consumers will be afforded the safety remedies sought in the Complaint for as long as the unremediated elevators remain in homes. Further, a mandatory

order is critical because such an order would be enforceable against the Respondent, and punishable by contempt and civil penalties if Respondent failed to comply. *See* 15 U.S.C. §§ 2068(a)(5), 2069(a)(1). The need for mandatory relief is highlighted by Respondent's previous termination of its homeSAFE campaign after only 4 years, which left thousands of hazardous Elevators in consumer's homes—one of which fatally injured a child. Compl. ¶¶ 74, 91–98. Additionally, Respondent has no intention of ensuring that all Hazardous Spaces in its Elevators are eliminated, as it already has indicated that it will only support the new Home Elevator Safety Program until December 31, 2025. Resp't Mem. 15. Congress provided the Commission the authority to seek mandatory relief under Section 15 where appropriate, and nothing cited by Respondent supports a different conclusion.

Respondent also cites *Whiting v. Krassner*, another child custody case, in support of its mootness claim. In that matter, the Third Circuit was faced with a mother who sued under the Hague Convention for the return of her abducted 1-year-old child, and the court ruled that the suit was *not* moot simply because the child had been returned. Resp't Mem. 14 (citing *Whiting v. Krassner*, 391 F.3d 540 (3d Cir. 2004)). Respondent's reliance on *Whiting* is wholly misplaced and actually demonstrates why its mootness argument is without merit. The court in *Whiting* found that the case was *not* moot if actions by lower courts could impact the rights and remedies of the parties—for instance, by issuing a different custody order or in connection with assessment of fees and costs. *Whiting*, 391 F.3d at 545 (stating "notwithstanding the return of the child, the issue as to whether the initial taking was wrongful was still very much alive").

Similarly, Respondent's attempts to "fix" the problem through unilateral actions do not diminish the Commission's need and authority to seek a mandatory order to protect the public, particularly children, and ensure that *all* Elevators are rendered safe. This lawsuit seeks to

vindicate the Commission's authority to require *mandatory* action to address Elevator defects that create a substantial risk of injury to the public, and specifically, a vulnerable population, and prevent Respondent from leaving dangerous Elevators in consumers' homes. Compl. ¶¶ 1, 117–121. The fact that Respondent exited the residential elevator business in 2012 is a red herring—as we have alleged, currently more than 16,000 of its defective Elevators are installed in the homes of consumers. Compl. ¶ 14. Further, Respondent could resume production of the defective Elevators at any time. A mandatory order ensuring consumers are safe is necessary to address the current—and any potential future—hazard posed by Respondent's Elevators.

Second, Respondent's claim that it is currently taking all the actions that the Complaint seeks in relief is wrong. The Complaint seeks, among other things, (i) a determination that Respondent's Elevators present a substantial product hazard; (ii) an order that public notification be required pursuant to the CPSA; (iii) an order directing Respondent to repair the defects in the Elevators and conduct free inspections and free installations of space guards to consumers; (iv) an order requiring Respondent to submit reports on the corrective action to the Commission to monitor the mandatory recall; and, (v) an order that Respondent take any other action deemed necessary to protect public health and safety and the CPSA. *See* Compl. at 15–17, ¶¶ A–D. In contrast, Respondent's current voluntary campaign is *not* mandatory, and thus provides for none of the mandatory items listed above sought by the Commission in this lawsuit; and again, could be terminated at any time at the sole discretion of Respondent. Accordingly, as the Supreme Court noted in *Chafin*—this dispute is still very much alive.

Respondent additionally argues that this court and the Commission do not have the power to effectuate the relief sought, and thus the case is moot. This argument too is without merit. Citing no cases and only one statute on review of agency actions, 5 U.S.C. § 706(2)(B),

Respondent argues that this court and the Commission are powerless to provide relief for an action for liability under Section 15 of the CPSA. This is plainly incorrect. This action is a congressionally authorized administrative enforcement action pursuant to Section 15 of the CPSA. Compl. ¶ 1. After affording an opportunity for a hearing, Section 15 authorizes the Commission to issue a variety of orders including, but not limited to, directing the cessation of distribution of products, issuing mandatory notifications, and requiring mandatory repairs and refunds. *See* 15 U.S.C. § 2064(c)–(e). Moreover, the Rules of Practice plainly provide that this court has the power to make rulings and issue decisions in this matter. *See* 16 C.F.R. §§ 1025.42 ("Powers and Duties of Presiding Officer"), 1025.51 ("Initial Decision") (decision includes findings and conclusions on fact and law).

For the reasons stated above, this matter is not moot and Respondent's Motion to Dismiss should be denied.

C. THIS ACTION IS NOT PRECLUDED BY CPSC'S PRIOR ACTIONS AND RESPONDENT'S MOOTNESS ARGUMENT WITH RESPECT TO THE 2014 INVESTIGATION AND 2017 RULEMAKING PETITION IS IN ACTUALITY AN INEFFECTIVE ATTEMPT TO ASSERT ESTOPPEL AGAINST THE GOVERNMENT

Respondent argues "mootness" should preclude this action because of a 2014 investigation into some of the Elevators that was later closed and because of a 2017 rulemaking petition that was denied. Resp't Mem. 17–21. Respondent's mootness argument is misplaced, however, and should be rejected for three reasons: (1) "mootness" does not apply to the 2014 closed investigation or the 2017 rulemaking petition denial—rather, Respondent's argument is better understood as a wholly ineffective attempt to assert estoppel against the Government; (2) Respondent's estoppel argument relies on issues of fact that are not pled in the Complaint and are outside the boundaries of matters subject to ruling on a motion to dismiss; and, (3) the authorities cited by Respondent are distinguishable and do not provide support for dismissal.

As a preliminary matter, Respondent's references to the rulemaking petition are irrelevant to an action under Section 15 of the CPSA. As pled in the Complaint, Complaint Counsel is seeking notice to consumers and the remediation of Elevators that have already been distributed in commerce by Respondent.[4] Compl. ¶ 1; at 15–17, ¶¶ A–D. Rulemaking is prospective and this enforcement action is retrospective. *See* Resp't Mem. Ex. E, at 6 (noting that "the Commission's regulations provide that petitions are for the issuance, amendment, or revocation of rules" while "[s]ubstantial product hazards *requiring remedial action (such as repair or recall) regarding particular elevators currently in place* may be appropriate under section 15 of the CPSA and [are] reviewed by the Office of Compliance.") (emphasis added).

Respondent's references to the rulemaking petition misapprehends the dual nature of the agency's function, a function that, by Congressional design, permits rulemaking and adjudication to proceed separately. *See* 15 U.S.C. §§ 2058, 2064; *see also SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.") (citation omitted). Congress carefully separated rulemaking and adjudicatory functions in separate and distinct sections of the CPSA, just as Congress separated those functions for all agencies in the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 553 (rulemaking), 554 (adjudications). Thus, deliberations by the Commission to address prospective installations of residential elevators have no bearing on whether Respondent's Elevators present a substantial product hazard.

[4] Respondent's argument relies upon facts and exhibits that fall outside the four corners of the Complaint. As discussed above, review of evidence outside of the Complaint is not appropriate on a motion to dismiss, and the Motion to Dismiss should be denied. Without waiving any objections, and to facilitate a prompt resolution of this matter to seek relief for consumers, Complaint Counsel is responding to Respondent's improper arguments.

First, although Respondent's argument is entitled "This Action is Moot as It Is Precluded by CPSC's Prior Action," Respondent cites no cases supporting the proposition that mootness is a doctrine that would preclude claims because of prior regulatory action. Resp't Mem. 17. As discussed more fully in Section B above, mootness has been defined by the Supreme Court as enforcing the constitutional requirement that courts only adjudicate cases or controversies by ensuring that a litigant "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Chafin*, 568 U.S. at 171–72. Thus, mootness is something entirely different than what Respondent is arguing with respect to the 2014 closed investigation and the 2017 rulemaking petition denial. Rather, Respondent appears to be arguing that the 2014 and 2017 prior agency actions should equitably estop the Commission from alleging the claims in this adjudicative proceeding.

This argument fails, however, because estoppel ordinarily cannot be advanced against the government. *Heckler v. Cmty. Health Serv. of Crawford Cnty, Inc.*, 467 U.S. 51, 60 (1984). Indeed, in order to establish estoppel against the Government, Respondent must show that the Government engaged in affirmative and egregious misconduct. *See Sanz v. U.S. Sec. Ins. Co.*, 328 F.3d 1314, 1319 (11th Cir. 2003) (affirming judgment as a matter of law against insured who brought claim against Government flood insurer and rejecting that Government should be estopped from asserted certain policy conditions). This misconduct has been held to constitute more than mere negligence, and "[t]he party asserting estoppel against the government bears the burden of proving an intentional act by an agency of the government and against the agent's requisite intent." *Michigan Exp., Inc. v. U.S.*, 374 F.3d 424, 427 (6th Cir. 2004) (affirming summary judgment and holding that the Department of Agriculture not estopped from imposing fine against a retail grocery store even after it sent a letter to the owners of the store stating it

would not pursue federal action against them). In this case, Respondent has not alleged any affirmative and egregious misconduct that would support an equitable estoppel defense. Respondent has not argued, let alone demonstrated, that the 2014 closed investigation and 2017 rulemaking petition denial constituted affirmative and egregious misconduct. Thus, Respondent's mootness argument, which is better understood as an estoppel argument, must fail.

Second, Respondent's argument concerning the 2014 investigation and 2017 rulemaking petition denial rely upon facts and exhibits that fall outside the four corners of the Complaint. As such, and per the standard of review for motions to dismiss, this argument should be rejected. *See* Section III of this Opposition, *supra*. The Complaint contains no allegations regarding the 2014 closed investigation, nor are there any allegations concerning the 2017 rulemaking petition that was denied. More importantly, there are well-pled allegations in the Complaint that post-date the 2014 closed investigation and the rulemaking petition—consumer incidents in 2017 and 2019 that resulted in the death of one child and hospitalization to another, as well as Respondent's recent attempted, and subsequently terminated, unilateral remedial actions. *See* Compl. ¶¶ 66–80, 91–101.

Third, even aside from the legal insufficiency of its veiled estoppel argument or its procedural inadequacy as a motion to dismiss, the authorities cited by Respondent are entirely distinguishable and do not support dismissal. The first case cited is *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983). Resp't Mem. 18. In that case, insurance companies challenged an order by the National Highway Traffic Safety Administration ("NHTSA") rescinding a rule that required new motor vehicles from being equipped with passive restraints. The Supreme Court found that the NHTSA action was arbitrary and capricious under the APA. *Motor Vehicle*

Mfrs. Ass'n, 463 U.S. at 51. However, this is not a rulemaking and the arbitrary and capricious standard in inapplicable.

Similarly, Respondent's citation to *FCC v. Fox Television Stations, Inc.* is also inapposite. Resp't Mem. 18. In that case, the Supreme Court found that the FCC's enforcement of its indecency ban was neither arbitrary or capricious. *Fox Television*, 556 U.S. 502, 514 (2009). These cases do not stand for the proposition that an adjudicative litigation should be dismissed for mootness; rather, these cases involved whether an agency *rulemaking* is arbitrary and capricious contrary to the APA. Indeed, the terms "moot" and "mootness" do not appear in the *Motor Vehicle Mfrs. Ass'n* or *Fox Television* decisions cited by Respondent. Accordingly, these authorities do not provide support for Respondent's argument for dismissal.

With no legal authority in support of its argument, Respondent nonetheless points to a letter sent from CPSC staff to Respondent regarding a prior investigation and draws unsupported conclusions from that letter. Essentially Respondent suggests—despite not citing a single authority regarding what constitutes final agency action—that the 2014 letter was final agency action, and the Commission is forever bound by that prior letter sent by a single member of CPSC staff. Resp't Mem. 17–18. As noted above, this is not supported by case law. *Michigan Exp.*, 374 F.3d at 427 (holding that the Department of Agriculture was not estopped from imposing fine even after sending a letter stating it would not pursue federal action).

In any event, Respondent's suggestion that the 2014 letter is final agency action is completely incorrect. Generally, two conditions must be satisfied for agency action to be final: (1) the action must mark the "consummation of the agency's decisionmaking process" and not be "merely tentative or interlocutory"; and (2) the action must be "one by which rights or obligations have been determined or from which legal consequences will flow." *Bennett v.*

Spear, 520 U.S. 154, 177–178 (1997) (internal quotation marks and citations omitted). Agency action is "considered final to the extent that it imposes an obligation, denies a right, or fixes some legal relationship." *Reliable Automatic Sprinkler Co., Inc. v. CPSC*, 324 F.3d 726, 731 (D.C. Cir. 2003).

In *Reliable*, the D.C. Circuit noted that the CPSA and the Commission's regulations "clearly prescribe a scheme whereby the agency must hold a formal, on-the-record adjudication before it can make any determination that is legally binding," referring to Section 15 of the CPSA and the Rules of Practice. *Id.* at 732. The court also noted that the Supreme Court has held that "even the filing of an administrative complaint does not constitute final agency action." *Id.* (citing *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 243 (1980) (remarking that the complaint in that matter "had no legal force or practical effect upon . . . daily business other than the disruptions that accompany any major litigation"). The D.C. Circuit also observed that when the Commission's actions "are merely investigatory and clearly fall short of filing an administrative complaint," they cannot be considered final agency action, as "no legal consequences flow from the agency's conduct to date, for there has been no order compelling" any action. *Reliable*, 324 F.3d at 732 (stating also that judicial review of tentative agency positions improperly intrudes into the agency's decisionmaking process) (internal quotation marks and citations omitted).

Absent from Respondent's Motion to Dismiss is the fact that even the 2014 closing letter contemplated staff's ability to take additional action in the future. Review of evidence outside of the complaint is not appropriate on a motion to dismiss, but the letter itself, which Respondent puts forth as an exhibit, notes that the investigation was being closed "at this time," implicating the potential for the matter to be reopened. Resp't Mem. Exh. A at 1. Further, the second

paragraph of the letter highlights the continuing obligations that Respondent had if it acquired new or additional information. *Id.* This is hardly language that suggests finality and that the Commission would never reopen the investigation or take additional action in the future, if warranted. The 2014 letter was simply a tentative decision that did not mark the consummation of the agency decisionmaking process. It was also signed by a junior member of CPSC staff in the Office of Compliance and as such could not bind the Commission or foreclose it from taking additional action necessary to protect the public. The letter did not impose a legal obligation or deny a right, as is required when something is considered final agency action. For these reasons, Respondent's arguments that the 2014 closing letter constitutes final agency action must fail.

Respondent also suggests that "none of th[e] factors that CPSC had previously found lacking are altered by the occurrence of additional incidents." Resp't Mem. 19. This could not be farther from the truth. As noted above, there has been substantial change since the prior investigation was closed. Since that time, Respondent has terminated the campaign that was referenced in staff's letter and two children have been involved in significant incidents with the Elevators (one died after becoming entrapped beneath an Elevator and another who was also entrapped was hospitalized). Compl. ¶¶ 66–80, 91–101. The Commission must consider various factors in a substantial product hazard determination, including the severity of risk and any other considerations. *See* 15 U.S.C. § 2064(a)(2). As defined in the Commission's regulations, severity of risk includes the "number of injuries reported to have occurred." 16 C.F.R. § 1115.12(g)(iii). It is thus absolutely appropriate for the Commission to consider additional incidents in evaluating whether a product presents a substantial product hazard. Moreover, the fact that these incidents occurred after Respondent launched an ineffective campaign—which

was abruptly terminated with no advance notice to consumers—provides another justification for seeking a mandatory order providing relief to consumers.

Finally, applying Respondent's faulty logic would lead to absurd results. For example, under Respondent's argument, even if the Commission received new evidence that the Elevators were leading to a serious injury or death *every day*, the Commission would be powerless to take additional actions to protect the public. Not only is this argument ridiculous, but it is also in direct contravention of Congress's mandate that the Commission protect consumers from hazardous products. *See* 15 U.S.C. § 2051(b)(1) (noting that one of the purposes of the CPSA is "to protect the public against unreasonable risks of injury associated with consumer products"); *see also Tcherepnin*, 389 U.S. at 336 (noting that remedial legislation "should be construed broadly to effectuate its purposes").

For the reasons stated above, this matter is not moot and Respondent's veiled estoppel argument must fail. As a result, the Motion to Dismiss should be denied.

D. RESPONDENT'S DUE PROCESS ARGUMENT IS WITHOUT MERIT BECAUSE THE CPSC HAS PROVIDED FAIR NOTICE OF ITS REGULATIONS AND IS NOT RETROACTIVELY APPLYING ANY RULES OR STANDARDS

Respondent argues that the Complaint violates the Due Process clause of the Fifth Amendment of the Constitution because it is unlawfully applying a revised industry standard (ASME A17.1) retroactively to Respondent's Elevators without fair notice. Resp't Mem. 21–27. Although Respondent raises fair notice and retroactivity as separate arguments in its Motion to Dismiss, *see* Resp't Mem. 21, 23, given the overlap in the arguments relating to the ASME A17.1 industry standard, Complaint Counsel addresses both arguments (points 4 and 5 in the Introduction section above) in this section.

Respondent baldly misrepresents the allegations in the Complaint—at no point does the Complaint use noncompliance with the revised ASME A17.1 industry standard as the legal basis for establishing a substantial product hazard under 15 U.S.C. § 2064. Rather, this is a properly pled action seeking to enforce Section 15 of the CPSA and establish a substantial product hazard. Indeed, the Complaint properly pleads that the Elevators constitute a substantial product hazard based entirely on the factors in the CPSA and applicable regulations. Thus, there is no enforcement of any product specific performance standard, voluntary or otherwise, here. Further, Respondent was provided fair notice of the legal requirements of a substantial product hazard determination by the text of the CPSA and by the Commission's regulations. *See* 15 U.S.C. § 2064(a)(2); 16 C.F.R. Part 1115. Finally, the Commission has created no "policy" through its actions that in any way invalidates the well-pled Complaint, nor acted impermissibly retroactively.

1. The Complaint Properly Pleads a Substantial Product Hazard Violation of the CPSA, not the Violation of any Voluntary Standard.

As stated in the Complaint, this action is an administrative enforcement proceeding pursuant to Section 15 of the CPSA, codified at 15 U.S.C. § 2064. Compl. ¶ 1. Section 15 defines a substantial product hazard as "a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public." This statute encompasses two requirements for finding that a consumer product presents a substantial product hazard: (1) the product has a defect, and (2) that defect creates a substantial risk of injury. *Id.*

CPSC's regulations describe in detail what constitutes a defect. 16 C.F.R. § 1115.4. In particular, a defect "is a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function." *Id.* 16 C.F.R. § 1115.4 enumerates the specific types of flaws that may be

used by the Commission to show a product defect and provides five examples of products that contain defects to assist subject firms, like Respondent, in understanding what constitutes a defect. *Id.* Relevant here is the regulatory language that a defect may be found where the "contents, construction, finish, packaging, warnings, and/or instructions" are defective or where the design of the product is defective. *Id.*; *see also* Compl. ¶ 40.

The factors for evaluating a substantial risk of injury are clearly enumerated in 16 C.F.R. § 1115.12(g) and include: (a) the pattern of defect, (b) number of defective products, (c) severity of risk, or (d) other considerations. Similar to the above regulation discussing a product defect, 16 C.F.R. § 1115.12(g) does not just list out these factors but gives an overview of each factor along with how the Commission interprets each to guide subject firms, like Respondent. *Id.* When making a substantial product hazard determination, the Commission relies on the CPSA and these factors clearly enumerated in the regulations.

One factor, out of many, that the Commission may consider in determining whether a consumer product presents a substantial product hazard is if the product complies with any applicable voluntary industry standard. *See* 16 C.F.R. § 1115.8 ("[W]hether a product is in compliance with applicable voluntary safety standards *may be relevant* to the Commission staff's preliminary determination of whether that product presents a substantial product hazard under section 15 of the CPSA.") (emphasis added). Thus, proof of noncompliance with industry safety standards does not automatically mean that a consumer product presents a substantial product hazard. Conversely, proof of compliance with industry safety standards does not mean a product is not defective and that no substantial product hazard exists.

The Commission encourages private sector development and compliance with voluntary industry safety standards to help protect the public. Many industry organizations develop

voluntary standards for consumer products such as the American Society of Mechanical Engineers ("ASME") and the American National Standards Institute ("ANSI"), among others. ASME has been developing industry safety standards and codes for mechanical production and machine design for over 100 years. ASME A17.1, *Safety Code for Elevators and Escalators*, is a voluntary industry standard governing the construction of new elevators and its requirements are often incorporated into state and local building codes.

One aspect of ASME A17.1 governs the gap between the hoistway door and the elevator door, or as previously defined, the Hazardous Space. Compl. ¶ 31. In 1955, the standard recommended a four-inch Hazardous Space. This Hazardous Space was subsequently increased to five inches in ASME A17.1-1981, which went into effect in April 1982. Due in part to several entrapment incidents with Elevators resulting in death and serious injury in that timeframe, the ASME again revised its standard in 2016, reducing the Hazardous Space back to four inches.[5]

Importantly, these industry standards are voluntary, minimum acceptable standards and as noted above are but one factor that may be considered as part of the substantial product hazard analysis. *See, e.g.*, *Meisner v. Patton Elec. Co.*, 781 F. Supp. 1432, 1443 (D. Neb. 1990) ("ANSI standards are voluntary standards, and more importantly, minimum standards."); *see also Bauerline v. Equity Residential Properties Mgmt. Corp.*, No. CIV-04-1904-PHX-SMM, 2006 WL 3834285, at *8 (D. Ariz. Dec. 29, 2006) (same). Put simply, the ASME A17.1 industry standard is not a mandatory rule or regulation that has been promulgated by the Commission and thus is not legally enforced by the Commission in this action or otherwise. *See* 16 C.F.R. Parts 1101–1460 (identifying mandatory rules and regulations under the CPSA, which does not

[5] As this is a Motion to Dismiss and not a motion for summary decision, Complaint Counsel relies on the facts within the four corners of its Complaint whenever possible. However, rebuttal of some of the mischaracterizations in Respondent's motion requires additional information and explanation. All of the statements in this section come from readily available information and should not be in dispute.

include ASME A17.1 or a standard for the Elevators); s*ee also* 15 U.S.C. § 2058 (detailing the Commission's rulemaking authority under the CPSA).

2. Respondent Had Fair Notice of the Commission's Substantial Product Hazard Authority under the CPSA and its Regulations

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). As such, if a law or regulation is "impermissibly vague," a party has not been provided fair notice of prohibited conduct. *Id.*

In the administrative context, fair notice is achieved by, *inter alia*, reading the agency's regulations. *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). "If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." *Id.*

As discussed above, the Commission's statutes and regulations regarding substantial product hazards are clear, unambiguous, and not vague. For that reason, a similar argument that CPSC's rules and regulations did not provide fair notice because its substantial product hazard regulations were vague was discussed in detail in *United States v. Spectrum* and found to "border on the frivolous." 218 F. Supp. 3d 794, 809–10 (W.D. Wis. 2016). As a result, this case does not involve ambiguous application of rules or vague rulemaking as prohibited by the case law

cited by Respondent.[6] Rather, the statute and regulations at issue here provide fair notice of this substantial product hazard action.

Respondent tries to sidestep *Spectrum*'s holding and analysis by wrongly arguing that the Complaint is somehow asserting a new policy by applying the revised ASME A17.1 industry standard to conduct that occurred prior to that 2016 revision date. However, as noted, this is a complete mischaracterization of the Complaint, which does not seek enforcement of the ASME standard, but rather seeks to enforce Section 15 of the CPSA.

Finally, Respondent not only had fair notice of this action under the law through the CPSA and the Commission's regulations, it had actual notice of this hazard—including that the existence of the ASME A17.1 voluntary industry standard was not preventing children from being seriously injured. At least as early as 2003, Respondent was on notice regarding potential safety issues with the Hazardous Space in its Elevators when it received a safety bulletin highlighting the importance of reducing the Hazardous Space by using space guards, which are safety devices that can be installed on the back of each hoistway door to eliminate some of the Hazardous Space. Compl. ¶¶ 82–83. Further, in 2006, members of the ASME A17 Residence Elevator Committee (the "Committee") publicly raised concerns regarding risks posed by the five-inch Hazardous Space found in ASME A17.1. Compl. ¶ 85. Various representatives of Respondent participated in the Committee, including the task group manager for this issue, the

[6] Respondent cites to two cases to support its fair notice arguments, *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987) and *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077 (D.C. Cir. 2007). Both cases are irrelevant to a proceeding under Section 15 of the CPSA. In *Satellite Broadcasting*, the FCC procedurally dismissed an administrative action because counsel filed its application in Washington, DC as opposed to the proper filing office in Gettysburg, PA, even though the application was eventually forwarded to the proper filing location (albeit after the filing deadline). The filing rules were ambiguous regarding where to file and the agency was using its interpretation of the rule to cut off a party's right before that party even had a chance to be heard. Here, as noted in *Spectrum*, Section 15 of the CPSA is not ambiguous. *Fabi* concerns the rulemaking process, where OSHA did not give proper notice of an expansion in the definition of the term "formwork" in a revised regulation to include permanent structures like concrete. There is no rulemaking involved here, just a typical Section 15 analysis in line with the promulgated regulations.

vice chairman of the committee, and several other employees. Compl. ¶ 86. Despite being on direct notice for over a decade that this five-inch Hazardous Space posed serious entrapment dangers, Respondent nevertheless made no changes to its Elevators or any Installation Materials. Compl. ¶¶ 87–90, 99. Because of Respondent's inaction, two children were involved in incidents with Elevators manufactured after 2006: one child became permanently disabled in December 2010 and one child died in February 2017. Compl. ¶ 100. Further, the Elevator involved in the 2010 incident that led to the child's permanent injury was installed with a Hazardous Space of between 4.875 and 5 inches, as explicitly required in Respondent's defective Installation Materials. Compl. ¶¶ 72–73.

Thus, it should come as no surprise to Respondent that these minimum industry standards were insufficient at the time or that they were subsequently revised in 2016. *See Meisner*, 781 F. Supp. at 1443–44 (finding product defect because space heater, which malfunctioned and burned down consumer's home, did not conspicuously warn consumers about not using an extension cord with the heater even though the Firm met, and even exceeded, the ANSI industry standard for labeling warnings about potential fire hazards). Indeed, industry customs may lag behind technological development or safety considerations as was the case here. *See Bauerline*, 2006 WL 3834285, at *8. It also should come as no surprise to Respondent that the Commission is addressing this dangerous product hazard, which has resulted in serious injury and death to children, through its substantial product hazard authority.[7]

[7] The Commission's Complaint is not inconsistent with Rule 407 of the Federal Rules of Evidence. *See* Resp't Mem. 25–26. The issue here is not that Respondent eventually made some remedial efforts to prevent serious injury or death, it is that Respondent particularly *did not* address the potential serious entrapment hazards when it was manufacturing and distributing the Elevators. Thus, the Commission is not "weaponize[ing]" any remedial efforts made by Respondent to prove a defect, Resp't Mem. 26—it is alleging that Respondent did not do enough to make sure consumers could safely use its Elevators.

3. The Commission's Prior Actions Do Not Establish Policy That Respondent's Elevators Are Not Defective

Respondent's argument that the 2014 closing letter and 2017 petition denial were affirmative policy statements by the Commission concerning whether elevator manufacturers need to comply with any particular ASME voluntary standard (Resp't Mem. 22–23) also fails for the same reasons discussed above. The Commission is not adjudicating any rulemaking here,[8] it is pursuing a Section 15 case under the CPSA. *See Spectrum*, 218 F. Supp. 3d at 813 (finding no "policy" established by CPSC staff's closures of prior, similar investigations because the CPSC "determines on a case-by-case basis whether a defective product presents a substantial product hazard by applying several, general factors"). Respondent's claim that the 2014 closing letter and 2017 petition denial "determined there were no defects" and determined that the "responsibility of remedying . . . installations[s] would lie with the contractor[s] or installer[s]," Resp't Mem. 22–23, has no support in any document cited by Respondent.[9] As noted in Section C above, the 2014 closing letter explicitly left open the possibility for additional enforcement action by the Commission. Further, the rulemaking petition was evaluating the *updated* ASME A17.1 standard and its application to *prospective* installations.

Thus, the 2014 closing letter and 2017 petition denial do not affect whether Respondent's Elevators present a substantial product hazard and do not preclude any relief sought in its Complaint. Similar to the position advanced by the Respondent in *Spectrum*, this argument is without merit.

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[8] As such, Respondent's citation to *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) is irrelevant. The Commission is not attempting to bypass the rulemaking process. At no point has the Commission adopted the A17.1 industry standard into a mandatory CPSC rule and it does not seek to do so here.

[9] Again, Respondent's argument relies upon facts and exhibits that fall outside the four corners of the Complaint. As discussed above, review of evidence outside of the Complaint is not appropriate on a motion to dismiss, and the Motion to Dismiss should be denied. Without waiving any objections, and to facilitate a prompt resolution of this matter to seek relief for consumers, Complaint Counsel is responding to Respondent's improper arguments.

4. The Commission is Not Applying Any Legal Standard Retroactively

Even if the Commission was retroactively applying the voluntary ASME A17.1 standard to Respondent's Elevators (it is not), the case law Respondent cites only prohibits agency statutes, rules, or regulations from retroactive application. Respondent again misrepresents the allegations in the Complaint as attempting to force a recall on the basis of a voluntary standard. Resp't Mem. 24. That is simply not the case. Further, Respondent cites to 15 U.S.C. § 2058, the section of the CPSA that deals with promulgating mandatory consumer product safety rules; however, as stated above, ASME A17.1 is not a mandatory rule, it is merely a voluntary industry standard. Respondent's cited cases, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) and *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), are completely silent regarding the propriety of applying a voluntary industry safety standard retroactively. Indeed, according to *Landgraf*, a legal standard does not operate retroactively merely because it upsets expectations based in prior law. 511 U.S. at 269–70 n.24 ("Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct.").

For these reasons, Respondent's due process and retroactivity arguments fail and the Motion to Dismiss should be denied.

V. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that Respondent's Motion to Dismiss be denied.

Dated this 6th day of August, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021, I served Complaint Counsel's Opposition to Respondent's Motion to Dismiss upon all parties and participants of record in these proceedings as follows:

An original and three copies by U.S. mail, postage prepaid, and one copy by email, to the Secretary:

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