

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

**RESPONDENT’S MEMORANDUM OPPOSING COMPLAINT COUNSEL’S MOTION
TO TRANSMIT PROPOSED AMENDED COMPLAINT AND COMPLAINT
COUNSEL’S MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL’S
AMENDED COMPLAINT TO THE COMMISSION**

Pursuant to the U.S. Consumer Product Safety Commission’s (“CPSC” or “the Commission”) Rules of Practice for Adjudicative Proceedings (“Rules”), 16 C.F.R. Part 1025, including 16 C.F.R. §§ 1025.13 and 1025.23, governing litigation under the Consumer Product Safety Act (“CPSA”), Respondent TK Access Solutions Corp., formerly known as thyssenkrupp Access Corp. (“TKASC” or “the Company”), by and through the undersigned counsel, respectfully requests that the Presiding Officer issue an Order DENYING Complaint Counsel’s Motion to Transmit Proposed Amended Complaint to the Commission¹ and, in the event the Presiding Officer deems Complaint Counsel’s Motion to Transmit as a constructive motion to amend the complaint, PROVIDING that such motion shall be held in abeyance pending completion of discovery going to related issues and/or that Respondent shall have adequate time, as provided under 16 C.F.R. § 1025.23(c), to oppose on the merits any such constructive motion.

¹ Complaint Counsel’s Motion to Transmit Proposed Amended Complaint to the Commission and Memorandum in Support of Complaint Counsel’s Amended to Complaint (“Motion to Transmit”), CPSC Docket No. 21-1 (Feb. 14, 2022). (docket number not assigned as of this filing).

Specifically, as discussed below:

- The CPSC Rules do not provide for or permit the purported “Motion to Transmit” a proposed amended complaint to the Commission;
- Complaint Counsel’s failure to file a motion to amend, addressed to the Presiding Officer, circumvents the Commission’s Rules and Respondent’s rights;
- Even if the purported “Motion to Transmit” were construed as an appropriate motion to amend, the proposed amendment would be impermissible; and
- If the Presiding Officer deems the Motion to Transmit to be a constructive motion to amend, the Presiding Officer should hold such motion in abeyance to protect Respondent’s rights under the Rules or otherwise give Respondent sufficient time to respond on the merits.

I. The CPSC Rules Do Not Permit or Provide For a “Motion to Transmit” a Proposed Amended Complaint to the Commission

CPSC’s Rules provide that “The Presiding Officer may allow appropriate amendments and supplemental pleadings which do not unduly burden the issues in the proceedings or cause undue delay.”² The Rules do not allow transmittal of a proposed amended complaint to the

² 16 C.F.R. § 1025.13. Complaint Counsel’s purported “Motion to Transmit” states that “the addition of TKE will not unduly broaden the issues or cause undue delay.” Respondent disagrees with the assertions regarding undue broadening of issues or delay reflected in Complaint Counsel’s Memorandum of Support. It is unclear to what entity Complaint Counsel intends “TKE” to refer, as Complaint Counsel’s understanding of the facts appears to be flawed and, as a result, Complaint Counsel appears at times to be conflating two entities (among other errors). TK Elevator GmbH is a multinational corporation based in Germany. TK Elevator Corporation is, as Complaint Counsel asserts, “a Delaware corporation with its principal place of business in Alpharetta, Georgia.” Memorandum in Support of Complaint Counsel’s Proposed Amended Complaint (“Memo in Support”), CPSC Docket No. 21-1, 4 (Feb. 14, 2022) (docket number not assigned as of this filing). However, neither of these entities is an appropriate party to this matter, as neither was or is a “manufacturer,” “distributor,” or “retailer” of the residential elevator components that are the subject of the Complaint within the meaning of the CPSA, either directly or under any “piercing the corporate veil” theory.

Commission. Instead, the Rules vest the Presiding Officer with sole authority regarding amending complaints or other pleadings.

Properly read, the Rules' complaint-amendment provision, Section 1025.13, requires that, if the Presiding Officer determines a proposed amendment is inappropriate or would unduly broaden or delay, then the Presiding Officer is to deny the motion proposing that amendment; the Rule does not discuss, let alone allow, any "transmittal" of any purported "proposed amendment" to the Commission. Indeed, when it issued the Rules under which this proceeding is being conducted, the Commission itself wrote:

- "The procedural mechanism for amending the complaint or allowing supplemental pleadings is **by motion addressed to the presiding officer.**"³
- "In **ruling upon** a motion, the **presiding officer** must heed certain fundamental principles" of adequate notice and opportunity to defend.⁴
- "In **ruling upon** a motion to amend or file supplemental pleadings, the **presiding officer** must consider any delay or prejudice to the parties that might result."⁵

This text expressly and exclusively assigns the responsibility for "ruling upon" the permissibility of proposed amendments to the "Presiding Officer" and does not reflect any mechanism for "transmitting" such proposed amendments to the Commission as a ministerial matter.

³ Consumer Prod. Safety Comm'n, Rules of Practice for Adjudicative Proceedings, 45 Fed. Reg. 29,206, 29,208 (May 1, 1980) (emphasis added).

⁴ *Id.* at 29,208 (emphasis added).

⁵ *Id.* at 29,208 (emphasis added).

Further, because the Rules do not contemplate the Commission considering a proposed amendment pursuant to any purported “Motion to Transmit,” they necessarily do not contemplate that a party would be able to oppose that amendment before the Commission. It is not clear that Respondent’s opposition would accompany any such “transmittal,” and, to the extent Respondent sought to “transmit” its opposition to the Commission independently, such a communication might be construed as a prohibited *ex parte* communication.⁶ Thus, granting the end-run around the Rules reflected in the purported “Motion to Transmit” could have the effect of foreclosing any opportunity for Respondent to address the merits of the proposed amendment before the Commission that the “Motion to Transmit” purports (improperly) to empower to render a decision. Aside from the factual inaccuracies in the motion, Complaint Counsel merely cites to a proposed amendment to the Rules, rather than the Rules themselves, to support its misguided motion.⁷ It goes without saying both that a *proposed* change to the Rules does not alter the Presiding Officer’s authority in this matter under the existing Rules (which do not give the Presiding Officer authority to transmit the motion to the Commission) and that addressing the policy question that Complaint Counsel cites as its basis for its purported “Motion to Transmit” is beyond the purview of the Presiding Officer.⁸

⁶ 16 C.F.R. § 1025.68 (prohibiting any communications on the merits of any open proceeding with any decision-makers, including Commissioners and their staffs).

⁷ Motion to Transmit at 2, citing U.S. Consumer Prod. Safety Comm’n, [Notice of Proposed Rulemaking for] Rules of Practice for Adjudicative Proceedings, 81 Fed. Reg. 21,775 (Apr. 13, 2016).

⁸ Motion to Transmit at 1-2 (arguing that “the addition of TKE as a respondent” could be inconsistent with the *proposed* rule’s requirement for Commission approval for “any amended complaint that would ‘have the effect of adding or removing any persons as a respondent’”) (internal citations omitted). Not only is this a policy question pertaining to a *proposed* rule, but Complaint Counsel’s premise is flawed. The proposed amended complaint seeks not to add TK Elevator Corp. but, effectively, to treat TKASC and TK Elevator Corp. as one and the same.

II. Complaint Counsel's Failure to File a Motion to Amend, Addressed to the Presiding Officer, Circumvents the Commission's Rules and Respondent's Rights

As noted above, to the extent Complaint Counsel wishes to amend its Complaint, the only procedural mechanism the Rules provide is for Complaint Counsel to move that the Presiding Officer allow such an amendment.⁹ This is consistent with the Federal Rules of Civil Procedure, which Complaint Counsel otherwise cites for support but then fails to recognize also requires “the court’s leave” for amendments such as the one Complaint Counsel proposes.¹⁰

Because Complaint Counsel has not made such a motion (appropriately addressed to the Presiding Officer), the proposed amendment’s permissibility is not properly before the Presiding Officer and Respondent is not obligated to respond to a motion that has not been made.

Moreover, if the purported “Motion to Transmit” were granted, and if the Commission were to approve the amended complaint, the appropriate motion to amend would seemingly never be made. In that event, Respondent would never have the opportunity to object to that motion on its merits. The “fundamental principle” of “the right to an adequate opportunity to prepare a defense to the charges”¹¹ would be violated.

In short, then, Complaint Counsel attempts, through its purported Motion to Transmit, to circumvent the existing Rules in a manner that would have the effect of depriving Respondent of

⁹ 45 Fed. Reg. at 29,208.

¹⁰ Fed. R. Civ. P. 15(a)(2). Complaint Counsel quotes this rule’s statement that “[t]he court should freely give leave when justice so requires,” Memo in Support at 7, thus impliedly conceding that the Presiding Officer’s leave is required. However, Complaint Counsel provides no basis for substituting the Federal Rules’ standard for allowing amendments in place of the standard the Rules in this matter already provide, namely that an amendment should not be allowed unless it is appropriate and would not unduly broaden the issues or cause undue delay. As discussed below, in addition to the improper procedural posture of Complaint Counsel’s “Motion to Transmit,” the proposed amendment does not meet this standard.

¹¹ *Id.* at 29,208.

rights provided by the current Rules. This deprivation is, as the Commission itself has written, precisely why the authority to allow or deny proposed amendments rests with the Presiding Officer. The proper mechanism is for Complaint Counsel to file a motion to amend addressed to the Presiding Officer, and thus the Presiding Officer should deny the purported “Motion to Transmit” and require Complaint Counsel to adhere to the Rules and file an appropriate motion to amend, with due time for Respondent to object.

III. Even if the Purported “Motion to Transmit” Were Construed as an Appropriate Motion to Amend, the Proposed Amendment Would Be Impermissible

As discussed above, because Complaint Counsel has eschewed the appropriate procedural mechanism for its proposed amendment, that proposed amendment is not appropriately before the Presiding Officer (who has the sole authority to allow or deny the proposed amendment). As such, Respondent’s opportunity to oppose any such motion on its merits has not been triggered. Accordingly, Respondent does not herein comprehensively catalogue the myriad inaccuracies embodied in Complaint Counsel’s proposed amended complaint and its accompanying memorandum and thus reserves the right to do so if Complaint Counsel files a proper motion to amend. However, even if the purported “Motion to Transmit” were construed as a motion to amend, and even assuming the facts Complaint Counsel alleges were true, the proposed amendment would nonetheless be inappropriate as it would unduly broaden the issues in this proceeding and cause undue delay.

The proposed amendment would add TK Elevator Corporation¹² as a party to this action and substitute TK Access Solutions Corp. for thyssenkrupp Access Corp.¹³ In order for TK Elevator Corporation to be a proper party, however, it would need to fall within one or more of the definitions of “manufacturer,” “distributor,” or “retailer” provided in the CPSA. It does not.

Neither the proposed amended complaint nor its accompanying memorandum alleges that TK Elevator Corporation directly manufactured, distributed, or sold the residential elevator components at issue. Instead, Complaint Counsel relies entirely on a “piercing the corporate veil” theory.¹⁴ “Piercing the corporate veil” is an exceptional deviation from longstanding principles recognizing the integrity of a corporate structure,¹⁵ and Complaint Counsel has not alleged (let alone proven) sufficient facts to support this theory, nor has Complaint Counsel identified a good-faith basis for seeking to drag a non-party into this case to defend itself when Complaint Counsel *admits* not even knowing the relationship between this Defendant and that prospective additional defendant.

¹² The Motion to Transmit and the proposed amended complaint identify TK Elevator Corporation as the “party” Complaint Counsel intends to add. *See* Motion to Transmit at 1; Amended Complaint, CPSC Docket No. 21-1, ¶¶ 5 (undated) (docket number not assigned as of this filing). However, many of the purported facts in these documents relate instead to TK Elevator GmbH. Nonetheless, Respondent interprets Complaint Counsel as intending to add solely the domestic TK Elevator Corporation, not the foreign TK Elevator GmbH over which CPSC would not have jurisdiction even if that entity had taken actions consistent with the CPSA definitions of “manufacturer,” “distributor,” or “retailer.”

¹³ Respondent would not oppose substituting its current formal corporate name as Respondent if requested in a properly structured motion that meets the requirements of the Rules.

¹⁴ Memo in Support at 8-11.

¹⁵ *Am. Bell Inc. v. Fed’n of Tel. Workers of Penn.*, 736 F.2d 879, 886 (3d Cir. 1984) (“A court may not disregard at will the formal differences between affiliated corporations, and in fact the requirements for corporate veil piercing, although rather imprecise in their various formulations, are demanding ones...The court may only pierce the veil in ‘specific, unusual circumstances,’ lest it render the theory of limited liability useless.”) (citation omitted).

For example, Complaint Counsel cites to Third Circuit precedent that provides that, “in order to succeed on an alter ego theory of liability, plaintiffs must essentially demonstrate that in all aspects of the business, the two corporations actually functioned as a single entity and should be treated as such.”¹⁶ However, the Third Circuit has held that its test for piercing the corporate veil is one in which “[n]o one factor is either necessary or determinative [but requires] the specific combination of elements.” That court pointed out that piercing the corporate veil was not permissible where, for example, a plaintiff relied on two persons’ “LinkedIn listings” and a defendant provided “a sworn affidavit” attesting to separate control structures.¹⁷

Here, much as the plaintiff in *Adtile* had done, Complaint Counsel relies entirely on faulty insinuations and pure speculation as to the Company’s finances which rest on inaccurate characterizations of information provided by Respondent to Complaint Counsel about those finances,¹⁸ and the employment status of two individuals (including reference to the LinkedIn profile of one of these¹⁹). Nevertheless, Complaint Counsel’s asserted facts, even supposing they

¹⁶ Memo in Support at 9, quoting *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484 (3d. Cir. 2001).

¹⁷ *Adtile Technologies Inc. v. Perion Network Ltd.*, 192 F.Supp.3d 515, 522 (3d. Cir. 2016).

¹⁸

[REDACTED]

[REDACTED] Respondent disputes that its financial position is even relevant to or within the proper scope of discovery in this proceeding.

¹⁹ Memo in Support at 5-6.

were accurate, would not create a sufficient basis to “pierce the corporate veil” and assign to TK Elevator Corporation legal responsibilities under the CPSA that it does not have. Complaint Counsel has not come close to presenting (beyond mere conjecture) evidence needed to show that TK Elevator Corporation controls the “day-to-day” activities or finances of TKASC or that TKASC was established to commit fraud or otherwise avoid any regulatory obligations.²⁰

Moreover, if TK Elevator Corporation were added as a party to this action, that company would then have its own right to contest Complaint Counsel’s inaccurate statements of facts and “corporate veil” allegations and to litigate that issue to the extent it chose to do so. TK Elevator Corporation’s exercise of its rights would necessarily broaden the issues in this proceeding and cause delay.

Specifically, regarding the proposed amendment’s broadening of issues, the Presiding Officer would have to determine not only whether the residential elevator components that are the subject of the Complaint are “consumer products” that contain a “substantial product hazard” that requires a “remedy” under Section 15, but also whether CPSC has jurisdiction over TK Elevator Corporation. This issue is, necessarily, beyond the current issues in this proceeding, as the actual manufacturer of these alleged “consumer products” is already before this tribunal and has been engaged with CPSC staff (including Complaint Counsel) on this matter for nearly a decade, and notably without CPSC staff ever inquiring about its financial situation.

As to the undue delay the proposed amendment would cause, TK Elevator Corporation is a separate corporate entity and would have all of the rights any party would have, including the right to file an answer, the right to conduct and participate in discovery, and the right to mount a defense, including, *inter alia*, a motion for summary decision on the “corporate veil” or any other

²⁰ 192 F.Supp.3d at 522.

issue. Each of these rights would invite – or even ensure – delay. This delay would be as undue as the broadening of issues since, as noted, the actual manufacturer of these alleged “consumer products” that has engaged with CPSC since 2013 is already before this tribunal.

IV. Even if the Purported “Motion to Transmit” Were Construed as an Appropriate Motion to Amend, the Presiding Officer Should Hold that Constructive Motion in Abeyance to Protect Respondent’s Rights under the Rules or Otherwise Give Respondent Adequate Time to Respond on the Merits

Under the Rules, where any party makes a motion, “any party who opposes the granting of the [motion] may file a written response to the motion”²¹ within ten days. In this instance, Complaint Counsel has (improperly) made its purported “Motion to Transmit,” and Respondent has, pursuant to the Rules, timely filed this written response opposing the requested transmittal.

Under the Rules, as noted above, to the extent Complaint Counsel wishes to amend the Complaint, Complaint Counsel should file an appropriate motion to amend, addressing that motion to the Presiding Officer. If Complaint Counsel does file such a motion, Respondent will be entitled to make a response in opposition to *that* motion, as well.

To the extent the Presiding Officer is inclined to deny Complaint Counsel’s procedurally improper purported “Motion to Transmit” but construe this improper filing as an implied motion to amend, the Presiding Officer should ensure that Respondent’s opportunity to respond is preserved. At minimum, any order issued by the Presiding Officer reflecting such construction should affirm that Respondent shall have at least ten days from the date of that order in which to oppose such a constructive motion to amend.

However, Respondent notes that discovery in this matter is ongoing and time is not of the essence for the Presiding Officer to consider the proposed amended Complaint. Indeed,

²¹ 16 C.F.R. § 1025.23(c).

Complaint Counsel has noticed – and Respondent has agreed to – the deposition of Mauro Carneiro,²² who, as President of the Company, can address the (largely inaccurate) points raised in Complaint Counsel’s Memo in Support and proposed amended complaint. Similarly, Complaint Counsel has recently served written discovery requests focused, in part, on the issues of corporate structure and control underlying the Memo and proposed amended complaint,²³ and Respondent’s responses to these requests are due on March 14.²⁴

It may be that the conduct of this and the remaining discovery in this matter will correct Complaint Counsel’s misunderstandings, relieve the Presiding Officer of any need to address the proposed amendment, and thus avoid the undue broadening and delay the proposed amendment threatens. However, even if, having completed appropriate discovery, Complaint Counsel nonetheless persists in the erroneous assumptions underlying the proposed amendment, holding in abeyance any constructive motion to amend until the conclusion of such discovery will preserve Respondent’s opportunity to appropriately oppose such a constructive motion and to present facts in support of its opposition.

As such, any decision to construe the improper purported “Motion to Transmit” as an appropriate motion to amend should hold the resolution of that constructive motion in abeyance until the conclusion of fact discovery (or, at minimum, until Mr. Carneiro’s deposition has been

²² See Complaint Counsel’s Amended Notice of Deposition of Mauro Carneiro, CPSC Docket No. 21-1, Docket No. 61 (Feb. 1, 2022).

²³ See Complaint Counsel’s Second Set of Interrogatories to Respondent, CPSC Docket No. 21-1, Docket No. 70 (Feb. 9, 2022); Complaint Counsel’s First Set of Requests for Admission to Respondent, CPSC Docket No. 21-1, Docket No. 69 (Feb. 9, 2022).

²⁴ See 16 C.F.R. § 1025.32; 16 C.F.R. § 1025.34.

completed and Respondent has responded to Complaint Counsel's most recent discovery requests), and Respondent should be guaranteed ten days from the conclusion of discovery (or the completion of the identified discovery steps) in which to file its written opposition to that constructive motion to amend on its merits.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Presiding Officer issue an Order:

- DENYING Complaint Counsel's Motion to Transmit Proposed Amended Complaint and Memorandum in Support of Complaint Counsel's Amended Complaint to the Commission; and
- to the extent the Presiding Officer construes Complaint Counsel's Motion to Transmit as a motion to amend, ORDERING that
 - resolution of that constructive motion shall be held in abeyance and that
 - Respondent shall have
 - no less than ten days from the conclusion of fact discovery, or, in the alternative,
 - no less than ten days from the latter of the date on which Mr. Carneiro's deposition is completed and the date on which Respondent responds to Complaint Counsel's February 9 discovery requests, or, in the alternative,
 - no less than ten days from the date of any Order issued on this matter

in which to file any written response in opposition to such constructive motion to amend.

Dated: February 16, 2022



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ATTORNEYS FOR RESPONDENT,
TK Access Solutions Corp.

CERTIFICATE OF SERVICE

Pursuant to 16 C.F.R. § 1025.16, as adopted by the Presiding Officer in CPSC Docket No. 21-1, I hereby certify that on February 16, 2022, true and correct copies of the foregoing Respondent's Memorandum in Opposition to Complaint Counsel's Motion to Transmit Proposed Amended Complaint to the Commission were filed with the Secretary of the U.S. Consumer Product Safety Commission and served on all parties and participants of record in these proceedings in the following manner:

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

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

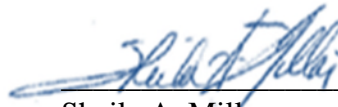
By electronic mail to the Presiding Officer:

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

By electronic mail to Complaint Counsel:

Mary B. Murphy
Complaint Counsel
Director
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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

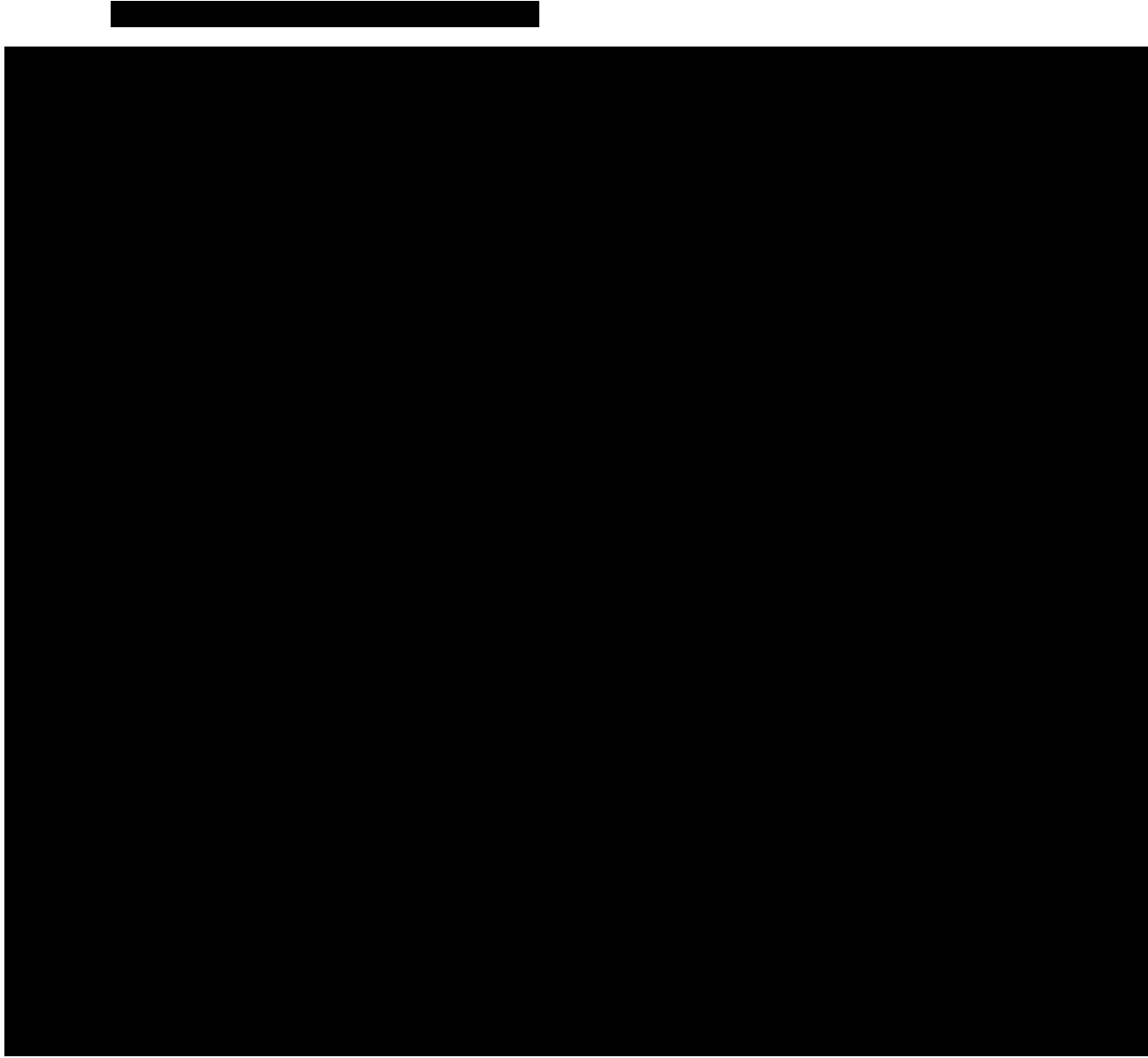
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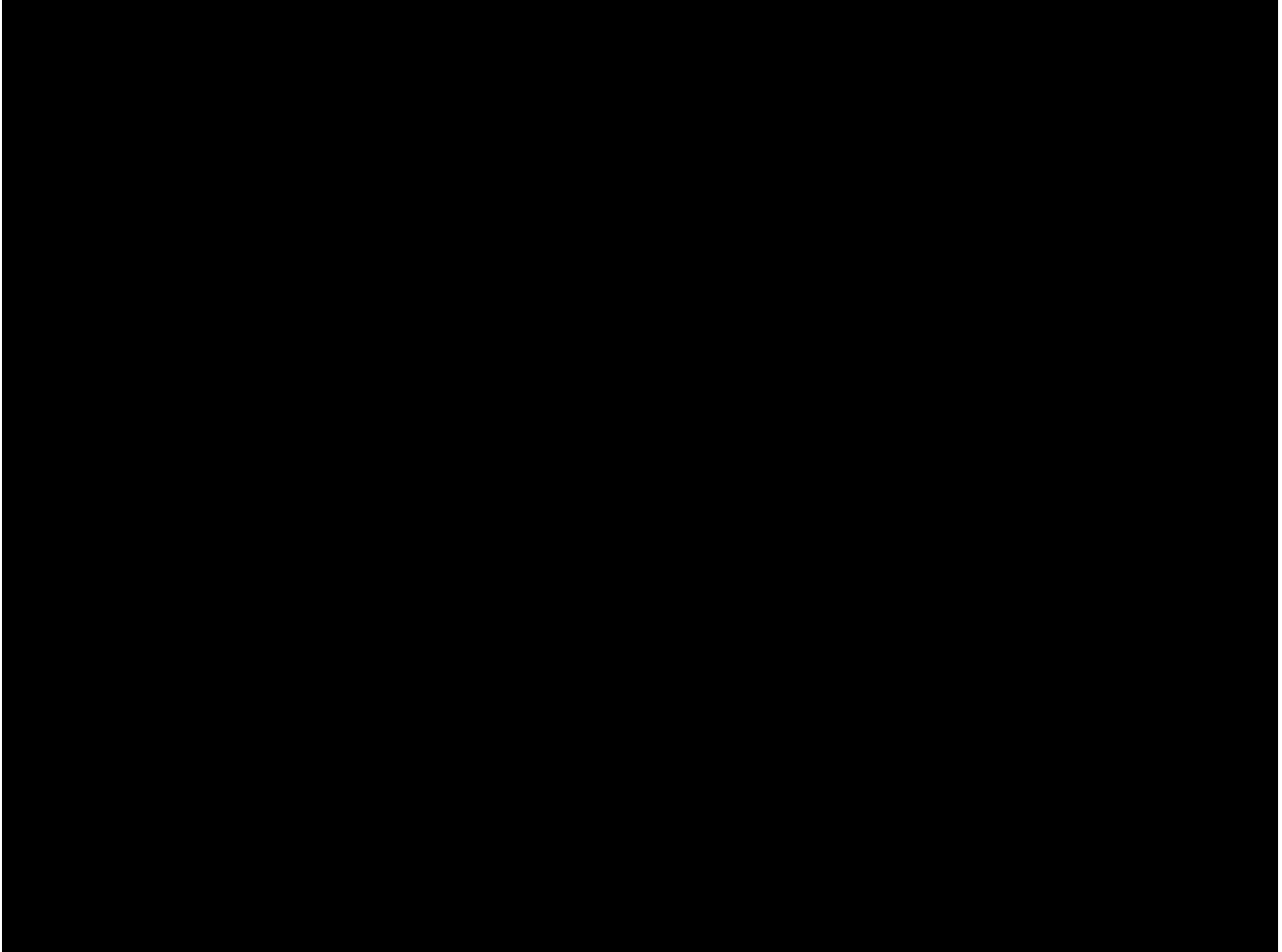
CPSC DOCKET NO.: 21-1

THYSSENKRUPP ACCESS CORP.

Respondent.

DECLARATION OF MAURO CARNEIRO





Executed on November 11, 2021.

A handwritten signature in black ink, appearing to read "Mauro Carneiro", is written above a horizontal line.

Mauro Carneiro

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2021, pursuant to 16 C.F.R. Part 1025 and the Order on Joint Motion to Amend Discovery Schedule and for Protective Order entered in CPSC Docket No. 21-1 on October 12, 2021, true and correct copies of the foregoing Declaration of Mauro Carneiro were served on all parties and participants of record in these proceedings in the following manner:

By electronic mail to:

Robert Kaye
Assistant Executive Director
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission
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By electronic mail to Complaint Counsel:

Mary B. Murphy
Complaint Counsel
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CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER

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A handwritten signature in blue ink, appearing to read "Sheila A. Millar", enclosed in a thin black rectangular border.

Sheila A. Millar

[Redacted]

From: [Redacted]
Sent: [Redacted]
To: [Redacted]
Cc: [Redacted]
Subject: [Redacted]

**** EXTERNAL EMAIL ****

[Redacted]

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From: [Redacted]
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To: [Redacted]

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Cc: [Redacted]

Subject: [Redacted]

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