

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
Polypore International, Inc.,)	Docket No. 9327
a corporation.)	Public
)	Emergency Motion

**COMPLAINT COUNSEL’S MOTION FOR CERTIFICATION TO
THE COMMISSION FOR COURT ENFORCEMENT**

Complaint Counsel respectfully submits this Motion pursuant to Federal Trade Commission Rules of Practice (“Rules”) section 3.38(c), 16 C.F.R. § 3.38(c), for the Court to grant Complaint Counsel’s Motion for Certification to the Commission for Court Enforcement of a subpoena in order for Complaint Counsel to conduct a voluntary deposition of Nippon Sheet Glass (“NSG”) in Japan. Complaint Counsel must obtain an order from a United States federal court authorizing the taking of a voluntary deposition of NSG in Japan. The only way that Complaint Counsel can procure this order is by asking this Court to grant Complaint Counsel’s Motion for Certification to the Commission for Court Enforcement of the NSG subpoena. Complaint Counsel cannot directly make the motion for authorization to take a voluntary deposition of NSG in Japan to a United States federal court because the FTC Act only allows the Commission to be before a United States federal court for an enforcement action. 15 U.S.C. § 9& 10 (2008). Complaint Counsel has discussed this motion with Respondent and Respondent will make its position on the motion known as soon as possible.

Facts

On January 21, 2009, Complaint Counsel served NSG, a Japanese company with businesses in North America, with a 3.33(c) Subpoena asking it to designate one or more persons

to testify about, among other things, any present or future plans it has to supply battery separators to customers located in North America. On January 22, 2009, NSG's General Counsel responded to the Federal Trade Commission's Subpoena stating that the person most knowledgeable about the matter on which examination is requested was in Japan and NSG "was unable to make NSG's corporate representative available for a deposition in the United States due to the overwhelming demands of the business in Japan at this time." See Exhibit 1 - NSG's Response to FTC's 3.33(c) Subpoena. NSG's General Counsel did say that its corporate representative would be available in Japan on "February 27, 2009 to *voluntarily appear*" to answer questions. See Exhibit 1 - NSG's Response to FTC's 3.33(c) Subpoena (emphasis added).

Statement of Authority

The purpose of this motion is to have this Court certify to the Commission that federal court enforcement of the Rule 3.33(c) subpoena properly issued to and served upon NSG is appropriate. According to Rule 3.38(c), in "instances where a nonparty fails to comply with a subpoena," the Administrative Law Judge "shall certify to the Commission a request that court enforcement of the subpoena or order be sought." 16 C.F.R. § 3.38(c). NSG's representative will not appear in the United States, but will appear voluntarily in Japan.

The United States - Japan Bilateral Consular Convention permits the taking of a deposition in Japan of a *willing* witness for use in a United States court proceeding provided that a United States federal court authorizes the taking of such voluntary deposition. Consular Convention and Protocol, Mar. 22, 1963, U.S. - Japan, art. 17.¹ Under the United States - Japan Bilateral

¹However, the United States - Japan Bilateral Consular Convention does not allow Japanese citizens to be deposed in Japan pursuant to a subpoena issued in the United States.

Consular Convention and the All Writs Act, once the Commission authorizes enforcement of the subpoena from a United States federal court, the Commission's General Counsel will be able to ask a federal court to authorize a consul or vice-consul of the United States to take a *voluntary* deposition of NSG's representative in Japan, which is already scheduled for February 27, 2009.

Consular Convention and Protocol, Mar. 22, 1963, U.S. - Japan, art. 17; 28 U.S.C. 1651.

Article 17 of the U.S. - Japan Consular Convention provides that consular officers may ...

(ii) take depositions, on behalf of the courts or other judicial tribunals or authorities of the sending state, voluntarily given, or

(iii) administer oaths to any person in the receiving state in accordance with the laws of the sending state and in a manner not inconsistent with the laws of the receiving state ...

Consular Convention and Protocol, Mar. 22, 1963, U.S. - Japan, art. 17(1)(e).

"This general reference to the authority of consular offices to take depositions has been interpreted by the government of Japan very strictly." *See* U.S. Department of State - Bureau of Consular Affairs, Japan Judicial Assistance, http://travel.state.gov/law/info/judicial_678.html (last visited January 21, 2009) (Exhibit 2). Agreed upon interpretations of the U.S. - Japan Consular Convention and Japanese law and practice permit the taking of a deposition of a willing witness for use in a court in the United States only

- 1) if the deposition is presided over by a U.S. consular officer;
- 2) is conducted on U.S. consular premises;
- 3) is taken pursuant to an American court order or commission;
- 4) and if any non-Japanese participant traveling to Japan applies for and obtains a Japanese Special Deposition visa.

Consular Convention and Protocol, Mar. 22, 1963, U.S. - Japan, art. 17

Here, an NSG company representative will *willingly* travel to the United States Consulate in Osaka, Japan and will have the oath administered to him by a consular or vice-consular. In order

for Complaint Counsel to satisfy the third and fourth steps of the U.S. - Japan Consular Convention, this Court must grant Complaint Counsel's Motion for Certification to the Commission for Court Enforcement of NSG's Rule 3.33(c) Subpoena.

Complaint Counsel did not request leave of this Court under 3.36² of the Rules to seek the issuance of a subpoena to be served in Japan. Under 3.36(b)(4), Complaint Counsel would not have been able to meet its burden that "the discovery requested would be permitted by treaty, law, custom, or practice in the country from which the discovery is sought . . . before the subpoena is served." Because the United States - Japan Bilateral Consular Convention only permits the taking of a deposition of a *willing* witness for use in a United States court proceeding, a Commission subpoena issued for discovery to be conducted in Japan would be insufficient to compel NSG's testimony in Japan.³ Consular Convention and Protocol, Mar. 22, 1963, U.S. - Japan, art. 17.

A federal court order under the All Writs Act can grant administrative agencies the authority to take voluntary depositions in Japan. 28 U.S.C. 1651. An order from a United States federal court specifically authorizing a United States consular officer to take the voluntary

² Rule 3.36 deals with procedures for issuing subpoenas to be served in a foreign country. Specifically Rule 3.36(b) states the party serving the subpoena must show: 1) the material sought is reasonable; 2) the material sought is reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the respondent; 3) the information or material sought cannot reasonably be obtained by other means; and 4) that the party seeking discovery has good faith belief that the discovery requested would be permitted by treaty, law, custom, or practice in the country from which the discovery is sought and that any additional procedural requirements have been or will be met before the subpoena is served. 16 C.F.R. § 3.36(b).

³ One of the policies behind 3.36 of the Rules was to encourage non-compulsory production of evidence from abroad. Thus, Complaint Counsel's request that this Court certify the matter to the Commission so that a United States federal court can authorize a voluntary deposition in Japan is consistent with Rule 3.36(b).

deposition in the United States Consulate in Osaka, Japan is required for an American attorney seeking to participate in depositions of Japanese nationals in Japan. Consular Convention and Protocol, Mar. 22, 1963, U.S. - Japan, art. 17. Moreover, a United States federal court order authorizing the taking of a voluntary deposition in Japan is a necessary prerequisite for obtaining the requisite Special Japanese Deposition Visa and Host Country Clearance, which is specific to officials of the United States Government. Without this type of order being granted, Complaint Counsel would be unable to proceed with the taking of the voluntary deposition in Japan.

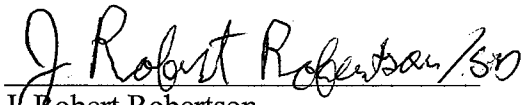
As of today, the Department of State is on notice that Complaint Counsel intends to commence voluntary depositions of Japanese nationals. Additionally, the United States Consulate in Osaka, Japan has reserved a deposition room for Complaint Counsel on February 27, 2009. However, all of the clearances that must be obtained cannot occur until Complaint Counsel can present an order from a United States federal court to the Japanese Embassy stating that it has authority to take voluntary depositions in Japan of NSG's representatives on February 27, 2009 at the United States Consulate in Osaka, Japan. Therefore, time is of the essence.

Conclusion

Accordingly, Complaint Counsel requests that the Court grants Complaint Counsel's Motion for Certification to the Commission for Court Enforcement of NSG's Rule 3.33(c) Subpoena on an expedited pace, so that Complaint Counsel may comply with the various necessary visas and country clearances.

January 22, 2009

Respectfully submitted,

A handwritten signature in cursive script that reads "J. Robert Robertson" followed by a stylized flourish that looks like "RSO".

J. Robert Robertson
Chief Trial Counsel
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
Telephone: (202) 326-2008
Facsimile: (202) 326-2884

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2009 I filed *via* hand and electronic mail delivery an original and two copies of the foregoing Complaint Counsel's Motion for Certification to the Commission for Court Enforcement with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-135
Washington, DC 20580

I hereby certify that on January 23, 2009, I served *via* electronic mail and mail delivery a copy of the foregoing Complaint Counsel's Motion for Certification to the Commission for Court Enforcement with:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
Washington, DC 20580
oa1j@ftc.gov

I hereby certify that on January 23, 2009, I served *via* electronic mail delivery and first class mail two copies of the foregoing Complaint Counsel's Motion for Certification to the Commission for Court Enforcement with:

William L. Rikard, Jr., Esq.
Eric D. Welsh, Esq.
Parker, Poe, Adams & Bernstein, LLP
401 South Tryon Street, Suite 3000
Charlotte, North Carolina 28202
williamrikard@parkerpoe.com
ericwelsh@parkerpoe.com

By: 
Linda Cunningham
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2638
lcunningham@ftc.gov

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
)	Docket No. 9327
Polypore International, Inc.)	
a corporation.)	
)	

**[PROPOSED] ORDER ON COMPLAINT COUNSEL’S MOTION FOR
CERTIFICATE TO THE COMMISSION FOR COURT ENFORCEMENT**

On January 23, 2009, Complaint Counsel filed a motion to certify Complaint Counsel’s Motion for Certification to the Commission for Court Enforcement. Complaint Counsel’s motion for Certification to the Commission for Court Enforcement is granted.

It is hereby ORDERED pursuant to 16 C.F.R. § 3.38(c) that Complaint Counsel’s request for court enforcement is certified to the Commission for court enforcement of the subpoena as of this day, January ____, 2009.

Ordered:

D. Michael Chappell
Administrative Law Judge

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

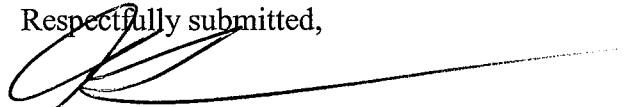
In the Matter of

**Polypore International, Inc.
a corporation.**

)
)
) **Docket No. 9327**
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Complaint Counsel has conferred with Mr. Welsh, who represents Respondent, in an effort in good faith to resolve by agreement the issues raised by the motion. Mr. Welsh agreed to the voluntary deposition of a NSG representative on February 27, 2009. During the "Meet and Confer," which was held on January 21, 2009, Mr. Welsh stated that he did not oppose the motion in principle, but merely wished to review it. Respondent's counsel received the Motion on the evening of January 21, 2009, but Respondent is now looking into the procedural process detailed in the motion for taking a deposition in Japan in a matter before the Federal Trade Commission. Complaint Counsel has requested that Respondent file any response by Friday, January 23, 2009. Respondent asserts that it will make its position on the motion known to the Court as soon as possible.

Respectfully submitted,



Steven A. Dahm, Esq.
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
Telephone: (202) 326-2192
Facsimile: (202) 326-2071

EXHIBIT 1

TO

**COMPLAINT COUNSEL'S MOTION
FOR CERTIFICATION TO THE
COMMISSION FOR COURT ENFORCEMENT**



PILKINGTON

January 22, 2009

Alan R. Graham
Country Manager, North America
General Counsel & Secretary

Mr. Stephen Antonio
Federal Trade Commission
600 Pennsylvania Aveue, N.W.
Washington, DC 20580

Email: santonio@ftc.gov

Re: Rule 3.33(c) Deposition of Nippon Sheet Glass ("NSG")

Dear Mr. Antonio:

This will confirm my receipt of the referenced FTC subpoena of a 3.33(c) deposition of the NSG corporate representative. The person most knowledgeable about the subject matter to be discussed is located in Japan. As such, please be advised that we are unable to make NSG's corporate representative available for a deposition in the United States due to the overwhelming demands of the business in Japan at this time. However, in looking at calendars, it appears that we could make NSG's corporate representative available to you in Japan on the afternoon of February 27 to voluntarily appear and answer your questions relative to the matters contemplated in the referenced deposition notice.

Please advise at your earliest convenience as to whether this arrangement is acceptable. As you can appreciate, calendars do fill quickly.

Sincerely,

Alan R. Graham

Pilkington North America, Inc.

811 Madison Avenue PO Box 799 Toledo Ohio 43697-0799
Office +1 419 247 4503 Fax +1 419 247 4884

A member of NSG Group

EXHIBIT 2

TO

**COMPLAINT COUNSEL'S MOTION
FOR CERTIFICATION TO THE
COMMISSION FOR COURT ENFORCEMENT**

	Disclaimer: The information in this circular relating to the legal requirements of specific foreign countries is provided for general information only and may not be totally accurate in a particular case. Questions involving interpretation of specific foreign laws should be addressed to foreign counsel. This circular seeks only to provide information; it is not an opinion on any aspect of U.S., foreign, or international law. The U.S. Department of State does not intend by the contents of this circular to take a position on any aspect of any pending litigation.
	Summary
	Service of Process
	Service of Criminal Subpoenas
	Service on a member of the U.S. Military in Japan
	Service on a Foreign State
	Obtaining Evidence Overview Summary
	Japanese Sovereignty
	U.S. Diplomatic and Consular Premises and Extraterritoriality
	Special Japanese Deposition Visas
	U.S. Court Order for the Taking of the Depositions
	Participation of Judges From the United States
	Telephone or Videoteleconference Testimony
	Special Note Regarding American Attorneys Residing in Japan
	Voluntary Depositions on Written Questions
	How Consular Depositions Are Conducted
	Scheduling Depositions
	Consular Fees for Depositions
	Video Tape Equipment
	Signing, Certifying and Mailing Deposition Transcripts
	Travel to Japan For Judicial Assistance Activities
	Compulsion of Testimony – Letters Rogatory
	Compulsion of Documents and Other Physical Evidence
	Participation of American Attorneys in Japanese Court Proceedings Regarding Execution of Letters Rogatory
	Criminal Matters
	Defense Requests in Criminal Matters
	Conducting Informal Interviews
	Authentication of Documents
	Enforcement of Judgments
	Lists of Attorneys in Japan
	U.S. Embassy Address and Contact Information
	Links
	Selected References
	Summary : Judicial assistance between the United States and Japan is governed by Article 5(f) of the Vienna Convention on Consular Relations (VCCR) , 21 UST 77, TIAS 6820, 596 U.N.T.S. 261, Article 17 of the U.S. - Japan Bilateral Consular Convention of 1963 (15 UST 768), the U.S. - Japan bilateral Mutual Legal Assistance in Criminal Matters treaty (Treaty Doc. 108-12), the multilateral Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters , 20 UST 361; to which the United States and Japan are parties, customary international law and the practice of nations, and applicable U.S. and local Japanese law and regulations.
	Service of Process : The United States and Japan are a parties to the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters . Persons requesting service of process of U.S. documents in Japan in civil and commercial matters should execute the USM-94 form or the new interactive Service Convention form available from the Hague Conference on Private International Law web page . The request form should be completed in duplicate and submitted with two sets of the documents to be served directly by the requesting attorney or clerk of court to the Japanese Central Authority . The Japanese Central Authority is Ministry of Foreign Affairs, 2-2-1 Kasumigaseki Chiyoda-ku, Tokyo 100-8919 Japan. The person executing the request form should be either an attorney or clerk of court. The applicant should include attorney at law or clerk of court title on the identity and address of applicant and signature/stamp fields. See the U.S. response to the 2003 Questionnaire in preparation for the Special Commission on the Practical Operation of the Convention. Question 17.3 addressed the issue of who is authorized under U.S. law to execute a request under the Convention. Attorneys should cite Rule 4 of the Federal Rules of Civil Procedure or comparable state statute permitting attorneys to execute service requests. Proof of service is transmitted to the requester by the Japanese central authority through the Japanese embassy and consulates in
Law, Regulations & Public Policy	
Information for Americans Abroad	
Consular Notification and Access	
Citizenship and Nationality	
Legal and Public Policy Information	
Family Issues	
Law Enforcement Issues	

Handbook on the Operation of the Hague Service Convention.

Service of Criminal Subpoenas : U.S. consular officers are permitted to serve criminal subpoenas on U.S. citizens and U.S. Lawful Permanent Residents abroad pursuant to 22 CFR 92.86, when specifically authorized by the Department of State.

Service on a member of the U.S. Military in Japan: It is possible to effect service on members of the U.S. Armed Forces in Japan through the Japanese central authority. Service by mail may also be used if state law permits (APO and FPO are U.S. mail). Also, contact the Judge Advocate General's (JAG) Office at the Pentagon for the particular branch of the service (tel: 703-545-6700).

Service on a Foreign State: See our Service Under the Foreign Sovereign Immunities Act (FSIA) feature and FSIA Checklist for questions about service on a foreign state, agency or instrumentality.

Obtaining Evidence Overview Summary: Japan is not a party to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. Judicial assistance between the United States and Japan in obtaining evidence is governed by Article 17 of the U.S. - Japan bilateral Consular Convention of 1963 (15 UST 768), customary international law and the practice of nations, and applicable U.S. and local Japanese law and regulations. Article 17(1) (e) of the U.S. - Japan Consular Convention provides that consular officers may ...

"(ii) take depositions, on behalf of the courts or other judicial tribunals or authorities of the sending state, voluntarily given.

(iii) administer oaths to any person in the receiving state in accordance with the laws of the sending state and in a manner not inconsistent with the laws of the receiving state."

This general reference to the authority of consular officers to take depositions has been interpreted by the Government of Japan very strictly. Japanese law and practice, and the mutually agreed upon interpretation of the U.S. - Japan bilateral Consular Convention concerning obtaining evidence in Japan permits the taking of a deposition of a willing witness for use in a court in the United States **only**

1. if the deposition is presided over by a U.S. consular officer;
2. is conducted on U.S. consular premises
3. is taken pursuant to an American court order or commission;
4. and if any non-Japanese participant travelling to Japan applies for and obtains a Japanese Special Deposition visa.

The Japanese Ministry of Foreign Affairs and Ministry of Justice have advised the United States that these requirements apply in civil, criminal and administrative cases. The Japanese requirement for a court order and special deposition visas would apply in all cases, even though the depositions began in the United States initially.

Therefore, depositions may be taken in Japan:

1. **On U.S. consular premises;**
2. pursuant to a commission (28 U.S.C. App. Fed. R. Civ. P. Rule 28(b)(2)) to take a deposition issued by a court to any Consul or Vice-Consul of the United States at (Tokyo, Naha, Osaka-Kobe, Sapporo, Fukuoka) or
3. on notice, provided an order issued by a court in the United States specifically authorizes an U.S. consular officer to take the deposition on notice.

NOTE: U.S. Government officials traveling to Japan to participate in the taking of depositions or informal interviews should see also Travel to Japan For Judicial Assistance Activities for guidance about obtaining the additional requisite host country clearance which requires a diplomatic note from the U.S. Embassy to the Ministry of Foreign Affairs. This is in addition to the Special Deposition Visa requirement. This additional requirement host country clearance does not pertain to private U.S. citizen attorneys, but as noted below the Special Deposition Visa requirement applies to **all** U.S. participants.

Japanese Sovereignty: The Government of Japan has advised the United States that it opposes deviations from these conditions, and that it would consider any action beyond the strictures of the U.S.-Japan understanding to be a violation of its judicial sovereignty. The United States recognizes the right of judicial sovereignty of foreign governments based on customary international law and practice; See, e.g., the Restatement (Third) of Foreign Relations Law (1987); Cumulative Digest of United States Practice in International Law, 1981-1988, Office of the Legal Adviser, U.S. Department of State, Vol. II, 1430-1432, 1440 (1994).

U.S. Diplomatic and Consular Premises and Extraterritoriality: All depositions

(Japan); the premises are not part of the territory of the sending state (the United States of America). See Restatement (Third) of Foreign Relations Law, Vol. 1, Sec. 466, Comment a and c (1987). See also, *Persinger v. Iran*, 729 F.2d 835, (D.C. Cir. 1984). **It should be noted that Japan has further advised that depositions may not take place on U.S. military bases in Japan as that is not sanctioned in the U.S. - Japan Status of Forces Agreement.**

Special Japanese Deposition Visas: Japan has instituted a requirement that persons from the United States wishing to participate in a deposition of a witness in Japan must apply for a Japanese "special deposition visa". As prerequisite to the issuance of the Japanese special deposition visa, Japan requires presentation of a U.S. court order, citing Article 17 of the U.S. - Japan bilateral Consular Convention. See suggested text for the court order below.

1. Apply for a "special deposition visa" at the Japanese Embassy or Consulate in the United States nearest you. The Consular Section of the Japanese Embassy is located at 2520 Massachusetts Avenue, N.W., Washington, D.C. 20008, tel: (202) 939-6700. Japanese consulates are also located in Anchorage, Atlanta, Boston, Chicago, Detroit, Guam, Honolulu, Houston, Kansas City, Los Angeles, Miami, New Orleans, New York, Portland, San Francisco and Seattle.
2. This special visa must be applied for at **least two weeks before departure for Japan**.
3. The request should be made on letterhead stationery and include the following information: (a) the name and location of the court; (b) name and occupation of each witness; and (c) a summary of the case. Travelers will also be required to present their U.S. passport, complete Japanese Embassy/consulate visa application forms and to provide the requisite photographs. A photocopy of the commission or court order for a U.S. consular officer to take the deposition must accompany the request. Special visas may also be required of deposition participants other than attorneys (stenographers, interpreters, parties, etc.). Inquiries should be made of the appropriate Japanese consular officer in the United States. For guidance about applying for a U.S. passport, see the Passports feature on the U.S. Department of State Bureau of Consular Affairs internet page.
4. The Japanese Embassy must seek concurrence from the Ministry of Foreign Affairs in every case. The Japanese Embassy or Consulate in the United States will contact the Japanese Foreign Ministry for permission to issue the "special deposition visa".
5. The Japanese Foreign Ministry will contact the U.S. Embassy or Consulate to confirm whether the U.S. consular officer has received a photocopy of the court order issued by a court in the United States and whether the deposition has been scheduled. **See below for guidance on how to schedule a deposition at the U.S. Embassy or one of the U.S. Consulates in Japan.**
6. The Japanese Foreign Ministry will authorize the Japanese Embassy or Consulate in the United States to issue the "special deposition visa".

U.S. Court Order for the Taking of the Depositions : A certified copy of the court order must be provided to the U.S. Embassy in Tokyo before application is made for the special deposition visa so that the U.S. Embassy is in a position to respond to the requisite inquiry made by the Ministry of Foreign Affairs to the U.S. Embassy before the Ministry authorizes the Japanese Embassy or consulate in the United States to issue the special deposition visa. **Japan will not accept orders issued by administrative law judges.** Examples of court orders obtained from U.S. courts under the All Writs Act, 28 U.S.C. 1651, by various administrative agencies for the taking of depositions in Japan are available from upon request (ASKPRI@state.gov). We suggest that the court order be worded "on or about" a date for maximum flexibility in scheduling.

Sample Suggested Text for Court Order or Commission

Japanese authorities have requested that the court order or commission contain the following information:

NAME OF COURT
CAPTION)
)
)

TO ANY CONSUL OR VICE CONSUL OF THE UNITED STATES
UNITED STATES (EMBASSY/CONSULATE) (NAME OF CITY)

Upon the application of (plaintiff, defendants), and pursuant to Article 17 of the United States - Japan consular convention,

You have been duly appointed and you are hereby authorized to take oral depositions

It is ordered that the depositions on notice of the following witnesses be taken at the United States (embassy/consulate) in (name of city), Japan

(names, addresses, and employer of witnesses) commencing on or about (date), (time) and terminating on or about (date), (time), and to mark any documentary exhibits in connection therewith.

Counsel for defendants who will participate in said depositions are (names); and counsel for plaintiffs who will participate in said depositions are (names). The proceedings will be reported by (name of court reporter, if one is travelling to Japan). Please cause the testimony of said witnesses to be reduced to writing and the depositions signed by said witnesses and annex said deposition testimony to your commission and close the same under your seal and make return thereof to this court with all convenient speed.

Date signature of judge
Name of judge
Seal

Participation of Judges From the United States : Japan has advised the United States that it will not permit the participation of foreign judges in the deposition of a witness located in Japan. For a general discussion of participation of judges in foreign depositions, see, Cumulative Digest of United States Practice in International Law, 1981-1988, Vol. II, 1400, 1402, Department of State (1994). See also, Administrative Office of the U.S. Courts, Guide to Judiciary Policies and Procedures, Vol. III, Judges' Manual, February 1988, trans. 2, vol. III, chap. XV, p. 3, Sec. B.1.c.

Telephone or Videoteleconference testimony: Japanese authorities have informed the United States that **Japan does not permit the taking of telephone or videoteleconference testimony.** In light of the U.S. treaty obligation pursuant to Article 17 of the U.S. - Japan Consular Convention, as interpreted by the U.S. and Japan, **absent specific authorization from the Japanese Ministry of Foreign Affairs**, the U.S. Embassy in Tokyo and U.S. consulates in Japan cannot participate in any way in a telephone or teleconference deposition. See, Restatement (Third) of Foreign Relations Law, 441-442. See also, interpretive notes, Rule 28(b), Federal Rules of Civil Procedure which provides "effectiveness and even availability, of one of the methods Rule 28(b) provides for taking of depositions in foreign countries depends largely upon law of foreign country in which deposition is to be taken." *Zassenhaus v. Evening Star Newspaper Co.*, 404 F.2d 1361, (D.C. Cir. (1968)), 131 App DC 384. The U.S. Department of State would again advise U.S. citizens contemplating participation in such a proceeding outside of U.S. consular premises to consider carefully the impact of such an action. In 1998, the Government of Japan permitted the taking of live videoteleconference testimony of a witness in Japan at the U.S. Embassy to a Federal courtroom in the United States. See *United States v. Nippon Paper Industries, Co., Ltd.*, Order (D. Mass., July 28, 1998); Order July 28, 1998. Permission must be obtained on a case by case basis by the U.S. Embassy in the form of a diplomatic note to the Ministry of Foreign Affairs which would consult with the Ministry of Justice. It should be noted that when the Government of Japan granted permission for the videoteleconference testimony in 1998, **Japan specifically stated that this should not be considered a precedent.**

Special Note Regarding American Attorneys Residing in Japan and Voluntary Depositions: Japanese authorities have informed the United States that Articles 3 and 72 of the Japanese Lawyer Law may prohibit the taking of depositions in Japan outside the procedures established for taking consular depositions under Article 17 of the U.S. Japan bilateral Consular Convention by private attorneys not admitted to practice law in Japan. In Note Verbale Hokubei 1 No. 220 dated October 31, 1996, the Japanese Ministry of Foreign Affairs advised that private American attorneys residing in Japan who wish to participate in depositions at the U.S. Embassy or consulate in Japan. American lawyers residing in Japan under the status of "legal/accounting services" (as "gaikokuhu jimubengoshi"), permanent residents, or their spouses may participate in depositions under their current visa status, that is, without the special deposition visa under certain circumstances. They must notify the Ministry of Foreign Affairs through the U.S. Embassy in Tokyo of their proposed participation. When submitting the note verbale notification to the Ministry, the Embassy will need to provide the names of such lawyers, their company affiliation in Japan, their address, telephone number, and the type and validity of their visa, in addition to a copy of the requisite commission or court order issued by the court in the United States for the taking of the deposition before the U.S. consular officer on U.S. consular premises. In order to facilitate the notification procedures, the Embassy has prepared a worksheet which each lawyer resident in Japan will need to fill out in order for the Embassy to submit the requisite note verbale.

Voluntary Depositions on Written Questions : Voluntary depositions on written questions may be taken in Japan (28 USC Fed. R. Civ. P., Rule 31, 22 C.F.R. 92.58). Requesting counsel should contact the U.S. Embassy or Consulate to arrange a mutually convenient day or days when the deposition may be conducted. The requirements for an American court order, consular fees and scheduling the Embassy

interpreter/translator, and withdraw, subject to recall. If the witness does not speak or read English adequately, a Japanese translation of the English text should be provided. The questions should be sent directly to the U.S. consular officer at the U.S. Embassy or Consulate. If preferred, the witness may write down the answers to the questions, rather than dictate the answers to the stenographer or video tape operator. The U.S. consular officer will affix a closing certificate after the deposition is completed.

How Consular Depositions Are Conducted: When a deposition of a willing witness is taken before a U.S. consular officer in Japan on U.S. consular premises, the procedures set forth at 22 CFR 92:55-92.64 and 7 Foreign Affairs Manual (FAM) 920. Generally, consular officers preside over the taking of the deposition, following special instructions of the requesting court or parties (22 CFR 92.56), consistent with Japanese requirements. Actual asking of the questions is usually done by requesting counsel after the consular officer administers oaths to the witnesses, stenographers, interpreters, video-tape operators, etc. The consular officer then withdraws, subject to recall.

Scheduling Depositions: Contact the U.S. Embassy or Consulate and make arrangements to schedule the availability of U.S. consular premises and a U.S. consular officer to conduct the deposition. **Note: The American Embassy in Tokyo is generally booked six months in advance. See Taking Depositions in Tokyo – U.S. Embassy which includes an on-line tool for scheduling depositions; Taking Depositions in Osaka – U.S. Consulate General.** Depositions are rarely taken at the U.S. Consulates in Fukuoka, Naha or Sapporo. Special arrangement must be made with the consular sections for depositions in these locations as there is no dedicated space in the consulates for depositions. Review the information on the U.S. Embassy Tokyo and U.S. Consulate General Osaka-Kobe web sites carefully as that information is subject to change. In general:

1. Please note that for administrative and security reasons, the embassy/consulate's deposition room and consular staff are not available for deposition taking outside of working hours 8:30 a.m. to 5:00 p.m. or on weekends or holidays.
2. The Embassy/consulate can tentatively schedule a deposition, and hold the dates reserved for three weeks. If the non-refundable scheduling fee (\$475.00) is not received at the Embassy/consulate within three weeks, the dates tentatively reserved will be released to others.
3. In addition, the Embassy/consulate cannot confirm a scheduled deposition until both the court order/commission and deposit for the prescribed deposition fee are received at the Embassy/consulate.
4. The embassy/consulate **does not** schedule the appearance of deponents or make arrangements for court reporters/stenographers or interpreters for private attorneys.

Consular Fees for Depositions : Current consular judicial assistance services fees are set forth in 22 CFR 22.1. The current fees include:

22 CFR 22.1 Schedule of Fees item 52 a – **Scheduling/arranging appointments for depositions (per daily appointment)** - \$475.00. This is a non-refundable fee.

22 CFR 22.1 Schedule of Fees item 52 b – **Attending or executing commissions to take testimony** (per hour thereof) - \$265.00. If the consular officer administers the oaths and withdraws, subject to recall, at least one hour is charged pursuant to item 52b.

22 CFR 22.1 Schedule of Fees item 52 c – **Swearing in witnesses for telephone depositions** - \$265.00.

22 CFR 22.1 Schedule of Fees item 52 d – **Supervising telephone depositions (per hour or part thereof over the first hour)** - \$265.00.

22 CFR 22.1 Schedule of Fees item 52 e – **Providing seal and certification of depositions** - \$70.00.

In addition, actual costs for mailing transcripts must be furnished.

No fees are normally charged for depositions at the request of U.S., state or local government officials (22 CFR 22.1 Schedule of Fees item 53(a)) or at the request of parties in criminal cases that have been found to be indigent by the court (22 CFR 22.1 Schedule of Fees item 53(b)).

Video Tape Equipment : The embassy/consulate does not provide tapes, taping equipment or equipment operators. The embassy/consulate also does not provide commercial rates for tapes, taping equipment or equipment operators. Participants must make all arrangements directly with the service providers. Participants are responsible for obtaining their own clearances from Japanese Customs authorities for

electrical equipment at the U.S. Embassy/Consulate. After the advance arrangements are completed, please so notify the U.S. Embassy a few days in advance of the actual deposition, so that the Embassy can obtain the necessary clearance from the Security Office for the entry of the equipment and the operators into the Embassy premises.

Signing, Certifying and Mailing Deposition Transcripts: Participants to a deposition may stipulate regarding the manner in which the transcript of the deposition (any exhibits) should be signed, certified and mailed. The transcript may be forwarded to counsel rather than to the clerk of court which requested the deposition. Moreover, participants may stipulate that after the deposing of witnesses is completed and the stenographer transcribes the testimony, the transcript may be sent directly to the witness for signature or to counsel for the participants who will make arrangements directly with the witness for signature of the transcript. If required by local or federal rules in the United States, the witness may bring the transcript to the American embassy or consulate for signature before a consular officer, making any necessary corrections in the presence of a consular officer. If required, a consular certification of the deposition may be made at this time. If you plan to have the deposition taped without subsequent transcription, the embassy/consulate asks that the court order or commission specify whether audio or video tape is to be used. Tapes may be sent directly by the video operator or by the embassy/consulate via registered air mail to either the person stipulated by the participants or directly to the court clerk immediately following completion of the deposition. Any change in the above procedures would have to be agreed to by both parties in the dispute and, if necessary, covered by an amended court order. Completed transcripts and related documents are sent via registered mail to the court in which the action is pending, or to requesting counsel unless the action is a federal criminal case, in which case, the documents are returned to the Department of State for onward transmission.

Compulsion of Testimony: Japan is **not** a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. There is not in force between the United States and Japan any other treaty or international agreement on judicial assistance. Compulsion of evidence in Japan from an unwilling witness can only be achieved on the basis of comity, pursuant to a letter rogatory. See Rule 28(b), Fed. R. Civ. P.; 4 Moore's Federal Practice 28.05-28.8 (2d ed. 1950); Ristau, International Judicial Assistance (Civil and Commercial), Vol. 1, 3-36 et seq., International Law Institute, 1984; Article 5(j) of the Vienna Convention on Consular Relations [1963], 21 UST 77 to which the United States and Japan are both parties. For criminal matters see guidance below. A letter rogatory is a request from a court in one country for assistance from a court in another country. Such requests are executed by Japanese district courts in accordance with the laws of Japan and generally take six months to a year to execute. The Japanese court will compel the witness to appear before a Japanese judge to respond to written questions annexed to the letter rogatory. All proceedings will be conducted in the Japanese language. The letter rogatory should be written in clear, simple language and should be written in the form of a request, not a demand for assistance. Japan requires that requests for international judicial assistance be processed through the diplomatic channel. This means that a request must be transmitted to the Department of State by the requesting court, or by counsel. See our general brochure on [preparation of letters rogatory](#). Moreover, the Department of State understands that the following Japanese conditions must be met before such a request will be honored:

1. The request must be made through diplomatic channels (as mentioned);
2. The letter rogatory should have attached documents showing parties to be examined, the type of evidence to be examined, the name, nationality and address of the persons to be examined and the items with respect to which they should testify [Japanese Law W relating to Reciprocal Judicial Aid to be Given at the Request of Foreign Courts - Law 63 of March 13, 1905, as amended];
3. The letter rogatory and all attachments must be translated into Japanese. Japanese courts often reject a letter rogatory if the documents including all attachments are not completely translated into Japanese, or if the quality of the translation is poor;
4. The letter rogatory must assure the Japanese court that compensation for all expenses incurred by the Japanese court will be paid;
5. The letter rogatory must assure the Japanese court that the requesting court will honor similar requests from the Japanese court.
6. Moreover, Japan requires that any document annexed to the letter rogatory must bear the seal of the requesting court and the signature of the judge. Japan will reject a request if the letter rogatory or accompanying documents bear the signature of the clerk of the court. Japanese authorities do not honor amendments to a letter rogatory which are not under the seal of the requesting court.

Letters rogatory for compulsion of evidence should be transmitted to the U.S. Department of State, Bureau of Consular Affairs, [Overseas Citizens Services](#), Office of American Citizens Services and Crisis Management, East Asia Division, CA/OCS/ACS/EAP. Mailing address: SA-29, 4th Floor, 2201 C Street N.W.,

payable to the U.S. Embassy. No fees are charged for letters rogatory at the request of U.S., state or local government officials or at the request of parties who have been found to be indigent by a court.

Compulsion of Documents and Other Physical Evidence : Japan has advised the United States that Japanese law **does not** include any provision for compulsion of documents or other physical evidence except in criminal cases. The Department of State continues to explore this issue with Japanese authorities. In the interim, while the Department is prepared to transmit such requests, be aware that attempts to compel such evidence by means of letters rogatory in civil cases have proven unsuccessful. However, production of documents and other physical evidence may be compelled through the Japanese courts by letters rogatory in criminal cases.

Participation of American Attorneys in Japanese Court Proceedings Regarding Execution of Letters Rogatory: Most American attorneys would prefer to participate in the proceeding before the Japanese court. This may well pose a problem in that it appears generally prohibited by Articles 3 and 72 of the Japanese Lawyer Law. The Japanese judge, however, may permit American counsel to participate on a case-by-case basis. For this reason, it may be preferable for you to prepare the letter rogatory in a way which offers the Japanese court alternative ways of executing the request. For example, the letter rogatory could request that:

1. American counsel be permitted to participate in the proceedings before the Japanese court;
2. If this is not possible, the letter rogatory could ask that local Japanese counsel representing the American client be permitted to participate in the proceedings;
3. Finally, if this alternative is not possible, the letter rogatory could enclose written questions to be put to the witness by the Japanese court.

Travel to Japan For Judicial Assistance Activities: Before traveling to Japan for judicial assistance related activities, see the [Country Specific Information](#) and any applicable [Travel Alerts](#) or [Travel Warnings](#). It is also recommended that U.S. travelers [register with the U.S. Embassy using our on-line registration system](#). If a U.S. federal, state or local official will participate in the deposition, contact the Office of Policy Review and Inter-Agency Liaison (ASKPRI@state.gov; (202-736-9125; fax 202-736-9111) for assistance in obtaining [host country clearance for the travel of U.S. officials to conduct judicial assistance activities abroad](#).

Criminal Matters: U.S. federal or state prosecutors should also contact the [Office of International Affairs, Criminal Division, Department of Justice](#) at (202) 514-0015 for guidance about the [U.S. – Japan bilateral Mutual Legal Assistance in Criminal Matters treaty](#) (Treaty Doc. 108-12). The treaty was signed August 5, 2003. See [U.S. Department of Justice Press Release August 5, 2003](#); [Japanese Ministry of Foreign Affairs signing of Mutual Legal Assistance Treaty with the United States](#); [Transcript U.S. Embassy Statements at Exchange of Instruments of Ratification 2006](#).

Defense Requests in Criminal Matters: The U.S. Department of State expects criminal defendants, or their defense counsel, who wish to request judicial assistance in obtaining evidence or in effecting service of documents abroad in connection with criminal matters to make such requests pursuant to letters rogatory in accordance with Article 5(j) of the [VCCR](#). Defense requests for compulsion of evidence in criminal matters may be prepared in the form of a letter rogatory transmitted via diplomatic channels from the U.S. Department of State, Bureau of Consular Affairs, [Overseas Citizens Services](#), Office of American Citizens Services and Crisis Management, East Asia Division, 1-888-407-4747. See [22 CFR 22.1](#) regarding current consular fees. For general guidance about preparation and transmittal of such requests, see our [Letters Rogatory feature](#). **Fees:** The consular fee for letters rogatory is set forth in [22 CFR 22.1](#). The current fee provided in 22 CFR 22.1 Schedule of Fees item 51 is \$735.00 which should be furnished in the form of a certified or corporate check payable to the U.S. Embassy. No fees are charged for letters rogatory at the request of U.S., state or local government officials.

Conducting Informal Interviews: While the taking of depositions, under the conditions explained above, is a right secured under the U.S.-Japan Consular Convention, 15 U.S.T. 768, conducting interviews and other informal evidence gathering or investigation techniques are entirely subject to the discretion of the Japanese government. The Japanese Ministry of Foreign Affairs has advised the U.S. Embassy in Tokyo that it considers the conducting of information interviews by in Japan to constitute formal evidence gathering and therefore to be subject to the Japanese law on international investigative assistance. Private litigants may need to obtain a special visa for travel to Japan to conduct informal interviews, inspections or other investigations. Contact the Japanese Embassy or consulate in the U.S. for information. Japanese authorities may require that the request to conduct such interviews be made in the form of a letter rogatory, or in criminal cases, on behalf of the U.S. Government, a formal letter of request. Local, state and federal prosecutors/attorneys seeking to conduct such interviews/inspections should contact the Office of American Citizens Services for additional information.

