

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of

Otto Bock HealthCare North
America, Inc.,
a corporation,

Respondent.

Docket No. 9378

**COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONDENT COUNSEL TO
ACCEPT SERVICE FOR DR. HELMUT PFUHL**

Pursuant to Rule 3.38(a) of the Federal Trade Commission's Rules of Adjudicative Practice (the "Rules"), Complaint Counsel respectfully moves the Court to compel Respondent counsel to accept service of the subpoena issued by Complaint Counsel to Dr. Helmut Pfuhl, an employee of Respondent, for the purpose of testifying at the hearing scheduled to begin on July 10, 2018.

Complaint Counsel properly served Respondent counsel with a trial subpoena for Dr. Pfuhl on June 14, 2018.¹ According to Rule 4.4(c), "[w]hen counsel has appeared in a proceeding on behalf of a party, service upon such counsel of any document, other than a complaint, shall be deemed service upon the party." Dr. Pfuhl is an employee of Otto Bock SE & Co. KGaA,² the parent of Otto Bock North America, which this Court previously held is within the custody and control of Respondent. *In re Otto Bock HealthCare North America*,

¹ Dr. Pfuhl's subpoena was sent care of Edward Biester III, Esq., Respondent's counsel in this matter (Exhibit A).

² Otto Bock SE & Co. KGaA was previously Otto Bock HealthCare GmbH.

Order on Complaint Counsel's Motion to Compel at 3 (Mar. 19, 2018). Additionally, Respondent counsel represented Dr. Pfuhl in his deposition on April 5, 2018, and produced documents from Dr. Pfuhl in response to Complaint Counsel's Requests for Productions on March 12, March 23, and March 30. Respondent counsel has also represented at depositions other similarly situated Respondent employees who work in Germany, including Sönke Rössing, Alexander Guck, Andreas Eichler, Sven Ehrich, and Ralf Stuch, and produced documents on their behalf. Respondent has also listed Dr. Rössing, its employee who works in Germany, on its trial witness list.³ Respondent's Amended Final Proposed Witness List at 12 (May 30, 2018) (identifying Dr. Rössing as a "Respondent" witness).

Notwithstanding proper service, on June 25, 2018, Respondent counsel sent Complaint Counsel a letter indicating that it is not authorized to accept service on behalf of Dr. Pfuhl, but provided no reason or explanation for its refusal to accept service.⁴ In follow-up correspondence on June 26, 2018, Respondent counsel reiterated that it would not accept service for Dr. Pfuhl, again without explanation beyond its claim that counsel is allegedly "not authorized" to accept service of a subpoena issued to Dr. Pfuhl.⁵ At the same time, Respondent has continued to "reserve the right" to call Dr. Rössing, a colleague of Dr. Pfuhl in Germany, to testify for Respondent at the hearing.⁶

Complaint Counsel's service of the subpoena to Respondent counsel was proper under Rule 4.4(c). As discussed below, Dr. Pfuhl's testimony is highly relevant and would be

³ Like Dr. Pfuhl, Dr. Rössing is employed by Otto Bock HealthCare SE & Co. KGaA.

⁴ June 25, 2018 email from Andrew Rudowitz to Jonathan Ripa, including attached letter (Exhibit B).

⁵ June 25-26, 2018 emails between Ed Biester and Jonathan Ripa (Exhibit C).

⁶ After Respondent counsel refused to accept service of Dr. Pfuhl's trial subpoena, Complaint Counsel asked Respondent counsel to "please explain whether or not Respondent plans to call any other ex-U.S. employee of Respondent, such as Sönke Rössing who appears on Respondent's Final Proposed Witness List, to provide testimony at the hearing." Respondent counsel replied that, "we reserve the right to call as a witness anybody on our Final Proposed Witness List." *Id.*

informative to the Court on a number of issues. Further, Complaint Counsel could be prejudiced if it cannot elicit testimony from Dr. Pfuhl that may contradict the testimony of Dr. Rössing and other Respondent witnesses at trial. Therefore, this Court should compel Respondent to accept service and produce Dr. Pfuhl for examination in the hearing set to begin on July 10.

I. Dr. Pfuhl’s Testimony at Trial Would Be Highly Relevant and Informative

As Otto Bock’s Head of Strategic Business Unit Prosthetics, Dr. Pfuhl’s testimony would be relevant and extremely informative to the Court. In a sworn statement to this Court, Respondent counsel described Dr. Pfuhl’s position, roles, and responsibilities as follows:

- Dr. Pfuhl is the Head of Strategic BU Prosthetics at Otto Bock;
- Dr. Pfuhl is responsible for “the oversight of product management” of, among other things, microprocessor knees at Otto Bock;

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

The importance of Dr. Pfuhl’s testimony in this matter was confirmed during discovery.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷ Respondent’s Opp. To Compl. Counsel’s Mot. To Compel Respondent to Produce Documents Requested by Compl. Counsel’s First Set of Requests for Prod. Of Documents, Decl. of Sean McConnell, at 2 (March 15, 2018).
⁸ See PX05157 (Pfuhl (Otto Bock) Dep. 86:20-89:12).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

After the acquisition, Dr. Pfuhl played an important role in Respondent's integration efforts. For example, he was a key presenter at an integration meeting in November 2017 where top executives from Otto Bock and Freedom met to discuss the future of Freedom's MPK products.¹⁰ Dr. Pfuhl, who "is responsible for the oversight of product management" for Otto Bock's microprocessor knees, presented a recommendation to Otto Bock senior management that, going forward, the Plié 3 and C-Leg 4 should be [REDACTED]¹¹ Strategically, Dr. Pfuhl planned to [REDACTED] [REDACTED]¹² Dr. Pfuhl also discussed the future of Freedom's next-generation [REDACTED] MPK in that November 2017 meeting. Dr. Pfuhl acknowledged that the [REDACTED] posed a [REDACTED]¹³ and, as he explained in his deposition, [REDACTED]

⁹ See, e.g., PX01511-006 (Otto Bock) (noting that [REDACTED])

¹⁰ Otto Bock executive attendees included Dr. Pfuhl (Head of Strategic BU Prosthetics), Ralf Stuch (Executive Vice President Global Sales), Christin Gunkel (CMO and Management Board), Sven Ehrich (Dir. of Research and Development), Andreas Schultz (Regional President & CFO for Ottobock Healthcare North America), Matt Swiggum (Regional President and CEO for Ottobock Healthcare North America), Scott Schneider (Vice President of Medical Affairs, Government Affairs, and Future Development for Ottobock Healthcare North America), and Sönke Rössing (Chief Strategy, Human Resources Officer). PX01304-001. Freedom executive attendees included Dave Reissfelder (CEO), Maynard Carkhuff (Chairman), Eric Ferris (Vice President of Marketing and Product Development), Jeremy Matthews (Senior Vice President of Sales and Marketing), and John Robertson (Senior Vice President of R&D in Irvine Manufacturing). PX01304-001 (Otto Bock).

¹¹ PX01303-081 (Otto Bock).

¹² PX01303-081 (Otto Bock).

¹³ PX01303-083 (Otto Bock).

██████████¹⁴ With the acquisition, Dr. Pfuhl and his colleagues concluded that the ██████████ could not continue on its original path ██████████¹⁵ Dr. Pfuhl's testimony about this presentation, and the reactions of other Otto Bock and Freedom executives who attended it, bear directly on the assessment of competitive effects of Otto Bock's acquisition of Freedom.

Given Dr. Pfuhl's intimate involvement, and leadership role, within both Otto Bock's due diligence efforts and integration planning after the acquisition, his testimony at trial would be highly relevant and informative to the Court.

II. Respondent is Attempting to Cherry Pick Which Witnesses Located Outside of the United States Will Present Testimony at Trial

While refusing to accept service for Dr. Pfuhl,¹⁶ Respondent counsel has retained on its Final Proposed Witness List a similarly situated witness: Sönke Rössing.¹⁷ Dr. Pfuhl and Dr. Rössing are both employees of Respondent and both work in Germany. The only apparent difference between the two is that Respondent counsel would like to call Dr. Rössing while precluding the live testimony of Dr. Pfuhl. That Respondent could produce Dr. Pfuhl if it were helpful to its case is beyond question: when Complaint Counsel served Respondent counsel with a deposition subpoena for Dr. Pfuhl, Respondent produced him for that deposition.

¹⁴ PX05157 (Pfuhl (Otto Bock) Dep. 172:11-17).

¹⁵ PX05157 (Pfuhl (Otto Bock) Dep. 125:24-126:7); *see* PX01304-004 (Otto Bock) (██████████).
██████████

¹⁶ Respondent Counsel has also refused to accept service for Professor Hans Georg Näder, the owner of Otto Bock. In addition to not accepting service for Professor Näder, Respondent counsel has continuously refused to produce Professor Näder for a deposition in this matter. *See* Exhibit D. This comes after Respondent tried to withhold Professor Näder's documents, only to be compelled to produce them by this Court. *See* March 19 Order.

¹⁷ *See* Exhibit C.

III. Conclusion

For the foregoing reasons, pursuant to Rule 4.4(c), Complaint Counsel respectfully requests that the Court compel Respondent counsel to accept service of the subpoena issued by Complaint Counsel to Dr. Helmut Pfuhl for the purpose of testifying at the administrative hearing in this matter.

Dated: July 9, 2018

Respectfully Submitted,

/s/ Daniel Zach

Daniel Zach
Stephen Mohr
Steven Lavender
Lisa DeMarchi Sleigh
Catherine Sanchez
Amy Posner
Lynda Lao
Steven Rodger
Dylan Brown
Jonathan Ripa
Sarah Wohl
Meghan Iorianni
Joseph Neely
Yan Gao
William Cooke

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2118
Facsimile: (202) 326-3496
Email: dzach@ftc.gov
Counsel Supporting the Complaint

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

**Otto Bock HealthCare North
America, Inc.,
a corporation,

Respondent.**

Docket No. 9378

**STATEMENT REGARDING MEET AND CONFER PURSUANT
TO 16 C.F.R. § 3.22(g)**

Pursuant to Rule 3.22(g) of the Federal Trade Commission's Rules of Adjudicative Practice, Complaint Counsel and counsel for Respondent met and conferred in good faith in an effort to resolve by agreement the issues raised in this motion and have been unable to reach such an agreement.

On June 14, 2018, Complaint Counsel served Respondent with a trial subpoena for Dr. Helmut Pfuhl and other Respondent witnesses. *See* Exhibit A. Notwithstanding proper service, on June 25, 2018, Respondent counsel sent Complaint Counsel a letter claiming it is not authorized to accept service on behalf of Dr. Pfuhl, but provided no reason or explanation for its refusal to accept service. *See* Exhibit B. That same day, Complaint Counsel sent Respondent counsel an email seeking confirmation that Respondent would not accept service for Dr. Helmut Pfuhl. Exhibit C. On June 26, 2018, Respondent counsel replied to Complaint Counsel's email, stating, "we are not authorized to accept service for Dr. Helmut Pfuhl." Exhibit C.

Dated: July 2, 2018

Respectfully Submitted,

/s/ Daniel Zach

Daniel Zach

Stephen Mohr

Steven Lavender

Lisa DeMarchi Sleigh

Catherine Sanchez

Amy Posner

Lynda Lao

Steven Rodger

Dylan Brown

Jonathan Ripa

Sarah Wohl

Meghan Iorianni

Joseph Neely

Yan Gao

William Cooke

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2118
Facsimile: (202) 326-3496
Email: dzach@ftc.gov

Counsel Supporting the Complaint

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of

**Otto Bock HealthCare North
America, Inc.,
a corporation,**

Respondent.

Docket No. 9378

PROPOSED ORDER

After reviewing Complaint Counsel's Motion to Compel Respondent counsel to accept service for Dr. Helmut Pfuhl, it is hereby ordered that Respondent counsel accept service of the subpoena issued by Complaint Counsel to Dr. Helmut Pfuhl for the purpose of testifying at the administrative hearing in this matter.

D. Michael Chappell
Chief Administrative Law Judge

DATED this ____ day of July, 2018

EXHIBIT A – EXHIBIT D

REDACTED IN ENTIRETY

PX01303 – PX05157

REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

Edward G. Biester III
Sean P. McConnell
Wayne A. Mack
Kelly Eckel
Sarah Kulik
William Shotzbarger
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103
egbiester@duanemorris.com
spmccconnell@duanemorris.com
WAMack@duanemorris.com
KDEckel@duanemorris.com
skulik@duanemorris.com
wshotzbarger@duanemorris.com

*Counsel for Respondent Otto Bock Healthcare
North America, Inc.*

Dated: July 9, 2018

By: /s/ Daniel Zach
Daniel Zach

Counsel Supporting the Complaint

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

July 9, 2018

By: /s/ Daniel Zach