

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.

Docket No. 9378

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

Nonparty Duane Morris LLP, in its capacity as counsel of record in this matter for Respondent, Otto Bock HealthCare North America, Inc. (“Ottobock”), responds to Complaint Counsel’s Motion to Compel Respondent Counsel to Accept Service for Dr. Helmut Pfuhl (the “Motion”) as follows:

**I. INTRODUCTION**

Complaint Counsel’s Motion asks the Court to turn the FTC Act, the Commission Rules, and the Hague Convention upside down by forcing Respondent Counsel to accept service of an adjudicative hearing subpoena *ad testificandum* of a German national who is employed by the non-party German parent company of Ottobock.<sup>1</sup> Indeed, the Motion does not cite any legal authority supporting Complaint Counsel’s proposition that the Court can circumvent well-established Hague Convention procedures for enforcing subpoenas against non-U.S. citizens by ordering legal counsel to accept service of a subpoena issued to a German citizen employee of a non-party German company.

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<sup>1</sup> In April 2018, Ottobock’s German parent company, Otto Bock HealthCare GmbH, modified its corporate name and legal structure. Otto Bock HealthCare GmbH is now Ottobock SE & Co. KGaA (“Ottobock KGaA” or “KGaA”).

The Motion should be denied for two reasons: First, Complaint Counsel must properly issue a subpoena in order to secure the testimony of Ottobock KGaA employees who are not citizens of the United States and are not employees of Respondent, Otto Bock HealthCare North America, Inc. In order to do so, Complaint Counsel must first file a motion with the Office of Administrative Law Judges and then comply with the Hague Convention requirements. *See* 16 C.F.R. §§ 3.36(a), 3.36(b)(4).<sup>2</sup> Complaint Counsel chose to ignore this requirement, instead choosing to serve outside counsel of Dr. Pfuhl’s employer’s U.S.-based subsidiary. This is inadequate.

Second, Dr. Pfuhl’s testimony at the adjudicative hearing would be needlessly cumulative of other Ottobock witnesses. To the extent Complaint Counsel believes Dr. Pfuhl’s “testimony is highly relevant and would be informative to the Court on a number of issues,” Mot. at 2-3, the Court may consider his deposition transcript as it is part of the record as an agreed-upon joint exhibit (PX05157).

## II. FACTUAL BACKGROUND

Complaint Counsel has filed a Complaint alleging that Ottobock’s acquisition of FIH Group Holdings, LLC (“Freedom”) violated Section 5 of the FTC Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint identifies “Respondent Otto Bock” as only “Ottobock Healthcare North America, Inc.,” excluding Respondent’s parent entities. *See* Compl. at Intro., ¶ 12. Germany-based Ottobock KGaA and its Head of Strategic Business Unit for Prosthetics, Dr. Helmut Pfuhl, are not parties to this matter. *Id.*

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<sup>2</sup> Subpoenas are not covered by the Hague Service Convention; instead, they fall under the Hague Evidence Convention. *See* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (March 18, 1970), available at <https://assets.hcch.net/docs/dfed98c0-6749-42d2-a9be-3d41597734f1.pdf>. In order to “serve” a subpoena to Dr. Pfuhl, a German employee, a Hague Evidence Request must be made through the appropriate channels, requesting a German court to compel the witness. *Id.*

On February 7, 2018, Complaint Counsel noticed the depositions of 27 Ottobock and Freedom representatives, including the deposition of Dr. Helmut Pfuhl, which was to be held in Respondent Counsel's Austin, Texas offices "or such other place as may be agreed." Exhibit A.<sup>3</sup> The deposition of Dr. Pfuhl took place at Respondent Counsel's Philadelphia, Pennsylvania offices on April 5, 2018. Shotzbarger Decl., ¶ 5; Exh. B. In response to Complaint Counsel's questions, Dr. Pfuhl testified at length about Ottobock's acquisition of Freedom as well as the products at issue in this case. Shotzbarger Decl., ¶ 6. He also testified that he works at Ottobock KGaA in Duderstadt, Germany. Pfuhl Dep. Tr. 14:17-18 (April 5, 2018) (PX05157) (Exh. B). Ottobock KGaA is a German Kommanditgesellschaft auf Aktien (limited partnership) with its principal place of business in Duderstadt, Germany. Shotzbarger Decl., ¶ 4.

On June 14, 2018, Complaint Counsel sent subpoenas *ad testificandum* for the adjudicative hearing via Federal Express and email to Respondent Counsel Edward G. Biester, III, for various Ottobock, Ottobock KGaA, and Freedom representatives, including Dr. Helmut Pfuhl and Professor Hans Georg Näder. Shotzbarger Decl., ¶ 7; Exh. C. On June 25, 2018, Respondent Counsel wrote to Complaint Counsel that it was authorized to accept service of certain subpoenas *ad testificandum*, indicating that Respondent Counsel was not authorized to accept service on behalf of the two Germany-based witnesses subpoenaed, Dr. Pfuhl and Prof. Näder. Shotzbarger Decl., ¶ 8; Exh. D. Respondent Counsel confirmed this position via email to Complaint Counsel on June 26, 2018. Shotzbarger Decl., ¶ 9; Exh. E.

### III. ARGUMENT

The Motion should be denied because Complaint Counsel is attempting to circumvent Commission Rules and the Hague Evidence Convention. Additionally, any live testimony from

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<sup>3</sup> All exhibits ("Exh.") are attached to the Declaration of William Shotzbarger.

Dr. Pfuhl would be needlessly cumulative, and the Court may consider Dr. Pfuhl's deposition testimony as part of the record at the adjudicative hearing.

**A. The Court Lacks the Ability to Compel Respondent Counsel to Accept Service of an Adjudicative Hearing Subpoena *Ad Testificandum* to a German Employee of Ottobock's Germany-based Parent Company.**

Section 9 of the FTC Act provides that the Commission has the authority to compel the attendance and testimony of witnesses "from any place *in the United States*." 15 U.S.C. § 49 (emphasis added). The Commission Rules specifically set forth the procedure for issuing a subpoena outside of the U.S.: "An application . . . for the issuance of a subpoena to be served in a foreign country, shall be made in the form of a written motion filed in accordance with the provisions of § 3.22(a)." 16 C.F.R. § 3.36(a). "The motion shall make a showing that: . . . With respect to subpoenas to be served in a foreign country, that the party seeking discovery or testimony has a good faith belief that the discovery requested would be permitted by treaty, law, custom, or practice in the country from which the discovery or testimony 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)(4).

Federal courts have applied a different standard for the production of witnesses that are not employees of the litigating entity as compared to the production of their documents. For example, in *In re Ski Train Fire of Nov. 11, 2000 Kaprun Austria*, No. MDL 1428(SAS)THK, 2006 WL 1328259, at \*9 (S.D.N.Y. May 16, 2006), the district court declined to require a U.S. subsidiary-litigant to produce employees of its Austrian parent company for deposition.<sup>4</sup> In so holding, the court reasoned that "there is simply no authority for the proposition that a corporate

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<sup>4</sup> Although the Motion concerns a subpoena for adjudicative hearing testimony as opposed to a subpoena for deposition testimony, both deposition and adjudicative hearing subpoenas are subpoenas *ad testificandum* under Rule 3.34(a).

party must produce for deposition fact witnesses who are not employed by, and do not speak for, that party.” *Id.* Other courts have followed this same reasoning, holding that though a subsidiary may be required to produce documents held by its parent, or answer interrogatories with knowledge held by its parent, it is not required to produce employees of its foreign parent corporation for deposition. *See Ethypharm S.A. France v. Abbott Labs.*, 271 F.R.D. 82, 90 (D. Del. 2010); *In re Benicar (Olmesartan) Prod. Liab. Litig.*, No. 15-2606 (RBK/JS), 2016 WL 5817262 (D.N.J. Oct. 4, 2016) (analyzing and distinguishing the “control” rule for document production and the requirement that a party make employees, officers, and managing agents available for deposition).

Here, for the Court to compel Dr. Pfuhl’s appearance at the adjudicative hearing, Complaint Counsel must issue a subpoena in order to secure the testimony of KGaA employees, such as Dr. Pfuhl, because they are not employees of the respondent in this case, Otto Bock HealthCare North America, Inc. In order to do so, Complaint Counsel must first file a motion with the ALJ, and then follow the Hague Evidence Convention requirements. *See* 16 C.F.R. §§ 3.36(a), 3.36(b)(4). The record is undisputed that Complaint Counsel has not followed any of those prescribed procedures.

Complaint Counsel contends that “Dr. Pfuhl is an employee of Otto Bock [sic] SE & Co. KGaA, the parent of Otto Bock North America, which this Court previously held is within the custody and control of Respondent.” Mot. at 1. But that ruling regarding control of electronic discovery is inapposite here. As a matter of fact, this Court has previously held—in granting a motion to quash a subpoena *ad testificandum* directed toward a foreign nonparty—that “[a] court may, under certain circumstances, order an entity located and properly served in the United States to produce documents located abroad with its foreign affiliate, *yet find at the same time*

*that it lacks the power to order that same entity's or its foreign affiliate's employee, officer, or partner, who reside(s) abroad, to come to the United States to be deposed.*" *In re Polypore Int'l, Inc.*, Docket No. 9327, 2009 WL 569715, at \*4 (F.T.C. Feb. 10, 2009) (emphasis added). In reaching its decision in *Polypore*, the Court quoted authority providing that "[i]t is not surprising that [the party seeking the testimony] has cited no authority that has held that a United States court has the power to compel a nonparty witness residing overseas to attend a deposition in the United States . . . It is one thing to require document production and another to force the presence of a nonparty witness in a foreign land." *Id.* (quoting *In re Price Waterhouse LLP*, 182 F.R.D. 56, 63 (S.D.N.Y. 1998)). "The phrase 'possession, custody, or control,' both in the Commission's Rules of Practice and in the Federal Rules of Civil Procedure, is not used with reference to individuals but only with reference to documents or other tangible things. *See, e.g.*, 16 C.F.R. § 3.37 (referring to 'designated documents ... or tangible things ... in the possession, custody, or control of the party upon whom the request is served'); F. R. Civ. P. 45(a)(1)(A)(iii) (distinguishing between subpoenas commanding a person to 'attend and testify' and those commanding a person to 'produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control')." *Id.*

Complaint Counsel also attempts to rely on Rule 4.4(c) in support of its Motion, but this argument is equally unavailing. According to Rule 4.4(c), "Service upon counsel. When 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.*" (emphasis added). As discussed above, Dr. Pfuhl, and his employer, Ottobock KGaA, are not parties to the action. Any subpoena to Dr. Pfuhl or any Ottobock KGaA employee is outside the express language of Rule 4.4.

The Court should come to the same conclusion here as it did in *Polypore*: the Motion should be denied because Complaint Counsel has not followed Rule 3.36 in attempting to serve Respondent Counsel with an adjudicative hearing subpoena directed to a German employee of Respondent's German parent company in an apparent attempt to avoid Hague Service Convention protocol.<sup>5</sup>

**B. Testimony from Dr. Pfuhl Would Be Needlessly Cumulative.**

Even if Complaint Counsel's adjudicative hearing subpoena to Dr. Pfuhl were served properly (which it was not), Dr. Pfuhl's testimony is needlessly cumulative, and Complaint Counsel has had ample opportunity to obtain the information sought during Dr. Pfuhl's deposition. In its Final Proposed Witness List, Complaint Counsel has listed seven current and former Ottobock HealthCare North America or Ottobock KGaA representatives. The following individuals will be able to testify about Ottobock's perspective of the acquisition of Freedom at the adjudicative hearing:

1. Dr. Andreas Kannenberg, Executive Medical Director at Respondent (on both witness lists);
2. Brad Ruhl, Managing Director for North America at Respondent (on both witness lists);
3. Scott Schneider, Vice President of Medical Affairs, Government Affairs and Future Development at Respondent (on both witness lists);
4. Cali Solorio, Senior Prosthetics Marketing Manager at Respondent (on both witness lists); and

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<sup>5</sup> It is further unclear how the relief sought by Complaint Counsel's Motion comports with compelling Dr. Pfuhl to travel to the United States and appear as a witness in this proceeding. Although the Court has jurisdiction over Respondent, Otto Bock HealthCare North America, Inc., and its legal counsel, a Delaware limited liability partnership, the Court lacks authority to compel Dr. Pfuhl to enter into an attorney-client relationship with Respondent Counsel and to compel Dr. Pfuhl to travel to the United States on the basis of that relationship.

5. Dr. Sönke Rössing, Chief Strategy and Human Resources Officer at Ottobock KGaA.<sup>6</sup>

Accordingly, in light of the opportunity to elicit testimony from the five witnesses above about the acquisition, any testimony from Dr. Pfuhl will be a “waste of time” and a “needless presentation of cumulative evidence.” 16 C.F.R. § 3.43(b).

#### IV. CONCLUSION

For the foregoing reasons, Respondent Counsel respectfully requests that the Court deny Complaint Counsel’s Motion.

Respectfully submitted,

Date: July 16, 2018

/s/ William Shotzbarger  
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Edward G. Biester III  
Sean S. Zabaneh  
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*Counsel for Respondent Otto Bock HealthCare  
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<sup>6</sup> The fact that other employees of Ottobock KGaA, e.g., Dr. Sönke Rössing, may voluntarily come to the United States to testify in this matter is immaterial to whether Dr. Pfuhl can be compelled to do so. Complaint Counsel does not seriously argue otherwise.

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In the Matter of

Otto Bock HealthCare North  
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Docket No. 9378

**DECLARATION OF WILLIAM SHOTZBARGER IN SUPPORT OF RESPONDENT  
COUNSEL’S OPPOSITION TO COMPLAINT COUNSEL’S MOTION TO COMPEL  
RESPONDENT COUNSEL TO ACCEPT SERVICE FOR DR. HELMUT PFUHL**

I, William Shotzbarger, pursuant to 28 U.S.C. § 1746, state and declare as follows:

1. I am an attorney at Duane Morris LLP (“Respondent Counsel”). I am licensed to practice law in the Commonwealth of Pennsylvania. I am over the age of 18, am capable of making this Declaration, know all of the following facts of my own personal knowledge, and, if called and sworn as a witness, could and would testify competently thereto.

2. Respondent Counsel is representing Respondent, Otto Bock HealthCare North America, Inc. (“Ottobock”), in this matter.

3. On February 7, 2018, Complaint Counsel noticed the depositions of 27 Ottobock, Ottobock SE & Co. KGaA (“Ottobock KGaA”), and FIH Group Holdings, LLC (“Freedom”) representatives, including the deposition of Dr. Helmut Pfuhl, which was to be held in Respondent Counsel’s Austin, Texas offices “or such other place as may be agreed.” Attached as **Exhibit A** is a true and correct copy of Complaint Counsel’s original Notice of Deposition dated February 7, 2018.

4. Ottobock KGaA is a German Kommanditgesellschaft auf Aktien (limited partnership) with its principal place of business in Duderstadt, Germany.

5. The deposition of Dr. Pfuhl took place at Respondent Counsel's Philadelphia, Pennsylvania offices on April 5, 2018. Attached as **Exhibit B** is a true and correct copy of excerpts of the deposition transcript of Dr. Helmut Pfuhl (Ottobock KGaA) dated April 5, 2018 (PX05157).

6. In response to Complaint Counsel's questions, Dr. Pfuhl testified at length about Ottobock's acquisition of Freedom as well as the products at issue in this case.

7. On June 14, 2018, Complaint Counsel sent subpoenas *ad testificandum* for the adjudicative hearing via Federal Express and email to Respondent Counsel Edward G. Biester, III, for various Ottobock, Ottobock KGaA, and Freedom representatives, including Dr. Helmut Pfuhl and Professor Hans Georg Näder. Attached as **Exhibit C** is a true and correct copy of Complaint Counsel's correspondence to Respondent Counsel and subpoenas *ad testificandum* dated June 14, 2018.

8. On June 25, 2018, Respondent Counsel wrote to Complaint Counsel that it was authorized to accept service of certain subpoenas *ad testificandum*, indicating that Respondent Counsel was not authorized to accept service on behalf of the two Germany-based witnesses subpoenaed, Dr. Pfuhl and Prof. Näder. Attached as **Exhibit D** is a true and correct copy of Respondent Counsel's correspondence to Complaint Counsel June 25, 2018.

9. Respondent Counsel confirmed this position via email to Complaint Counsel on June 26, 2018. Attached as **Exhibit E** is a true and correct copy of Respondent Counsel's email to Complaint Counsel June 26, 2018.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of July, 2018 in Philadelphia, Pennsylvania.

/s/ William Shotzburger  
William Shotzburger

# EXHIBIT A

REDACTED IN ENTIRETY

# **EXHIBIT B**

**REDACTED IN ENTIRETY**

# EXHIBIT C

**REDACTED IN ENTIRETY**

# EXHIBIT D

REDACTED IN ENTIRETY

# EXHIBIT E

REDACTED IN ENTIRETY

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 16, 2018, I caused a true and correct copy of the foregoing Respondent Counsel's Opposition to Complaint Counsel's Motion to Compel Respondent Counsel to Accept Service for Dr. Helmut Pfuhl to be served via the FTC E-Filing System and e-mail upon the following:

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Washington, DC, 20580

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/s/ William Shotzberger  
William Shotzberger

Notice of Electronic Service

**I hereby certify that on July 16, 2018, I filed an electronic copy of the foregoing Public - Respondent Counsel's Opposition to Motion to Compel Acceptance of Service of Subpoena Ad Testificandum, with:**

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
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Donald Clark  
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**I hereby certify that on July 16, 2018, I served via E-Service an electronic copy of the foregoing Public - Respondent Counsel's Opposition to Motion to Compel Acceptance of Service of Subpoena Ad Testificandum, upon:**

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