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

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| In the Matter of | ) | |
| Otto Bock HealthCare North America, Inc., a corporation, | ) | Docket No. 9378 |
| Respondent. | ) | |

**ORDER DENYING COMPLAINT COUNSEL'S MOTION TO COMPEL ACCEPTANCE OF SERVICE OF SUBPOENA *AD TESTIFICANDUM***

**I.**

On July 2, 2018, Complaint Counsel filed a Motion to Compel Respondent's Counsel to Accept Service for Dr. Helmut Pfuhl of a subpoena *ad testificandum* ("Motion"). Respondent Otto Bock HealthCare North America, Inc. ("Respondent" or "Ottobock") filed an opposition to the Motion on July 10, 2018 ("Opposition"). As explained below, the Motion is DENIED.

**II.**

Based on the Motion, the Opposition, and the exhibits submitted therewith, the record shows that on June 14, 2018, Complaint Counsel sent to Respondent's counsel a subpoena *ad testificandum* for Dr. Helmut Pfuhl, purporting to compel Dr. Pfuhl to attend and give testimony at the trial of this matter ("trial subpoena"). Motion Exhibit A. Dr. Pfuhl is a German national, employed by Ottobock's parent company, Otto Bock SE & Co. KGaA ("Ottobock KGaA"),[1] which is a German limited partnership with its principal place of business in Duderstadt, Germany. Opposition Exhibit B; Declaration of William Shotzbarger ("Shotzbarger Decl.") (attached to Opposition) ¶ 4. In correspondence dated June 25 and 26, 2018, Respondent's counsel advised Complaint Counsel that Respondent's counsel was not authorized to accept service on behalf of Dr. Pfuhl. Motion Exhibits B and C. The Motion seeks a determination that Respondent's counsel is legally required to accept service of the trial subpoena, in furtherance of Complaint Counsel's effort to compel Dr. Pfuhl, a nonparty, non-United States resident, to appear and testify in this United States administrative proceeding.

[1] Otto Bock SE & Co. KGaA was previously Otto Bock HealthCare Gmbh.

Complaint Counsel contends that, under Commission Rule 4.4(c), sending the trial subpoena to Respondent's counsel is a sufficient method of service to compel the attendance of Dr. Pfuhl at trial. In support of this claim, Complaint Counsel asserts that a previous order in this matter held that Ottobock has "custody and control" of its parent company Ottobock KGaA. Complaint Counsel further asserts that such control is demonstrated by Respondent's counsel having produced documents from Dr. Pfuhl in response to requests for production from Ottobock and having represented Dr. Pfuhl at his deposition. In addition, Complaint Counsel argues that Dr. Pfuhl's testimony is highly relevant and that Respondent should not be allowed to "cherry-pick" which foreign witnesses will testify, by naming as a potential witness Dr. Sönke Rössing, who is also an employee of Ottobock KGaA in Germany. According to Complaint Counsel, Complaint Counsel will be prejudiced if it cannot elicit testimony from Dr. Pfuhl that may contradict the testimony of Dr. Rössing or other witnesses.

Respondent argues that Rule 4.4(c) does not govern service of a trial subpoena to Dr. Pfuhl because neither Dr. Pfuhl nor Ottobock KGaA is a party to this action. Moreover, Respondent argues, Complaint Counsel is attempting to circumvent the rules of the Commission and of the Hague Convention that govern compelling testimony from a foreign witness in the United States. Additionally, Respondent argues, any live testimony from Dr. Pfuhl would be unnecessarily cumulative because Complaint Counsel took Dr. Pfuhl's deposition, which is admissible as evidence at the hearing, and because there are five other witnesses on the witness lists of one or both parties who will testify regarding the same subject matter.

## III.

It should be noted at the outset that Complaint Counsel incorrectly designates its Motion as a "motion to compel" authorized under Commission Rule 3.38(a). Motion at 1. Rule 3.38 authorizes an order compelling discovery from a party that has unjustifiably failed to provide it in accordance with the discovery rules. Complaint Counsel's Motion does not seek discovery from Respondent. Thus, Rule 3.38 is not authority for the Motion.

In addition, Commission Rule 4.4(c) is not authority for an order requiring Respondent's counsel to accept service for Dr. Pfuhl. Rule 4.4(c) states in pertinent part:

> 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.

16 C.F.R. § 4.4(c). Neither Dr. Pfuhl nor Ottobock KGaA is a party to this proceeding, and Complaint Counsel does not contend otherwise. Therefore, by its express language, Rule 4.4(c) does not apply to effect service upon Dr. Pfuhl through service on Respondent's counsel. Complaint Counsel cites no authority for interpreting the term "party" so broadly as to encompass a foreign resident employed by a party's foreign

parent company. Nor does Complaint Counsel cite any authority for inferring an attorney client relationship with a party's counsel, for purposes of Rule 4.4(c), based on a party's counsel having provided documents from a non-party individual or having represented that individual at a deposition.

Furthermore, Complaint Counsel's reliance on Ottobock's alleged "custody" or "control" over Ottobock KGaA is unavailing. First, contrary to Complaint Counsel's assertion, the order of March 19, 2018 compelling Respondent to produce certain documents in the possession of Ottobock KGaA did not hold that Ottobock KGaA or its personnel were under Ottobock's "custody and control." The issue was whether Respondent could avoid producing relevant documents in discovery based on the objection that the documents were in the possession of Respondent's foreign parent corporation. In granting the motion to compel in part, the order applied well-established law holding that a domestic corporation cannot avoid producing documents in possession of a foreign affiliate where it appears that the domestic corporation has access to and ability to obtain those documents notwithstanding that they are in the possession of a foreign affiliate. *See In re Rambus, Inc.*, 2002 FTC LEXIS 90, at *12 (Nov. 18, 2002) (stating that "the test focuses on whether the corporation has 'access to the documents' and 'ability to obtain the documents'") (citing *Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 U.S. Dist. LEXIS 101, *9 (S.D.N.Y. Jan. 11, 1999)).

In contrast to the foregoing established authority concerning production of documents, Complaint Counsel cites no authority for the proposition that a non-party, foreign citizen, can be forced to travel to the United States and testify, on the basis of a party's alleged "custody" or "control." In fact, case law is to the contrary. In *In re Polypore*, No. 9327, 2009 WL 569715 (Feb. 10, 2009), it was held that a deposition subpoena directed at a foreign citizen employed by a foreign company, served on the United States parent of the foreign citizen's employer, was not valid. While "possession, custody, or control" may require "an entity located and properly served in the United States to produce documents located abroad with its foreign affiliate," this does not require "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." 2009 WL 569715, at *4 (citing cases). Moreover, it is not inconsistent to require, under certain circumstances, that a domestic company produce documents located abroad while refusing to require the presence of foreign witnesses. "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)). *See also Hunter Douglas, Inc.*, 1999 U.S. Dist. LEXIS 101, at *11-12 (ordering production of documents in possession of foreign affiliate but holding that deposition subpoena was not valid to compel deposition of foreign national).

Moreover, Complaint Counsel has failed to demonstrate that it will be prejudiced at trial if Respondent's counsel is not compelled to accept service of the trial subpoena on behalf of Dr. Pfuhl. First, there are procedures available to Complaint Counsel if it wishes to procure the attendance of Dr. Pfuhl at trial. *See, e.g.*, Rule 3.36 (describing procedures for applying for issuance of a subpoena in a foreign country, including

making a showing that the party seeking the testimony has a good faith belief that the testimony "would be permitted by treaty, law, custom, or practice in the country from which the . . . testimony is sought and that any additional procedural requirements have been or will be met before the subpoena is served").[2] Second, Complaint Counsel has taken Dr. Pfuhl's deposition, which Respondent agrees can be considered as part of the adjudicative record in this matter. Complaint Counsel has failed to show that the deposition testimony is inadequate to meet Complaint Counsel's asserted need to rebut the testimony of other Ottobock witnesses. Lastly, the record does not support Complaint Counsel's assertion that Respondent is improperly "cherry-picking" foreign witnesses by including Dr. Rössing as a potential witness. The fact that one or more foreign witnesses, such as Dr. Rössing, may voluntarily choose to come to the United States to testify in this matter without a subpoena has no bearing on whether Dr. Pfuhl should be made subject to compulsory attendance, via service of a subpoena on Respondent's counsel.

**IV.**

For all the foregoing reasons, the Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: July 16, 2018

[2] Rule 3.36 recognizes that procedures for compelling the appearance of a witness by subpoena need to comply with international law. "When compulsory process is served [on a foreign citizen on foreign soil in the form of an investigative subpoena], . . . the act of service *itself* constitutes an exercise of one nation's sovereignty within the territory of another sovereign. Such an exercise [absent consent by the foreign nation] constitutes a violation of international law." *CFTC v. Naji Nahas*, 738 F.2d 487, 493-94 (1984) (emphasis in original) (quoting *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1313 (1980)).