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ORIGINAL

Factual Background

Complaint Counsel served its First Set of Requests for Production of Documents Issued to Respondent on January 19, 2018 (the “First RFP”).¹ (Exhibit B). The First RFP seeks approximately three years’ worth of documents from over sixty custodians. (*Id.*) Respondent has produced and is producing documents from over 38 custodians,

in response to the First RFP. (*Id.*; _____). Contrary to the representations in the Motion, Respondent will be producing documents for the following seven employees of Otto Bock HealthCare GmbH: Dr. Helmut Pfuhl, Dr. Sönke Rössing, Alexander Gück, Dr. Sven Ehrich, Dr. Johnnis Willem Van Vliet, Ralf Stuch, and Dr. Andreas Eichler. (McConnell Declaration at ¶ 3). These are the individuals primarily responsible for

(*Id.*).

In addition to the traditional burdens associated with e-discovery, Respondent must also comply with European and German data privacy laws; therefore it is utilizing the services of two law firms and two e-discovery vendors. (*Id.* at ¶¶ 4-5). Managing the document collection, review, processing, and production across two continents requires actual around-the-w 0.83 0 Td[(Id[(IB3. 2.89

Respondent, not Otto Bock GmbH, acquired Freedom Innovations.

(Complaint).

Despite these best efforts to comply with Complaint Counsel's discovery requests, Respondent maintains objections to searching for and producing documents from certain custodians that Respondent believes are outside the reasonable boundaries permitted by the Rules relating to discovery, *i.e.*, Rules 3.37 and 3.31 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings (the "Rules"). (Respondent's Responses and Objections to the First RFP served on February 20, 2018) (Exhibit G). At issue in the present Motion is Respondent's objections to the following high-level executives at Otto Bock HealthCare GmbH:

§ 3.31(c)(2)(i). Discovery shall also be limited where “[t]he burden and expense of the proposed discovery on a party or third party outweigh its likely benefit.” 16 C.F.R. § 3.31(c)(2)(iii).

I. Respondent Does Not Have Control Over The Four GmbH Executives’ Documents

The fact that Otto Bock GmbH has agreed to allow Respondent produce documents from certain employees does not mean all Otto Bock GmbH employees are within the control of Respondent under Rule 3.37(a). [REDACTED]

[REDACTED] In the parent-subsidary context, it is more common for parent companies to be required to produce documents held by their subsidiaries, as by definition, subsidiaries do not “control” their parent corporations. *See, e.g., Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 233 F.R.D. 143, 145 (D. Del. 2005) (collecting cases). However, courts require subsidiaries to produce documents held by their parent corporations, for example, where the “subsidiary ha[d] easy and customary access to [the parent’s] documents involving th[e] transaction, and [the subsidiary] possess[ed] the ability to obtain such documents from [the parent] for its usual business needs.” *See Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438 (D.N.J. 1991); *see also* 8 Wright & Miller § 2107. Here, Respondent does not have easy and customary access to the Four GmbH Executives’ documents.

Moreover, the relationship between the Four GmbH Executives and Respondent is distinguishable from the relationship in *Rambus, Inc.*, the case cited by Complaint Counsel. 2002 FTC LEXIS 90, at *13-14. Here, [REDACTED]

[REDACTED] Of the four, only Professor Näder played a material role in the transaction at issue, and his role was [REDACTED]

[REDACTED] Indeed, [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Even though Otto Bock HealthCare GmbH is permitting Respondent to produce documents of certain employees most heavily involved in the claims and defenses asserted in this case, Respondent should not be considered to have control over the Four GmbH Executives here.

II. Discovery From The Four GmbH Executives Would Be Unreasonably Duplicative and Cumulative

Even if the Court concludes that Respondent has possession, custody, or control over the files of the Four GmbH Executives, Complaint Counsel's Motion supports Respondent's position that discovery from the Four GmbH Executives would be unreasonably duplicative and cumulative and that Complaint Counsel has obtained and may obtain the requested discovery from other sources that are more convenient, less burdensome, and less expensive to Respondent. 16 C.F.R. § 3.31(c)(2)(i).

First, Complaint Counsel's Motion demonstrates why the Four GmbH Executives would not likely have non-cumulative relevant documents. Complaint Counsel contends that Respondent's executives report up to executives at Otto Bock HealthCare GmbH, that Respondent's employees are involved in business decisions made by Otto Bock HealthCare GmbH, and that employees from both Respondent and Otto Bock HealthCare GmbH negotiated the acquisition of Freedom Innovations, participated in due diligence, and worked on integration planning. (Motion at p. 5). [REDACTED]

[REDACTED]

[REDACTED]

Second, Complaint Counsel’s Motion establishes that there is no good reason to believe that the Four GmbH Executives would possess uniquely relevant documents in this case. For instance, Complaint Counsel contends that “there is a [REDACTED]

[REDACTED] and that “Otto Bock HealthCare GmbH [REDACTED]

[REDACTED] (Motion at pp. 5-6). In doing so, Complaint Counsel ignores the fact that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Compare*

McConnell Decl. at ¶ 3 *with* Motion at p. 6). Complaint Counsel’s argument focuses largely on the need for documents related to Respondent’s decision to acquire Freedom Innovations, the sale of microprocessor controlled prosthetic knees in the United States, and integration planning. (Motion at p. 7). [REDACTED]

[REDACTED]

Most importantly, Complaint Counsel does not argue that three of the Four GmbH Executives are relevant to this case. While the Motion does contend that Professor Näder may have relevant information, [REDACTED]

[REDACTED]

[REDACTED], (Motion at p. 8) documents from the aforementioned [REDACTED]

[REDACTED] have all been or will be produced in this case. Accordingly, Complaint Counsel's Motion tends to support the proposition that discovery sought from the Four GmbH Executives is largely irrelevant, and, to the extent any of it is relevant, it would be unreasonably cumulative and duplicative of other discovery being produced in this case. *See, e.g., Assured Guar. Mun. Corp. v. UBS Real Estate Secs. Inc.*, Nos. 12-cv-1579, 12-cv-7322, 2013 WL 1195545 (S.D.N.Y. Mar. 25, 2013) (applying analogous standard to the one at bar) (Exhibit H).

III. The Burden And Expense Of Producing Discovery From The Four GmbH Executives On Respondent Outweigh Any Likely Benefit

Contrary to Complaint Counsel's bald assertion that "[i]t does not matter that Otto Bock HealthCare GmbH is located outside of the United States," the burdens and costs to Respondent associated with collecting, reviewing, processing, and producing documents and data from dozens of custodial files on various document management systems across two continents have been substantial. (McConnell Decl. at ¶¶ 4-5). Respondent has retained two law firms and two e-discovery vendors to assist with this process, in particular for compliance with the German Federal Data Protection Act and the EU Data Protection Regulation. (*Id.*). Though Respondent cannot reasonably quantify the significant burdens and expenses associated with such strict compliance, Complaint Counsel's own Motion highlights the fact that there is virtually no marginal benefit to Complaint Counsel from Respondent producing the discovery sought. 16 C.F.R. § 3.31(c)(2)(iii). Accordingly, Respondent should not be required to collect, review, process, and produce discovery from the Four GmbH Executives.

The Motion also fails to demonstrate how Complaint Counsel would be prejudiced if they do not receive discovery from the Four GmbH Executives. The Motion raises only two concerns related to possible prejudice, and both are unfounded. First, Complaint Counsel raise the need to

obtain discovery from custodians identified on Respondent's witness list, *e.g.*, "Gück, Rössing, and Pfuhl." (Motion at p. 8). However,

And

Conclusion

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

/s/ Sean P. McConnell
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Dated: March 22, 2018

*Attorneys for Respondent Otto Bock HealthCare
North America, Inc.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 22, 2018, I caused a true and correct copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion to Compel Respondent to Produce Documents Requested By Complaint Counsel's First Set of Requests for Production of Documents to be served via the FTC E-Filing System and e-mail upon the following:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Rm. H-110
Washington, DC, 20580

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

Meghan Iorianni
Jonathan Ripa
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William Cooke
Yan Gao
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/s/ Sean P. McConnell
Sean P. McConnell

**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

REDACTED PUBLIC VERSION

**DECLARATION OF SEAN MCCONNELL IN SUPPORT OF RESPONDENT'S
OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONDENT
TO PRODUCE DOCUMENTS REQUESTED BY COMPLAINT COUNSEL'S FIRST
SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

I, Sean P. McConnell, pursuant to 28 U.S.C. § 1746, state and declare as follows:

1. I am an attorney at Duane Morris LLP. My firm represents Respondent, Otto Bock HealthCare North America, Inc. ("Respondent") in this case. 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. Through March 15, 2018, Respondent has provided Complaint Counsel with 885.86 GBs of data from 31 custodians. The total number of documents produced to Complaint Counsel through March 15, 2018 is at least 208,170. The total number of pages produced to Complaint Counsel through March 15, 2018 is in excess of 815,969 pages.

3. Respondent is collecting, reviewing, processing, and producing documents and data from seven employees of Otto Bock HealthCare GmbH to Complaint Counsel. The seven additional custodians are located in either Germany or Austria. These custodians' roles at Otto Bock HealthCare GmbH at or around the time of Otto Bock HealthCare North America, Inc.'s acquisition of FIH Group Holdings, LLC in September 2017 are as follows:

a. Dr. Helmut Pfuhl, [REDACTED]

[REDACTED] According to Scott Schneider, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

b. Dr. Sönke Rössing, [REDACTED]

[REDACTED] According to Scott Schneider, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

c. Alexander Gück, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

d. Dr. Sven Ehrich, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

e. Dr. Johnnis Willem van Vliet, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

f. Ralf Stuch. [REDACTED]

[REDACTED] According to Scott Schneider, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] According to Dr. Rössing, [REDACTED]

[REDACTED]

g. Dr. Andreas [REDACTED]

[REDACTED]

4. Respondent has retained the services of Luther Rechtsanwaltsgesellschaft mbH (“The Luther Firm”), a law firm with offices in Germany; Kroll Ontrack GmbH (“Kroll”), an e-discovery vendor with offices located in Germany; and The MCS Group, Inc. (“MCS”), a Philadelphia-based e-discovery vendor to assist with responding to Complaint Counsel’s discovery requests in this case.

5. The Luther Firm, Kroll, and MCS are assisting Respondent and Duane Morris LLP with compliance with Germany’s Federal Data Protection Act (Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act], April 27, 2017, BGBl. I at 2097 (Ger.), http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117s2097.pdf) and the European Union’s General Data Protection Regulation (European Union GDPR - 2016 O.J. (L 119) 4.5.2016, <http://eur-lex.europa.eu/eli/reg/2016/679/oj>).

PUBLIC

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

EXHIBIT F

REDACTED IN ENTIRETY

EXHIBIT G

REDACTED IN ENTIRETY

EXHIBIT H

Opinion

***1**

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All Citations

Footnotes

- 1 Indeed, UBS's selection of its own custodians demonstrates this point: by its own account, UBS has named as custodians eight out of 28 members of its Mortgage Credit Committee and four out of 14 members of its Seller–Servicer Informal Working Group. (Letter of Paul J. Lockwood dated Jan 14, 2013, attached as Exh. F to Declaration of Adam M. Abensohn dated Feb. 5, 2013 (“Absensohn Decl. I”); E-mails dated Jan. 16, 2013, attached as Exh. G to Abensohn Decl. I; E-mails dated Dec. 12, 2012 and Dec. 17, 2012, attached as Exh. I to Abensohn Decl. I); *cf. Mount Hawley*, 269 F.R.D. at 617 (excluding member of group not involved in incident at issue).
- 2 UBS relies on three e-mails to suggest that Mr. DiRende's role was not limited to settlement negotiations. (UBS Memo. at 13 n. 15). However, UBS's reliance on the e-mails is misplaced. One concerns lunch plans and whether Mr. DiRende has a contact at U.S. Bank. (E-mail dated March 3, 2011, attached as Exh. 24 to Declaration of Scott D. Musoff dated Feb. 5, 2013 (“Musoff Decl. I”). That email contains no substantive discussion about the Transactions, and Mr. DiRende never refers to them. The other emails merely reflect Mr. DiRende's limited role in workouts generally and do not concern the Transactions. (E-mails dated Nov. 3, 2009, attached Exh. 25 to Musoff Decl. I; E-mails dated Feb. 4, 2009 and Feb. 5, 2009, attached as Exh. 26 to Musoff Decl. I).
- 3 The Court's ruling was based, in part, on this representation. (Tr. 33 (“And in terms of the breadth of what we are talking about, we're not asking for every document about the business.... [B]ut if they have analysis of American Home Mortgage for example, that reveal what they thought were the risks or perhaps even deviations from underwriting guidelines, and yet they still insured American Home Mortgage deals. That goes right to the heart of what they're alleging in this case.”)).
- 4 In the November 21 Opinion, I expressly reserved ruling on issues of privilege and work product as they were not properly raised. *Assured*,

Notice of Electronic Service

I hereby certify that on March 22, 2018, I filed an electronic copy of the foregoing Respondent's Opposition to CC Motion to Compel (Public), with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on March 22, 2018, I served via E-Service an electronic copy of the foregoing Respondent's Opposition to CC Motion to Compel (Public), upon:

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