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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92061215
Party	Defendant Piano Factory Group
Correspondence Address	Adam R. Stephenson IPTechLaw 8350 E RAINTREE DR., STE 245 SCOTTSDALE, AZ 85260 UNITED STATES Email: ipdocket@iptech.law
Submission	Opposition/Response to Motion
Filer's Name	Adam R. Stephenson
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Signature	/Adam Stephenson/
Date	09/26/2017
Attachments	ExhibitAMotiontoStrike.pdf(89762 bytes) Motion to Strike Testimony.pdf(50448 bytes)

Obtaining evidence from Germany for use in a US civil or commercial trial

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CONTENTS

Exhibit A

OBTAINING EVIDENCE FROM GERMANY FOR USE IN A US CIVIL OR COMMERCIAL TRIAL

1. Introduction

Attorneys who are involved in international litigation may already be aware that, in certain circumstances, German courts will assist US courts in obtaining evidence from witnesses resident in Germany. US courts may ask for such assistance by issuing Letters of Request under the Hague Convention on the taking of Evidence Abroad in Civil or Commercial Matters of 1970 ("Hague Convention") in respect of evidence which is sought for trial in civil or commercial proceedings. The proceedings must have a trial either pending or contemplated. Letters of Request may be submitted either through diplomatic channels or, what is generally regarded as the more efficient and direct method, by transmitting the Request from the US court to the German Central Authority ("Central Authority"). Delivery of documents through diplomatic channels can take several months or more.

There are two other methods for obtaining evidence from witnesses resident in Germany:

(1) Evidence may be collected from persons willing to provide it voluntarily without the intervention of a German court. However, there is an attendant risk that witnesses later become unwilling to assist and that their evidence may be inadmissible in the home court.

(2) Evidence may be collected from US nationals or persons entitled to permanent residence in the US pursuant to Para. 1783 of 28 United States Code. A brief overview of this method is included at the end of this note for completeness.

2. Evidence

As a contracting state to the Hague Convention, Germany has agreed to assist foreign courts in other contracting states, including the United States of America, in civil or commercial proceedings by enabling evidence to be taken from witnesses in Germany for the purpose of the foreign proceedings. Courts are to hear the evidence in Germany, if witnesses, objects, documents or experts are located on German territory at the time of the hearing. The nationality of the witnesses or experts is irrelevant for this purpose.

Provisions regulating legal assistance by means of Letters of Request in Germany are contained in the Hague Convention and in its implementing Act ("Ausführungsgesetz zum Haager Übereinkommen" – "AusfG"), in the Ordinance on Legal Assistance in Civil Matters ("Rechtshilfeordnung für Zivilsachen" – "ZRHO") and in the German Code of Civil Procedure ("ZPO").

2.1. Who may ask for evidence to be obtained by way of a Letter of Request?

According to Art. 1 (1) of the Hague Convention, a Letter of Request must be issued by a state judicial authority. A state judicial authority is an authority or person empowered by the applicable national law to deliver a judgment on precise legal questions with binding effect on the parties to the proceeding. US courts are judicial authorities for the purpose of Art. 1 (1) of the Hague Convention. Although parties to proceedings in the US have greater procedural rights in respect of US proceedings than German parties in German civil proceedings, for example, in connection with interrogatory proceedings or pre-trial discoveries, they are not recognized as judicial authorities for the purpose of Art. 1 (1) of the Hague Convention and can therefore not file Letters of Request themselves, but have to apply to their US competent court to issue the document.

Although arbitration tribunals have power to determine procedural and substantive issues arising out of an arbitration, arbitration tribunals are not entitled to submit directly a Letter of Request under the Hague Convention as such tribunals are not deemed to be a state authority.

2.2. Formal requirements

2.2.1. Content

Art. 3 of the Hague Convention distinguishes between mandatory statements that must be made on the application in any case (essential content) and those statements which depend on the facts of the case (variable content).

Essential content for the purposes of Art. 3 (1) of the Hague Convention is as follows:

- Name and address of the requesting authority;
- Name and address of the parties and their representatives;
- Applications and a brief statement of the facts of the case; and
- Type of relief sought from the court.

Variable content for the purposes of Art. 3 (2) of the Hague Convention includes, in particular:

- Name and address of the persons, witnesses or experts to be deposed, depending on the nature of the pre-trial discovery procedure;
- A list of questions or a statement of the facts on which the witness is to be heard (unlike in common law jurisdictions, German procedural rules do not require an explicit list of questions);
- In case a swearing-in ceremony is to take place, this must be stated, including any special formula destined to substantiate the testimony. Under German procedural rules a testimony will generally be made without swearing-in ceremony unless otherwise ruled by the court in exceptional cases or upon the parties' request.

In the case of a motion for the production of documents, the Letter of Request must contain the following:

- Identification of the document;
- Description of the facts which are to be evidenced by the document;
- Exhaustive description of the contents of the document;
- Facts on which the assertion is based, that would lead to the conclusion that the document is in possession of the witness or respondent; and
- Reason which explains the alleged obligation to disclose the document. The reason must be made plausible.

Under German law, the defendant is under no general duty to disclose documents in the absence of substantive laws to the contrary.

In case of any uncertainties or incompleteness with respect to the statements made in the Letter of Request, the requested court or the Central Authority will seek clarification from the requesting authority according to Art. 5 of the Hague Convention by written inquiry.

2.2.2. Language

The Letter of Request must be written in German language or a certified translation into the German language must be attached to the original Letter of Request The same applies to any attachments.

2.3. Submission of the Letter of Request

The swiftness of the execution of a Request depends largely on the means of transmission. According to Art. 27 (a) of the Hague Convention, every country has the possibility to deliver the Request through diplomatic or consular channels (as mentioned above), or to directly transmit it from the national court to the foreign court. These alternative means of transmission are time-consuming and are therefore not recommended.

2.4. Execution of the Letter of Request

2.4.1. Presence of the parties at examination of witnesses

The hearing of the evidence is conducted by a German judge in a German court. For this purpose, the maxim of free access to the courts by all concerned parties applies, in accordance with Art. 7 (2) of the Hague Convention and Sec. 357 ZPO. The parties to the original lawsuit, and their attorneys, have the right to participate in the hearing of the evidence and to question the witnesses.

According to Art. 12 AusfG, the examination of the witnesses may be performed by a delegate (attorneys, notaries) chosen by the court upon the party's request. However, the Central Authority will only permit such an examination in exceptional cases.

2.4.2. Presence of members of the requesting court

The presence of members of the requesting US court may be necessary during the taking of evidence in order to obtain an effective outcome for the US court. This is because US procedural rules may need to be observed when hearing the evidence. According to Sec. 128a ZPO, the examination of the witness may be conducted via video-conference if all parties to the litigation and the requested court agree. However, such video-conferences are rare as many of the German courts do not have the necessary technical equipment. Therefore, the members of the requesting US court would have to appear personally if they want to join the examination of the witness. Access to the hearing by telephone conference is unlawful under German procedural rules.

Art. 8 of the Hague Convention allows contracting states to determine whether or not members of the requesting authority may be present at the hearing of the evidence stage. Germany has reserved the right to permit such presence (Art. 10 AusfG). In general, the members of the requesting court will be permitted to attend the procedure in Germany, unless such attendance could breach the main principles of the German Law in the particular case. The necessary permission is discretionary and can be obtained upon application via the Central Authority.

2.4.3. Applicable law

Generally, the procedures for the witness depositions will be subject to German law, in accordance with Art. 9 (1) of the Hague Convention. However, to ensure that the outcome of the hearing best serves the interests of the US court, the German court shall, upon application by the requesting US court, conduct the hearing of the evidence and the procedure in such a way that is in accordance with US law and procedure.

2.4.4. Compulsion measures

As a matter of principle, the hearing of evidence may take place voluntarily and without the intervention of a state court in Germany. However, in such a case, it must be kept in mind that US procedure rules must be complied with and that where the taking of an oath is required, such taking must be done by an authorized person, normally a notary (Sec. 38 German Notarization Act). Compulsion measures can only be taken by official authorities. Where compulsion measures are necessary, the evidence must be heard under the official Letter of Request regime. According to Art. 10 of the Hague Convention, a German court must, on execution of a Letter of Request, use compulsion measures to the same extent as it would do in case of national requests, but it must not go further. The usual means for enforcing attendance by a German court is to impose a disciplinary fine or confinement for contempt of court or to order the witness to pay the costs of the trial (in the case of non attendance). As a last resort, the court can order compulsory attendance by issuing a warrant for arrest by the police (Secs. 380, 390 ZPO).

However, a German court cannot order more compulsory measures than permitted by national law, even where US law would provide for more extensive measures.

2.4.5.The evidence must be for use at a trial

According to Art. 1 (2) of the Hague Convention, the scope of application of the Convention is limited to the taking of evidence for use at a pending or future trial. This is consistent with the US pre-trial discovery procedure, which requires a lawsuit to have already been filed. The preliminary taking of evidence analogous to the US deposition is only possible through diplomatic or consular channels, or by compliance with the requirements of Sec. 482 ZPO, which sets conditions for the safeguarding of evidence in a German trial.

2.4.6 Notification

The notice in writing from the German court to the requesting US court will be made in German.

2.5. Objections to the Execution of the Letter of Request

2.5.1. Lack of form

Lack of form, such as insufficient or untrue statements, wrong language or missing translation will be reprimanded by the Central Authority, which will then call back on the US court for rectification. Such inquiry by the requested court will generally be made in writing without returning the documents to the requesting court (see above).

2.5.2. Right to refuse to give evidence

In accordance with Art. 11 of the Hague Convention, a Letter of Request does not need to be executed in cases where the witness has the right to refuse to give evidence and where the witness asserts that right for himself. It is immaterial for that purpose, whether the witness asserts the right to refuse to give evidence under US law or German law. According to German law, there is a right to refuse to give evidence for the following:

- Affianced and married persons
- Close relatives

- Attorneys, tax advisers, CPAs, and doctors with respect to information concerning clients or patients, where the duty of confidentiality has not been waived
- Questions touching on company or trade secrets
- Questions, the answers to which may bring about the danger for the witness to criminal prosecution or the imposition of a fine

Equally, the rights to refuse to give evidence also apply with respect to the production of documents.

3. The US Civil Code

As mentioned above, instead of issuing a Letter of Request, the US court may utilize the provisions of para 1783 of 28 United States Code (copy of extract attached). The Code empowers a US court to issue a subpoena which requires a witness to appear or produce a document (or thing) if the court regards it as necessary in the interests of justice. Service of the subpoena should be in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country.

This alternative method of obtaining evidence might be helpful in instances where the witness is willing to give evidence but perhaps needs the assurance of a subpoena to cover travel expenses. This method would not overcome issues of confidentiality and privilege arising under German law.

Annex 1: Model Letter of Request

From:
(The appellation of the requesting judicial authority)

To:
(The Central Authority of the requested state)

To be returned to:
(Person to whom the executed request is to be returned)

Request for International judicial assistance on taking evidence in civil or commercial matters pursuant to the Hague Convention of March 18, 1970

In re

I. (Names and addresses of the parties)

.....

Plaintiff

.....

Defendant

.....
(other parties if applicable)

II. Nature and purpose of the proceedings and summary of the facts

III. Evidence to be obtained or other judicial act to be performed

IV. Items to be completed where applicable

1. Identity and address of any person to be examined
2. Questions to be put to the persons to be examined or statements of the subject matter about which they are to be examined
3. Documents or other property to be inspected
4. Any requirement that the evidence should be given on oath or affirmation and any special form to be used
5. Special methods or procedure to be followed
6. Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified
7 Request for attendance or participation of judicial personnel of the requesting authority at the execution of the Letter of Request
8. Specification of privilege or duty evidence under the law of the State of origin
9. The fees and costs incurred which are reimbursable under the second paragraph of article 14 or under article 26 of the Convention will be borne by plaintiff/defendant.

Signed ..... Date .....

Annex 2: Central Authorities in Germany

FEDERAL STATE	CENTRAL AUTHORITY
Baden-Württemberg	Präsident des Amtsgerichts Freiburg (President of the local court of Freiburg)
Niedersachsen (Lower Saxony)	Niedersächsisches Ministerium der Justiz und für Europaangelegenheiten (Ministery of Justice and EU-Matters of Lower Saxony)
Bayern (Bavaria)	Präsident des Oberlandesgericht München (President of the higher regional court of Munich)
Berlin	Senatverwaltung für Justiz von Berlin (Senatadministration of Justice of Berlin)
Brandenburg	Ministerium der Justiz und für Bundes- und Europaangelegenheiten des Landes Brandenburg (Ministery of Justice and of Federal and EU-Matters of Brandenburg)
Bremen	Der Präsident des Landesgerichts (President of the regional court)
Hamburg	Präsident des Amtsgerichts Hamburg (President of the local court of Hamburg)
Hessen (Hesse)	Hessisches Ministerium der Justiz und für Europaangelegenheiten (Ministery of Justice and EU-Matters of Hesse)
Mecklenburg-Vorpommern (Mecklenburg-Western Pomerania)	Justizministerium des Landes Mecklenburg Vorpommern (Ministery of Justice of Mecklenburg-Western Pomerania)
Nordrhein-Westfalen (North Rhine-Westphalia)	Präsident des Oberlandesgerichts Düsseldorf (President of the higher regional court of Duesseldorf)
Rheinland-Pfalz (Rhineland-Palatinate)	Ministerium der Justiz des Landes Rheinland Pfalz (Ministery of Justice of Rhineland-Palatinate)
Saarland	Ministerium der Justiz des Saarlandes (Ministery of Justice of Saarland)
Sachsen (Saxony)	Präsident des Oberlandesgericht Dresden (President of the higher regional court of Dresden)
Sachsen-Anhalt (Saxony-Anhalt)	Ministerium der Justiz des Landes Sachsen-Anhalt (Ministery of Justice of Saxony-Anhalt)
Schleswig-Holstein	Ministerium für Justiz, Bundes- und Europaangelegenheiten des Landes Schleswig Holstein (Ministery of Justice, Federal and EU-Matters of Schleswig-Holstein)
Thüringen (Thuringia)	Thüringer Ministerium der Justiz und für Europaangelegenheiten (Ministery of Justice and EU-Matters of Thuringia)

Annex 3: Para 1783 of 28 United States Code

(a)

A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

(b)

The subpoena shall designate the time and place for the appearance or for the production of the document or other thing. Service of the subpoena and any other to show cause, rule, judgment, or decree authorized by this section or by section 1784 of this title shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country. The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Schiedmayer Celesta GmbH,	Cancellation No.: 92/061,215
Petitioner,	Reg. No. 3,340,759
v.	Mark: SCHIEDMAYER
Piano Factory Group, Inc. and Sweet 16 Musical Properties, Inc.	Registration Date: November 20, 2007
Respondents.	

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION TO STRIKE RESPONDENT'S AMENDED NOTICE TO TAKE CROSS-EXAMINATION ON WRITTEN QUESTIONS AND RESPONDENT'S CROSS MOTION TO STRIKE TESTIMONY OF ELIANNE SCHIEDMAYER

Respondents Piano Factory Group, Inc. and Sweet 16 Musical Properties, Inc. ("Respondent") hereby submit their response to Petitioner's motion to strike Respondent's Amended Notice to Take Cross-Examination on Written Questions and hereby cross-moves to strike the entirety of the testimony of Elianne Schiedmayer, which was submitted by declaration, including all exhibits.

Permission for the filing of this cross-motion was granted by Interlocutory Attorney Benjamin Okeke in a telephone call on September 20, 2017.

FACTS

Petitioner filed its motion to strike Respondent's Amended Notice to Take Cross-Examination of Written Questions on September 12.

On the May 24, 2017, Petitioner filed its notice of the Declaration of Elianne Schiedmayer which contained the entirety of her testimony and the corresponding

exhibits filed therewith. Also in May, Petitioner filed various notices of reliance for documents produced during discovery, answers to interrogatories, and a discovery deposition of Glenn Treibitz. A declaration of Helga Kasimoff and a declaration of Olga Fuchs was also filed during Petitioner's testimony period, which closed June 8, 2017.

Petitioner never obtained Respondent's consent, nor conferred with Respondent prior to filing any testimony by declaration, including Ms. Schiedmayer's.

ARGUMENT

Response to Petitioner's Motion to Strike:

Respondent was dismayed to receive Petitioner's Motion to Strike the Amended Notice of Cross-Examination by Written Questions. Respondent has reviewed the various legal reasons why Ms. Elianne Schiedmayer, as a national of Germany present in Germany should not and, in Petitioner's counsel's opinion cannot be compelled to provide admissible testimony even by written questions in this proceeding.

Respondent's counsel does not pretend to be an expert on German law or the Hague Convention. While Respondent's research does indicate that a German notary can be authorized to administer oaths and record answers it is apparent that nothing but Respondent beginning the process using a Letter of Request under the Hague Convention (outlined nicely in Exhibit A) could possibly persuade Respondent's counsel to countenance letting Elianne Schiedmayer answer Petitioner's questions under oath. Furthermore, it is abundantly clear that Petitioner's counsel is indicating that Ms. Schiedmayer is not willing to answer Respondent's questions and is, therefore an unwilling witness.

Respondent's further research on the question of whether unwilling witnesses located in Germany can be compelled to testify before a German judge indicates that apparently only third party witnesses can be compelled to do so. Furthermore, in such a proceeding, the German judge will ask whatever questions he or she decides is appropriate to the witness in open court and is not limited to just asking the questions proposed by the parties. While there is no court fees in Germany under the Hague Convention for the services of the judge (or notary if the judge delegates the authority to a notary), it is apparent that no matter what final set of written questions are eventually agreed upon, both parties will have to live with the questions that the German judge actually decides to ask and with the form of such questions. While Respondent's counsel could be present at the asking the question, he would not participate in the proceeding in any way. Exhibit A also indicates (see p. 3 and 4) that there is a possibility that Ms. Schiedmayer could refuse to answer any questions presented by the German judge that, in her opinion, involve questions touching on company trade secrets, attorney-client privileged communications, details regarding married persons, or other close relatives. Given that Ms. Schiedmayer runs a family owned business and many relevant questions turn on her observing her late husband's prior business dealings during the time where a sale of the piano portion of the business took place in the 1980s, it is entirely possible she would entirely refuse to answer these questions. In this event, Respondent would have no ability to compel any further answers.

Furthermore, whether Ms. Schiedmayer, as the owner of Petitioner, would be actually regarded as a third party witness under German law is not a question the undersigned has been able to determine. If she is not a third party witness but legally one

and the same with Petitioner under German law, then if Petitioner's allegation in its motion is true, then a German judge would not permit examination of her of any kind in a courtroom as she is unwilling to participate. This result would occur even if the Hague Letter of Request process was used (incurring months of additional delay to this proceeding). What is certain, however, is that, in any event she is not willing to testify and Petitioner's counsel is not willing to cooperate **in any way** to facilitate the process of Ms. Schiedmayer answering any of Respondent's questions raised by Ms. Schiedmayer's testimonial deposition.

While Exhibit A does indicate that it probably is possible to get Ms. Schiedmayer to answer the propounded cross examination questions in a way that would be admissible in this proceeding (though perhaps not in a German court) without using the compulsory processes of the Hague Convention, the U.S. Consulate Officials, or the German courts, this would require her and her counsel to cooperate [see Section 1(1) on p. 1]. It is clear that Ms. Schiedmayer is not willing to cooperate (nor is her counsel willing to facilitate such an arrangement) and so it is apparent that this option is permanently off the table.

Respondent is disappointed that Petitioner chose to raise these issues at this stage in the proceeding as every one of the points could have been raised in Petitioner's previous objections filed over three months ago to Respondent's Notice of Cross Examination by Written Questions. All that has transpired since then is that the Board and the parties have expended time and resources briefing and deciding issues that Ms. Schiedmayer's conduct has now rendered moot.

In view of the non-cooperation of Petitioner, Ms. Schiedmayer, and its counsel, Respondent hereby withdraws its Notice to Take Cross Examination by Written

Questions and does not further contest Petitioner's Motion to Strike the same. Without some form of cooperation between the parties, it will simply be impossible to implement the process to produce admissible cross examination testimonial evidence in this proceeding. However, by withdrawing this request, Respondent is not waiving its right to cross examination; rather Respondent is simply acknowledging that Petitioner appears to have successfully rendered Ms. Schiedmayer entirely unavailable for cross examination. By not further contesting Petitioner's Motion to Strike, Respondent still has the right to to cross examine Ms. Schiedmayer. Respondent does not consent to the entry of her testimony without cross examination and hereby objects on this ground to her entire testimony, including exhibits.

Motion to Strike Testimony of Elianne Schiedmayer:

Fortunately however, it is not Respondent's duty or responsibility to move heaven and earth to compel admissible cross-examination testimony from Ms. Schiedmayer—it is Petitioner's once Petitioner has submitted testimony by declaration and Respondent has requested cross examination being willing to pay the costs associated with the same.

37 CFR § 2.123(a)(1) states:

> The testimony of witnesses in inter partes cases **may be submitted in the form of an affidavit or a declaration** pursuant to § 2.20 and in conformance with the Federal Rules of Evidence, filed during the proffering party's testimony period, **subject to the right** of any adverse party **to elect to take** and bear the expense of oral cross-examination of that witness as provided under paragraph (c) of this section if such witness is within the jurisdiction of the United States, or conduct **cross-examination by written questions** as provided in § 2.124 if such witness is outside the jurisdiction of the United States, **and the offering party must make that witness available**…Emphasis added.

It is clear that it is mandatory a witness providing testimony in a TTAB proceeding unilaterally by declaration **MUST** be made available for cross examination (whether orally or by written question). The U.S. Supreme Court endorsed the TTAB's relatively new approach just implemented this year of allowing unilateral submission of testimony in *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. ___, 135 S. Ct. 1293, 113 USPQ2d 2045 (2015) stating that:

> The primary way in which TTAB proceedings differ from ordinary civil litigation is that "proceedings before the Board are conducted in writing, and the Board's actions in a particular case are based upon the written record therein." [TBMP] § 102.03. In other words, there is no live testimony. Even so, the TTAB allows parties to submit transcribed testimony, taken under oath and **subject to cross-examination**, and to request oral argument[1]. Emphasis added.

The Supreme Court's endorsement of the "writing only" testimony submission process conditioned on the right to cross examine was also explicitly endorsed by the Office in the Federal Register Notice accompanying the new version of the rules quoted at Note 3 in TBMP § 7703.01(b): "The new procedure retains what the Supreme Court focused on in *B&B Hardware, Inc. v*... That testimony be under oath and subject to cross-examination. The ability to elect cross-examination of the witness in the new unilateral procedure maintains the fairness and weightiness of Board proceedings." Accordingly, the policy of the TTAB under the new rule is that a party may unilaterally provide declaration evidence only if the declarant is made available for cross examination.

While Respondent's research on the question in the TBMP does not come up with a decision detailing what happens if a foreign national person providing testimony by

[1] *Id.* at 1300.

declaration in a proceeding cannot be cross examined, it is apparent from the Federal Rules of Evidence, Rule 804 that such a declaration would not constitute admissible evidence. A declaration like Ms. Schiedmayer's from a person unavailable to testify at trial does not fit into any of the exceptions to hearsay evidence from unavailable witnesses (former testimony, dying declaration, statement against interest, personal or family history, etc.). Because of this, Respondent hereby objects to the entirety of Ms. Schiedmayer's testimony, including all exhibits, as inadmissible hearsay and requests that all of it be excluded from consideration by the Board.

Finally, allowing Petition to enter such declaration testimony in to evidence in this proceeding is violation of Respondent's rights to due process of law. While the 6th Amendment provides the right of cross examination only in criminal cases, the Federal Rules of Evidence (and the U.S. Supreme Court in *Hargis*) require that declaration testimony in civil cases be admissible only subject to the right to cross examination. Permitting Ms. Schiedmayer to testify via declaration but refuse to participate in any form of admissible cross examination violates Respondent's right to a fair trial in this matter.

The rule is clear on what happens next: 37 C.F.R. § 2.123(k) states: "Evidence not obtained and filed in compliance with these sections <u>will not be considered</u>." Since the Petitioner has refused to allow Ms. Schiedmayer to provide cross examination testimony and she is unwilling to do so, her testimony has not been obtained in compliance with the Rule and cannot be considered by the Board.

While there may be concerns of the prejudicial effect on Petitioner's case as a result of the striking of the major portion of the testimony in its case in chief, this is not

Respondent's concern, but Petitioner's problem. Petitioner still has ample evidence remaining through the various pieces of evidence it has submitted via notices of reliance and the remaining declarations. Petitioner's case is not irretreviably lost if Ms. Schiedmayer's testimony is excluded.

Respondent reminds Petitioner that if Ms. Schiedmayer attempts to provide additional testimony during the Rebuttal Period using declaration to replace her existing testimony, Respondent will object as Petitioner has had ample time to present such evidence in its case in chief.

If Petitioner indicates in a writing filed with the Board that it is willing and able to provide cross examination testimony by written questions using the questions previously served upon Petitioner's counsel and the prescribed process of written questions outlined in the rules, then Respondent is willing to entertain withdrawing its present objections to the testimony and this motion to strike Ms. Schiedmayer's testimony. However, if Petitioner does not so indicate, Respondent maintains its objections and moves to strike the testimony. This proceeding is well into its third year, and Respondent does not wish any more delay in providing its own testimony to the Board so this proceeding may be concluded.

In view of the foregoing, the Respondent respectfully requests that the entirety of Elianne Schiedmayer's testimony, including all associated Exhibits, be stricken from this proceeding as 1) inadmissible hearsay and/or 2) evidence submitted contrary to rule and due process of law. Furthermore, Respondent asks that this case be removed from suspension and trial dates reset so that Respondent may provide Petitioner with its pretrial disclosures and submit its testimony to the Board.

Dated: September 26, 2017

Respectfully submitted,

/s/ Adam R. Stephenson
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Fax: 480.718.8336
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Attorney for Respondents

CERTIFICATE OF SERVICE

It is hereby certified that one (1) copy of the foregoing RESPONDENT'S RESPONSE TO PETITIONER'S MOTION TO STRIKE RESPONDENT'S AMENDED NOTICE TO TAKE CROSS-EXAMINATION ON WRITTEN QUESTIONS AND RESPONDENT'S CROSS MOTION TO STRIKE TESTIMONY OF ELIANNE SCHIEDMAYER is being sent via email to Petitioner Schiedmayer Celesta GmbH's attorney of record at the designated email below:

Michael J. Striker
Collard & Roe, P.C.
1077 Northern Blvd
Roslyn, NY 11576
striker@collardroe.com

Dated: 9/26/2017

_/s/ Adam Stephenson____