PUBLIC

**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:** **Joseph J. Simons, Chairman**
**Noah Joshua Phillips**
**Rohit Chopra**
**Rebecca Kelly Slaughter**
**Christine S. Wilson**

**In the Matter of**

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

**Respondent.**

**Docket No. 9378**

# COMPLAINT COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S APPEAL BRIEF


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## SUBJECT INDEX

I. INTRODUCTION .......... 1
II. STANDARD OF REVIEW .......... 2
III. ARGUMENT .......... 2
A. The ALJ Properly Applied Section 7 and Amply Supported Each Significant Factual Finding .......... 3
1. The ALJ Correctly Found that Complaint Counsel Established a Strong *Prima Facie* Case .......... 3
i. The ALJ's MPK Market Definition is Supported by *Brown Shoe* Indicia and Sound Economic Evidence .......... 3
a. *Brown Shoe* Indicia Unambiguously Demonstrate MPKs Are a Relevant Product Market .......... 3
b. The ALJ's Relevant Market Was Not Vague .......... 5
c. Respondent's Criticisms of the Hypothetical Monopolist Test Are Unfounded and Incapable of Undermining the *Prima Facie* Case .......... 6
ii. Market Concentration Establishes Strong Presumption of Harm .......... 9
iii. The ALJ Correctly Concluded that Evidence of Unilateral Effects Bolstered Complaint Counsel's *Prima Facie* Case .......... 9
a. Respondent's Criticism of the Initial Decision Fundamentally Misunderstands Unilateral Effects .......... 9
b. The ALJ's Conclusion that Otto Bock's and Freedom's MPKs Are Close Substitutes Is Supported by Overwhelming Evidence .......... 10
c. The ALJ Considered Evidence that Plié and C-Leg Are "Sufficiently Different" from Other MPKs .......... 11
d. Additional Direct Evidence of Harm Not Weighed by the ALJ Further Undermines Respondent's Criticisms of Unilateral Effects .......... 13
2. The ALJ Properly Analyzed and Rejected Respondent's Rebuttal Arguments and Defenses .......... 14
i. Remaining MPK Sellers Will Not Prevent Competitive Harm .......... 14
a. Össur .......... 16
b. Endolite .......... 18
c. Proteor .......... 19
ii. Respondent Failed to Meet its Burden to Show that Freedom Is a Failing Firm .......... 20
a. Freedom Was Not at Risk of Imminent Failure .......... 21
b. Respondent Failed to Show Freedom Would Not Have Been Able to Reorganize in Bankruptcy .......... 23

c. Freedom Failed to Make Good-Faith Efforts to Elicit Reasonable Alternative Offers ........ 24

iii. Respondent Failed to Show that Power Buyers Exist that Could Prevent Post-Merger MPK Price Increases ........ 26

iv. Respondent Failed to Show that Insurer Reimbursement Rates Will Prevent Post-Merger MPK Price Increases ........ 27

v. Respondent's Alleged Efficiencies Are Not Verifiable or Merger Specific and It Failed to Show Any Purported Savings Would Be Passed on to Consumers ........ 28

3. The ALJ Acknowledged Additional Evidence of Anticompetitive Effects, which Was Unnecessary to Find the Merger Illegal, May Have Buttressed Complaint Counsel's Case ........ 30

B. The ALJ Properly Concluded Respondent's Speculative Divestiture [REDACTED] Would Not Restore Competition and Did Not Undermine Complaint Counsel's *Prima Facie* Case ........ 32

1. The ALJ Properly Found Complaint Counsel Established a Strong *Prima Facie* Case Despite Respondent's Proposed [REDACTED] ........ 33

2. The ALJ Properly Concluded Respondent's Divestiture [REDACTED] Were Speculative ........ 34

3. The ALJ Properly Concluded Respondent's Limited Asset Sale Divestiture [REDACTED] Would Not Restore Competition ........ 36

C. The ALJ's Proposed Order Is Necessary to Restore Competition ........ 38

1. A Divestiture Narrower than the ALJ's Order Would Not Restore Competition ........ 39

2. The Proposed Order Is Not Punitive ........ 40

D. Respondent's Constitutional Claims Lack Merit and Have Been Waived ........ 41

IV. CONCLUSION ........ 44

## TABLE OF CASES AND AUTHORITIES

**Cases**

*Armour v. City of Indianapolis, Ind.*, 566 U.S. 673 (2012) ........................................................ 44

*Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) ........................................................ 3, 5, 8

*Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008) ........................................ 26, 27, 30

*Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969) ............................................... 20, 23

*City of New Orleans v. Dukes*, 427 U.S. 297 (1976) ................................................................ 44

*Ford Motor Co. v. United States*, 405 U.S. 562 (1972) ......................................................... 38, 41

*Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) .......................... 42

*FTC v. Harbour Grp. Invs., L.P.*, 1990 WL 198819 (D.D.C. 1990) ........................................... 25

*FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001). ....................................................... 28, 29

*FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016) .......................................... 29

*FTC v. ProMedica Health Sys., Inc.*, 2011 WL 1219281 (N.D. Ohio 2011) .............................. 21

*FTC v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. 2016). ..................................................... 28, 33

*FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997) ............................................................. 10

*FTC v. Swedish Match*, 131 F. Supp. 2d 151 (D.D.C. 2000)................................................. 12, 14

*FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015)........................................................... 14, 26

*FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991)......................................................... 30

*FTC v. Wilh. Wilhelmsen Holding ASA*, 2018 WL 4705816 (D.D.C. 2018)................................ 26

*In re Fruehauf Corp*., 90 F.T.C. 891, 1977 FTC LEXIS 9 (Dec. 21, 1977) ............................... 39

*In re Jim Walter Corp*., 90 F.T.C. 671, 1977 FTC LEXIS 10 (F.T.C. 1974).............................. 40

*In re McWane, Inc.*, 2014 FTC LEXIS 28 (Jan. 30, 2014) ........................................................... 2

*In re Otto Bock HealthCare North America, Inc.*, Docket No. 9378, Opinion and Order of the Commission (Apr. 18, 2018) ..................................................................... 32, 33, 34, 35

*In re Polypore, Int'l, Inc.*, 149 F.T.C. 486 (Mar. 1, 2010)................................. 13, 14, 27, 28, 41

*In re 1-800 Contacts, Inc.*, Docket No. 9372, Opinion of the Commission (Nov. 18, 2018)....... 42, 43

*Hospital Corp. of Am. v. FTC,* 807 F.2d 1381 (7th Cir. 1986) .................................................. 42

*Lucia v. SEC*, 138 S. Ct. 204 (2018) ......................................................................................... 42

*Mathews v. Eldridge*, 424 U.S. 319 (1976) ................................................................................. 43

*ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014) ........................................... 10

*United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017) ........................................ 33, 35, 36

*United States v. Baker Hughes*, *Inc.*, 908 F.2d 981 (D.C. Cir. 1990)........................................... 30

*United States v. E. I. du Pont de Nemours & Co*., 366 U.S. 316 (1961) ............................... 38, 41

*United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415 (2017)........................................... 21, 25

*United States v. H&R Block, Inc*., 833 F. Supp. 2d 50 (D.D.C. 2011) ....................... 10, 12, 14, 29

*United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974)....................................................... 20

*United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549 (1971). ............................................ 25

**Statutes and Regulations**

Clayton Act § 7, 15 U.S.C. § 18 (2012).................................................................... *passim*

**Other Authorities**

FTC's Merger Remedies 2006-2012 (January 2017) .................................................................. 39

*U.S. Dep't of Justice & Fed. Trade Comm'n, 2010 Horizontal Merger Guidelines…………passim*

U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 5 (2004).... 33

## TABLE OF ABBREVIATIONS

The following abbreviations and citation forms are used in this Answering Brief:

| | |
|---|---|
| Appeal | Respondent's Appeal Brief |
| CCFF | Complaint Counsel's Proposed Findings of Fact |
| CC Post-Tr. Br. | Complaint Counsel's Post-Trial Brief |
| CC Post-Tr. Reply Br. | Complaint Counsel's Post-Trial Reply Brief |
| CC Response to RPFF | Complaint Counsel's Response to Respondent's Proposed Findings of Fact |
| F. | Findings of Fact in Initial Decision |
| ID | Initial Decision |
| Tr. | Hearing Transcript |

## I. INTRODUCTION

This case is not a close call, and the ALJ's Initial Decision and Order are supported by a robust factual record and sound legal reasoning. The evidence presented clearly proved that, when Otto Bock acquired Freedom, its closest microprocessor knee ("MPK") competitor, on September 22, 2017 (the "Merger"), Respondent cemented its position as the dominant U.S. MPK provider with a market share of greater than [redacted]. Over the course of the 31-day trial, Complaint Counsel introduced evidence that was "more than sufficient" to establish a "strong presumption" that the Merger violated Section 7. ID 49, F. 481. Overwhelming evidence from numerous reliable sources, including Respondent's ordinary course documents, supported the ALJ's market definition, and his conclusion that the Merger increased concentration in the U.S. MPK market by 1,522 points to a post-Merger level of 6,767. Complaint Counsel buttressed the strong presumption that the Merger would harm consumers with extensive direct evidence of anticompetitive effects, including Respondent's post-Merger plans to raise prices and quash next-generation MPK competition. Respondent raised several rebuttal arguments and defenses, none of which were supported by the record.

Respondent's argument that the ALJ ignored evidence it submitted is belied by the ALJ's well-reasoned and thoroughly supported decision. The ALJ explained that he considered "the whole record . . . and all contentions and arguments therein were thoroughly reviewed and considered." ID 4. Judge Chappell explicitly stated that Respondent's factual propositions "were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the merits of the case," and its legal contentions "were rejected, because they lacked support in fact or law, were not material, or were otherwise lacking in merit." ID 4.

Rather than ignore evidence or Respondent's arguments, the ALJ simply found Respondent's claims unpersuasive and unsupported. A tremendous body of evidence proved that other MPK manufacturers will not fill the competitive void left by the Merger, nor will a large clinic or the reimbursement system prevent higher prices. Respondent produced no persuasive evidence showing that Freedom would have failed without the Merger or that this harmful acquisition will create any efficiencies. And the ALJ properly concluded that Otto Bock's speculative and incomplete divestiture [REDACTED] could not restore competition. The immense factual record in this case supports the ALJ's conclusions. He made no legal errors. The Merger is illegal, and the Commission should affirm the Initial Decision and issue the proposed order.

## II. STANDARD OF REVIEW

"The Commission reviews the ALJ's findings of facts and conclusions of law *de novo*." *In re McWane, Inc.*, 2014 FTC LEXIS 28, *29 (Jan. 30, 2014), *aff'd*, 783 F.3d 814 (11th Cir. 2015). Pursuant to Rule 3.54, upon review of the ALJ's Initial Decision, and consideration of the evidence cited therein, the Commission, in its discretion, may adopt the findings and conclusions in the Initial Decision and issue the ALJ's proposed order.

## III. ARGUMENT

The ALJ's well-reasoned decision is supported by a robust factual record and ample legal support. First, the ALJ correctly concluded that Complaint Counsel proved a strong *prima facie* case that was bolstered by evidence of unilateral harm, and he appropriately rejected Respondent's myriad defenses and rebuttal arguments. Second, Respondent's speculative divestiture would not restore competition lost from this Merger. Third, Respondent failed to prove that any remedy narrower than the ALJ's order would restore competition. Finally, Respondent's Constitutional claims are meritless.

## A. The ALJ Properly Applied Section 7 and Amply Supported Each Significant Factual Finding

### 1. The ALJ Correctly Found that Complaint Counsel Established a Strong *Prima Facie* Case

The ALJ properly concluded that Complaint Counsel presented "prima facie proof of market structure and direct competition between Ottobock and Freedom [] sufficient to raise an inference of likely anticompetitive effects." ID 49 n.25. Notwithstanding Respondent's argument to the contrary, Appeal 36, the ALJ's market definition is supported by voluminous evidence from multiple reliable sources, the *Brown Shoe* practical indicia, and the hypothetical monopolist test.

#### i. The ALJ's MPK Market Definition is Supported by *Brown Shoe* Indicia and Sound Economic Evidence

##### a. *Brown Shoe* Indicia Unambiguously Demonstrate MPKs Are a Relevant Product Market

The ALJ properly concluded, based on ample record evidence, that, "[t]he *Brown Shoe* indicia in this case point to a distinct relevant product market consisting only of MPKs." ID 22. He correctly held that, "the 'peculiar characteristics' factor points to a distinct relevant product market consisting only of MPKs," ID 28, finding that a microprocessor "allows the MPK to function, operate, and perform in a way that is different from how a mechanical knee functions, operates, and performs," ID 22; *see also* F. 103-04, 330-93; (CCFF ¶¶ 607-16). Respondent's own documents and testimony supported this conclusion, ID 23-24; (CCFF ¶¶ 657-87), as did evidence from other MPK manufacturers, ID 25; *see also* (CCFF ¶¶ 688-96), mechanical knee manufacturers, ID 25; *see also* (CCFF ¶¶ 697-700), insurers, ID 26; *see also* (CCFF ¶¶ 742-51), and peer-reviewed research articles that "found increased safety and performance of MPKs compared to mechanical knees," ID 26; *see also* (CCFF ¶¶ 617-48).

The ALJ found that, "the 'industry recognition' factor points to a distinct relevant product market consisting only of MPKs." ID 30. Analyzing party and third-party testimony and business documents, the ALJ found that "Ottobock, Freedom, other MPK manufacturers, and mechanical knee manufacturers all view the market for MPKs as a distinct market from mechanical knees." ID 28. For example, Otto Bock estimates its market share in relation to only other MPKs, tracks MPK sales separately from mechanical knees, and looks to only other MPKs when setting its MPK prices. ID 29, 31-32; *see also* (CCFF ¶¶ 717-25). Freedom, too, "analyzes MPKs as a distinct market from mechanical knees in its ordinary course of business documents." ID 29; *see also* F. 422-26; (CCFF ¶¶726-28). Other MPK and mechanical knee manufacturers similarly view MPKs as competing in a separate market from mechanical knees. ID 29-30; (CCFF ¶¶ 752-66).

Judge Chappell next concluded that, "the 'distinct prices' and 'sensitivity to price changes' factors point to a distinct relevant product market consisting only of MPKs." ID 32. Evidence disregarded by Respondent shows that, in 2017, the average sales price of an MPK was approximately [redacted], while a mechanical knee sold for only about [redacted] ID 30; *see also* (CCFF ¶¶ 705-06). Similarly, insurance providers reimburse clinics substantially more for MPKs than for mechanical knees. ID 30-31; *see also* (CCFF ¶¶ 707-11). Ample evidence showed that MPK prices are not sensitive to mechanical knee prices, (CCFF ¶¶ 712-16), and medical professionals do not move patients from MPKs to mechanical knees (or vice versa) based on the prices that clinics pay for MPKs or mechanical knees. ID 21; *see also* (CCFF ¶¶ 525-28). Otto Bock, Freedom, and other MPK manufacturers do not even consider mechanical knee prices when setting MPK prices. ID 31-32; *see also* (CCFF ¶¶ 731, 755).

**b. The ALJ's Relevant Market Was Not Vague**

Contrary to Respondent's assertion that the ALJ's market definition analysis was "impermissibly vague" and failed to address certain mechanical knees, Appeal 37,[1] the ALJ analyzed all types of mechanical knees, including friction brake, pneumatic, and hydraulic controlled mechanical knees, ID 23; F. 96-101. The ALJ also evaluated evidence about specific "sophisticated" mechanical knees, such as College Park's hydraulic and pneumatic mechanical knees designed for K3 patients, F. 432-35, and determined that, "[b]ased on the evidence in this case, mechanical knees are properly excluded from the relevant product market," ID 35.

As *Brown Shoe* instructs, the ALJ began by analyzing the "interchangeability of use" and "cross-elasticity of demand" between MPKs and mechanical knees, 370 U.S. 294, 325 (1962); ID 19-22, concluding that "clinics (the purchasers in this case) are not willing to substitute an MPK for a mechanical knee based on an increase in the price of MPKs," ID 22. Clinics would not substitute to mechanical knees in response to an MPK price increase because "prosthetists have an ethical obligation to fit each patient with a prosthetic knee that best meets the patient's medical needs . . . [and] as long as clinics can fit an MPK on a patient who has a prescription and insurance coverage, without losing money, they will." ID 21; *see also* ID 21 ("the choice between . . . an MPK or a mechanical knee (if insurance coverage were available for both products) is a clinical decision and is not based on the relative prices"); (CCFF ¶¶ 600, 602-04) (mechanical knees have no impact on MPK prices); (CCFF ¶¶ 712-13) (mechanical knees play no role in MPK price negotiations); (CCFF ¶¶ 807-13) (clinics fit MPKs provided insurance coverage exists and fitting an MPK is profitable); (CCFF ¶¶ 524, 814) (prosthetists have ethical obligation to fit best knee from medical perspective).

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[1] Respondent also criticizes the ALJ's market definition as "internally inconsistent," Appeal 7, but provides no explanation for that assertion.

Respondent also erroneously criticized the ALJ for including certain MPKs in the relevant market, alleging he "failed to address the significant variation among prosthetic knees." Appeal 37. But Complaint Counsel's economic expert, who the ALJ properly relied upon, "calculated market shares for a narrower market that excluded lower-end MPKs and higher-end MPKs ('narrower MPK market')," ID 36, and "[e]ven in her narrower market . . . the statistics in this case far exceed the thresholds for presumptive illegality provided in the Merger Guidelines." ID 37; *see also* CC Post-Tr. Br. 56-59; (CCFF ¶¶ 964-66).

#### c. Respondent's Criticisms of the Hypothetical Monopolist Test Are Unfounded and Incapable of Undermining the *Prima Facie* Case

The ALJ held that the hypothetical monopolist test performed by Complaint Counsel's economic expert "adhered to the Merger Guidelines" and supported the MPK market definition. ID 34-35. Judge Chappell correctly found that Dr. Scott Morton conducted a critical loss analysis showing a "candidate market consisting of only Ottobock's MPKs and Freedom's Plié 3 constituted a relevant product market" under the hypothetical monopolist test.[2] ID 33; *see also* (CCFF ¶¶ 774-94). The ALJ also recognized that Dr. Scott Morton concluded, based on the totality of evidence in the record, that a relevant market in which to analyze the Merger was "'a wider market consisting of all microprocessor knees sold in the United States,'" ID 33 (quoting (F. 471)), the same relevant market he held to exist, ID 35.

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[2] While the results of her analysis support a relevant market for only Respondent's MPKs, Respondent implies that Dr. Scott Morton actually analyzed the Merger in such a market "of 'only the two merging firms.'" Appeal 38. This is incorrect. She concluded two different relevant markets exist: an all-MPK market, and a narrower market excluding certain low-end and high-end MPKs. ID 38; (CCFF ¶¶ 958-59). To reach this conclusion, she used a candidate market in her critical loss analysis that is consistent with the *Merger Guidelines*, *Merger Guidelines* §§ 4.1.1-4.1.3 (instructing analysis should begin with merging firms' products), and properly interpreted the results of her analysis, F. 471 ("if it is profitable . . . to impose a SSNIP in the narrow market, then it is profitable . . . to impose a SSNIP in the wider market . . . as well.").

On Appeal, Respondent raises two criticisms of the ALJ's discussion of Dr. Scott Morton's critical loss analysis, neither of which has merit. First, Respondent's claim that the ALJ "rubber-stamped unreliable expert testimony that relied on the flawed Lerner Condition" is just wrong. Appeal 36. Judge Chappell did not "rubber stamp" Dr. Scott Morton's work at all; he evaluated it with the record evidence and concluded her results were "consistent with the evidence in this case that the choice between fitting a patient with an MPK or a mechanical knee . . . is a clinical decision and is not based on the relative prices a clinic pays for MPKs and mechanical knees." ID 35; *see also* (CCFF ¶¶ 795-801, 807-28). Similarly, Respondent's claim that Dr. Scott Morton's analysis is flawed is without merit, which is why Respondent did not attempt a *Daubert* challenge at trial, found no errors in her calculations, and submitted no evidence showing that any change to her inputs or assumptions would lead to a different result. (CCFF ¶¶ 778-85, 794). Moreover, the factual record in this case clearly supports Dr. Scott Morton's use of the Lerner Condition. For example, Otto Bock executives with intimate knowledge of the MPK market and access to the same margin and diversion information used by Dr. Scott Morton concluded, in the ordinary course of business, that they could profitably increase Plié prices post-Merger. (CCFF ¶¶ 803-06; CC Response to RPFF ¶ 541). They determined Otto Bock [redacted]

[redacted]

[redacted]

[redacted] Based on this understanding, they recommended removing or increasing the price of the Plié post-Merger and took steps in furtherance of this recommendation, (CCFF ¶¶ 1353-64, 1392-404), demonstrating that Respondent itself knew that demand conditions would make such actions profitable.

Second, Respondent's allegation that Dr. Scott Morton used unreliable diversion and margin figures to perform her critical loss analysis is also incorrect. Appeal 36. The ALJ rightly found "[t]his criticism is unavailing" because "[t]he margin rate Dr. Scott Morton used is comparable to the rate used by Respondent's expert . . . [and the] diversion rate Dr. Scott Morton used was derived from Ottobock's own diversion estimates . . . prepared by the head of corporate strategy and mergers and acquisitions . . . ." ID 33-34 (citing F. 458, 460). Respondent tries to recast the document containing these diversion estimates as a mere "draft," Appeal 38, but the record shows Otto Bock's most senior executives used this document to evaluate the Merger, (CCFF ¶ 1354). Otto Bock's CEO corroborated these diversion estimates, testifying [redacted] (CCFF ¶ 1364), and, post-Merger, Otto Bock's top executives recommended discontinuing or increasing the price of the Plié based on the sales Otto Bock expected to divert to its MPKs, (CCFF ¶¶ 1392-404).

In short, Respondent's unfounded criticisms do nothing to undermine the enormous body of *Brown Shoe* and economic evidence used to apply the hypothetical monopolist test that support the ALJ's conclusion that the relevant market is the sale of MPKs to U.S. clinics. Indeed, the *prima facie* case established by Complaint Counsel was so strong that, even if mechanical knees were included in the relevant market, the transaction would still be presumptively illegal by a wide margin. As the ALJ noted, "even using Respondent's expert witness' market and market share calculations, the post-Acquisition HHI level in this case . . . demonstrates a highly concentrated market, and the increase in the HHI . . . is high enough to create a presumption of anticompetitive effects." ID 38; *see also* F. 486 (Merger increased

concentration by [redacted] points to HHI level of [redacted] in Respondent's alleged market); (CCFF ¶¶ 986-87).

**ii. Market Concentration Establishes Strong Presumption of Harm**

Respondent admits that Otto Bock historically has held a dominant share of the U.S. MPK market, Appeal 2 n.1 ("for many years Ottobock had between 80-98% share of the MPK market"), and it raises no challenges to the ALJ's market share findings. The ALJ found that the "pre-Acquisition HHIs confirm that the market for all MPKs in the United States was already highly concentrated and that the change in HHIs post-Acquisition establishes a strong presumption that the Acquisition will likely enhance market power in the merged firm." F. 481.[3]

**iii. The ALJ Correctly Concluded that Evidence of Unilateral Effects Bolstered Complaint Counsel's *Prima Facie* Case**

In its unilateral effects argument, Appeal 24, Respondent misunderstands how mergers cause unilateral effects, ignores the record, and rests on a mistaken reading of the Initial Decision.

**a. Respondent's Criticism of the Initial Decision Fundamentally Misunderstands Unilateral Effects**

Respondent claims that the ALJ "misappli[ed] well-settled unilateral effects analysis" because he found that "[t]he evidence demonstrates that, regardless of the asserted differences between the C-Leg 4 and the Plie 3, from the perspective and experience of a significant fraction of clinic customers, both knees are *acceptable*, C-Legs and Plies are their *top two choices*, and Freedom's presence as a competitor has enabled clinics to increase their bargaining leverage and

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[3] The ALJ found that Complaint Counsel's economic expert calculated reliable revenue-based and unit-based market shares. ID 36. These market shares show that the Merger increased concentration by [redacted] points, resulting in a post-Merger HHI of [redacted], far exceeding established thresholds to create a strong presumption that the Merger is likely to increase market power. ID 36-37; (CCFF ¶ 964, Table 6). These market shares "are consistent with Respondent's market share estimates in its ordinary course of business documents," ID 37; *see also* F. 411-16, 423; (CCFF ¶¶ 967-80), as well as third-party market share analyses, *see* (CCFF ¶¶ 981-84).

negotiate lower prices."[4] Appeal 22-23 (emphasis in original). Respondent fails to appreciate that this evidence goes directly to the likelihood and magnitude of unilateral effects. As the *Merger Guidelines* explain, substantial unilateral harm normally requires "a significant fraction of the customers purchasing that product view products formerly sold by the other merging firm as their next-best choice." § 6.1 (also noting that, "unless pre-merger margins between price and incremental cost are low, that significant fraction need not approach a majority"); *see also ProMedica*, 749 F.3d at 569; *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1083 (D.D.C. 1997).

**b. The ALJ's Conclusion that Otto Bock's and Freedom's MPKs Are Close Substitutes Is Supported by Overwhelming Evidence**

While acknowledging that the ALJ found the merging parties' products to be direct competitors, Respondent asserts that he failed to analyze whether they are also close substitutes. Appeal 23. Respondent is wrong. As his opinion makes clear, the ALJ thoroughly evaluated the closeness of substitution between C-Leg and Plié. ID 39-48. For example, the ALJ found that clinic customers testified C-Leg 4 and Plié 3 present "'similar componentry,'" use "'similar platforms,'" and "for most patients, C-Leg and Plié are 'functionally similar.'" ID 43 (quoting F. 538, 543, 554). He also concluded that C-Leg and Plié were the "top two MPK choices" for a "significant fraction of clinic customers," and were the two most widely used MPKs for numerous clinics, including the largest in the United States. ID 41; *see also* F. 499-512, 537-38. Such findings, as well as voluminous other record evidence, *see* (CCFF ¶¶ 1011-174), amply

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[4] Respondent also suggests the ALJ erred because he "did not find that Ottobock and Freedom were closest competitors and appeared to concede that they were not." Appeal 22. That was no error because the ALJ properly concluded that, "it is not necessary for the merging products to be each other's closest competitor in order for the merger to present a reasonable likelihood of unilateral effects." ID 43 (citing *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 569 (6th Cir. 2014); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 50, 83 (D.D.C. 2011)). Moreover, record evidence shows that Otto Bock and Freedom are very close competitors and the elimination of Freedom will result in higher MPK prices. *See* ID 40-49; CC Post-Tr. Br. 63-72; (CCFF ¶¶ 1008-174).

support the ALJ's conclusion that Plié and C-Leg are close substitutes and the Merger will result in substantial unilateral effects.

The ALJ also found that "a substantial history of Ottobock and Freedom responding competitively to each other in the MPK market" supported his conclusion that the Merger would result in unilateral effects. ID 43-47. Only by turning a blind eye to the countless internal documents and testimony from several of its own executives can Respondent argue that, "there is scant record" of vigorous head-to-head competition between Freedom and Otto Bock. Appeal 22. [redacted]

[redacted] ID 44-45; (CCFF ¶¶ 1028-33). Freedom responded to the launch of C-Leg 4 with the creation of the "Ideal Combo," reduced Plié 3 pricing, and other aggressive promotions, ID 46-47; (CCFF ¶¶ 1074-139); CC Post-Tr. Br. at 69-70, which, in turn, provoked a competitive response from Otto Bock, ID 47; (CCFF ¶ 1135). These are only a few of the many examples of direct, head-to-head competition between Freedom and Otto Bock in the U.S. MPK market that Respondent ignores.[5] *See generally* (CCFF ¶¶ 1008-174); CC Post-Tr. Br. 63-74.

#### c. The ALJ Considered Evidence that Plié and C-Leg Are "Sufficiently Different" from Other MPKs

Respondent further alleges that, in its view, the ALJ's "analysis totally ignores whether Ottobock's and Freedom's MPKs are 'sufficiently different' from rival MPKs and whether repositioning by those competitors would be unlikely." Appeal 23. Despite Respondent's claims, providing evidence of repositioning is Respondent's burden, not Complaint Counsel's in

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[5] Respondent misrepresents that, "the ID did not identify a single specific instance of head-to-head price competition between C-Leg 4 and Plié 3," Appeal 24; to the contrary, it discusses multiple instances. For example, the ALJ explained that POA "has been able, in negotiations with Ottobock, to rely on the option of purchasing Pliés 'to get better pricing on the C-Leg 4.'" ID 42 (quoting F. 547-48 and describing other instances).

establishing its *prima facie* case. *See H&R Block*, 833 F. Supp. 2d at 73 (citing *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000)). As discussed *infra* Section III.A.2.i, Respondent's assertions fell well short of meeting its burden to show repositioning would prevent competitive harm from the Merger.

Respondent's claim that "Össur, Endolite, and Proteor supply higher quality, better functioning MPKs than Freedom" is unsupported by the totality of the evidence. Appeal 24. The ALJ did not ignore the selective, self-serving testimony upon which Respondent relied; he considered, but rejected it because it was "not supported by the evidence." ID 4. MPKs sold by Össur, Endolite, and Proteor are more distant substitutes for C-Leg and Plié than Respondent's MPKs are for each other. *See infra* Section III.A.2.i. Össur is the most significant MPK manufacturer remaining, but its products are functionally different from C-Leg and Plié, as well as Freedom's next-generation Quattro, and many customers perceive Össur's Rheo to have significant safety and reliability issues. ID 51-52; (CCFF ¶¶ 1480-527). Endolite suffers from a legacy of poor quality and service, does not price as aggressively as Freedom, and has a market share of less than [redacted] despite selling MPKs in the United States for more than twenty years. ID 52-53; (CCFF ¶¶ 964, 1528-47). Proteor, the exclusive U.S. distributor of Nabtesco's MPK, has a tiny presence in the U.S. Market. Its "best-seller," [redacted] ID 53-54; (CCFF ¶¶ 1564-66), and many customers refuse to purchase it due to reliability and customer service concerns, (CCFF ¶¶ 1599-602).

Finally, Respondent dedicates a significant portion of its Appeal Brief to discussing the undisputed fact that Freedom and Otto Bock not only lower prices to compete with each other, but also occasionally with other MPKs, and some customers negotiate prices with multiple MPK

manufacturers. Appeal 24-28. But even if some customers also view third-party MPKs as substitutes, the ALJ properly determined that the "significant fraction of clinic customers" that view Otto Bock and Freedom as their top two MPK choices will still be harmed by the Merger. ID 48-49.

#### d. Additional Direct Evidence of Harm Not Weighed by the ALJ Further Undermines Respondent's Criticisms of Unilateral Effects

In the first step of Section 7's burden-shifting framework, the ALJ needed to decide only whether Complaint Counsel established a *prima facie* case. *See In re Polypore, Int'l, Inc.*, 149 F.T.C. 486, 800-801 (Mar. 1, 2010). While the ALJ did not need to evaluate any direct evidence of harm, he chose to evaluate a small fraction of the direct effects evidence submitted by Complaint Counsel, and concluded that it bolstered the *prima facie* case, ultimately finding it "more than sufficient" to meet Complaint Counsel's burden. ID 38, 48-49. As discussed *infra* Section III.A.3, he also acknowledged that additional evidence of unilateral harm may have made Complaint Counsel's case even stronger, but because Respondent failed to rebut the strong *prima facie* case, he did not need to evaluate that evidence. ID 87 n.42. This additional evidence, however, further undermines Respondent's criticisms of the ALJ's analysis of unilateral harm. For example, it proved that, post-Merger, Respondent's top executives recommended and took actions in furtherance of discontinuing or increasing the price of the Plié, concluding that was a profitable strategy due to the large amount of business Otto Bock expected to recapture. (CCFF ¶¶ 1392-404). Similarly, this additional evidence proved that Freedom's next-generation MPK, the Quattro, was expected to be a far closer competitor to C-Leg 4 than any other MPK, including Rheo, (CCFF ¶¶ 1179-209, 1230-318), something Respondent's executives were so concerned about they planned to reposition it away from C-Leg post-Merger, (CCFF ¶¶ 1405-11).

### 2. The ALJ Properly Analyzed and Rejected Respondent's Rebuttal Arguments and Defenses

Having concluded that the evidence was "more than sufficient to meet Complaint Counsel's prima facie burden," ID 3, the burden shifted to Respondent to "produc[e] evidence to cast doubt on the accuracy of the government's" evidence, *Polypore,*149 F.T.C. at 800. In rebuttal, Respondent claimed that "likely expansion by viable MPK competitors," "Freedom's imminent market exit pre-Acquisition," "bargaining power of clinics," "market dynamics that foster MPK competition," and "the potential for procompetitive efficiencies," overcame the *prima facie* case, Appeal 5, but after evaluating these arguments, the ALJ properly rejected them.

#### i. Remaining MPK Sellers Will Not Prevent Competitive Harm

Respondent bears the burden of showing that "ease of expansion is sufficient 'to fill the competitive void that will result if [it is] permitted to purchase' [its] acquisition target." *H&R Block*, 833 F. Supp. 2d at 73 (quoting *Swedish Match*, 131 F. Supp. 2d at 169); *see also FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 80 (D.D.C. 2015). To meet its burden, Respondent must do more than show that expansion would replace "*some* of the competition" lost to the Merger. *Swedish Match*, 131 F. Supp. 2d at 170 (emphasis added). The ALJ correctly held that Respondent failed to satisfy its burden. ID 51 ("[T]he evidence fails to justify the conclusion that any of these competitors are poised to expand in a way that is timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract any potential anticompetitive effects resulting from the Acquisition.").

Respondent presents two main criticisms of this conclusion. First, it claims the ALJ "ignored substantial evidence produced by Respondent" that Össur, Endolite, and Proteor had capacity to supply more MPKs in response to a future price increase. Appeal 9-10. Second,

Respondent argues that the ALJ erred by allegedly focusing "backward to the state of the market several years ago." Appeal 10. Both arguments lack merit.

Respondent's capacity argument is a straw man; there has never been a dispute over whether smaller suppliers have limited sales due to constraints on their manufacturing capacity. Simply having the ability to produce more MPKs, which are differentiated products, is insufficient to prevent harm from the Merger. Because many customers view MPKs from Össur, Endolite, and Proteor as more distant substitutes than Otto Bock's and Freedom's MPKs, *see* ID 51-54; (CCFF ¶¶ 1484-604), customers are unlikely to turn to their MPKs if Respondent increases its MPK prices. In reaching his conclusion that Respondent's repositioning argument did not rebut Complaint Counsel's *prima facie* case, the ALJ cited reliable evidence from multiple sources showing why each third-party MPK supplier would not "deter or counteract" the anticompetitive effects. *See* ID 51-52 (Össur); ID 52-53 (Endolite); ID 53-54 (Proteor).

Respondent's characterization of the ALJ's analysis as impermissibly backward looking is both nonsensical and incorrect. Of course Judge Chappell considered third-party MPK competitors' existing capabilities, reputations, and sales because such evidence informs whether their products "'are not close enough substitutes to the products offered by the merged firm to render a price increase by the merged firm unprofitable.'" ID 50 (quoting *Merger Guidelines* § 9.3). Using this well-established approach, the ALJ found, for example, Endolite's reputation to be relevant because "even if Endolite has the ability and willingness to expand, Endolite faces barriers arising from negative customer perception of the Endolite MPK." ID 53. In addition, the Initial Decision addresses the very type of forward-looking evidence that Respondent claims the ALJ disregarded. For example, with respect to Össur, the ALJ observed that, "Respondent does not point to any evidence of a plan for Össur to expand, or to any specific evidence

indicating the likelihood of an Össur expansion, which casts doubt on the timeliness and likelihood of an Össur expansion." ID 51 (citation omitted). Similarly, with respect to Proteor, the ALJ explained that, "Respondent does not claim that Nabtesco's sales will increase sufficiently to replace Freedom's sales." ID 53. Respondent does not address these important findings in its Appeal Brief.

Other record evidence further supports the ALJ's conclusion that repositioning will not prevent harm. Otto Bock's plan to discontinue or raise the price of the Plié post-Merger, and its belief that such a plan would be profitable, confirms that it knew that repositioning by any individual firm or all firms collectively would not prevent harm. (CCFF ¶¶ 1392-404). Similarly, evidence shows Freedom's next-generation "C-Leg Killer"—the Quattro—would compete more closely with Otto Bock's C-Leg than any other MPK, including Össur's Rheo. CC Post-Tr. Br. 74-80; (CCFF ¶¶ 1270-318).

Beyond these generalized arguments, Respondent also claims, incorrectly, that the ALJ either ignored evidence or cited unreliable evidence relating to the expansion potential of specific MPK manufacturers. On the contrary, the ALJ carefully considered each of these firms in concluding that they could not fill the competitive void left from the Merger.

**a. Össur**

Respondent asserts that, "Ottobock's closest substitute in the MPK market is Össur," making it "well-positioned to totally thwart any unilateral harm." Appeal 10-11. This argument was raised at trial, and the ALJ rejected it because the evidence did not support Respondent's claim. ID 51-52. On appeal, it is equally unpersuasive.

In contrast to the voluminous evidence of head-to-head price competition between Freedom and Otto Bock, *see* ID 40-49; F. 487-646; CC Post-Tr. Br. at 63-74, Respondent cited

no instances of price competition between Otto Bock and Össur in either its Post-Trial Brief or its Appeal Brief. Respondent's only support for its argument that Össur is a closer competitor to Otto Bock than Freedom is a single Otto Bock document and the testimony of a handful of clinicians, Appeal 10-11, yet even those are unavailing. Of the four clinic witnesses cited by Respondent, one testified that his clinic stopped using the Össur's MPK due to service issues, (CCFF ¶ 1514) (testimony of Rob Yates), and another testified it "feels unstable . . . [and] it tends to make the patient not trust it," (CCFF ¶ 1508) (testimony of Keith Watson). And Respondent ignores that numerous prosthetists and clinic owners harbor safety and reliability concerns about Össur's MPK technology. (CCFF ¶¶ 1493-516). After considering the evidence cited by Respondent and the voluminous contradictory evidence that clinicians and patients find Össur's MPK to be an unattractive alternative to C-Leg and Plié, the ALJ correctly concluded that Respondent failed to demonstrate expansion by Össur would be likely or sufficient to prevent anticompetitive effects from the Merger. *See* ID 51-52.

Respondent also contends that the Initial Decision "inaccurately relies on the testimony of three customers" for the conclusion that Össur's MPK is functionally different from C-Leg and Plié. Appeal 12. Not only is the ALJ's conclusion supported by the overwhelming weight of the evidence, *see* (CCFF ¶¶ 1483-85, 1491-99), including Freedom's Senior Product Manager, (CCFF ¶ 1495), but the functional differences were confirmed by Össur's Executive Vice President of R&D, who testified at trial that Össur's MPKs use a functionally different technology than C-Leg 4 or Plié 3, which are much more similar to each other than to the Rheo 3, (CCFF ¶¶ 1480-82).

Finally, Respondent's claim that Össur could produce an additional [REDACTED] [REDACTED] Appeal 11, even if accurate, is insufficient to satisfy Respondent's

burden, particularly when so many customers view Össur's MPKs as an unattractive alternative and would be harmed if they were forced to purchase them, ID 51-52; (CCFF ¶¶ 1483-92, 1501-16). In any event, the record contains no evidence Össur actually plans to expand. ID 51.

**b. Endolite**

Respondent argues that the ALJ ignored evidence of Endolite's post-2016 growth, as well as evidence that Endolite "has rehabilitated its MPK reputation." Appeal 14. As with Respondent's other claims that the ALJ "ignored" evidence, the ALJ explicitly stated that he reviewed and considered the entire record, but did not credit claims if "they were not supported by the evidence." ID 4. The overwhelming weight of the evidence showed that Endolite, with less than [REDACTED] of the U.S. MPK market and [REDACTED] was unlikely to replace the competition lost from the Merger. ID 52-53; *see also* (CCFF ¶¶ 964, 1531).

Moreover, the Initial Decision makes clear that the ALJ considered, and rejected, the very argument Respondent claims he ignored. He acknowledged, "Endolite has seen sales growth since the launch of the Orion 3 in September 2016," but also found that "some prosthetic clinics are reluctant to purchase Endolite's Orion MPK." ID 53. He also cited evidence that Endolite continues to fall short in sales and customer support. ID 53. Relying on testimony from Endolite's Executive Chairman, the ALJ explained that Endolite's strategic plan "did not specifically attribute the planned growth to growth in sales of MPKs in the United States" and Endolite had no plans for upgrades to its MPK. ID 52-53; *see also* (CCFF ¶ 1546). Thus, the ALJ correctly concluded that the evidence "casts doubt on the timeliness and likelihood of an Endolite expansion." ID 53.

Respondent also claims that the ALJ inappropriately relied on two clinic witnesses to support his conclusion that Endolite's MPKs face significant reputational barriers. Appeal 16. Their testimony is reliable,[6] but even if the Commission were to ignore those customers, a wealth of other evidence supports the ALJ's findings, including testimony of Endolite's Executive Chairman, Respondent's own documents, and Endolite's documents relating to its significant reputational issues. *See, e.g.*, ID 53; (CCFF ¶¶ 1533-38). Thus, the ALJ correctly concluded that "negative customer perception of the Endolite MPK" is a barrier to expansion. ID 53.

Finally, Respondent misleads the Commission by claiming Hanger's CEO testified that Hanger "could shift 100%" of its MPK purchases to Endolite. Appeal 15. On its face, the CEO's testimony does not address the feasibility or likelihood of Hanger shifting any MPK purchases to Endolite in response to a price increase by Respondent. (Tr. 1446-50). Instead, he was merely responding to the ALJ's hypothetical questions about the accuracy of Hanger's corporate projections and how internal incentives affect clinician MPK choices. (Tr. 1446-50); *see also* ID 56-57 (ALJ found Hanger did not assess feasibility of switching MPK purchases post-Merger).

#### c. Proteor

Respondent incorrectly asserts that the ALJ used "exaggerate[d] unreliable, limited evidence to reach the conclusion that 'many' customers have not heard of Nabtesco and that 'many' would not fit a Nabtesco Allux." Appeal 18. In reality, credible evidence from multiple sources supported the ALJ's conclusion that the "weight of the evidence is contrary to a

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[6] Respondent bases its contention that testimony from COPC and POA does not support the ALJ's conclusion, Appeal 16, on an incorrect and selective reading of those witnesses' testimony. For example, the CFO of COPC confirmed that his company purchased only a few Endolite MPKs in 2017 because "the quality of the Plié or back up to the C-Leg 4 is greater than the Endolite knee." (CCFF ¶ 1543); *see also* (CCFF ¶ 1539) (testifying that COPC practitioners "do not feel the [Endolite] knee functions as well as the Freedom or Ottobock knees").

conclusion that Nabtesco is capable of replacing lost competition." ID 54. For example, based on testimony from several clinics, the ALJ found that "[m]any of Ottobock's and Freedom's clinic customers are not familiar with MPKs manufactured by Nabtesco [and o]f the prosthetists who have heard of Nabtesco, many testified that they would not fit a Nabtesco MPK on a patient because of difficulties with customer service or concerns about the reliability of the MPK." ID 54; *see also* F. 667-68; (CCFF ¶¶ 1591, 1593, 1594-98). The ALJ's conclusion that repositioning by Proteor would not prevent harm is buttressed by the sworn testimony of the only Proteor executive Respondent called at trial, who described the company as a "tadpole in the ocean," ID 54, and explained that [redacted] (CCFF ¶ 1587); *see also* (CCFF ¶ 1585) (Freedom executive describing Allux as a "piece of crap knee"). Moreover, the ALJ's finding that Nabtesco has "an insignificant presence in the United States MPK market, with less than a [redacted] share," ID 54, is supported by undisputed sales data, F. 479-80; *see also* (CCFF ¶ 1562). Therefore, Respondent has fallen far short of satisfying its burden to demonstrate that Össur, Endolite, or Proteor would expand in a timely, likely, and sufficient manner to counteract the Merger's likely anticompetitive effects.

**ii. Respondent Failed to Meet its Burden to Show that Freedom Is a Failing Firm**

Under Supreme Court precedent and the *Merger Guidelines*, Respondent bears the burden of proving the three elements of the failing firm defense. *See United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974); *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 136-139 (1969); *Merger Guidelines* § 11. Failure to prove any element is fatal, *see Merger*

*Guidelines* §11; *United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 444-46 (D. Del. 2017), and Respondent failed on all three.

**a. Freedom Was Not at Risk of Imminent Failure**

Respondent alleges that, "[u]ndisputed evidence established that Freedom was unable to pay its insurmountable debt absent the Acquisition, and otherwise would have been liquidated." Appeal 40. In fact, overwhelming evidence carefully considered by the ALJ led him to properly conclude that Respondent failed to prove "that Freedom was at risk of imminent failure." ID 68; *see also FTC v. ProMedica Health Sys., Inc.*, 2011 WL 1219281, at *42 (N.D. Ohio 2011); *Merger Guidelines* § 11.

Focusing entirely on Freedom's financial performance between 2012 and 2016, Appeal 40, Respondent disregarded Freedom's financial turnaround and its above-plan performance, which began in 2016 and continued up until the Merger in September 2017. While considering Freedom's earlier financial performance, ID 62, the ALJ properly found that Freedom took a number of steps that improved its financial performance beginning in 2016, including hiring a new CEO, "replacing the company's chief operating officer and head of sales, revamping Freedom's sales[,] service structure, [] enhancing the productivity of its research and development pipeline," implementing a new strategic plan, and securing an additional ███ ██████ of capital from Freedom's equity investors. ID 62-63; *see also* CC Post-Tr. Reply Br. 105-08; (CCFF ¶¶ 1826-38). As a result, Freedom's top line revenues grew significantly in 2017, its EBITDA and cash flow were ahead of plan and the prior year's performance, and "the reality [was] that Freedom's financial position had significantly improved in 2017." ID 63; *see also* (CCFF ¶¶ 1847-908). Additionally, Freedom's research and development pipeline was "'the best it's ever been in the history of [the] company.'" ID 75.

Respondent falsely claims that the Initial Decision "incorrectly states that [Freedom's auditor] issued a clean audit opinion." Appeal 40. Ordinary course documents in the record and testimony from Freedom's CFO clearly demonstrate Freedom's 2016 audited financial statement was clean because it did not contain any "going concern qualification." (CCFF ¶¶ 1946-2012); CC Post-Tr. Br. 120-23.

In attempting to convince the Commission that Freedom's audited financial statement did not contain a clean audit opinion, Respondent obfuscates. Appeal 40. In its Appeal Brief, Respondent omits language in Note 1 of Freedom's financial statement that clearly explained Freedom had access to capital that ID 65; F. 818; *see also* (CCFF ¶¶ 1989-2012). In light of this evidence, the ALJ correctly concluded that, "[t]he audited financial statement for Freedom for the calendar year 2016 does

[7] Referring to the memo from Freedom's CFO, Respondent alleges that the "ID bolsters the 'legitimacy' of the Kim Memo . . . with findings that are demonstrably false and/or misleading." Appeal 40. Respondent does not explain how any of the ALJ's findings related to the memo are false or misleading. To the contrary, the ALJ correctly concluded that, "Respondent's attempt to challenge the legitimacy of the audit by challenging the competence and veracity of Freedom's CFO is unavailing." ID 65 (internal citation omitted). The ALJ explained that Freedom's CFO received input from other executives and testified that he strived to be truthful in communications with the outside auditor, who was required to obtain reasonable assurances that the financial statements were free from material misstatements. ID 65; *see also* CC Post-Tr. Br. 120-22; (CCFF ¶¶ 1953-88). Despite its allegations, Respondent did not produce any evidence showing that the independent audit or related financial statements were improper, inadequate, or incorrect.

not support Respondent's argument that Freedom would not have been able to meet its financial obligations in the near future." ID 64.

Even setting aside Freedom's financial turnaround and its audited financial statements, Respondent has not demonstrated, as is its burden, that Freedom would have been liquidated, but-for the Merger. *Citizen Publ'g Co.*, 394 U.S. at 137. Respondent's claim that Freedom's lenders would have forced liquidation is based entirely "on the after-the-fact testimony" of two Freedom witnesses, ID 66, and "Respondent presented no evidence from Freedom's lenders indicating that they would have" done so, ID 75; *see also* (CCFF ¶¶ 2037-39, 2041-43). Respondent did not call lender witnesses because the banks had no incentive to force Freedom into liquidation given the proceeds from doing so would not make them as much money as a sale of Freedom. *See* ID 66; CC Post-Tr. Reply Br. 108-09. As the ALJ explained, the evidence shows that "the Lenders repeatedly amended the Credit Agreement and twice extended the maturity date of the debt, rather than foreclosing." ID 66.

#### b. Respondent Failed to Show Freedom Would Not Have Been Able to Reorganize in Bankruptcy

Respondent asserts—without explanation—that Freedom would not have been able to reorganize successfully under Chapter 11 of the Bankruptcy Act. Appeal 40-41. The ALJ held that it was "not necessary to resolve whether, as a matter of law, Respondent must prove that the prospects for Freedom's reorganization under the bankruptcy laws were dim or nonexistent because Respondent has not proven the other elements of the failing company defense." ID 68. Record evidence shows, however, that Freedom did not initiate Chapter 11 bankruptcy proceedings, and never seriously explored doing so. (CCFF ¶¶ 2061, 2063-71).

#### c. Freedom Failed to Make Good-Faith Efforts to Elicit Reasonable Alternative Offers

With respect to the third prong of the failing firm defense, Respondent rehashes several arguments properly rejected by the ALJ. First, Respondent claims Freedom seriously pursued refinancing the company as an alternative to the Merger. Appeal 41. The ALJ correctly concluded, however, that, "Freedom's preferred avenue was a sale to a strategic buyer." ID 69. From the outset of the sales process, Freedom's shareholders strongly preferred to sell Freedom to a strategic buyer rather than dilute their equity by bringing on new investors. ID 69-70; CC Post-Tr. Brief at 126-128; (CCFF ¶¶ 2100-18). For example, according to Freedom's investment banker in June 2017, [redacted] (CCFF ¶ 2105). Thus, the ALJ appropriately concluded that "[t]he assertion that Freedom's preferred avenue was a refinancing is contradicted by evidence . . . ." ID 69.

Respondent also claims it "introduced substantial evidence of good-faith efforts to find reasonable alternative offers," Appeal 41, which under the *Merger Guidelines*, must be "offer[s] to purchase the assets of the failing firm for a price above the liquidation value of those assets," *Merger Guidelines* § 11, n.16. Contrary to Respondent's assertion, overwhelming evidence shows Freedom did not undertake the required search for alternatives to its clearly anticompetitive sale to Otto Bock. Instead, Freedom focused only on maximizing the sale price of the company, and ignored or precluded other offers above liquidation value. ID 71-72; (CCFF ¶¶ 2119-63). As the ALJ found, "[f]rom October 2016 to April 2017, neither Freedom nor Moelis contacted any potential alternative strategic buyers besides Ottobock." ID 70. When they finally did contact a small number of potential acquirers, "Freedom's objective was to get bids as high as possible." ID 71; *see also* (CCFF ¶ 2120) (Freedom's then-CEO testifying he

was ██████████. Freedom failed to meet the strict requirements of the failing firm defense because its search was "clearly focused on obtaining what it perceived to be [the acquired firm's] fair value, not an offer above the liquidation value, which is likely to be less." *Energy Sols.*, 265 F. Supp. 3d at 446; *see United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 556 (1971)*; FTC v. Harbour Grp. Invs., L.P.*, 1990 WL 198819, at *4 (D.D.C. 1990); (CCFF ¶¶ 2119, 2203-11) (Freedom's investment banker did not reach out to companies without ██████████, well above any estimate of Freedom's liquidation value). As a result, "several smaller prosthetics companies testified that they were not contacted during Freedom's sales process, but would have had an interest in acquiring Freedom," including ██████████. ID 71; (CCFF ¶¶ 2124, 2145-46, 2154, 2160-61). For example, when Nabtesco contacted Freedom expressing "interest in acquiring Freedom," (CCFF ¶ 2124), Freedom demurred because it already had "several good offers in hand," (CCFF ¶ 2125); *see also* ID 72; F. 877-78.

Finally, Respondent argues that the Commission should ignore Össur's bid because it was "unreasonably low" and would have created a greater danger to competition than Freedom's sale to Otto Bock.[8] Appeal 41-42. Össur's second-round bid was ██████████. ID 72. Based on reliable evidence, the ALJ held that "[t]o the extent that there is a liquidation threshold, Freedom's tangible and intangible assets combined would have a liquidation value of at most ██████████." ID 73; *see also* (CCFF ¶¶ 2194-211). In addition, Respondent failed to prove that an Össur acquisition of Freedom would pose the same or greater danger to competition than the Merger in any relevant market. *See* ID 74, (CCFF ¶¶ 2228-34), CC Post-Tr. Br. 133 (no

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[8] Respondent's claim that Össur's offer was not a *bona fide* offer is factually unsupported. *See* ID 72 (explaining why the argument that Össur's bid was not sufficiently concrete or binding "is without merit"); *see also* (CCFF ¶¶ 2174-93).

proof of harm to purported prosthetic foot market); ID 73 (no proof of greater danger to competition in MPK market). Thus, Össur's offer easily qualifies as a "reasonable alternative offer." Because Respondent failed to meet any element of the failing firm defense, the ALJ properly rejected it.

**iii. Respondent Failed to Show that Power Buyers Exist that Could Prevent Post-Merger MPK Price Increases**

The ALJ likewise properly rejected Respondent's power buyer argument related to Hanger concluding that, "Ottobock's acquisition of Freedom is likely to increase Ottobock's bargaining leverage post-Acquisition, regardless of Hanger's pre-Acquisition power as a large, important customer." ID 56. Respondent does not identify any legal errors or unsupported factual findings in the Initial Decision; it merely asserts on appeal that clinic customers "receive discounts from MPK suppliers based on the overall volume of MPKs they buy" and clinics have "buying power via their ability to switch MPK brands easily." Appeal 21. This argument does nothing to undermine Complaint Counsel's *prima facie* case.

The ALJ properly held that, "Courts do not consider proof of the existence of power buyers 'as itself independently adequate to rebut a *prima facie* case.'" ID 55 (quoting *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 440 (5th Cir. 2008). Instead, "[t]he ability of large buyers to keep prices down . . . depends on the alternatives these large buyers have available to them." *Sysco*, 113 F. Supp. 3d at 48 (internal citations omitted). Respondent's focus on volume discounts and the general proposition that customers can switch between MPK brands is misplaced. "In assessing a power buyer argument, the court should 'examine the choices available to powerful buyers and how those choices likely would change due to the merger,' keeping in mind that '[n]ormally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer.'" *FTC v. Wilh. Wilhelmsen*

*Holding ASA*, 2018 WL 4705816, at *22 (D.D.C. 2018) (quoting *Merger Guidelines* § 8); *see also Chi. Bridge*, 534 F.3d at 440.

Here, "Ottobock and Freedom are Hanger's top two suppliers of MPKs" and post-Merger, Hanger plans to continue offering both products to patients. ID 56. As Freedom's Chairman testified, Hanger's ability to threaten to move its Plié volume to C-Leg is what allowed it to negotiate lower prices. ID 56; (CCFF ¶ 3090). Thus, the elimination of Freedom as an independent competitor will enable Otto Bock to extract higher prices from Hanger than it would have been able to absent the Merger. *See ProMedica*, 2012 WL 1155392, at *45.

Additionally, MPK manufacturers "charge different prices to different clinic customers, and different clinic customers have different bargaining leverage in negotiations with MPK suppliers." ID 57. Therefore, even if Hanger could somehow avoid an MPK price increase because of its size, this would do nothing to help "smaller buyers" of MPKs, which comprise [redacted] (CCFF ¶¶ 3109-10), resist such a price increase, ID 57-58 (citing *Polypore*, 2010 WL 9549988, at *32).

**iv. Respondent Failed to Show that Insurer Reimbursement Rates Will Prevent Post-Merger MPK Price Increases**

Respondent's argument that "the reimbursement system for MPKs constrains the ability of Ottobock to raise prices above competitive levels" is false and flatly contradicted by the record. Appeal 19. The ALJ directly addresses this claim, concluding that reimbursement rates would not constrain an MPK price increase. ID 58-60. While acknowledging evidence from Respondent that reimbursement rates may set a *ceiling* on the price an MPK manufacturer can charge a clinic, the ALJ correctly explained that, "it does not logically follow that there is no room in the space between the price of the MPK and the ceiling for reimbursement for Respondent to impose a price increase." ID 59.

The record shows that Medicare and other third-party payers reimburse prosthetic clinics the same fixed dollar amount for all MPKs, including Plié 3 and C-Leg 4, (CCFF ¶¶ 381-83, 748-49, 3039-40), and many, if not all, clinics currently pay substantially more for C-Leg 4 than Plié 3, but still fit C-Leg 4 profitably, ID 59; F. 493; (CCFF ¶¶ 3052-53). Thus, as the ALJ explained, "based on the price differential between the Plié 3 and the C-Leg 4, Respondent could impose a 10% increase in the price of the Plié 3 post-Acquisition, and the cost would still be lower than a C-Leg 4 (F. 736-737), which suggests there is room to raise the price of the Plié 3, notwithstanding the insurance reimbursement ceiling." ID 59; *see also* (CCFF ¶¶ 824-27). Additionally, Respondent's argument ignores the fact that "[a] clinic's profit for fitting an MPK takes into account the reimbursement on all components of the lower-limb prosthetic, not solely the reimbursement on the MPK," and therefore, as even Respondent's expert conceded, "a clinic may earn a profit on the prosthetic leg as a whole even if the clinic does not make a profit on the MPK component." ID 59 (citing F. 739); *see also* (CCFF ¶¶ 2959-61, 3038, 3041-47).

**v. Respondent's Alleged Efficiencies Are Not Verifiable or Merger Specific and It Failed to Show Any Purported Savings Would Be Passed on to Consumers**

Although Respondent has the burden to demonstrate that efficiencies offset any likely anticompetitive effects caused by the increase in market power produced by the Merger, *see Polypore*, 149 F.T.C. at 801, it devotes a mere two sentences to efficiencies in its Appeal Brief, Appeal 28. Respondent does not identify any legal or factual errors in the Initial Decision, nor does Respondent claim that the ALJ ignored any evidence in his opinion. *See* ID 81-87.

The ALJ's conclusion that Respondent failed to demonstrate how any of its alleged efficiencies are verifiable or merger specific, or would be passed on to consumers, was supported by overwhelming evidence and case law. *Merger Guidelines* § 10; *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-22 (D.C. Cir. 2001); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 137 n.15

(D.D.C. 2016); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 350-51 (3d Cir. 2016). For example, the ALJ found that, "Respondent has failed to demonstrate that the integration team sufficiently verified the synergies estimates in its financial model, or that the estimates are non-speculative," ID 85, and that "the evidence shows that Ottobock had not yet made decisions regarding integration plans . . . ." ID 85. These findings—unchallenged by Respondent—are supported by abundant additional evidence that Respondent's synergies targets were too preliminary and speculative to be verified. *See, e.g.*, (CCFF ¶¶ 1748-65). Similarly, with respect to merger-specificity and pass-through, Respondent's own efficiencies expert "d[id] not address whether Freedom could have independently achieved the asserted efficiencies, or achieved them through another type of transaction" and "did not attempt to calculate an estimate of the efficiencies that would be realized by consumers." ID 86; *see also* CC Post-Tr. Reply Br. 66-67; (CCFF ¶¶ 1770-81).

Respondent's sole remaining argument is its unsupported claim that a "Dual Brand" Strategy would somehow result in efficiencies, without describing any of these purported efficiencies or attempting to explain how they would be achieved. Appeal 28. This assertion is insufficient to satisfy Respondent's burden, particularly given Respondent's economic expert conceded that he [REDACTED] (CCFF ¶ 1815). In any event, the dual brand strategy is mere cover for what would be in reality an anticompetitive reduction in output [REDACTED]. (CCFF ¶¶ 1395-97); *see H&R Block*, 833 F. Supp. 2d at 85 (explaining dual-brand strategy would stifle "price and feature competition"). Any efficiencies that arise from such output reductions cannot be cognizable. *See Penn State Hershey*, 838 F.3d at 348-49; *Heinz*, 246

F.3d at 722; *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222-25 (11th Cir. 1991); *Merger Guidelines* § 10.

**3. The ALJ Acknowledged Additional Evidence of Anticompetitive Effects, which Was Unnecessary to Find the Merger Illegal, May Have Buttressed Complaint Counsel's Case**

Even if, *arguendo*, the Commission were to credit some or all of Respondent's rebuttal arguments, Complaint Counsel would still satisfy its burden of persuasion and demonstrate the Merger violates Section 7. *Chi. Bridge*, 534 F.3d at 423; *United States v. Baker Hughes*, *Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990). In addition to its strong *prima facie* case, Complaint Counsel presented voluminous direct effects evidence proving (1) the Merger eliminated competition that was set to intensify between Freedom's and Otto Bock's next-generation MPKs; (2) Otto Bock's core Merger rationale was to keep Freedom's MPK business out of the hands of a competitor; (3) Respondent had post-Merger plans to discontinue or raise the price of the Plié and reposition Quattro to avoid cannibalizing its C-Leg sales; and (4) the Merger has already harmed competition and consumers. The ALJ found it unnecessary to address this evidence because Respondent "failed to successfully rebut the prima facie proof of reasonably likely anticompetitive effects based on market structure and direct competition between Ottobock and Freedom," and "[w]hether or not such additional proof exists would not change the result in this case." ID 87 n.42 (internal citation omitted). Should the Commission determine that engaging in the third step of the burden-shifting framework is warranted, this evidence would be more than sufficient to prove that the Merger has harmed and will continue to harm consumers and violates Section 7.

There is a rich record proving that the Merger eliminated competition that was set to intensify between Freedom and Otto Bock's next-generation MPKs. At the time of the Merger,

(CCFF ¶¶ 1175, 1193, 1207-09, 1213, 1449). Freedom executives and engineers nicknamed Quattro the "C-Leg 4 killer," (CCFF ¶¶ 1230, 1232-36, 1266-80), because it possessed . Freedom executives viewed Quattro as a "blockbuster" that would greatly increase its MPK sales and market share, (CCFF ¶¶ 1271-75, 1283, 1285), while Otto Bock executives viewed it as a both before, (CCFF ¶¶ 1355, 1361, 1370), and after the Merger, (CCFF ¶¶ 1405-11).

Evidence also proves that Otto Bock viewed its acquisition of Freedom as a way to eliminate a close competitor and increase its already dominant position in the MPK market. Otto Bock viewed Plié's market share as (CCFF ¶ 1367); *see also* CC Post-Tr. Br. 85-86, and a core (CCFF ¶ 1355); *see also* CC Post-Tr. Br. 82-85. The record is clear that both before, (CCFF ¶¶ 1350, 1353-54, 1362, 1363), and after the Merger, (CCFF ¶¶ 1392-411), Otto Bock planned to raise MPK prices and deprive consumers of the benefits that competition between Quattro and the C-Leg would have provided. Consistent with that plan, more than a month and a half after Otto Bock acquired Freedom, Respondent's high-ranking executives recommended that going forward the Plié 3 and C-Leg 4 (CCFF ¶¶ 1395, 1404). Specific recommendations included to (CCFF ¶ 1394), and to evaluate

Finally, Complaint Counsel proved that the Merger has already harmed competition. At the time of the Merger, Freedom was on the verge of launching an upgrade to Plié 3, which would have provided customers a new higher-quality MPK. (CCFF ¶¶ 1456-58, 1463).

(CCFF ¶ 1468). (CCFF ¶¶ 1449, 1452-54), and the testimony and actions of Respondent's own witnesses show that the Merger drastically altered the incentives of Otto Bock and Freedom to compete against each other, to the great detriment of consumers, (CCFF ¶¶ 1473, 1475-77).

### B. The ALJ Properly Concluded Respondent's Speculative Divestiture Would Not Restore Competition and Did Not Undermine Complaint Counsel's *Prima Facie* Case

Whether the Commission assesses Respondent's "planned divestiture" as a proposed remedy, as it should,[9] or as a rebuttal argument, Respondent bears the burden to show that "the divestiture . . . replace[s] the competitive intensity lost as a result of the merger;" and its proposal is "sufficiently non-speculative for the court to evaluate its effects on future competition."

---

[9] Because the ALJ held that Respondent failed to show that of its divestiture would restore competition, he did not need to determine whether, in a consummated merger, divestiture proposals that would restore competition could be analyzed as a rebuttal argument, or are relevant only to determining the appropriate remedy. ID 81 n.37. While the outcome of this case does not turn on this question because Respondent's arguments fail either way, evidence related to divestiture is not material to the determination that Respondent consummated the Merger in violation of Section 7. When consummated, the effect of the transaction was "substantially to lessen competition." 15 U.S.C. § 18 (2012). A future divestiture cannot undo that violation. The Commission, therefore, should assess the legality of the transaction without regard to divestiture which are only material to the remedy that the Commission may order or to assessing the likelihood and significance of continuing anticompetitive effects after any divestiture occurs. *In re Otto Bock HealthCare North America, Inc.*, Docket No. 9378, Opinion and Order of the Commission at 4-6 (Apr. 18, 2018) ("Commission Order").

*United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (internal quotations omitted); *see also Staples*, 190 F. Supp. 3d at 137 n.15. Respondent failed to prove either, and its claim that these [redacted] undermine Complaint Counsel's *prima facie* case is incorrect.

### 1. The ALJ Properly Found Complaint Counsel Established a Strong *Prima Facie* Case Despite Respondent's Proposed [redacted]

Respondent argues that, "by failing to consider the Acquisition together with the MPK Divestiture," the ALJ's "finding of a strong presumption of anticompetitive effects in the face of a clean-sweep divestiture was plain error." Appeal 6-7. Respondent contends that, "[t]here is no basis for a presumption of anticompetitive effects where the acquirer has agreed to divest the acquisition target's entire business in the alleged relevant product market." Appeal 28. This is simply wrong, both factually and as a matter of law.

In a consummated merger, the Commission has held that the legality of the transaction can be assessed without regard to any proposed divestiture, but a planned divestiture can "impact . . . the existence or magnitude of likely post-divestiture competitive harms." Commission Order at 6. This is consistent with the holding in *Aetna*, a non-consummated merger case, that, "[i]n rebuttal, a defendant may introduce evidence that a proposed divestiture . . . effectively preserve[s] competition in the relevant market." *Aetna*, 240 F. Supp. 3d at 60 (internal quotation omitted). Thus, whether as a remedy for a violation or in rebuttal, Respondent bears the burden of showing that a proposed divestiture negates the anticompetitive effects of the transaction. *Aetna*, 240 F. Supp. 3d at 60; *Staples* 2016, 190 F. Supp. 3d at 137 n.5; ID 77.

Respondent's myopic focus on whether its speculative divestiture [redacted] would reduce the change in concentration in the MPK market below certain thresholds is insufficient to satisfy its burden. *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 5 (2004) ("Attachment A") ("Restoring competition requires

replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels" because "assessing the competitive strength of a firm purchasing divested assets requires more analysis than simply attributing to this purchaser past sales associated with those assets"). Respondent failed to show that its contingent and uncertain divestiture [redacted] which lack several essential assets, intellectual property rights, and other terms, would counteract the anticompetitive effects of the Merger and restore competition in the U.S. MPK market. ID 89-91. As explained in the ALJ's analysis of all [redacted] [redacted] "the trial record lacks sufficient evidence to conclude that Respondent has met the required burden." ID 81.

Additionally, "Nothing in Otto Bock's [proposed [redacted]] . . . addresses the alleged change in incentives attributable to the consummated merger or the competitive harm that the Complaint alleges followed therefrom." Commission Order at 4. As described *supra* Section III.A.3, the Merger resulted in anticompetitive product delays and had an immediate and significant impact on Freedom's incentives and operations, harming competition and consumers. *See* (CCFF ¶¶ 1446-79). A divestiture someday would not, as a matter of law, change the anticompetitive nature of a transaction that closed more than a year and a half ago in violation of Section 7, nor could it undo the harm that has already occurred. Commission Order at 4-5.

### 2. The ALJ Properly Concluded Respondent's Divestiture [redacted] Were Speculative

Respondent argues that the ALJ, in holding that its divestiture [redacted] were speculative, "erred by imposing a standard that would effectively require that any partial divestiture [] be completed *before* the termination of litigation over the challenged transaction." Appeal 30 (emphasis in original). Contrary to Respondent's claim, the ALJ explicitly acknowledged that a "'divestiture need not be iron clad for a court to consider it.'" ID 77

(quoting *Aetna*, 240 F. Supp. 3d at 60). The ALJ explained that Respondent's burden was "producing evidence that the divestiture will actually occur." ID 77. With respect to the [redacted] [redacted],[10] the ALJ appropriately concluded that Respondent "failed to demonstrate that [redacted]

With respect to the [redacted], the ALJ concluded that substantial uncertainty surrounded [redacted]

[10] In hopes of improving the efficiency and fairness of future Part 3 proceedings, Complaint Counsel brings a procedural issue related to [redacted] to the Commission's attention. Respondent signed [redacted] [redacted] during the middle of trial and succeeded in introducing [redacted] into evidence, in part, by relying on ambiguous language in the Commission Order stating, "Respondent remains entitled to *develop and present* relevant evidence regarding [redacted]
Complaint Counsel requests any guidance the Commission can provide on how to interpret this language and any restrictions that apply to developing new divestiture proposals post-discovery or during trial and entering such proposals into evidence.

With all of these open issues, and more, *see* (CCFF ¶¶ 2377-437), the ALJ correctly determined that none of Respondent's meet the basic requirement that they be "sufficiently non-speculative for the court to evaluate its effects on future competition." *Aetna*, 240 F. Supp. 3d at 60.

**3. The ALJ Properly Concluded Respondent's Limited Asset Sale Divestiture Would Not Restore Competition**

Even if were sufficiently non-speculative for consideration, Respondent bears the burden to demonstrate that the proposal would restore competition. *Aetna*, 240 F. Supp. 3d at 60. Citing the exclusion of Freedom's prosthetic foot products, important technology, and critical employees, the ALJ concluded that, "Respondent has failed to demonstrate that a partial divestiture limited to Freedom's MPK Assets would be sufficient to restore competition in the MPK market." ID 90. He was right to do so.

Respondent's argument that "[t]here is no valid basis in the evidence to conclude that [redacted] is contradicted by overwhelming evidence cited by the ALJ. The ALJ held that [redacted] ID 90-91. Respondent claims this finding was erroneous, arguing that foot products are unnecessary to manufacture or sell MPKs. Appeal 34-35. But credible evidence from a variety of sources clearly shows that Freedom's prosthetic feet have been a key element to Freedom's success in the U.S. MPK market:

> "The purpose of the ideal combo promotion was to regain Plié's sales lost to the C-Leg 4. F. 616-617. Furthermore, the promotion has been successful in increasing Freedom's Plié 3 sales, including by converting multiple customer accounts to the Plié from other MPKs, and has incentivized customers to buy more Freedom MPKs and feet. F. 617, 624-626. . . . Freedom's ideal combo promotion has also impacted Ottobock's sales. F. 637."

ID 91; *see also* (CCFF ¶¶ 1084, 2550-67). Transfer of [redacted]

The ALJ also found that Freedom's MPKs share [redacted]

### C. The ALJ's Proposed Order Is Necessary to Restore Competition

According to the Supreme Court, "[c]omplete divestiture is particularly appropriate where . . . acquisitions violate the antitrust laws." *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972); *see also United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 328-29 (1961). Consistent with this approach, the ALJ's Order requires Otto Bock to divest the ongoing Freedom business, including Freedom's MPKs, [12] Order § II.A.1; Order Appendix B. Respondent has failed to show a divestiture narrower in scope than the ALJ's Order would restore competition.

[11] The (CCFF ¶¶ 2725-872).

[12] The Order allows Respondent to retain certain prosthetic foot assets so long as the competitive intensity of Freedom in the MPK market is not compromised. Order § II.A.1, Appendix A.

### 1. A Divestiture Narrower than the ALJ's Order Would Not Restore Competition

Respondent argues that, "[a]ny remedy should be limited to divestiture of the assets in the alleged MPK-only relevant market." Appeal 42. Respondent asserts that its proposal to sell a limited set of handpicked assets "would cure any harm claimed by CC" without any explanation, analysis, or citation to the record apart from the unremarkable observation that the Commission and courts have sometimes approved settlements involving partial divestitures. Appeal 43. Respondent has the burden "to demonstrate that a remedy other than full divestiture would adequately redress any violation," *In re Fruehauf Corp.*, 90 F.T.C. 891, 1977 FTC LEXIS 9, at *3 n.1 (Dec. 21, 1977); it has failed to do so.

As detailed *supra* Section III.B.3, Respondent seeks to exclude critical assets. For example, Respondent refuses to divest to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As the Commission observed in its 2017 Remedy Study, "buyers of less than an ongoing business—buyers of 'selected assets'—did not always succeed at maintaining competition, suggesting that the more limited scope of the asset package increases the risk that a remedy will not succeed." FTC's Merger Remedies 2006-2012 (January 2017) at 5.

Respondent's approach is also problematic because, given the limited scope of assets it proposes to sell, [REDACTED] would need to rely on Respondent for important aspects of their operations going forward. (CCFF ¶¶ 2286, 2309, 2329, 2352). [REDACTED]

(CCFF ¶¶ 2309-11, 2404-06); CC Post-Tr. Br. 164-65. In sum, Respondent has not shown that any divestiture narrower in scope than the ALJ's Order would fully restore competition, nor could it given the ALJ's proper finding that Freedom's MPK products are part of an integrated business that shares important assets, intellectual property, and employees with other product areas. ID 89.

**2. The Proposed Order Is Not Punitive**

Respondent claims that any remedy broader than a divestiture of its limited set of handpicked MPK assets is punitive and contrary to prior settlements and litigated cases that involved partial divestitures. Appeal 42-43. Respondent relies heavily on *In re Jim Walter Corp.*, 90 F.T.C. 671, 1977 FTC LEXIS 10 (F.T.C. 1974), *vacated on other grounds*, 625 F.2d 1976 (5th Cir. 1980), to incorrectly suggest that the inclusion of assets related to Freedom's prosthetic feet would be punitive. In contrast to Freedom, which sells its MPKs and feet bundled together and has its MPK operations deeply integrated with the rest of its business, the roof products at issue in *Jim Walter* were "separable and severable" from other business divisions which produced unrelated products manufactured at different facilities and sold through separate sales forces. *Id.* 117-18. Notably, the Commission in *Jim Walter* recognized that "it is certainly within our power to order divestiture of assets unrelated to the asphalt roofing business, particularly if such action is needed to assure the viability and attractiveness to would-be purchasers of the divested entity." *Id.* at 206-07. Moreover, in direct contradiction to Respondent's assertion, the Commission in that case also held that the company's asbestos

mining assets, which were not in the alleged relevant market, needed to be divested because they were used to produce the company's roofing products. *Id.* at 208.

Respondent's citations to settlements and other cases involving partial divestitures are similarly unavailing. Appeal 43. The law is clear that complete divestiture is "the usual and proper remedy where a violation of Section 7 has been found." *Polypore*, 149 F.T.C. at 678 (citing *du Pont*, 366 U.S. at 329; *Ford Motor Co.*, 405 U.S. at 573). Respondent has failed to meet its burden to prove any lesser divestiture would fully restore competition. *See* ID 89 (noting Respondent "does not state any objections to any specific provision of the Proposed Order"). Every provision in the ALJ's Order is necessary to restore competition and address particular deficiencies in Respondent's divestiture [redacted] *See* CC Post-Tr. Br. 186-91; *see also* Attachment A to CC Post-Tr. Br. (explaining purpose of and precedent for each significant provision in Proposed Order). For example, the ALJ concluded that credible evidence showed Freedom's MPK assets could not be easily separated out from the whole of Freedom's business because the MPK assets share technology, employees, and manufacturing facilities. ID 89-90; *see also* (CCFF ¶¶ 2501-23, 2638-53, 2678-87, 2729-834). Additionally, the ALJ held that the "evidence shows that Freedom has leveraged its foot products to stimulate sales of the Plié 3 and compete with Ottobock's C-Leg." ID 90; *see also* (CCFF ¶¶ 2547-84). The ALJ's Order tailors the specific assets to be included in the divestiture to the needs of the particular buyer, Order § I.I, I.J, I.M, I.N, II.A.1, thus avoiding the sale of unnecessary assets. In sum, the ALJ's remedy is well-supported by case law and properly designed to ensure that the divestee fully restores competition in the U.S. MPK market.

### D. Respondent's Constitutional Claims Lack Merit and Have Been Waived

In its Appeal Brief, Respondent makes, for the first time, various vague and unsupported Constitutional claims challenging the legitimacy of the FTC's enforcement proceeding. Appeal

6. Respondent did not raise any of these Constitutional arguments in its pleadings or while the matter was pending before the ALJ, but rather waited until the ALJ had ruled against it. "By waiting until this late date, Respondent has waived th[ese] claim[s]." *In re 1-800 Contacts, Inc.*, Docket No. 9372, Opinion of the Commission at 58 (Nov. 7, 2018). Additionally, by compressing the presentation of its broad Appointments Clause, removal, Due Process, and Equal Protection arguments into only a few sentences each, Respondent has "failed to present a complete showing of constitutional harm," resulting in the waiver of its claims. *Id.* (citing *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1392-93 (7th Cir. 1986)). Regardless of whether the Commission deems these arguments waived, Respondent's cursory and unsupported Constitutional claims also fail on the merits.

Citing *Lucia v. SEC,* 138 S. Ct. 2044 (2018), Respondent alleges that "[t]he ALJ's hiring violates the Appointments Clause, and the post-hoc ratification effectuated by the Commission is insufficient to cure the constitutional defect." Appeal 43-44. Respondent cites no authority and presents no argument why such ratification was insufficient. In fact, Judge Chappell's appointment is proper under the Constitution, as the Commission already held addressing these same arguments in *1-800 Contacts*, which was decided after *Lucia*. *1-800 Contacts,* at 58 (holding "unlike in *Lucia v. SEC*, where the Court found that the ALJ was unconstitutionally appointed by SEC staff members, the FTC's ALJ was appointed by the Commission, which is a 'Head[] of Department[]'").

Respondent's vague claim that the process by which Judge Chappell may be removed is unconstitutional similarly lacks merit and was addressed directly by the Commission in *1-800-Contacts*. Appeal 44 (including only four conclusory sentences in furtherance of its claim and citing only one case: *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484

(2010)). In *1-800-Contacts*, the Commission unambiguously held that, "if the Administrative Procedure Act's 'good cause' standard for removal is properly construed—*i.e.*, to allow removal of an ALJ for failure to perform adequately or to follow agency policies, and to limit the Merit Systems Protection Board's role to determining whether a factual basis exists for the agency's proffered grounds for removal—the APA gives the President a constitutionally adequate degree of control over ALJs." *1-800 Contacts,* at 58-59. Respondent offers no explanation why the Commission's clear ruling in *1-800-Contacts* is incorrect.

Citing no cases, Respondent also asserts that, "Part 3 litigation fails to afford respondents with procedural due process," pointing without explanation to "one-sided evidentiary rules that relax the admissibility and authentication rules as they relate to CC" and the Commission's denial of additional time for Respondent to file its Appeal Brief. Appeal 44-45 (including just three conclusory sentences). To the extent Respondent is challenging the FTC's administrative procedures on Constitutional Due Process grounds, Respondent identifies no authority and fails to sufficiently allege any elements of a Due Process violation or how it has made a showing that would justify the Commission ruling in its favor. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Finally, Respondent claims, again citing no case law, that the never-executed 2002 FTC/DOJ clearance agreement violates the Constitution's Equal Protection Clause. Appeal 45 (including just four conclusory sentences). As written, the specific Constitutional violation alleged by Respondent remains unclear, but to the extent it seeks to challenge the clearance process on Equal Protection grounds, Respondent has failed to allege the requisite elements of a viable claim or explain how it has made a showing that would justify the Commission ruling in

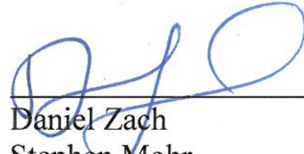
its favor. *See, e.g.*, *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673 (2012); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976).

## IV. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Commission conclude that Otto Bock's acquisition of Freedom violated Section 7 of the Clayton Act and Section 5 of the FTC Act, as alleged in the Complaint, enter the ALJ's Order, and provide any such other relief deemed necessary and proper.

Dated: July 9, 2019

Respectfully submitted,



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# ATTACHMENT A

PUBLIC

# ANTITRUST DIVISION POLICY GUIDE

# TO

# MERGER REMEDIES

## U. S. DEPARTMENT OF JUSTICE

**Antitrust Division**

**October 2004**

# TABLE OF CONTENTS

Page

I. Overview . . . . . . . . . . 1

II. Guiding Principles . . . . . . . . . . 2

III. Fashioning the Remedy . . . . . . . . . . 7

A. Structural Remedies Are Preferred . . . . . . . . . . 8

B. A Divestiture Must Include All Assets Necessary for the Purchaser To Be an Effective, Long-Term Competitor . . . . . . . . . . 9

C. Divestiture of an Existing Business Entity Is Preferred . . . . . . . . . . 12

D. The Merged Firm Must Divest Rights to Critical Intangible Assets . . . . . . . . . . 15

E. Conduct Relief Is Appropriate Only in Limited Circumstances . . . . . . . . . . 18

IV. Implementing the Remedy . . . . . . . . . . 26

A. A Fix-It-First Remedy Is Acceptable if It Eliminates the Competitive Harm . . . . . . . . . . 26

B. A Hold Separate Provision Is a Necessary Component of Most Consent Decrees . . . . . . . . . . 29

C. The Divestiture Should Be Accomplished Quickly . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 29

D. The Antitrust Division Must Approve Any Proposed Purchaser . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 31

E. A Successful Divestiture Does Not Depend on the Price Paid for the Divestiture Assets . . . . . . . . . . . . . . . . . . 33

F. Restraints on the Resale of Divestiture Assets Will Ordinarily Not Be Permitted . . . . . . . . . . . . . . . . . . . . . . . 35

G. Seller Financing of Divestiture Assets Is Strongly Disfavored . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 36

H. Crown Jewel Provisions Are Strongly Disfavored . . . . . . 37

I. Selling Trustee Provisions Will Ordinarily Be Included in Consent Decrees . . . . . . . . . . . . . . . . . . . . 38

V. Consent Decree Compliance and Enforcement . . . . . . . . . . . . . 41

A. The Consent Decree Must Bind the Entities Against Which Enforcement May Be Sought . . . . . . . . . 42

B. The Consent Decree Must Provide a Means to Investigate Compliance . . . . . . . . . . . . . . . . . . . . . . . . . 43

C. The Antitrust Division Will Ensure that Remedies Are Fully Implemented . . . . . . . . . . . . . . . . . . . 43

D. The Antitrust Division Will Enforce Consent Decrees . . . 44

## I. Overview

The Antitrust Division is authorized to challenge acquisitions and mergers ("mergers") under Section 15 of the Clayton Act, 15 U.S.C. § 25, and Section 4 of the Sherman Act, 15 U.S.C. § 4. If the Division has concluded that a merger may substantially lessen competition, it can "fix" the problem in several ways. The Division may seek a full-stop injunction that would prevent the parties from consummating the transaction. The Division may choose, instead, to negotiate a settlement (a consent decree) or accept a "fix-it-first" remedy that allows the merger to proceed with modifications that restore or preserve the competition.[1]

The purpose of this Guide is to provide Antitrust Division attorneys and economists with a framework for fashioning and implementing appropriate relief short of a full-stop injunction in merger cases. The Guide focuses on the remedies available to the Division and is designed to ensure that those remedies are based on sound legal and economic principles and are closely related to the identified competitive harm. The Guide also sets forth policy issues that may arise in connection with different types of relief and offers Division attorneys and economists guidance on how to resolve them.

This Guide is a policy document, not a practice handbook. It is not a compendium of decree provisions, and it does not list or give "best practices" or the particular language or provisions that should be included in any given decree. Rather, it sets forth the policy considerations that should guide Division attorneys and economists when fashioning remedies for

[1] A consent decree is a binding agreement between the Division and defendants that is filed publicly in federal district court and, upon entry, becomes a binding court order. With a fix-it-first remedy, in contrast, the parties modify or "fix" the transaction before consummation to eliminate any competitive concern. There is no complaint or other court filing. Although a fix-it-first remedy technically preserves, rather than restores, competition, this Guide uses the terms restore and preserve interchangeably. *See infra* Section IV.A.

anticompetitive mergers. The Guide is intended to provide Division attorneys and economists with the tools they need — the pertinent economic and legal principles, appropriate analytical framework, and relevant legal limitations — to craft and implement the proper remedy for the case at hand.

Remedial provisions in Division decrees must be appropriate, effective, and principled. While there is no need to reinvent the wheel with each decree, neither is it appropriate to include a remedy in a decree merely because a similar provision was included in one or more previous decrees, particularly where there has been no clear articulation of the purpose behind the inclusion of that provision. There must be a significant nexus between the proposed transaction, the nature of the competitive harm, and the proposed remedial provisions. Focusing carefully on the specific facts of the case at hand will not only result in the selection of the appropriate remedies but will also permit the adoption of remedies specifically tailored to the competitive harm.

The Guide has five sections. The section immediately following this Overview describes guiding principles governing merger remedies. The third section discusses the policies for fashioning merger remedies, while the fourth addresses implementation of those remedies. Each of these sections sets forth the Antitrust Division's general policies for a variety of remedial issues, including the legal and economic support for those policies and the caveats to those policies.

Finally, the last section of the Guide addresses steps the Division will take to ensure that, once a remedy is established, it is effectively complied with and enforced.

## II. Guiding Principles

The following principles guide the development of remedies in all Antitrust Division merger cases:

- **The Antitrust Division Will Not Accept a Remedy Unless There Is a Sound Basis for Believing a Violation Will Occur.** Before recommending a specific remedy, there should be a sound basis for believing that the merger would violate Section 7 of the Clayton Act and that the resulting harm is sufficient to justify remedial action. The Division should not seek decrees or remedies that are not necessary to prevent anticompetitive effects, because that could unjustifiably restrict companies and raise costs to consumers. Consequently, even though a party may be willing to settle early in an investigation, the Division must have sufficient information to be satisfied that there is a sound basis for believing that a violation will otherwise occur before negotiating any settlement.

- **Remedies Must Be Based upon a Careful Application of Sound Legal and Economic Principles to the Particular Facts of the Case at Hand.** Carefully tailoring the remedy to the theory of the violation is the best way to ensure that the relief obtained cures the competitive harm.[2] Before recommending a proposed remedy to an anticompetitive merger, the staff should satisfy itself that there is a close, logical nexus between the recommended remedy and the alleged violation — that the

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[2] Ford Motor Co. v. United States, 405 U.S. 562, 575 (1972) (In a Section 7 action, relief "necessarily must 'fit the exigencies of the particular case.'"); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 133 (1969); United States v. United States Gypsum Co., 340 U.S. 76, 89 (1950) ("In resolving doubts as to the desirability of including provisions designed to restore future freedom of trade, courts should give weight to . . . the circumstances under which the illegal acts occur."); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 726 (1944) ("The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions."); Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1228 (D.C. Cir. 2004) ("[T]he court carefully considered the 'causal connection' between Microsoft's anticompetitive conduct and its dominance of the market . . . ."); United States v. Microsoft Corp., 253 F.3d 34, 105-07 (D.C. Cir. 2001) (Relief "should be tailored to fit the wrong creating the occasion for the remedy."); Yamaha Motor Co. v. FTC, 657 F.2d 971, 984 (8th Cir. 1981) (Relief barring certain vertical restrictions "goes beyond any reasonable relationship to the violations found."); United States v. Microsoft Corp., 231 F. Supp. 2d 144, 154, 202 (D.D.C. 2002), *aff'd sub nom,* 373 F.3d 1199 (D.C. Cir. 2004).

remedy fits the violation and flows from the theory of competitive harm. Effective remedies preserve the efficiencies created by a merger, to the extent possible, without compromising the benefits that result from maintaining competitive markets.

This assessment will necessarily be fact-intensive. It will normally require determining (a) what competitive harm the violation has caused or likely will cause and (b) how the proposed relief will remedy that particular competitive harm. Only after these determinations are made can the Division decide whether the proposed remedy will effectively redress the violation and, just as importantly, be no more intrusive on market structure and conduct than necessary to cure the competitive harm. Basing remedies on the application of sound economic and legal analysis to the particular facts of each case avoids merely copying past relief proposals or adopting relief proposals divorced from guiding principles.

- **Restoring Competition Is the Key to an Antitrust Remedy.** Once the Division has determined that the merger is anticompetitive, the Division will insist on a remedy that resolves the competitive problem. Accepting remedies without analyzing whether they are sufficient to redress the violation involved is a disservice to consumers.

  Although the remedy should always be sufficient to redress the antitrust violation, the purpose of a remedy is not to enhance premerger competition but to restore it. The Division will insist upon relief sufficient to restore competitive conditions the merger would remove. Restoring competition is the "key to the whole question of an antitrust remedy,"[3] and restoring competition is the only appropriate goal with respect to crafting merger remedies.

[3] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

The Supreme Court has stressed repeatedly that the purpose of an antitrust remedy is to protect or restore competition.[4] Restoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels. Thus, for example, assessing the competitive strength of a firm purchasing divested assets requires more analysis than simply attributing to this purchaser past sales associated with those assets.

- **The Remedy Should Promote Competition, Not Competitors.** Because the goal is reestablishing competition — rather than determining outcomes or picking winners and losers — decree provisions should promote competition generally rather than protect or favor particular competitors.[5]

- **The Remedy Must Be Enforceable.** A remedy is not effective if it cannot be enforced.[6] Remedial provisions that are too vague to be enforced or that could be construed when enforced in such a manner as to fall short of their intended purpose can render useless the enforcement effort that went into investigating the transaction and obtaining the decree, leaving the competitive harm unchecked. The same is true of a decree that fails to bind a person or entity necessary to implementing the remedy. A defendant will scrupulously obey a decree only when the decree's

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[4] *Ford Motor Co.*, 405 U.S. at 573; *du Pont*, *id.*

[5] *E.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458-59 (1993); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990); Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 116-17 (1986); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); Massachusetts v. Microsoft Corp., 373 F.3d at 1211, 1230; United States v. Microsoft Corp., 253 F.3d at 58.

[6] *See, e.g.,* New York v. Microsoft Corp., 224 F. Supp. 2d 76, 137 (D.D.C. 2002), *aff'd sub nom*. Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004) ("Plaintiffs' definition is vague and ambiguous, rendering compliance with the terms of Plaintiffs' remedy which are reliant on this definition to be largely unenforceable.").

meaning is clear, and when the defendant and its agents know that they face the prospect of fines or imprisonment if they disregard the decree. Courts are certain to impose such sanctions only when (a) the decree provisions are clear and understandable and (b) the defendant's agents knew, or should have known, about the decree provisions.[7]

Consequently, decree provisions must be as clear and straightforward as possible, always focusing on how a judge not privy to the settlement negotiations is likely to construe those provisions at a later time.[8] Likewise, care must be taken to avoid potential loopholes and attempted circumvention of the decree. Attention must also be given to identifying those persons who must be bound by the decree to make the proposed relief effective and to ensuring that the judgment contains whatever provisions are necessary to put them on notice of their responsibilities.

- **The Antitrust Division Will Commit the Time and Effort Necessary to Ensure Full Compliance with the Remedy.** It is contrary to our law enforcement responsibilities to obtain a remedy and then not monitor and, if necessary, enforce it. Our work is not over until the remedies mandated in our consent

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[7] *E.g.*, United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998); United States v. NYNEX Corp., 8 F.3d 52, 54 (D.C. Cir. 1993) ("There are three essential elements of criminal contempt under 18 U.S.C. § 401(3): (1) there must be a violation, (2) of a clear and reasonably specific order of the court, and (3) the violation must have been willful. United States v. Turner, 812 F.2d 1552, 1563 (11th Cir. 1987). The Government carries the burden of proof on each of these elements, and the evidence must be sufficient to establish guilt beyond a reasonable doubt."); United States v. Smith International, Inc., 2000-1 Trade Cas. ¶ 72,763 (D.D.C. 2000).

[8] *See* New York v. Microsoft Corp., 224 F. Supp. 2d at 100 ("Moreover, the case law counsels that the remedial decree should be 'as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know [ ] their duties and unintended contempts may not occur.'"); International Salt Co. v. United States, 332 U.S. 392, 400 (1947).

> decrees have been fully implemented, which means that decrees that place continuing obligations on defendants must be monitored. This requires, in the first instance, that decrees be drafted with sufficient reporting and access requirements to keep us apprised of how the decree is being implemented, and then a continuing commitment of Division resources to decree compliance and enforcement. Responsibility for enforcing all of the Division's outstanding judgments lies with its civil sections, to which the judgments are assigned according to the current allocation of industries or commodities among those sections, with assistance from a criminal section in criminal contempt cases.

## III. Fashioning the Remedy

Merger remedies take two basic forms: one addresses the *structure* of the market, the other the *conduct* of the merged firm. Structural remedies generally will involve the sale of physical assets by the merging firms. In some instances, market structure can also be changed by requiring, for example, that the merged firm create new competitors through the sale or licensing of intellectual property ("IP") rights.[9] A conduct remedy usually entails injunctive provisions that would, in effect, manage or regulate the merged firm's postmerger business conduct. As discussed below, in some cases the remedy may require both structural and conduct relief.

### A. Structural Remedies Are Preferred

The speed, certainty, cost, and efficacy of a remedy are important measures of its potential effectiveness. Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market. A carefully crafted divestiture decree is "simple, relatively easy to administer,

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[9] U.S. v. 3D Systems Corp., 2002-2 Trade Cas. ¶ 73,738. (D.D.C. 2001).

and sure" to preserve competition.[10] A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.

Conduct remedies suffer from at least four potentially substantial costs that a structural remedy can in principle avoid. First, there are the direct costs associated with monitoring the merged firm's activities and ensuring adherence to the decree. Second, there are the indirect costs associated with efforts by the merged firm to evade the remedy's "spirit" while not violating its letter. As one example, a requirement that the merged firm not raise price may lead it profitably, and inefficiently, to reduce its costs by cutting back on quality — thereby effecting an anticompetitive increase in the "quality adjusted" price.

Third, a conduct remedy may restrain potentially procompetitive behavior. For instance, a requirement that the merged firm not discriminate against its rivals in the provision of a necessary input can raise difficult questions of whether cost-based differences justify differential treatment and thus are not truly discriminatory. Firms often sell to a wide range of customers, some of which have very intense demands for the product and would be willing to pay a high price based on that demand and others of which are not willing to pay nearly so much. When this is the case, and when price discrimination is feasible, permitting the firm to charge low prices to customers that have a low demand for the product and higher prices to customers that have a high demand for the product can increase not only the firm's profits, but total output and consumer welfare as a whole. Requiring the firm to charge a single price to all may, in such circumstances, result in a price that excludes the low demand group entirely.

Fourth, even where "effective," efforts to regulate a firm's future conduct may prevent it from responding efficiently to changing

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[10] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 331 (1961); *see generally* California v. American Stores Co., 495 U.S. 271, 280-81 (1990) ("[I]n Government actions divestiture is the preferred remedy for an illegal merger or acquisition.").

market conditions. For all of these reasons, structural merger remedies are strongly preferred to conduct remedies.[11]

### B. A Divestiture Must Include All Assets Necessary for the Purchaser To Be an Effective, Long-Term Competitor

The assets consolidated in a merger may be tangible (factories capable of producing automobiles or raw materials used in the production of some other final good) or intangible (patents, copyrights, trademarks, or rights to facilities such as airport gates or landing slots). The goal of a divestiture is to ensure that the purchaser[12] possesses both the means and the incentive to maintain the level of premerger competition in the market(s) of concern.[13]

This requires a clear identification of the assets a competitor needs to compete effectively in a timely fashion and over the long-term. Any divestiture should address whatever obstacles (for example, lack of a distribution system or necessary know-how) lead to the conclusion that a competitor, absent the divestiture, would not be able to discipline a merger-generated increase in market power.[14] That is, the divestiture assets must be substantial enough to enable the purchaser to maintain the premerger level of competition, and should be sufficiently comprehensive that the purchaser will use them in the relevant market and be unlikely to liquidate or redeploy

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[11] *See* discussion *infra* Section III.E.

[12] The use of "purchaser" in this Guide refers to the third-party purchaser of the divested tangible or intangible assets from the merging firms.

[13] *See* Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'. . . Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.") (citation omitted).

[14] S*ee, e.g.,* White Consol. Indust. Inc. v. Whirlpool Corp., 612 F. Supp. 1009 (N.D. Ohio), *vacated on other grounds*, 619 F. Supp. 1022 (N.D. Ohio 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986) (court analyzes sufficiency of a proposed divestiture package to restore effective competition).

them.[15]

If, for example, a constraint is the time or the incentive necessary for a potential entrant or small incumbent to construct production facilities, then sufficient production facilities should be part of the divestiture package. If the assets being combined through the merger are valuable brand names or other intangible rights, then the divestiture package should include a brand or a license that enables its purchaser to compete quickly and effectively. In markets where an installed base of customers is required in order to operate at an effective scale, the divested assets should either convey an installed base of customers to the purchaser or quickly enable the purchaser to obtain an installed customer base.

In any event, there are certain intangible assets that likely should be conveyed whenever tangible assets are divested. Many of these simply provide valuable information to the purchaser — for example, documents and computer records providing the purchaser with customer information or production information, research results, computer software, and market evaluations. Others pertain to patents, copyrights, trademarks, other IP rights, licenses, or access to key intangible inputs (for example, access to a particular range of broadcast spectrum) that are necessary to allow for the most productive use of any tangible assets being divested, or of any tangible assets already in the hands of the purchaser.

The package of assets to be divested must not only allow a purchaser quickly to replace the competition lost due to the merger, but also provide it

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[15] *See* Chemetron Corp. v. Crane Co., 1977-2 Trade Cas. ¶ 61,717 at 72,930 (N.D. Ill. 1977). In a merger between firm A and firm B, the Division generally would be indifferent as to which firm's assets are divested, despite possible qualitative differences between the firms' assets, so long as the divestiture restores competition to the premerger level. However, if the divestiture of one firm's assets would not restore competition, then the other firm's assets must be divested. For example, if firm A's productive assets can only operate efficiently in combination with other assets of the firm, while firm B's productive assets are free standing, the Division likely would require the divestiture of firm B's assets.

with the *incentive* to do so.[16] Unless the divested assets are sufficient for the purchaser to become an effective and efficient competitor, the purchaser may have a greater incentive to deploy them outside the relevant market.

A final issue to consider is whether and when it may be appropriate to permit flexibility in the specification of the divestiture assets. Although the appropriate identification of the divestiture assets is sometimes obvious, either due to the nature of the business or the homogeneity of potential purchasers, this is not always the case. The circumstances of potential bidders may vary in ways that affect the scope of the assets each would need to compete quickly and effectively. For example, one potential purchaser might require certain distribution assets and another may not. In other cases, the Division may be indifferent between two alternative sets of divestiture assets — for example, a manufacturing facility owned by merging firm A versus a similar facility owned by merging firm B, or even two differently configured sets of assets, either of which would enable a purchaser to maintain the premerger level of competition in the affected market(s). The Division recognizes the need for flexibility in defining the divestiture assets in such cases.

However, once the Division files a proposed consent decree, Division policy requires that the decree include a precise description of the package of assets that, when divested, will resolve the Division's competitive concerns by maintaining competition at premerger levels.[17] This will ordinarily require the identification of a single set of divestiture assets in the consent decree. In rare circumstances, the decree may include a description of more than one set of assets the divestiture of which would be acceptable to the Division, with the defendant permitted to sell any of the described asset packages during the initial divestiture period.[18] If, at any time after the decree is filed, the Division

[16] See *infra* Section IV.D. for a further discussion of the characteristics of an acceptable purchaser.

[17] Nothing, however, prohibits the merged firm from selling *additional* assets not specified in the decree.

[18] The decree may specify that a selling trustee have similar flexibility to sell the
(continued...)

and the defendant agree that the sale of an asset package not described in the consent decree will resolve the competitive concerns raised by the proposed transaction, the consent decree must be modified to describe this new divestiture package and the reasons this new divestiture is appropriate must be set forth in the moving papers.[19]

### C. Divestiture of an Existing Business Entity Is Preferred

As stated above, any divestiture must contain at least the minimal set of assets necessary to ensure the efficient current and future production and distribution of the relevant product and thereby replace the competition lost through the merger. The Division favors the divestiture of an existing business entity that has already demonstrated its ability to compete in the relevant market.[20] An existing business entity should possess not only all the physical assets, but also the personnel, customer lists, information systems, intangible assets, and management infrastructure necessary for the efficient production and distribution of the relevant product. Where an existing business entity lacks certain of these characteristics, additional assets from the merging firms will need to be included in the divestiture package.

An existing business entity provides current and potential customers with a track record they can evaluate to assure themselves that the unit will continue to be a reliable provider of the relevant products. Importantly, an existing business entity's track record establishes a strong presumption that it can be a viable and effective competitor in the markets of concern going forward. It has, in a very real sense, been tested by the market.

Conversely, a set of assets that comprises only a portion of an existing

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[18](...continued)
alternative sets of assets or may require the trustee to sell only one of the described sets of assets.

[19] However, a minor deletion of assets from the divestiture package may not require a decree modification.

[20] In some cases, an existing business entity may be a single plant that produces and sells the relevant product; in other cases, it may be an entire division.

business entity has not demonstrated the ability effectively to compete. Such a divestiture almost invariably raises greater concern about the viability or competitiveness of the purchaser, perhaps because it is missing some unanticipated yet valuable component.

The Division should scrutinize carefully the merging firm's proposal to sell less than an existing business entity because the merging firm has an obvious incentive to sell fewer assets than are required for the purchaser to compete effectively going forward. Further, at the right price, a purchaser may be willing to purchase these assets even if they are insufficient to produce competition at the premerger level. A purchaser's interests are not necessarily identical to those of the public, and so long as the divested assets produce something of value to the purchaser (possibly providing it with the ability to earn profits in some other market or enabling it to produce weak competition in the relevant market), it may be willing to buy them at a fire-sale price regardless of whether they cure the competitive concerns.

**Caveats: 1. Divestiture of Less than an Existing Business Entity May Be Considered if There Is No Existing Business Entity Smaller than Either of the Merging Firms and a Set of Acceptable Assets Can Be Assembled from Both of the Merging Firms**

- There may be situations where there is no obvious existing business entity smaller than either of the merging firms. In limited circumstances, it may be possible to assemble an acceptable set of assets from both of the merging firms to create a viable divestiture. However, the Division must be persuaded that these assets will create a viable entity that will restore competition.

**2. Divestiture of Less than an Existing Business Entity Also May Be Considered When Certain of the Entity's Assets Are Already in the Possession of, or Readily Obtainable in a Competitive Market by, the Potential Purchaser**

- The Division will approve the divestiture of less than an existing business entity if the evidence clearly demonstrates that certain of the entity's assets already are in the possession of, or readily obtainable in a competitive market by, the potential purchaser (e.g., general accounting or computer programming services). For example, if the likely purchaser already has its own distribution system, then insisting that a comparable distribution system be included in the divestiture package may create an unwanted and costly redundancy. In such a case, divesting only the assets required efficiently to design and build the relevant product may be appropriate.

### 3. Divestiture of More than an Existing Business Entity May Be Considered when It Is Necessary to Restore Competition

- Divesting an existing business entity, even if the divestiture includes all of the production and marketing assets responsible for producing and selling the relevant product, will not always enable the purchaser fully to replicate the competition eliminated by the merger. For example, in some industries, it is difficult to compete without offering a "full line" of products. In such cases, the Division may seek to include a full line of products in the divestiture package, even when our antitrust concern relates to only a subset of those products. Similarly, although the merger creates a competitive problem in a United States market, divestiture of a world-wide business may be necessary to restore competition. More generally, integrated firms can provide scale and scope economies that a purchaser may not be able to achieve after obtaining the divested assets. When available evidence suggests that this is likely to be the case (such as where only large integrated firms manage to remain viable in the marketplace), the entity that needs to be divested may actually be the firm itself, and blocking the entire transaction rather than accepting a divestiture

may be the only effective solution.

### D. The Merged Firm Must Divest Rights to Critical Intangible Assets

Where the critical asset is an intangible one — e.g., where firms with alternative patent rights for producing the same final product are merging — structural relief must provide one or more purchasers with rights to that asset.[21] Such rights can be provided either by sale to a different owner or through licensing.[22]

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[21] A critical asset is one that is necessary for the purchaser to compete effectively in the market in question. When a patent covers the right to compete in multiple product or geographic markets, yet the merger adversely affects competition in only a subset of these markets, the Division will insist only on the sale or license of rights necessary to maintain competition in the affected markets. In some cases, this may require that the purchaser or licensee obtain the rights to produce and sell only the relevant product. In other circumstances, it may be necessary to give the purchaser or licensee the right to produce and sell other products (or use other processes), where doing so permits the realization of scale and scope economies necessary to compete effectively in the relevant market.

[22] United States v. National Lead Co., 332 U.S. 319, 348 (1947) (courts may order mandatory patent licensing as relief in antitrust cases where necessary to restore competition). When the divestiture involves licensing, the Division will generally insist on fully paid-up licenses rather than running royalties for two reasons. First, running royalty payments, even if they are less expensive to the licensee over the lifetime of the license, add a cost to the licensee's production and sale of incremental units, tending to increase the licensee's profit-maximizing price. The result will be less competition than the two merging firms had previously been providing. Second, running royalties require a continued relationship between the merged firm and the purchaser, which could soften competition between them. However, the Division may consider the use of running royalties if (a) no deal would otherwise be struck between the merged firm and the licensee (perhaps because the firms differ greatly in their estimates of future revenue streams under the license) and (b) blocking the deal entirely would likely sacrifice merger-specific efficiencies worth preserving.

Also, the Division will not generally require royalty free licenses since parties should ordinarily be compensated for the use or sale of their property, intangible as well as tangible. *See id.* at 349 ("[T]o reduce all royalties automatically to a total of zero, regardless of their nature and regardless of their number, appears, on its face, to be inequitable without special proof to support such a conclusion."); Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1231

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When the remedy requires divestiture of intangible assets, often an issue arises as to whether the merged firm can retain rights to these assets, such as the right to operate under the divested patent itself. Because such intangible assets have the peculiar economic property that use of the asset by one party need not preclude unlimited use of that very same asset by others, there may be in this sense no cost to allowing the seller to retain the same rights as the purchaser.

Nonetheless, in the context of a merger, permitting the merged firm to retain access to the critical intangible assets may present a significant competitive risk. Because the purchaser of the intangible assets will not have the right to exclude all others (specifically, the merged firm), it may face a greater challenge in differentiating its product from rivals and therefore be a lesser competitive force in the market. Also, if the purchaser is required to share rights to an intangible asset (like a patent or a brand name), it may not engage in competitive conduct (including investments and marketing) that it might have engaged in otherwise. For example, the purchaser may face greater risks of misappropriation by its rival of future "add on" investments or marketing activities. Where the purchaser is unable effectively to differentiate its offering from that of the merged firm, this may weaken its ability and incentive to compete as aggressively as the two formerly independent firms had been competing premerger. Moreover, where multiple firms have rights to the same trademark or copyright, *none* may have the proper incentive to promote and maintain the quality and reputation of the brand. In these circumstances, the Division is likely to conclude that permitting the merged firm to retain rights to the critical intangible assets will prevent the purchaser from restoring effective competition and, accordingly, will require that the merged firm relinquish all rights to the intangible assets.[23]

However, there may be other circumstances when the merged firm

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[22](...continued)
(D.C. Cir. 2004).

[23] For example, the Division required the exclusive licensing of brand names in United States v. Interstate Bakeries Corp., 1996-1 Trade Cas. ¶ 71,271 (N.D. Ill. 1995).

needs to retain rights to the intangible assets to achieve demonstrable efficiencies – which are not otherwise obtainable through an efficient licensing agreement with the purchaser following divestiture – and a non-exclusive license is sufficient to restore competition and assure the purchaser's future viability and competitiveness. These conditions are more likely to be satisfied in, for example, the case of production process patents than with final product patents, copyrights, or trademarks. This is because the purchaser is almost certain to rely on the latter to distinguish its products from incumbent products. In contrast, patented production technology that is shared, in addition to having the beneficial effect of lowering both producers' marginal costs, is less likely significantly to affect competition since the production process generally does not affect the purchaser's ability to differentiate its product. Under these circumstances, the merged firm will likely be permitted to retain certain rights to the critical intangible assets and may only be required to provide the purchaser with a non-exclusive license.[24]

There also may be circumstances when licensing the intangible assets to multiple firms – or perhaps even to "all comers" – is necessary to replace the competition lost through the merger.[25] This might be the case, for example, if the number one and two firms merge and there is a significant gap between those firms and the competitive significance of smaller firms. Licensing to more than one of those smaller firms or new entrants may be required to replace the competition eliminated by the merger.

### E. Conduct Relief Is Appropriate Only in Limited Circumstances

As discussed above, conduct remedies generally are not favored in merger cases because they tend to entangle the Division and the courts in the operation of a market on an ongoing basis and impose direct, frequently substantial, costs upon the government and public that structural remedies can

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[24] *See, e.g.,* United States v. 3D Systems Corp., 2002-2 Trade Cas. ¶ 73,738 (D.D.C. 2001).

[25] *See, e.g.,* United States v. Miller Industries, Inc., 2001-1 Trade Cas. ¶ 73,132 (D.D.C. 2000); United States v. Cookson Group plc, 1994-1 Trade Cas. ¶ 70,666 (D.D.C. 1993).

avoid. However, there are limited circumstances when conduct remedies will be appropriate: (a) when conduct relief is needed to facilitate transition to or support a competitive structural solution, i.e., when the merged firm needs to modify its conduct for structural relief to be effective or (b) when a full-stop prohibition of the merger would sacrifice significant efficiencies and a structural remedy would also sacrifice such efficiencies or is infeasible. In either circumstance, the costs of the conduct relief must be acceptable in light of the expected benefits.

#### 1. Conduct Relief as an Adjunct to a Structural Remedy

Limited conduct relief can be useful in certain circumstances to help perfect structural relief. One example of a potentially appropriate transitional conduct provision is a *short-term* supply agreement. While *long-term* supply agreements between the merged firm and third parties on terms imposed by the Division are generally undesirable,[26] *short-term* supply agreements on occasion can be useful when accompanying a structural remedy. For example, if the purchaser is unable to manufacture the product for a limited transitional period (perhaps as plants are reconfigured or product mixes are altered), a short-term supply agreement can help prevent the loss of a competitor from the market, even temporarily. In such a case, the potential problems arising from supply agreements are more limited, given their short duration, and may be outweighed by their ability to maintain another competitor during the interim.

Similarly, *temporary* limits on the merged firm's ability to reacquire personnel assets as part of a divestiture may at times be appropriate to ensure

[26] Given the merged firm's incentive not to promote competition with itself, competitors reliant upon the merged firm for product or key inputs are likely to be disadvantaged in the long term. Contractual terms are difficult to define and specify with the requisite foresight and precision, and a firm compelled to help another compete against it is unlikely to exert much effort to ensure the products or inputs it supplies are of high quality, arrive as scheduled, match the order specifications, and satisfy other conditions that are necessary to restore competition. Moreover, close and persistent ties between two or more competitors (as created by such agreements) can serve to enhance the flow of information or align incentives that may facilitate collusion or cause the loss of a competitive advantage.

that the purchaser will be a viable competitor. The divestiture of any portion of a business unit would normally involve the transfer of personnel from the merging firms to the purchaser of the assets. Incumbent employees often are essential to the productive operation of the divested assets, particularly in the period immediately following the divestiture (i.e., they may be integral to efficient operation of the other assets that are being divested). Current employees may have uncommon technical knowledge of particular manufacturing equipment or may be the authors of essential software. While knowledge is often transferrable or reproducible over time, the immediate loss of certain employees may substantially reduce the ability of the divested entity to compete effectively, at least at the outset. To protect against this impairment, the Division may prohibit the merged firm from re-hiring these employees for some limited period.[27]

Restricting the merged firm's right to compete in final output markets or against the purchaser of the divested assets, even as a transitional remedy, is strongly disfavored. Such restrictions directly limit competition in the short term, and any long-term benefits are inherently speculative. For this reason, the Division is unlikely to impose them as part of a merger remedy. When the purchaser appears incapable of surviving or competing effectively against the merged firm without such restrictions, the Division is likely to seek a full-stop injunction against the transaction.

Finally, in addition to temporary or transitional conduct remedies, there may be occasions when continuing conduct relief is needed to effectuate or bolster the structural remedy. For example, there can be instances under the Capper-Volstead Act, 7 U.S.C. § 291, and other statutes where antitrust exemptions could become applicable if the divested assets were owned by

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[27] *See, e.g.,* United States v. AlliedSignal, Inc., 2000-2 Trade Cas. ¶ 73,023 (D.D.C. 2000); United States v. Aetna, Inc., 1999-2 Trade Cas. ¶ 72,730 (N.D.Tex. 1999). Of course, in a situation in which there are a limited number of key employees who are essential to any purchaser competing effectively in the market, the Division will scrutinize very carefully whether divestiture is an appropriate remedy. If the Division cannot be satisfied that the key personnel are likely to become and remain employees of the purchaser, a more appropriate action may be to block the entire transaction.

persons having certain characteristics. In those rare situations, a conduct provision providing that the merged firm and the purchaser of the divested assets cannot sell the divested assets to a person having those characteristics might be appropriate, if the efficiencies gained from allowing the merger to go forward are high.[28]

### 2. Stand-Alone Conduct Relief

While conduct remedies are used in limited circumstances as an adjunct to structural relief in merger cases, the use of conduct remedies standing alone to resolve a merger's competitive concerns is rare[29] and almost always in industries where there already is close government oversight. Stand-alone conduct relief is only appropriate when a full-stop prohibition of the merger would sacrifice significant efficiencies and a structural remedy would similarly eliminate such efficiencies or is simply infeasible.

Both horizontal and vertical mergers present the potential to create efficiencies.[30] Where merger-specific scale, scope, or other economies are

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[28] An example of such a provision is found in the Final Judgment in United States v. Dairy Farmers of America, 2001-1 Trade Cas. ¶ 73,136 (E.D. Pa. 2000).

[29] For example, between October 1, 1993 and September 30, 2003, the Division filed about 113 merger cases. Less than ten had conduct relief without any structural remedy, and most of those cases involved the regulated telecommunications industry and the defense industry. *See* United States v. MCI Communications Corp, 1994-2 Trade Cas. ¶ 70,730 (D.D.C. 1994), *modified*, 1997-2 Trade Cas. ¶ 71,935 (D.D.C. 1997) (transparency provision); United States v. Sprint Corp., 1996-1 Trade Cas. ¶ 71,300 (D.D.C. 1996) (same); United States v. Tele-Communications, Inc., 1996-2 Trade Cas. ¶ 71,496 (D.D.C. 1994) (fair dealing provision); United States v. AT&T Corp., 59 Fed. Reg. 44158 (D.D.C. 1994) (same); United States v. Northrop Grumman Corp., 68 Fed. Reg. 1861 (D.D.C. 2003) (fair dealing and firewall provisions); and United States v. Lehman Bros. Holdings, Inc., 1998-2 Trade Cas. ¶ 72,269 (D.D.C. 1998) (firewall provision and prohibitions on certain joint bidding agreements). *See also* United States v. Morton Plant Health System, Inc., 1994-2 Trade Cas. ¶ 70,759 (M.D. Fla. 1994) (firewall provision and prohibitions on certain joint pricing).

[30] Horizontal and vertical mergers often produce different types of efficiencies. Examples of possible horizontal-merger-related efficiencies include achieving economies of

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significant but the merger is on balance anticompetitive, requiring a structural divestiture might remedy the competitive concerns only at the cost of unnecessarily sacrificing significant efficiencies. In such situations, a stand-alone conduct remedy may be appropriate. However, for the prospect of potentially attainable efficiencies to justify accepting a pure conduct remedy, the efficiencies in question need to be cognizable rather than merely asserted. Moreover, they must be unattainable (at reasonable cost) if there is a structural divestiture. Analogizing to the Merger Guidelines, the Division requires them to be "conduct-remedy specific."

Mergers may also present the situation where any possible structural remedy that would undo the competitive harm would result in the loss of pre-existing internal efficiencies, i.e., efficiencies already achieved by a merging firm, prior to the merger, that are not due to the merger. For example, in order to minimize costs a firm may use the same distribution system for the widgets and gadgets that it produces. A divestiture that requires breaking up the distribution system into a widget distribution system, entirely separate from the gadget distribution system, may eliminate efficiencies that had been created by their original consolidation. The Division would give consideration to a conduct remedy that retained these efficiencies and still remedied the anticompetitive concern arising from the proposed merger.

There also may be situations where a structural remedy is infeasible**.** Certain vertical mergers in particular may simply not be amenable to any type of structural relief, as is typically found in the case of an upstream firm with a single plant acquiring a downstream firm with a single plant. Where such a

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[30](...continued)
scale or scope, and rationalization of sales forces, design teams, and distribution networks. Examples of vertical-merger-related efficiencies include elimination of the double-marginalization problem (i.e., the vertically integrated firm has an incentive to charge a lower price for the final good compared to the price that results from each of the merging firms setting prices independently), coordination of the design of intermediate and final products, and perhaps reduction or elimination of other types of transaction costs. See D. Carlton & J. Perloff, Modern Industrial Organization 377-417 (3rd ed. 2000) for an explanation of the various efficiencies that can arise from a vertical merger. For a discussion of the efficiencies that can arise from a horizontal merger, see Section 4 of the Horizontal Merger Guidelines.

merger may substantially lessen competition yet would likely result in significant efficiencies, the Division's choice necessarily will come down to stopping the transaction or imposing a conduct remedy.

In deciding whether a conduct remedy is appropriate, the Division will also consider the costs of monitoring and enforcing the remedy. Monitoring and enforcing a conduct remedy may be easier in markets in which regulatory oversight is already being employed and data on the merged firm's conduct would regularly be collected and audited in any event. Although those regulators will not generally have the same incentives and goals as the competition authorities, the greater transparency of market conduct that they permit can lower the cost to the Division and the courts of monitoring and enforcement.[31]

The most common forms of stand-alone conduct relief are firewall, fair dealing, and transparency provisions. As discussed below, however, their ongoing use, along with that of all other forms of stand-alone conduct relief, can present substantial policy and practical concerns.

a. Firewall Provisions

Firewalls are designed to prevent the dissemination of information within a firm. Suppose, for example, that an upstream monopolist proposes to merge with one of three downstream firms, all three of whom compete in the same relevant market. The Division may be concerned that the upstream firm will share information with its acquired downstream firm (and perhaps with

[31] This will not, however, eliminate all mechanisms through which conduct-regulated firms can evade the conduct remedy. For instance, suppose the Division is considering a conduct remedy partly because a government agency accurately monitors the prices in the industry (but only the prices). One way to comply with the pricing provision (such as a non-discrimination provision) might be to keep prices the same, but decrease quality. However, if quality is not easily altered, or if there are other restraints on the merged firm's incentive to decrease quality, then the conduct remedy may be more acceptable.

the two other downstream firms) that will facilitate anticompetitive behavior.[32] A properly designed and enforced firewall could prevent that.

The problems with firewalls are those of every regulatory provision. The first concern is the considerable time and effort the Division and the courts have to expend in monitoring and enforcing such provisions. The second problem is devising a provision that will ensure that the pertinent information will not be disseminated in any event. The third is that a firewall may frequently destroy the very efficiency that the merger was designed to generate.

For these reasons, the use of firewalls in Division decrees is the exception and not the rule. They are infrequently used in horizontal mergers because, no matter how carefully crafted, the risks that the merging firms will act collaboratively in spite of the firewall are great. However, they have occasionally been used in some defense industry mergers, and in vertical and other non-horizontal mergers when both the loss of efficiencies from blocking the merger outright and the harm to competition from allowing the transaction to go unchallenged are high.

b. Fair Dealing Provisions

Fair dealing provisions include the concepts of equal access, equal efforts, and non-discrimination. However, as discussed previously, a non-discrimination requirement presents the difficult question of whether cost-based differences justify differential prices and thus are not truly discriminatory.[33]

Suppose, for example, an upstream monopolist proposes to merge with one of three downstream firms. The three downstream firms all compete in

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[32] While coordination is perhaps the chief concern in such instances, such information sharing could also lead rivals concerned about misappropriation of their proprietary information to under-invest in product development and thus stifle innovation.

[33] See *supra* Section III.A. for a discussion of non-discrimination provisions.

the same relevant market. A concern arising from this merger could be that the upstream firm will now have an incentive to favor the acquired downstream firm by offering less attractive terms to the acquired firm's two downstream competitors.

In such a case, consideration may be given to a fair dealing clause whereby the upstream firm must offer the same terms to all three downstream competitors. As with most forms of regulation, however, enforcing (and even drafting) this sort of requirement can be problematic. In the first instance, if the upstream and downstream firms have merged in such a manner that the sales price to the acquired downstream firm becomes a mere internal accounting factor, the upstream firm could set a high, non-discriminatory price to downstream firms that would nonetheless disadvantage the acquired downstream firm's competitors. A fair dealing provision might then be ineffective. Even where this is not the case, e.g., where regulation at one level dictates how transfer prices are measured or the vertical integration is only partial, difficulties remain with fair dealing provisions. In order to accept such a remedy, the Division must be convinced that it has protected against problems where the independent downstream firms get lesser quality product, slower delivery times, reduced service, or unequal access to the upstream firm's products.

Such provisions should not be undertaken without careful analysis. Fair dealing provisions have a great potential for harm as well as good, and the Division must always evaluate and weigh the benefits of using such a provision against the risks. When used at all in Division decrees, such provisions invariably require careful crafting so that the judgment accomplishes the critical goals of the antitrust remedy without damaging market performance.

c. Transparency Provisions

The Division on occasion has used so-called transparency provisions as the sole or principal form of relief in vertical merger cases. Such provisions usually require the merged firm to make certain information available to a

regulatory authority that the firm would not otherwise be required to provide. For example, a telecommunications firm may be required to inform a regulatory authority of what prices the firm is charging customers for telephone equipment even though the regulatory agency may not have authority to regulate those prices. The theory is that the additional information will aid the regulatory authority in curtailing the telecommunications firm from engaging in regulatory evasion by, for example, charging telephone equipment clients with which it competes for telephone services higher prices than it charges its other telephone equipment customers.

Transparency provisions present the same problems that other regulatory provisions entail. First, they present the difficulty of devising a provision that will not be circumvented. Second, they require the Antitrust Division to educate the regulator on the significance of the additional information and ensure that the information is reviewed. Third, they require the Division and the courts to expend considerable resources in monitoring and enforcing the provision. For these reasons, transparency provisions are also used sparingly in Division decrees.

d. Other Types of Conduct Remedies

While firewall, fair dealing, and transparency provisions are the most common forms of stand-alone conduct relief (and even these provisions are quite rare), other conduct remedies are also possible. These include so-called competitive-rule joint ventures ("CRJV"),[34] non-compete clauses, long-term

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[34] A CRJV operates under a set of structural and behavioral rules designed to maintain the independence of multiple selling entities by ensuring that they will obtain the relevant product (or key input) at or near true marginal cost. Though theoretically appealing, the technical
requirements for a CRJV to perform as advertised are many and subtle, and there are several potential pitfalls. Owners have a clear incentive to classify some fixed costs as variable costs, thereby increasing participants' marginal cost of production and reducing output. The Division might also need to insert firewalls to remove concerns about information sharing that would facilitate collusion and would have to exert resources to monitor the process. The Division has

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supply contracts, and restrictions on reacquisition of scarce personnel assets.[35]

## IV. Implementing the Remedy

### A. A Fix-It-First Remedy Is Acceptable if It Eliminates the Competitive Harm

A fix-it-first remedy is a structural remedy that the parties implement and the Division accepts before a merger is consummated.[36] A fix-it-first remedy eliminates the Division's antitrust concerns and therefore the need to file a case.[37]

The Division does not discourage acceptable fix-it-first remedies. If parties express an interest in pursuing a fix-it-first remedy that satisfies the conditions discussed below, the Division will consider the proposal. Indeed, in certain circumstances, a fix-it-first remedy may restore competition to the market more quickly and effectively than would a decree. This would be particularly important, for example, where a rapid divestiture would prevent asset dissipation or ensure the resolution of competitive concerns before an upcoming bid.

If an acceptable fix-it-first remedy can be implemented, the Division will exercise its Executive Branch prerogative to forego filing a case and conclude its investigation without imposing additional obligations on the

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[34](...continued)
used a CRJV only once, in United States v. Alcan Aluminum, Inc., 605 F. Supp. 619 (W.D. Ky. 1985).

[35] *See supra* Section III.E.1.

[36] The parties may always *unilaterally* decide to restructure their transaction to eliminate any potential competitive harm. While this may obviate the need for the Division to further investigate the transaction, it is not considered a fix-it-first remedy for the purposes of this Guide since the Division did not "accept" the fix.

[37] A fix-it-first remedy usually involves the sale of a subsidiary or division, or specific assets of one or both of the merging parties, to a third party.

parties. A fix-it-first remedy restores premerger competition, removes the need for litigation, allows the Division to use its resources more efficiently, and saves society from incurring real costs. Moreover, a fix-it-first remedy may provide more flexibility in fashioning the appropriate divestiture. Because different purchasers may require different sets of assets to be competitive, a fix-it-first remedy allows the assets to be tailored to a specific proposed purchaser. A consent decree, in contrast, must identify all of the assets necessary for effective competition by any potentially acceptable purchaser.

The Division will accept a fix-it-first remedy when it eliminates the competitive harm otherwise arising from the proposed merger. The same internal review is given to fix-it-first remedies as is given to consent decrees. Before exercising its prerogative not to file a case, the Division must be satisfied that the fix-it-first remedy will protect the market from any adverse competitive effects attributable to the proposed transaction. A fix-it-first remedy will not eliminate the Division's concerns unless the Division is confident that the proposed fix will indeed preserve the premerger level of competition. In addition, Antitrust Division attorneys reviewing fix-it-first remedies should carefully screen the proposed divestiture for any relationships between the seller and the purchaser, since the parties have, in essence, self-selected the purchaser. An acceptable fix-it-first remedy should contain no less substantive relief than would be sought if a case were filed.[38] The Division, therefore, needs to conduct an investigation sufficient to determine both the nature and extent of the likely competitive harm and whether the proposed fix-it-first remedy will resolve it.[39]

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[38] The parties should provide a written agreement regarding the fix-it-first remedy. The agreement should specify which assets will be sold, detail any conditions on those sales (e.g., regulatory approval), provide that the Division be notified when the assets are sold, and state that the agreement constitutes the entire understanding with the Division concerning the divested assets. Unless the parties also enter into a timing agreement, a signed stipulation and consent decree (i.e., a "pocket decree") should be obtained that will be filed if the parties fail timely to comply with the written agreement.

[39] Although the parties may propose a fix-it-first remedy because they face substantial

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**Caveat: A Fix-It-First Remedy Is Unacceptable if the Remedy Must Be Monitored**

- If the competitive harm requires remedial provisions that entail some continued obligations on the part of the merged firm (e.g., the use of firewalls or other conduct relief), a fix-it-first solution is unacceptable. In such situations, a consent decree is necessary to enforce and monitor any ongoing obligations. For example, a fix-it-first remedy would be unacceptable if the merged firm as part of the solution is required to provide the purchaser with a necessary input pursuant to a supply agreement. The Division would insist upon having recourse to a court's contempt power in such circumstances so as to ensure the merged firm's complete compliance with the agreement and the protection of competition.

### B. A Hold Separate Provision Is a Necessary Component of Most Consent Decrees

Consent decrees requiring divestiture after the transaction closes should require defendants to take all steps necessary to ensure that the assets to be divested are maintained as separate, distinct, and saleable. A hold separate provision is designed to maintain the independence and viability of the divested assets as well as competition in the market during the pendency of the divestiture.

It is unrealistic, however, to think that a hold separate provision will entirely preserve competition. For example, managers operating entities kept apart by a hold separate provision are unlikely to engage in vigorous competition. Likewise, customers during the period before divestiture may be influenced in their purchasing decisions by the merger, even if the to-be-divested assets are being operated independently of the merged firm pursuant

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time pressures, the Division must allow itself adequate time to conduct the necessary investigation, including an evaluation of the proposed purchaser. *See* discussion *infra* Section IV.D.

to a hold separate provision. Similarly, there may be some dissipation of the soon-to-be-divested assets during the period before divestiture, notwithstanding the presence of a hold separate agreement — valuable employees may leave and critical investments may not be made. For these reasons, a hold separate agreement does not eliminate the need for a speedy divestiture.

Nevertheless, hold separate provisions are extremely important in Division merger enforcement. To ensure that there will be an independent, effective competitor after divestiture, the divestiture assets must remain independent and economically viable before divestiture.

### C. The Divestiture Should Be Accomplished Quickly

The Division will require the parties to accomplish any divestiture quickly. A quick divestiture has two clear benefits. First, it restores premerger competition to the marketplace as soon as possible. Second, it mitigates the potential dissipation of asset value associated with a lengthy divestiture process. The Division recognizes that a comprehensive "shop" of the assets, the need for due diligence on the part of potential purchasers, and Division review of the purchaser take time. The Division will balance these considerations in developing an appropriate timetable for the divestiture process.

Depending on the size and complexity of the divestiture assets, the divesting firm normally will be given 60 to 90 days to locate a purchaser on its own.[40] The consent decree may also permit the Division to exercise

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[40] The Tunney Act provides for a 60-day waiting period before the court can enter a proposed consent decree. 15 U.S.C. § 16(b). The Division will not oppose the sale of the divestiture assets to a purchaser acceptable to the Division before the judgment is entered if (a) the court is notified of the plan to complete the sale before the court enters the judgment and (b) there is no objection from the court. However, under no circumstance will such a sale preclude the Division from proceeding to trial, dismissing the case, or requesting additional or different relief if the court ultimately rejects the proposed decree. *See generally* United States v. BNS, Inc., 858 F.2d 456, 466 (9th Cir. 1988).

discretion in granting short extensions when it appears that the divesting firm is making good faith efforts and an extension seems likely to result in a successful divestiture. On the other hand, the Division may insist upon more rapid divestiture in cases where critical assets appear likely to deteriorate quickly or there will be substantial competitive harm before the purchaser can operate the assets. In situations where an investment banker or other intermediary conducts the shop, the Division may require that the intermediary's compensation be based in part on speed of the sale.[41]

The Division will require regular reports on the divestiture process in order to ensure good faith efforts and to facilitate a quick review once a final settlement is proposed. Once a purchaser is proposed, the Division may require additional information to evaluate both the purchaser and the process by which the purchaser was chosen. The divesting firm and the proposed purchaser ordinarily will be required to respond to requests for such information within 30 days.

### D. The Antitrust Division Must Approve Any Proposed Purchaser

The Division must approve any proposed purchaser.[42] Its approval will be conditioned on three fundamental tests. First, divestiture of the assets to the proposed purchaser must not itself cause competitive harm. For example, if the concern is that the merger will enhance an already dominant firm's ability unilaterally to exercise market power, divestiture to another large competitor in the market is not likely to be acceptable, although divestiture to a fringe incumbent might. On the other hand, if the concern is one of coordinated effects among a small set of postmerger competitors, divestiture

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[41] See *infra* Section IV.I. for a discussion of the role of a trustee.

[42] As discussed above, the Division focuses on specifying in the decree the appropriate set of assets to be divested quickly rather than on the identification of an acceptable buyer ("up front buyer") before entering into a consent decree. If the Division has done this correctly, then an acceptable buyer should be forthcoming. Moreover, the merging firms are always free to identify an acceptable buyer in a fix-it-first remedy.

to any firm in that set would itself raise competitive problems. In that situation, the Division would likely only approve divestiture to a firm outside that set.[43]

Second, the Division must be certain that the purchaser has the incentive to use the divestiture assets to compete in the relevant market. Even if the choice of a proposed purchaser does not raise competitive problems, the need for additional review arises because the seller has an obvious incentive not to sell to a purchaser that will compete effectively. A seller may wish to sacrifice a higher price for the assets today in return for selling to a rival that will not be especially competitive in the future. This is in contrast to a situation in which the firm selling the assets is itself exiting the market. The incentive of the latter firm is simply to identify and accept the highest offer.

Because the purpose of divestiture is to preserve competition in the relevant market, the Division will not approve a divestiture if the assets will be redeployed elsewhere.[44] Thus, there should be evidence of the purchaser's intention to compete in the relevant market. Such evidence might include business plans, prior efforts to enter the market, or status as a significant producer of a complementary product.[45] In addition, customers and suppliers of firms in the relevant market are often an important source of information concerning a proposed purchaser's intentions and ability to compete. Accordingly, their insights and views will be considered. However, in no case will they be given veto power over a proposed purchaser.

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[43] Indeed, if harmful coordination is feared because the merger is removing a uniquely-positioned maverick, the divestiture would likely have to be to a firm with maverick-like interests and incentives.

[44] *See supra* Section III.B.

[45] Complementary businesses often have a strong independent interest in maintaining competition in the relevant market, because higher prices in that market would impact them adversely as sellers of complementary goods or services. Further, if others in the relevant market are not also vertically integrated, creation of a vertically integrated rival may serve to disrupt postmerger coordinated conduct. *See* Horizontal Merger Guidelines ¶ 2.11.

Third, the Division will perform a "fitness" test to ensure that the purchaser has sufficient acumen, experience, and financial capability to compete effectively in the market over the long term. Divestiture decrees state that it must be demonstrated to plaintiff's sole satisfaction that the purchaser has the "managerial, operational, technical and financial capability" to compete effectively with the divestiture assets.

In determining whether a proposed purchaser is "fit," the Division will evaluate the purchaser strictly on its own merits. The Division will not compare the relative fitness of multiple potential purchasers and direct a sale to that purchaser that it deems the fittest. The appropriate remedial goal is to ensure that the selected purchaser will be an effective, viable competitor in the market, according to the requirements in the consent decree, not that it will necessarily be the best possible competitor.

If the divestiture assets have been widely shopped and the seller commits to selling to the highest paying, competitively acceptable bidder, then the review under the incentive/intention and fitness tests may be relatively simple.[46] Ideally, assets should be held by those who value them the most and, in general, the highest paying, competitively acceptable bidder will be the firm that can compete with the assets most effectively.[47] On the other hand, if (a) the seller has proposed a specific purchaser, (b) the shop has been narrowly focused, or (c) the Division has any other reason to believe that the proposed purchaser may not have the incentive, intention, or resources to

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[46] The Division may identify specific firms that the seller should contact when the staff has learned of potential purchasers in the course of its original investigation. In addition, the Division may, under limited circumstances, require that an investment banker or other intermediary conduct the shop from the outset when the Division is concerned that the defendant will not complete the divestiture within a reasonable time. See *infra* Section IV.I. for a discussion of the role of a trustee.

[47] However, even when the divestiture assets have been widely shopped, it may sometimes be difficult reliably to rank competing offers. Ranking difficulties materialize when potential purchasers bid for different packages of assets or when offers are qualified by contingencies or otherwise depart from simple cash terms. In such cases, the Division may have to examine the competing offers more closely.

compete effectively, then a more rigorous review may be warranted.

### E. A Successful Divestiture Does Not Depend on the Price Paid for the Divestiture Assets

The Antitrust Division's interest in divestiture lies in the preservation of competition, not with whether the divesting firm or the proposed purchaser is getting the better of the deal. Therefore, the Division is not directly concerned with whether the price paid for the divestiture assets is "too low" or "too high." The divesting firm is being forced to dispose of assets within a limited time frame. Potential purchasers know this. If there are few potential purchasers to bid up the price, the divesting firm may fail to realize full competitive value. On the other hand, if there are many interested purchasers, the divesting firm may actually get a price above the appraised market value. In either event, the Division will not consider the price of the divestiture assets unless, as discussed below, it raises concerns about the effectiveness or viability of the purchaser.

**Caveat: The Purchase Price Will Not Be Approved if It Clearly Indicates that the Purchaser Is Unable or Unwilling to Compete in the Relevant Market**

- **"Too Low" a Price**. A purchase price that is "too low" may suggest that the purchaser does not intend to keep the assets in the market. In determining whether a price is "too low," the Division will look at the assets' liquidation value. Liquidation value is defined here as the highest value of the assets when redeployed to some use outside the relevant market. Liquidation value will be used as a constraint on minimum price only when (a) liquidation value can be reliably determined and (b) the constraint is needed as assurance that the proposed purchaser satisfies the fundamental test of intending to use the divestiture assets to compete in the relevant market. In many cases, however, liquidation value is difficult to determine reliably. Also, sale at a price below liquidation value does not *necessarily* imply that the assets will be

redeployed outside the relevant market. It may simply mean the purchaser is getting a bargain. Therefore, if the Division has other sufficient assurances that the proposed purchaser intends to compete in the relevant market, the Division will not require that the price exceed liquidation value.

- **"Too High" a Price**. In theory, a price that appears to be unusually high for the assets being sold could raise concerns for two reasons. First, it could indicate that the proposed purchaser is paying a premium for the acquisition of market power. However, this concern is adequately and more directly addressed in applying the fundamental test that the proposed purchaser must not itself raise competitive concerns. Second, a purchaser who pays too high a price might be handicapped by debt or lack of adequate working capital, increasing the chance of bankruptcy. Thus, a price that is unusually high may be taken into account when evaluating the financial ability of the purchaser to compete.

### F. Restraints on the Resale of Divestiture Assets Will Ordinarily Not Be Permitted

Although the Division will insist that the purchaser have both the intention and ability to compete in the market for the foreseeable future, the Division will not insist that the assets, once successfully divested, continue to be employed in the relevant market indefinitely. Conditions change over time, and the divested assets may in the future be employed more productively elsewhere.

The market for corporate control is imperfect. In unusual cases, an unfit, poorly informed potential purchaser may overbid and win the divestiture assets. The Division is not able consistently to foresee and correct faulty market outcomes. Also, even when in retrospect the market for corporate control has made a mistake, the market itself tends to correct the mistake as long as the purchaser is free to resell the divestiture assets to the firm capable of operating them most efficiently. Therefore, the Division will not attempt to

limit the purchaser's ability to resell the divestiture assets, nor will it permit the seller to do so.

**Caveat: In Unusual Circumstances, the Purchaser's Ability To Sell the Divestiture Assets to a Particular Entity or Type of Entity Will Be Limited**

- Where the Division is confident that during the life of the consent decree the resale of the divestiture assets to a particular entity or type of entity would be anticompetitive, it may seek to limit the purchaser's ability to sell those assets to such an entity.[48]

- There may also be circumstances when the merging firm will be permitted to limit a licensee's further licensing of the divested intangible assets. For example, suppose the remedy includes the right to use a particular brand name in the relevant market but not elsewhere. If the value of the brand name elsewhere is both significant and reasonably dependent on how the brand name is used in the relevant market, the merging firm may have a legitimate interest in limiting the licensee's ability to re-license the brand name rights.

### G. Seller Financing of Divestiture Assets Is Strongly Disfavored

Seller financing of the divestiture assets, whether in the form of debt or equity, raises a number of potential problems.[49] First, the seller may retain some partial control over the assets, which could weaken the purchaser's

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[48] Division decrees also prohibit defendants from reacquiring the divested assets. *Cf. infra* Section V.A. This prohibition on reacquisition of assets is the key reason that the term of the decree in merger cases exceeds the completion of the divestiture. The typical term of Division merger decrees is 10 years.

[49] The Division may permit the purchaser to make staggered payments to the seller, such as disbursement out of an escrow account pending final due diligence. This is typically not considered seller financing.

competitiveness. Second, the seller's incentive to compete with the purchaser may be impeded because of the seller's concern that vigorous competition may jeopardize the purchaser's ability to repay the financing. Similarly, the purchaser may be disinclined to compete vigorously out of concern that it may cause the seller to exercise various rights under the loan. Third, the seller may have some legal claim on the divestiture assets in the event the purchaser goes bankrupt. Fourth, the seller may use the ongoing relationship as a conduit for exchanging competitively sensitive information. Finally, the purchaser's inability to obtain financing from banks or other lending institutions raises questions about the purchaser's viability.

For these reasons, the Division is strongly disinclined ever to permit the seller to finance the sale of the divestiture assets. The Division will consider seller financing only when it is persuaded that none of the possible concerns discussed above exist. For example, in the relatively rare case where the information financial institutions need adequately to evaluate the purchaser's business prospects is either unavailable or costly to obtain relative to the amount of the financing, very limited seller financing may be considered.

### H. Crown Jewel Provisions Are Strongly Disfavored

A crown jewel provision typically requires the addition of certain specified — and generally more valuable — assets to the initial divestiture package if the parties are unable to sell the initially agreed-upon divestiture assets to a viable purchaser within a certain period. The Division disfavors the use of crown jewel provisions because generally they represent acceptance of either less than effective relief at the outset or more than is necessary to remedy the competitive problem.

In some circumstances there may be a trade-off between requiring a somewhat smaller, less valuable package of divestiture assets and accepting greater risk that the remedy will prove inadequate, or demanding a more substantial divestiture in order to be highly confident that postmerger competition will be fully preserved. Because the Antitrust Division must be highly confident that the merger will not harm competition, its preference is to

demand at the outset a remedy that provides this confidence — rather than one that may turn out later to require the addition of more assets, e.g., a crown jewel.

The staff's investigation should allow it to determine whether a particular package of assets proposed for divestiture will (a) solve the competitive problems with the proposed merger and (b) be sufficiently attractive to viable purchasers. Moreover, because restoring competition, rather than punishing the merging firm, is the goal of a merger remedy, the consent decree should not require the divestiture of crown jewel assets that exceed the assets necessary to remedy the competitive problem.

Crown jewel provisions also provide an opportunity for purchaser manipulation. If there are only a few potential purchasers and they are aware of the crown jewel provision in the decree, they may intentionally delay negotiating for the agreed-upon divestiture assets so that they may later purchase the crown jewels at an attractive price.[50]

### I. Selling Trustee Provisions Must Be Included in Consent Decrees

For divestiture to be an effective merger remedy, the Division must have the ability to seek appointment of a trustee to sell the assets if a defendant is unable to complete the ordered sale within the period prescribed by the decree.[51] A selling trustee provision provides a safeguard that ensures the decree is implemented in a timely and effective manner. In addition, to the extent that defendants desire to control to whom the decree assets are sold and

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[50] As discussed in Section III.B. *supra*, the Division may permit the merging firms to offer two different asset packages for sale simultaneously in the rare circumstance where either package would remedy the competitive problem. Such a parallel shop does not present the same concerns raised by the use of crown jewel provisions.

[51] Indeed, even in cases in which a defendant has been ordered to divest the assets to a designated buyer, a trustee is necessary in the event that the ordered sale is not completed for some unforeseen reasons. *See* United States v. Cargill Inc., 1997-2 Trade Cas. ¶ 71,893 (W.D.N.Y. 1997).

the price at which they are sold, the potential for a selling trustee to assume that responsibility provides an incentive for defendants to divest the assets promptly. Thus, every decree in a Division merger case must include provisions for the appointment of a selling trustee.

In the vast majority of cases, the Division will allow the defendant a reasonable opportunity to divest the decree assets to an acceptable purchaser before it asks the court to appoint a trustee to complete the sale. The assumption is that the defendant, at least initially, is best positioned to have complete information about the operation and value of the assets to be divested and to communicate that information quickly to prospective buyers, thereby facilitating a speedy divestiture to an acceptable purchaser. However, as discussed in Section IV.D. *supra*, because a divestiture would introduce a viable new competitor into the market, the defendant also has economic incentives to delay or otherwise frustrate the ordered divestiture. Therefore, the Division will permit the defendant only a limited time to effect the ordered divestiture before seeking appointment of a trustee.

A defendant may fail to complete a divestiture to an acceptable purchaser for any number of reasons. The defendant's selling efforts may have been dilatory. It may have sought a more favorable price or other terms than potential purchasers were willing to pay. A decree-ordered divestiture may also languish for reasons unrelated to the defendant's diligence in seeking to divest the assets, *e.g.,* an inability to obtain necessary approvals from a third party such as a government permitting agency, or the purchaser backed out of the deal at the last minute.

The divestiture decree should provide that whenever a divestiture has not been completed by the prescribed deadline for any reason, the Division may promptly nominate, and move the court to appoint, a trustee with responsibility for completing the divestiture to a purchaser acceptable to the Division as soon as possible. In addition, when the proposed remedy is contingent on the approval of a third party, and that approval will not be obtained prior to the entry of the decree, the decree should include a

contingency provision setting forth alternative relief in the event that the required approval ultimately is not forthcoming.

**Caveats: 1. The Immediate Appointment of a Selling Trustee May Be Required in the Rare Instance when the Defendant Will Not Complete the Divestiture Within a Reasonable Time**

- A decree that provides for the immediate appointment of a trustee to sell the divestiture assets is an unusual merger remedy, reserved for those situations in which the Division has reason to believe at the outset that a defendant will not complete an ordered divestiture within a reasonable time. For example, if the assets deteriorate quickly such that the seller has an incentive to delay divestiture, the Division may require the immediate appointment of a selling trustee. Also, when a defendant has taken an inordinately long time to complete an ordered divestiture in a previous case, the Division may conclude that the assets are likely to be promptly divested only if a selling trustee is immediately appointed to divest the assets in the current case.

**2. An Operating Trustee May Be Required in the Rare Instance when the Defendant Is Unlikely to Manage the Divestiture Assets During the Divestiture Period Without Impairing Their Value**

- An operating trustee is responsible for day-to-day management of all or part of a business ordered to be divested pursuant to the terms of a decree. Installing a trustee to run a business before divestiture is an extraordinary remedy. It is highly unlikely that an operating trustee will have adequate knowledge and incentive in the short term to run the business effectively. Therefore, the Division will only require an operating trustee in the very rare instance in which the Division believes that the defendant is likely to mismanage the assets during the typical divestiture period and

thereby impair the likelihood that the divestiture will restore effective competition. For example, this might occur if the nature of the assets to be divested is such that their competitive value could quickly deteriorate if inappropriately managed during the divestiture period. Appointment of an operating trustee might be warranted when intangible property such as computer software has been ordered divested, and under-investment in the development and improvement of the software in a rapidly changing business environment may irreparably impair the sale of the assets as a viable product to any acceptable purchaser.

### 3. A Monitoring Trustee May Be Required in the Rare Instance when the Trustee's Expertise Is Critical to an Effective Divestiture

- A monitoring trustee is responsible for reviewing a defendant's compliance with its decree obligations to sell the assets to an acceptable purchaser as a viable enterprise and to abide by injunctive provisions to hold separate certain assets from a defendant's other business operations. In a typical merger case, a monitoring trustee's efforts would simply duplicate, and could potentially conflict with, the Division's own decree enforcement efforts. For this reason, appointment of a monitoring trustee should be reserved for relatively rare situations where a monitoring trustee with technical expertise unavailable to the Division could perform a valuable role.

## V. Consent Decree Compliance and Enforcement

Whether structured as a fix-it-first or a consent decree including structural or conduct provisions, the remedy agreed upon by the Antitrust Division and the parties must maintain competition at premerger levels. It is incumbent upon the Division, pursuant to its responsibility to the public interest, as well as to the court in the case of a consent decree, to ensure strict

implementation of and compliance with the agreed-upon remedy.[52] To do so, Division attorneys must first ensure that the decree correctly binds the appropriate parties, provides sufficient notice of the decree to any persons against whom the decree may be enforced, and provides a means for Division attorneys to gather information necessary to monitor compliance. The Division will commit substantial resources to monitor parties' implementation of and compliance with the remedy and will not hesitate to bring actions to enforce consent decrees, typically through the use of civil or criminal contempt proceedings.[53]

### A. The Consent Decree Must Bind the Entities Against Which Enforcement May Be Sought

For a decree to be effective, it must bind the parties needed to fulfill the consent decree objectives. Both parties to the transaction are generally named defendants even if only one will be making the required divestitures.[54] Furthermore, the decree should include language to bind the defendants' successors and assigns, so that a defendant cannot sell its interest in the assets to be divested before divestiture, thereby frustrating the sale of the divestiture package to the approved purchaser. If it is anticipated that a non-party to a decree could be instrumental to its enforcement, the decree should require that

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[52] The Antitrust Division will likewise commit all resources necessary to ensure that parties comply with a fix-it-first remedy. Because a fix-it-first divestiture will occur before or simultaneously with the closing of the main transaction, the attorney assigned to the matter will likely review the same materials with similar considerations — *e.g.*, viable purchaser and no limitation on ability to compete — as if the divestiture were taking place under a consent decree.

[53] Non-parties are not permitted to enforce Division decrees. The court in New York v. Microsoft Corp., 224 F. Supp. 2d 76, 181 (D.D.C. 2002), *aff'd sub nom.* Massachusetts v. Microsoft, 373 F.3d 1199 (D.C. Cir. 2004), likewise recently noted that "non-parties should not be allowed direct access to the enforcement mechanisms." *See also* Massachusetts v. Microsoft, 373 F.3d at 1243-1244.

[54] Naming both parties to the transaction as defendants increases the likelihood that (a) the assets to be divested are maintained as separate, distinct, and saleable until they are transferred to the purchaser, (b) the assets to be divested are actually divested, and (c) the Division can obtain appropriate relief in the event the court does not accept the decree or later orders revisions.

actual notice of the decree be given to such a person.[55] The decree should also prohibit defendants from reacquiring or otherwise exerting control over the assets ordered to be divested.[56]

### B. The Consent Decree Must Provide a Means to Investigate Compliance

Consent decrees must have provisions allowing the Division to monitor compliance. They may require defendants to submit written reports and permit the Division to inspect and copy all books and records, and to interview defendants' officers, directors, employees, and agents as necessary to investigate any possible violation of the decree. Although civil investigative demands may also be issued to investigate compliance,[57] access terms should nonetheless be included in the decree, both to monitor compliance and to examine possible decree modification or termination.

### C. The Antitrust Division Will Ensure that Remedies Are Fully Implemented

Resources will be devoted before and after a decree is entered to ensure that the decree is fully implemented. Every decree is assigned to staff responsible for monitoring implementation and compliance. The specific steps necessary to ensure compliance with a decree will vary depending on its nature. For a divestiture decree, staff will closely monitor the sale, including reviewing (a) the sales process, (b) the financial and managerial viability of the purchaser, (c) any documents related to the sale, and (d) any relationships

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[55] The parties’ agents and employees, and others who are in active concert or participation with the parties, will be bound by the decree so long as they receive actual notice of the order. Fed. R. Civ. P. 65(d). If other non-parties are needed for effective enforcement, consideration should be given to joining them as parties, Fed. R. Civ. P. 19, 15 U.S.C. § 25, or otherwise obtaining their agreement to be bound by the decree.

[56] However, the decree may permit the merging firm in limited circumstances to retain rights to intangible assets. *See* discussion *supra* Section III.D.

[57] 15 U.S.C. §§ 1311(c), 1312(a).

between the purchaser and defendants, to ensure that no such relationship will inhibit the purchaser's ability or incentive to compete vigorously.

Where a decree requires affirmative acts, such as the submission of periodic reports, Division staff will determine whether the required acts have occurred and evaluate the sufficiency of compliance. With respect to decrees that prohibit certain actions, staff may also need to conduct periodic inquiries to determine whether defendants are observing the prohibitions.[58]

### D. The Antitrust Division Will Enforce Consent Decrees

If the Antitrust Division concludes that a consent decree has been violated, the Division will institute an enforcement action. There are two types of contempt proceedings, civil and criminal, and either or both may be used. Civil contempt has a remedial purpose — compelling compliance with the court's order or compensating the complainant for losses sustained.[59] Staff may consider seeking both injunctive relief and fines that accumulate on a daily basis until compliance is achieved.[60] Criminal contempt is not remedial — its purpose is to punish the violator, to vindicate the authority of the court, and to deter others from engaging in similar conduct in the future.[61] Criminal contempt is established under 18 U.S.C. § 401(3) by proving beyond a reasonable doubt that there is a clear and definite order, applicable to the

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[58] Use of special masters for Division decree enforcement is disfavored, Fed. R. Civ. P. 53(b); New York v. Microsoft Corp., 224 F. Supp. 2d at 179-82.

[59] *See* United Mine Workers v. Bagwell, 512 U.S. 821, 826-30 (1994); IBM v. United States, 493 F.2d 112, 115 (2d Cir. 1973).

[60] *See* United States v. United Mine Workers, 330 U.S. 258 (1947); United States v. Work Wear Corp., 602 F.2d 110 (6th Cir. 1979). Moreover, courts have recognized that, under appropriate circumstances, other equitable remedies may also be available (for example, compensation for harm or disgorgement of profits as a proxy for harm). In re General Motors Corp., 110 F.3d 1003, 1018 n.16 (4th Cir. 1997).

[61] A criminal contempt proceeding may be instituted by indictment, *see* United States v. Snyder, 428 F.2d 520, 522 (9th Cir. 1970), or by petition following a grand jury investigation, *see* United States v. General Dynamics Corp., 196 F. Supp. 611 (E.D.N.Y. 1961).

person charged, which was knowingly and willfully disobeyed. The penalty may be a fine or imprisonment, or both.

The Antitrust Division has instituted a number of contempt proceedings to enforce its judgments and will continue to do so where appropriate in the future.[62] In some situations, rather than seeking sanctions for contempt where the correct interpretation of a judgment is disputed, it may be appropriate simply to obtain a court order compelling compliance with the judgment.[63]

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[62] *See, e.g., Work Wear Corp.*, 602 F.2d 110; United States v. Greyhound Corp., 508 F.2d 529 (7th Cir. 1974); United States v. Morton Plant Health System, Inc., No. CIV.A. 94-748-CIV-T-23E, 2000 WL 33223244 (M.D. Fla. July 14, 2000); United States v. Smith International, Inc., 2000-1 Trade Cas. ¶ 72,763 (D.D.C. 2000); United States v. North Suburban Multi-List, Inc., 1981-2 Trade Cas. ¶ 64,261 (W.D. Pa. 1981); United States v. FTD Corp., 1996-1 Trade Cas. ¶ 71,395 (E.D. Mich. 1995). *See also* United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998); United States v. NYNEX Corp., 8 F.3d 52 (D.C. Cir. 1993).

[63] *See, e.g.,* United States v. CBS Inc., 1981-2 Trade Cas. ¶ 64,227 (C.D. Cal. 1981).

**CERTIFICATE OF SERVICE**

I hereby certify that on July 9, 2019, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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