UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

Thursday, July 25, 2019
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ORAL ARGUMENT
PART 1 - PUBLIC RECORD

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P R O C E E D I N G S

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CHAIRMAN SIMONS: Good afternoon, everybody, and welcome. The Commission is meeting today in open session to hear oral argument in the matter of Otto Bock Healthcare North America, Inc., Docket Number 9378, on the appeal of the Respondent of the initial decision issued by the Administrative Law Judge.

The Respondent is represented by Sean McConnell, and the complaint counsel represented by Daniel Zach.

During this proceeding, each of the parties will have 45 minutes to present their arguments. Counsel for the Respondent will make the first presentation and will be permitted to reserve time for rebuttal, and complaint counsel will then make his presentation.

I want to remind counsel that the argument should be limited to information that is public in all respects. If we need to ask questions relating to in camera material, then we will make a motion at the end of the session and go into closed in camera session.

Let's see, what else? At that time, if we have to do that, we'll be asking everyone to leave the courtroom, except for the counsel and the Commission staff.

Mr. McConnell, do you want to reserve any time

for rebuttal?

MR. McCONNELL: Yes, please, Mr. Chairman. Five minutes.

CHAIRMAN SIMONS: Terrific. And the bailiff will note that.

Mr. McConnell, would you like to introduce your colleagues?

MR. McCONNELL: Sure. With me today is Wayne Mack.

CHAIRMAN SIMONS: Welcome.

MR. McCONNELL: Sean Zabaneh.

CHAIRMAN SIMONS: Welcome.

MR. McCONNELL: And Sarah Kulik.

CHAIRMAN SIMONS: Welcome.

MR. McCONNELL: As well as the general counsel for Otto Bock HealthCare North America, Mr. Al Li.

CHAIRMAN SIMONS: Welcome.

Mr. Zach, would you like to introduce your colleagues?

MR. ZACH: Yes. At the table today with me is Mr. Mohr.

CHAIRMAN SIMONS: Welcome. Then we are ready. Mr. McConnell, you have the podium.

MR. McCONNELL: Good afternoon. My name is Sean McConnell, and it is my privilege to represent the

Respondent in this case Otto Bock HealthCare North America today.

During several months of discovery, and over 30 days of trial, Respondent produced an overwhelming record of evidence that the acquisition of Freedom Innovations in September of 2017 did not violate the Clayton Act or the FTC Act.

The initial decision issued by Administrative Law Judge Chappell in April of 2019 largely ignored reliable evidence in the record and was not supported by a preponderance of reliable evidence. Instead, it relies on snippets of unreliable speculation and misapplications to the well-established law. Respondents appealed in reply briefs, raised numerous material issues with the factual findings and legal conclusions in the initial decision; however, during this afternoon's oral argument, Respondent wishes to focus on two primary areas.

First, reliable empirical evidence proves that unilateral harm is unlikely in any relevant market. The Administrative Law Judge failed to consider the relative closeness in product space of Otto Bock's microprocessor knees with the microprocessor knees offered by Össur, Endolite, Proteor and Freedom Innovations.

The Administrative Law Judge failed to consider

the total distance in product space between Otto Bock's high-end MPKs and Freedom's Plié 3. No matter how the market is defined in this case, existing microprocessor knee rivals have the ability to timely, likely, and sufficiently replace the roughly 800 microprocessor knees sold annually by Freedom in the United States.

CHAIRMAN SIMONS: Can I interrupt you one second, Mr. McConnell?

MR. McCONNELL: Sure, Chairman.

CHAIRMAN SIMONS: So one issue when you're talking about a differentiated products market as opposed to one that's more homogenous, is the capacity to make something, you know, the plant capacity to make something, is really not so important, really, it's the ability to compete in the product space.

Is that what you're referring to, or are you referring just to the actual capacity, the physical capacity to make the product?

MR. McCONNELL: No. The evidence is overwhelming, and complaint counsel has acknowledged in their answering brief that all three of other mainstream MPK competitors do have sufficient capacity to fill the competitive void left by Freedom, but what the evidence is clear as to is that these MPK manufacturers can reposition themselves quickly and efficiently, within a

year, let alone the two years that the merger guidelines and case law precedent establishes for repositioning.

And that every single clinical customer that testified in this case testified that they would be willing to switch to rival MPKs in the face of a price increase. Dr. Argue, the Respondent's expert in this case, looked at the overwhelming evidence, looked at the data, the purchasing data of these various clinics, and determined that a price increase post-acquisition would be unlikely.

And, in fact, Otto Bock itself, post-acquisition, when it had access to margin, costs, return rate data from Freedom Innovations, determined that it could not profitably discontinue or raise the price of the Plié 3, because of repositioning from MPK rivals.

COMMISSIONER PHILLIPS: How does that, in your mind, counsel, square with decisions like H&R Block and Bazaarvoice that sort of discount the importance of capacity on its own?

MR. McCONNELL: Well, I think capacity really isn't an issue anymore in this case. I mean, we're only talking about 800 knees, and more importantly, we're talking about 800 knees for price-sensitive customers, and that's the big difference that Administrative Law

Judge Chappell ignored, is that within the direct competition of microprocessor knees, you have individuals that have better insurance, they have Medicare, they have better employer insurance, and they can get a C-Leg, because it costs a little bit more. They can get a Rheo, the two best MPKs within the mainstream class of MPKs.

But where Freedom's niche really was was with people with poor insurance. People in more rural areas where COPC and Hanger treats clinics. And people don't have great insurance coverage. And in those areas, Plié was a great option for those price-sensitive customers.

So the question that the Commission needs to ask itself, based on reliable evidence, from the actual certified prosthetists that testified in this case, that make the decisions on who gets what MPK is whether the Endolite Orion 3 and the Proteor Allux, which are priced below the Plié 3, could replace that lost competition, and we think the evidence is overwhelming that they could.

I also today want to talk about the divestiture in this case. If the Commission considers the proposed divestiture to a divestiture buyer in the prosthetics market as part of the overall transaction, it is our position that the case law establishes that there would

be no change in HHI; therefore, an application of a presumption of harm looking at the transaction in total would be inappropriate. And that the Administrative Law Judge failed to consider the proposed divestiture, both to undermine complaint counsel's establishment of a prima facie case, as well as rebuttal evidence of the presumption of harm, if it so established.

COMMISSIONER CHOPRA: So how should we think about the harm after the consummation but before the proposed divestiture?

MR. McCONNELL: So why this case is very unique, unlike Polyphor, unlike Promedica, unlike other cases, is that here, despite allegations from complaint counsel, there's no anticompetitive harm between the date that the agreement was signed in September of 2017, and the agreement to entered into a hold separate agreement with the FTC on December 19th, 2017.

And so during that period, Otto Bock and Freedom were very clear that they were going to operate under a dual-brand strategy. The ordinary course documents created around September of 2017 established that that was the plan, to keep the companies entirely separate, and there's no evidence that Otto Bock was ever involved in pricing the Plié, how to position the Plié in the market, what to do with Quattro.

In fact, Dr. Prince, who is the head of development of the Quattro MPK at Freedom Innovations, testified that no one from Otto Bock has ever been involved in any meeting that he's ever had with the development of the Quattro. Otto Bock has been totally hands off, both before the acquisition and after September of 2017, until the date of the hold separate. And there's no allegations by complaint counsel that after the hold separate agreement was entered, that there has been any violation of the hold separate agreement.

So because the status quo in this case has been maintained from September 22nd of 2017, through the entrance of the hold separate agreement, and through today, this case should be looked at like Atlantic Richfield and Arch Coal, and the Commission should not apply a strong presumption of harm, because with the divested -- with the assets going to a divestiture buyer, all the MPK estimates of Freedom Innovations would be going to a divestiture buyer, and there is no anticompetitive harm in the interim, there should be no application of a strong presumption of unilateral harm.

COMMISSIONER WILSON: A couple of questions. Counsel, first, to what cases would you direct us regarding the approach for annualizing a proposed

divestiture in the context of a consummated acquisition?

MR. McCONNELL: Arch Coal and Atlantic Richfield. We believe both of those cases apply here because there's no -- there's no consummated merger case where there has been a subsequent divestiture buyer identified in the situation like we have here today. But our position is that these facts and circumstances, given the no anticompetitive harm, given the fact that these companies were held entirely separate, both as a matter of business judgment, from September until December 2017, and then as a matter of operation of the hold separate agreement, that these cases are more like Atlantic Richfield and Arch Coal, but there is no precise case on point for a consummated merger case.

COMMISSIONER WILSON: And you would have us disregard information that was presented by complaint counsel demonstrating the impact of the acquisition on the Quattro?

MR. McCONNELL: Well, we think the evidence was very clear at trial that if you look at testimony from first Mr. John Robertson, who was the head of development of the Quattro during the discovery phase, he's now the head of R&D at Ohio Willow Wood, and then Dr. Prince, who testified here at trial, and was in charge of the development of the Quattro, he testified

that Otto Bock has had no influence, other than to prop up R&D with cash to keep them afloat.

I mean, we have to be cognizant here of the but-for world, with the condition that Freedom Innovations was in leading up to September 2017.

COMMISSIONER PHILLIPS: I have absolutely no doubt that we are going to talk about that, counsel, but I actually want to follow up on one of the questions that Commissioner Wilson asked. Help me understand what the limiting principle is to the argument that you're compelled as part of your prima facie case to consider a divestiture that occurs after, right? Two years, three years? Should we allow into the prima facie case something that comes up during trial?

MR. McCONNELL: Well, our position is that what makes this case distinct and unique is the fact that Otto Bock decided to keep Freedom as a held separate entity as a matter of business judgment from the time the acquisition was inked in September of 2017. My experience with other consummated merger cases is that integration planning starts very quickly and decisions start getting made about how to position the products in the marketplace and things change. Therefore, the -- you know, the egg is broken, if you will, and you can't put the two back together, to mix metaphors.

Here we have, despite allegations, we have very clear record evidence from reliable witnesses with first-hand knowledge of what happened here between September and December. Every single clinic customer that testified in this case said that the acquisition had no effect on their business. Prices did not go up in the interim. In fact, prices went down for the acquisition of MPKs.

COMMISSIONER SLAUGHTER: But I want to understand the answer to Commissioner Phillips' question. Because he asked what the limiting principle for a divestiture proposed post-consummation would be in terms of whether it needs to be considered in the prima facie case, and it sounded like your answer was if there's a hold separate agreement, that is the limiting principle that we should look at.

Is that what you were saying? Because I think he was thinking about it in a time horizon way, too.

MR. McCONNELL: Yes. I mean, I think it has to be with all Section 7 analysis, it's totality of the circumstances. Every case is going to be a little bit different. I think that the point here is that there's not some specific time horizon. I think the Commission needs to look at the evidence between the date of consummation and the hold separate agreement. So it's

very clear, it's undisputed, that from December 19th until present, the assets have been held separate. I don't think you're going to get any argument from complaint counsel that there has been any issues with the operation of the businesses separately pursuant to the hold separate agreement from December.

So the question for the Commission is, it's not a timing thing, it's not whether it's three months or six months, it's whether the Commission looking at reliable evidence of what happened in the MPK marketplace, or any relevant market here, between September and December 2017, there's no anticompetitive harm. No price raising, no repositioning, no effect on development of any products.

CHAIRMAN SIMONS: So, counsel, are you suggesting that there's no change in incentives on behalf of your client when they owned the target?

MR. McCONNELL: No, I think the incentives were to investigate whether they could raise prices or discontinue the Plié, and that's exactly what Otto Bock did. I mean, Otto Bock looked at -- in early November 2017, Otto Bock examined -- German executives suggested, why don't you guys consider raising prices? Can't you just move people over to Otto Bock's products?

Any good profit-maximizing company, I would

think, would look at that option. And it makes economic sense. It determined -- Otto Bock determined when it had knowledge of demand conditions, when it knew margins and prices and had full information, that it couldn't do so.

And in December, even before the hold separate agreement, it decided to go forward with the dual-brand strategy that it already put in place to keep the Plié in the market as a lower brand product.

CHAIRMAN SIMONS: Actually, I was getting to a different point, did the fact that you owned Freedom -- that Otto Bock owned Freedom -- did that change Otto Bock's incentives as it behaved in the marketplace?

MR. McCONNELL: Yes.

CHAIRMAN SIMONS: Because now they owned a significant competitor?

MR. McCONNELL: Yes.

CHAIRMAN SIMONS: And how were those incentives changed?

MR. McCONNELL: Well, under common ownership, Otto Bock would operate those as determined the best way to strategically position those assets in the marketplace as a profit-maximizing firm, and that's exactly what it did.

CHAIRMAN SIMONS: Right. So the incentives were

changed as a result of the acquisition?

MR. McCONNELL: Yes, the incentives were changed, but even before the acquisition went through, Otto Bock suspected that the dual-brand strategy would be most appropriate in this case, given Freedom's segmentation as a value low-priced product relative to Otto Bock's higher quality, more innovative products for, you know, people interested in premium products. And when they did the analysis after the acquisition, that turned out to be true.

COMMISSIONER CHOPRA: But you keep saying --

CHAIRMAN SIMONS: Let me try it again. So I'm trying to get at whether Otto Bock's incentives changed in terms of Otto Bock's own business. Just because Otto Bock also acquired Freedom. Do you see what I'm saying?

So I'm not talking about what Otto Bock was going to do with Freedom, because as you suggest, Freedom -- we'll take that for granted for a moment, that Freedom was basically just going on autopilot, but the question I'm asking is whether Otto Bock's incentives changed in terms of how Otto Bock was going to pursue its own business.

MR. McCONNELL: Yes, until Otto Bock could determine -- until it could have full information about the Freedom products, then yes, its incentives were

changed, and it turned out that Otto Bock continued to operate as it did before the acquisition. We think that's why this is a unique case, because if you ask every clinic that testified in this case, whether it was at deposition or at trial, they said that there was no difference in how Otto Bock operated during September to December of 2017.

So even though, in the back room, the incentives changed, the key for the Commission to consider is whether the marketplace changed, whether things in the market, whether prices changed, whether anyone stopped innovating, whether anyone discontinued any products, and none of that happened. It's very clear.

COMMISSIONER WILSON: So actually I have a followup to Commissioner Phillips' question. As a practical matter, if complaint counsel needs to take into account each proposal that's introduced by the Respondent, doesn't that essentially impose a changing evidentiary standard on complaint counsel as a practical matter? Can you help us understand the administrability of the rule that you're proposing for us?

MR. McCONNELL: Well, we think the Commission's opinion by Commissioner Ohlhausen was clear in April of 2018 that a divestiture that's entered into -- a proposed divestiture entered into must be considered by

complaint counsel, if complaint counsel has opportunity to litigate it. And which they had a fair opportunity in this case. Complaint counsel was aware of the planned proposed divestiture, even before the hold separate agreement. And there was plenty of time. Complaint counsel took depositions of three executives --

CHAIRMAN SIMONS: Yeah, so they knew about -- they knew it was something they were thinking about, but did they have something concrete in front of them like an asset purchase agreement?

MR. McCONNELL: They did. We were able to get an asset purchase agreement executed in time to provide our exhibit list so that it could be litigated at trial. And it was litigated at trial.

CHAIRMAN SIMONS: And so was that after or during discovery?

MR. McCONNELL: It was in the middle of discovery.

CHAIRMAN SIMONS: In the middle of discovery?

MR. McCONNELL: Well, it was after -- it was when -- it was on the last day that we could produce exhibits to get ready in anticipation of trial.

CHAIRMAN SIMONS: So fact discovery had already closed?

MR. McCONNELL: Correct.

COMMISSIONER WILSON: And hypothetically, if there were multiple divestiture candidates, if perhaps the primary divestiture candidate fell through, and multiple divestiture candidates were advanced as safety nets, does that mean that complaint counsel would essentially need to take all four of those into account in presenting a prima facie case?

MR. McCONNELL: We think the Commission's previous guidance in cases like Aetna are clear that it needs to be sufficiently definitive so that it can be litigated by complaint counsel and overseen by the Administrative Law Judge and the Commission. We think that by getting the APA executed in time to be litigated at trial and to allow it to be tested through a cross examination and through evidence at trial, that was giving them sufficient time to test the divestiture.

And it should be analyzed both as not only part of complaint counsel's prima facie, but even if the Commission decides that it should not be considered as part of the prima facie case, it should be considered as rebuttal evidence on whether the proposed divestiture would cure any anticompetitive harm in this case. And we think it was a fatal flaw by Administrative Judge Chappell to not consider the divestiture except as part

of the remedy.

COMMISSIONER PHILLIPS: So, counsel, I want to pick up on that. Complaint counsel basically say, at least as I understand it, and they can correct me later if I'm wrong, that whether we treat it as rebuttal, whether we consider it -- let's assume away, for purposes of this question, prima facie case treatment.

Whether we treat it as rebuttal or consider it as part of the remedy, it sort of washes out, basically the answer is the same. Is that your position, too? Do you agree with that?

MR. McCONNELL: Totally disagree.

COMMISSIONER PHILLIPS: Why?

MR. McCONNELL: We think that under Baker Hughes, if complaint counsel establishes a presumption and the burden switches to Respondent to produce evidence, it's not a burden of persuasion, it's a burden of production. And under Baker Hughes and all of its progeny, the duty on Respondent is to produce evidence sufficient to rebut that prima facie case. And the ALJ and the Commission needs to look at all of that evidence in its totality.

The Administrative Law Judge took each of these issues piecemeal and said, this is not enough, this is not enough, this is not enough, in isolation. That's a

violation of Baker Hughes in the totality of circumstances approach.

If the Commission were to look at the divestiture proposal in light of the evidence of repositioning, and expansion, by competitive firms, the evidence of efficiencies, the evidence of the fact that Freedom was a failing, if not failing firm. All of those things need to be considered as part of Respondent's rebuttal case, and if the Commission would appropriately apply Baker Hughes, we think the overwhelming reliable evidence is that Respondent, if the Commission decides to apply presumption in this case, Respondent met its burden of production.

COMMISSIONER CHOPRA: So what's the latest you can propose a divestiture, then, in the context of the full Commission process?

MR. McCONNELL: I think the case law is clear that it needs to be in enough time to allow complaint counsel to litigate it. And our position is that getting the APA signed and executed in time for it to be tested at trial was sufficient time. I think it's unclear precisely when proposed divestitures need to be entered into before so that they can be litigated, but our position is that there was enough time in this case.

COMMISSIONER CHOPRA: Can I also just rewind to

this, you keep mentioning dual brand as if Otto Bock is completely a passive player in the operation of the acquisition. I mean, but then you also said they're involved in R&D. So where is the line of where we should think about that?

MR. McCONNELL: So I should correct myself if I said that, because Otto Bock is not at all involved in Freedom's R&D. The dual-brand strategy was to keep some backoffice elements of the operation together, but to operate totally separate sales forces, totally separate products, totally separate R&D, and to have Freedom operate for price-sensitive customers as a value, young, agile brand, and Otto Bock as a more premium, sophisticated brand for customers that want more innovative, higher quality products.

COMMISSIONER SLAUGHTER: But you also referenced several times Otto Bock's access to Freedom's confidential business information, including on margins and sales, which I think goes to the question Commissioner Chopra asked about whether a dual brand strategy, and even a hold separate agreement, you know, where that line falls in terms of, again, what the Chairman was asking about, how incentives change, and also how information changes.

Isn't that relevant to how we should think about

Otto Bock's position in the market pre- and post-acquisition?

MR. McCONNELL: I think all of the factors, of course, need to be considered, but I think the most important thing for the Commission to look at is what actually happened in the marketplace between September and December, and every clinic that testified, every person with first-hand knowledge from Otto Bock and Freedom that testified in this case was that they remained separate. If you were a clinician in the marketplace, you knew no different of whether you were dealing with Freedom as owned by Otto Bock or an independent Freedom. The testimony and evidence is very clear on that point.

If I could transition from the divestiture, back to the real merits of the case and the unilateral effects case, which we think is very important to be addressed today.

So I just want to talk first about application of a presumption of harm. As Mr. Chairman pointed out, you know, Oracle warns us that a strong presumption of unilateral harm is problematic in differentiated products cases like this one. And in particular, Promedica, which was decided recently by the 6th Circuit, decided only to apply a strong presumption of

unilateral harm in a differentiated products because in that case the counsel had established a historic correlation between market share and bargaining power.

Here, we have evidence that when Otto Bock released the first C-Leg 4 in 1999, it had a virtual monopoly on the marketplace. And from 1999 until the acquisition, its share eroded and increased with innovation, and eroded by competition, but there's no evidence in the record that market shares have ever been tied with bargaining power. And given the fact that market share is not tied to market power in this case, there's no evidence of that, we think under Promedica, it's important for the Commission to consider whether an application of a strong presumption is appropriate in this case, even with significant changes in HHI.

CHAIRMAN SIMONS: So how would you articulate the standard, or would you articulate any standard for a presumption in a merger involving differentiated products?

MR. McCONNELL: I think if, as part of establishing a prima facie case, if complaint counsel can establish a historical correlation between market share and market power, that there may be a -- it may be appropriate to apply a strong presumption of unilateral harm, but here, where there's no connection between

market shares and market power, under Promedica, it's inappropriate to apply a strong -- nearly unrebuttable presumption of harm, given this is a unilateral differentiated products case.

CHAIRMAN SIMONS: So what kind of evidence are you contemplating that would meet that burden?

MR. McCONNELL: Well, in Promedica, there was a direct correlation between the share of the different hospitals and their pricing power, and coupled with that, patient satisfaction surveys that said, even though Promedica was --

CHAIRMAN SIMONS: When you say the pricing power, what do you mean by that?

MR. McCONNELL: Their bargaining leverage, as the 6th Circuit put it. Their ability to get higher prices from managed care organizations. And in that case, the 6th Circuit found persuasive evidence that Promedica was able to charge higher prices, even though customers didn't like Promedica as much as it liked other surrounding hospitals.

Here, the evidence is overwhelming that Otto Bock is the gold standard. It has the highest quality, most innovative, best MPKs on the market. Otto Bock has subjected its MPKs to dozens of clinical studies, which have proven time and time again that its knees are safe

and effective for users, and prevent stumbles, prevent falls. Other companies like Freedom, they've never done any clinical studies. There's no evidence that the Plié 3 is better than any other K3 or K4 knee.

And so we think the fact that Össur and Otto Bock charge a little bit more for their products is tied with their quality and innovation, bigger sales force, better products, not their market share.

CHAIRMAN SIMONS: So if Otto Bock and Össur were merging, would we then be in a position to apply a presumption?

MR. McCONNELL: Yes, I would think so. They're positioned much more closely to each other. Well, presumption wouldn't -- the unilateral effects test would change, the application of the presumption may not change, because the market would still be the same. There's no connection between market share in this case and market power.

So even if Otto Bock merged with Össur, that may change the unilateral effects test, but it wouldn't change application of the presumption, because of the lack of correlation. So I apologize, I correct that. If that makes sense.

CHAIRMAN SIMONS: No, actually, what I thought I heard you say earlier was that the correlation was

demonstrated by the fact that they're charging higher prices -- the two companies are charging higher prices and have similar --

COMMISSIONER WILSON: Shares.

CHAIRMAN SIMONS: No, no, they're charging higher prices, and that their products are higher quality.

MR. McCONNELL: That's correct. But I guess to answer -- you asked if the presumption would apply in a merger.

CHAIRMAN SIMONS: Yeah.

MR. McCONNELL: And the answer would still be no because you need to look at the overall market dynamics. Once you move past the application of the presumption and actually look at unilateral effects, it would be likely the acquisition of Otto Bock merger with Össur would be anticompetitive, because those products are positioned much more closely to each other in the marketplace than the competing rival MPKs.

CHAIRMAN SIMONS: So I'm a little confused. Can you say -- give me concisely how you articulate the test for a presumption to apply in a differentiated products merger case?

MR. McCONNELL: I think under Promedica, it's when there is an established correlation between market

share and market power, and sufficient changes in HHI and market concentration under the merger guidelines, it would be appropriate to apply a presumption of harm, whether or not and how strong of a presumption that is, again, should be examined closely by the Commission, given that this is a differentiated products unilateral effects case.

CHAIRMAN SIMONS: Thank you.

MR. McCONNELL: So I just want to try to explain for the Commission a little bit about these products, just in case you've never seen or are unfamiliar with a prosthetic knee. There are several components that go into a prosthetic or a transfemoral amputee. You have the socket and liner, which connect the device to the leg. You have suspension components, you have the knee itself, then structural components, including a pylon to connect the knee to the foot, and you can have a prosthetic foot or ankle, and then a cosmesis it's called, which is kind of the outer plastic shell that covers the foot.

It's undisputed in this case that there are six MPK suppliers in the United States: Otto Bock, which is considered the gold standard and leading MPK; the clear number two in the market, Össur, which provides similar products to Otto Bock, high quality, highly innovative;

Endolite, which makes the Orion 3 and Linx, which have been incredibly successful in the market since 2016. Endolite is based in Miamisburg, Ohio, and has a sales force that's bigger than Freedom's.

Proteor, USA, which is a new competitive force in the marketplace. It sells the Nabtesco Allux exclusively in the United States, recently acquired Ability Dynamics, which makes the Rush Foot, which is a very popular K3/K4 foot. We have Freedom Innovations, which we've talked about; and DAW, which is properly considered a fringe player, it's based in San Diego, and it's the exclusive distributor of MPKs for a company called Teh Lin, based out of Taiwan.

COMMISSIONER WILSON: And when you say that it's a fringe player, is that the reason for omitting it from the charts on pages 9 and 10 that we'll get to?

MR. McCONNELL: It is. It's clear from the evidence that there are certain customers on the West Coast where Freedom competes with DAW, but DAW only has a few salesmen and women and has really been unable in the recent years to reposition itself and expand in the marketplace, unlike the other MPKs, which all clinics now consider to be mainstream rival MPKs.

As I talked about earlier, the test to apply in this case, since it's a unilateral effects case, is the

test from H&R Block, CCC Holdings, Oracle, where we need to look at the products controlled by the merging firms, in this case C-Leg and the other MPKs from Otto Bock, and the Plié, and determine whether a substantial number of customers of one firm would turn to the other in response to a price increase.

And where we think that the ALJ got the test fundamentally wrong is that he analyzed whether some customers merely accept the Plié 3 and C-Leg 4 and choose them more often and are more popular overall at their clinic, and did not analyze where those customers were turning faced with a price increase, and that is a fundamental error in this application of unilateral effects law.

It doesn't matter if two products are the most popular, what would matter is what the -- what would those prosthetists do if you increased the price of the Plié, where would they turn? If you increased the price on the C-Leg, where would they turn? And the answer from reliable evidence, overwhelming evidence, is that they wouldn't turn to each other. And that's what's key.

The ALJ also failed to consider that those other firms in the middle, between Otto Bock's C-Leg and Plié would take -- that's where those customers would turn.

They would turn to the Rheo, they would turn to the Endolite Orion, they would turn to the Endolite Linx, they would turn to the Proteor Allux.

COMMISSIONER WILSON: So, I'm sorry, counsel, I think we're going to be short on time soon, so I have a couple of other questions that I was hoping to have you answer. So in your submissions you say we should reject the diversion ratios that are offered in a document that you describe as preliminary and a draft. Is there evidence of an alternative diversion ratio that you think we should employ instead?

MR. McCONNELL: Well, there's evidence looking at overall in the marketplace, we have evidence relied upon by Dr. Argue looking at all of the data and all of the clinical evidence, saying that there would not be a shift between Otto Bock and Plié that they are not each other's next choice. In fact, they're probably not even the second or third choice in the face of a price increase.

In fact, it's in camera, but Judge Chappell agreed, at trial, and said that any post-merger attempted price increase on the Plié 3 would be ridiculous.

COMMISSIONER CHOPRA: So we should not look at any ordinary course documents, then, on this question?

MR. McCONNELL: You should look at all of the ordinary course documents because we think they're very clear that there's much more robust competition -- there's very robust competition in this marketplace with the Plié.

COMMISSIONER CHOPRA: But on the question of diversion.

MR. McCONNELL: Well, in that diversion document, you should look at that document, you should inspect it very carefully, because that document was clearly a preliminary draft document, and it was created in August 2017, months before Otto Bock had access to margin data, cost data, pricing data, and it was put together by a foreign executive, Alex Gück, who testified that he didn't have any information about the U.S. prosthetics industry, he didn't have any information about competitors in the United States, and that these were rough estimates or best guesses.

Complaint counsel --

COMMISSIONER WILSON: But it was discussed with the board?

MR. McCONNELL: I'm sorry?

COMMISSIONER WILSON: That document was discussed with the board?

MR. McCONNELL: It was sent to the Board, but

never discussed or presented to the Board.

COMMISSIONER WILSON: Okay. And then one other question in this vein. You expressed concern that the initial decision is essentially backward looking, it takes a look at the products and the rivals as they existed previously, but much of the evidence that you were pointing us to focuses only on the Plié 3 rather than on the Quattro.

If we are concerned about the ability of the Quattro to cannibalize the Otto Bock product, the C-Leg, how do we then think about the unilateral effects analysis and the competitive effects at issue here?

MR. McCONNELL: Sure. So I would instruct the Commission to look at the person with the most first-hand knowledge on the development of the Quattro, and that's Dr. Stephen Prince. Dr. Prince was very clear that the projections on the greatness that the Quattro could be in the summer of 2017 was sales puffery on the part of Freedom. They have not been able to develop the technology in the Quattro, and he explained at trial that it can't be as short as they intend it to be, it can't be as light as they intend it to be, and there are serious issues with whether or not the Quattro will ever be released on the marketplace.

And, indeed, the foundational technology in the

Quattro was in the Kinnex product, which was a successful product that helped keep Freedom barely afloat in 2017, that had to be recalled from the market and is still not on the market today, and who knows if it will ever be put back on the market.

And it was Otto Bock, in the but-for world, that has kept Quattro alive. I mean, the Commission needs to remember, what is the but-for world here? If Freedom had $27.5 million in September 2017 with no cash reserves to pay, unlike Promedica, they had additional money they needed to prop up operations, and they have this product in R&D, and then they had to recall the Kinnex, and deal with that issue.

COMMISSIONER WILSON: So you would have us ignore the ordinary course materials that talk about the threat that Quattro presents?

MR. McCONNELL: Well, I think you need to look at the document very carefully, because even though that was based on puffery, from Freedom, it's important to note that Otto Bock put no financial money or no number on the acquisition price when it bought Freedom. It did not put any money -- it put the money -- when it assessed the value of Freedom Innovations, when it was deciding what to bid, it bought Freedom Innovations because it wanted its prosthetic foot line. That's what

Otto Bock needed to complete its portfolio.

In that very same document it says, don't put any money attributed to the Quattro, because it's far too speculative. They didn't have any real hard and fast information on how promising the Quattro would be. In fact, I would have the Commissioners look at the due diligence report that Otto Bock put together when they finally got a view of the Quattro and the serious problems that Otto Bock identified with the Quattro in that due diligence document.

So I would like to turn, again, talking about positioning and unilateral effects. We have the most important features for clinicians for when they're picking between MPKs. And the most important feature is that the microprocessor changed the resistance or friction in the swing and stance phase of the knee.

So if you're not familiar with what that means, stance phase would be standing, the friction along the knee, and then swinging would be the return of the leg to the front position and back when swinging.

With the Plié 3, you need to use an Allen wrench, and a bicycle pump, just like mechanical knees, to set the friction level for both the stance phase and the swing phase; meaning, if I want to walk and then start running, or if I'm running and then I want to

start to walk, I need to change the settings on my knee manually.

That is fundamentally different, and the ALJ found that it's fundamentally different than all of the other mainstream MPKs, and all of the studies cited by the ALJ in determining the relevant product market is MPKs and not mechanical knees. He relies on these studies that say, it's that functionality. It's variable resistance control of a microprocessor that makes these knees better than mechanical knees. And Freedom's Plié 3 not having that is what makes it different.

COMMISSIONER CHOPRA: So you think we should override the fact that they have the same L-code? How should we weigh the fact that they have the same CMS code?

MR. McCONNELL: I see I'm out of time. Am I able to answer the question?

COMMISSIONER CHOPRA: Yes.

MR. McCONNELL: So the fact that they are reimbursed by the same L-code means that they are competitors, but it's the difference in technology that makes them fundamentally different products, why Plié is lower priced for price-sensitive customers and different from the other better products.

CHAIRMAN SIMONS: Thank you.
MR. McCONNELL: Thank you.
CHAIRMAN SIMONS: Mr. Zach?
MR. ZACH: Thank you. If you'll bear with me for one minute.
CHAIRMAN SIMONS: Thank you. We have a technical glitch here which you are suffering through.
MR. ZACH: Good afternoon, Mr. Chairman, Commissioners. Dan Zach for complaint counsel.
At trial, an enormous amount of evidence proved that there is a relevant market for microprocessor knees. Otto Bock is the dominant player in that market. Otto Bock acquired its closest competitive threat, Freedom. The merger has already harmed consumers, and absent an effective remedy, Otto Bock plans to kill future competition and raise MPK prices, which will further harm clinics and the above-the-knee amputees who wear MPKs.
During my presentation, I will begin with a brief overview of the extremely strong prima facie case that we established at trial. Next, I will highlight some of the overwhelming direct effects evidence that proves the merger has already harmed and will continue to harm consumers. Third, I will explain why the ALJ was right to find each of Respondent's rebuttal

arguments and defenses to be without merit, as he did at pages 3 and 87 of the initial decision.

Finally, I will explain, if there's time, why Respondent's Constitutional claims lack merit and weight.

Otto Bock acquired Freedom on September 22nd, 2017. The merger violated Section 7 on the day it was consummated. It resulted in undue concentration, consistent with Philadelphia National Bank, and it resulted in a merged firm controlling an enormous share of the market.

The merger was not accompanied by any divestiture proposal at that time. Respondent's first attempt at a divestiture proposal would not come until this litigation was well into discovery. Its last set of proposals wouldn't come until the middle of the hearing.

These proposals cannot undo the strong presumption of illegality triggered by the merger, and it was triggered on the day that it was consummated, and since consummation, the merger has already harmed competition. And as I mentioned before and will show in a moment, it will continue to further harm competition.

Complaint counsel established our extremely strong prima facie case based on Respondent's ordinary

course document, the testimony of its own witnesses, other MPK and mechanical knee manufacturers, clinics, clinical researchers, and their published articles, insurers and others.

The ALJ rightfully found this evidence proved the existence of the U.S. MPK market, and that it triggered a strong presumption of illegality.

The ALJ also found that this presumption was supported by evidence showing that Hanger and several other clinics view the Plié and C-Leg as their first and second choices. These clinics, which account for an enormous portion of all MPK sales in the United States, benefited from the intense competition between Freedom and Otto Bock, and the merger ended that competition and the lower prices and better quality products that had resulted from it.

The presumption was not a close call. The merger is presumptively illegal by a wide margin, even if you look at it through Respondent's erroneous market definition.

CHAIRMAN SIMONS: So would you say that the presumption applies irrespective of whether it's a homogenous goods merger or a differentiated products goods merger?

MR. ZACH: Yes, the case law, Philadelphia

National Bank, says that if undue concentration results from a merger in a relevant market, it will be presumptively illegal. And to pick up on a point that Respondent counsel made, it goes on to say that it's so inherently likely to lessen competition, substantially, that it must be enjoined in the absence of evidence clearly showing the merger is not likely to result in such anticompetitive effects. That's at page 363.

The point being, there is no need for extrinsic evidence of a correlation between market shares and market power for the presumption to apply. As the Supreme Court said in Brown Shoe, the market shares are the primary index of that market power.

COMMISSIONER WILSON: Counsel, obviously the 2010 Horizontal Merger Guidelines are not Supreme Court precedent, but what is the relevance of the statement that the agency's rely much more on the value of diverted sales that on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products and any presumption that one might draw from that?

MR. ZACH: I think the importance is, when we bring a case, we don't rely on just the presumption, and just as we have here, we bring cases where we have enormous amounts of direct effects evidence showing that

the specific differentiated products will result in an articulable market power.

Here, I think that's most clearly shown through the post-merger plans by Otto Bock to raise the price of the Plié. They made that decision after they acquired Freedom. It was a month and a half later. There were top executives, not just from Otto Bock, but from Freedom, they all got together, and they created a plan to raise the price of the Plié and to reduce cannibalization between Quattro and C-Leg. And then the minutes of that meeting show they actually gave action items to people to begin implementing it.

I think what the guidelines are suggesting is that when you have both the evidence to prove a presumption, and this type of strong evidence, those are the types of cases that we are going to challenge, and that the court should find anticompetitive.

Based on a Brown Shoe analysis, there is no doubt that the MPK market exists. Otto Bock and Freedom measure their own shares in the U.S. MPK market. All of their ordinary course documents show they view MPKs and mechanical knees to compete in different markets. Other MPK manufacturers, clinics, and insurers, share this view.

Mechanical knee manufacturers confirm that they

don't compete with MPKs. Every company in the industry agrees that MPKs function and perform differently than mechanical knees.

Peer-reviewed research proves MPKs provide safety and performance benefits mechanical knees simply don't. And to Respondent's point, Freedom uses those exact clinical studies to market its product. The C-Leg and Plié are played off of each other by clinics to get better pricing.

To Commissioner Chopra's point, they are reimbursed under the Compact same L-code. All of the competitors in the marketplace view the Plié as an MPK that competes very closely with the C-Leg.

There is simply no evidence, at all, that it is anything but an extremely close competitor with the C-Leg. In fact, there was a slide that mentioned a term "MP switch." To be clear, that doesn't exist in any document anywhere in the record. That is a made-for-litigation term that nobody uses in the ordinary course.

CHAIRMAN SIMONS: How about the description that Respondent's counsel gave of what you have to do when you want to go from walking to running with the Plié versus the C-Leg?

MR. ZACH: The evidence is clear that the Plié

makes realtime adjustments using its microprocessor that make it perform and function on par with the C-Leg.

CHAIRMAN SIMONS: So you don't have to make a manual adjustment with a wrench or a pump or anything like that?

MR. ZACH: Certainly not to use it effectively in your daily life, no. I mean, they make a big deal about the bicycle pump, but the evidence is clear that when a user is wearing it and it's been adjusted and it's on your leg, that they go about their daily life the way somebody wearing a C-Leg would.

CHAIRMAN SIMONS: So I guess if you wanted to go jogging around a track or something, you might need to make an adjustment, but to go through your workday life, you wouldn't have to do anything?

MR. ZACH: I'm not actually sure that the record is clear at what specific time you would have to make that adjustment. They just make the point that you make the adjustment through that mechanism, which is slightly different than the other knees, but its performance when you're wearing it, certainly Freedom's chairman testified, they think it's a superior knee to the C-Leg, and there have been these types of marketing attacks made by Otto Bock for years, and what you see is clinics choosing between them by negotiating them off one

another trying to get a better price.

COMMISSIONER PHILLIPS: Counsel, I thought I heard you say two different things and I just want to understand the distinction. Respondent's counsel citing the ALJ talked about how these are two fundamentally different products. I heard you to say two things, and I'm not sure which, and maybe you're saying both.

One is they're not that different, that's how I understood the Chairman's question. Another is an argument that, well, maybe they are different, but if you look at the Brown Shoe factors, they're still competing.

MR. ZACH: In the universe -- what I'm trying to say, and maybe inarticulately, is that this is a differentiated products market. There are certain characteristics of these two knees, of all these knees, that vary, but the evidence shows that actually there's more similarity between the C-Leg and the Plié than just about any other knee out there. In fact, the testimony from Össur, who uses a fundamentally different platform, it's called magnetorheologic -- something, and he testified that the C-Leg and the Plié are far closer to one another than either is to the Rheo, because they're both based on a hydraulic platform.

And what you see from clinics, what you see from

economic substitution, is companies like Hanger and COPC and POA, all viewing the C-Leg and the Plié as their preferred option because, as the Hanger CEO testified, they're equivalent in terms of functionality and patient satisfaction. That's the evidence that I think is most powerful when we're thinking about an antitrust analysis of the differentiation between these products.

COMMISSIONER PHILLIPS: Thank you.

COMMISSIONER CHOPRA: And how should we weigh the reimbursement issues? Respondent counsel talked about people with worse insurance are likely to choose different products. How should that factor into anything?

MR. ZACH: It shouldn't. I'm not sure there's anything in the record to support that claim. What we see are the same customers, clinics, competing with presumably the same population, being served at the clinics, competing these two MPKs off each other regularly to get the best price possible.

CHAIRMAN SIMONS: And this is not -- I think Mr. McConnell suggested that the -- to the extent there was any kind of close competition, it was in rural areas. Is there anything to that in your view?

MR. ZACH: No evidence in the record that I could point to to support that. I'm unaware of it.

COMMISSIONER SLAUGHTER: Counsel, how do you respond to the point that Respondent's counsel made that the ALJ erred when relying on the fact that the Plié and the C-Leg were the top two choices, but that doesn't indicate that they were substitutes for each other?

MR. ZACH: There is an overwhelming amount of evidence in the first instance of clinics literally using the two to play off one another in negotiations, which is I think powerful evidence of the closeness of competition. We have testimony cited by the ALJ from Hanger, who represents -- and this is public -- 50 percent of all Pliés purchased and 40 percent, roughly, of all C-Legs purchased, saying that those are their preferred MPKs.

You have similar testimony from, whether it's COPC, POA, or other clinics, and then at the end of the day, you have maybe the clearest evidence of all, which is the post-merger plans of Respondent where they looked and said, what happens if I raise the price of the Plié? Where do I think people are going to go? And they determined that at least a majority and likely the vast majority of all people who purchase a Plié today would find the C-Leg to be their next best alternative.

CHAIRMAN SIMONS: And was that implemented?

MR. ZACH: The plan was developed and acted

upon, but this litigation occurred, and this happened in November of 2017. So from a timeline perspective, you have the merger on September 22nd, 2017, you have the plan, where everyone gets together and says, let's implement the Plié plan, in November, I believe 7th and 8th, and then the complaint and the hold separate end up taking place in late December.

CHAIRMAN SIMONS: So when was the first contact from the FTC to the Respondent?

MR. ZACH: I believe it was within a couple of weeks -- I'm not positive on the time frame -- of consummation of the merger. It was a very short investigation.

Now, just finishing up on the Brown Shoe evidence. Some of the most powerful evidence is that MPK prices are not sensitive at all to mechanical knee prices. This is because the choice between an MPK and a mechanical knee is a clinical decision.

A hypothetical monopolist of MPKs could easily impose a SSNIP. Customers do not switch from MPKs to mechanical knees based on price. There's not a single clinic in the record who testified that they ever have. Clinics and manufacturers agree that mechanical knees play no role in MPK negotiations. And as I've been talking about already, Respondent's own actions prove

that MPKs constitute a separate market, because when Otto Bock's top executives recommended raising Plié prices, they did so because they knew customers would not switch to mechanical knees. They also knew that they wouldn't switch to other MPKs.

CHAIRMAN SIMONS: So, and do I take it from what you're saying that you really believe that if the price of MPKs went up 5 or 10 percent that literally there would be no loss of volume to mechanical knees?

MR. ZACH: Yes. I think the evidence shows clearly that what clinics have testified that they will fit an MPK on a patient, as long as they don't lose money. Because ultimately, the clinical benefits of MPKs over mechanical knees is so great, it becomes an ethical issue whether you substitute for economic reasons.

And at the same time, the evidence shows that there's plenty of room underneath the theoretical ceiling for reimbursement to raise the price on MPKs substantially. So the answer is yes, I do not think there would be any switching to mechanical knees based on the record.

If we could go to the next slide. We do not rest on the strong presumption we established. At trial, we submitted an enormous volume of direct effects

evidence. The ALJ weighed only a tiny fraction of this evidence because Respondent never came close to overcoming the strong prima facie case. This direct effects evidence shows that Otto Bock's core deal rationale was to eliminate its closest competitor. Otto Bock had post-merger plans to raise Plié prices and to eliminate future Quattro C-Leg competition. And, contrary to the claims of Respondent, the merger has already harmed consumers because the evidence shows Otto Bock was able to keep the Plié 3 Fast Fit off of the market. The merger delayed the launch of the Quattro, and there's evidence that the merger clearly eliminated the incentives for Freedom and Otto Bock to compete, to the detriment of consumers.

COMMISSIONER PHILLIPS: So, counsel, on that third bullet, what do the facts show in the post-consummation period about what Otto Bock did to effectuate keeping the Plié 3 Fast Fit out and delaying the Quattro launch, or is this an incentive story?

MR. ZACH: No, this is a clear evidence story. The evidence shows that in the spring of 2017, Freedom made a presentation to the board of directors that identified the Plié 3 fast fit, which is an upgraded version of the Plié, largely improving a lot of the software and capabilities of the existing Plié, and it

targeted it for launch later in 2017.

In August, there's a presentation to the minority shareholder of Freedom at the time, so this is just right before the merger, that showed that that product was going to be launched in October of 2017.

We have the testimony of the CEO of Freedom at the time of the merger, Mr. Smith, who says when he left the company, the day before the merger was consummated, that was still the plan. It was still in the pipeline and they were going to launch it shortly.

After the merger, there's documents from Respondent showing that product was put "on hold," and testimony making clear it was never launched. That is clear evidence of harm that has resulted from this merger.

COMMISSIONER WILSON: And can you give us the best evidence as to the Quattro, the delay of the Quattro launch?

MR. ZACH: There is testimony from Mr. Prince, and Mr. Robertson, and that said, essentially the FTC matters and the ongoing litigation have delayed Quattro. Our contention is not that there were -- that it explains the entirety of the delay, but certainly their testimony was that these ongoing proceedings contributed to that delay, but there is direct testimony on that,

which we have cited in our briefs and are contained certainly in our findings of fact.

COMMISSIONER WILSON: It sounds like there's no evidence to indicate that in the background there were efforts to keep Quattro from launching so as to avoid cannibalizing the C-Leg or to reposition the Quattro so that it would be less likely to take share from the C-Leg when it launches?

MR. ZACH: There is absolutely evidence that the plan discussed in November of 2017 was to reposition Quattro, which is called the C-Leg 4 Killer for a reason, away from the C-Leg, and target other products, but what I didn't want to suggest is that there is necessarily evidence of somebody from Otto Bock becoming part of the R&D team.

COMMISSIONER WILSON: Okay. So we have the plan from November of 2017, but no subsequent developments would indicate that they were carrying out the plan?

MR. ZACH: We have evidence that after the meeting on the 7th and 8th of November of 2017, there were action items assigned to people to begin the implementation.

CHAIRMAN SIMONS: So action items to people within Freedom?

MR. ZACH: Yes. I believe -- yes, I believe one

was to Mr. Robertson and one was to Mr. Ferris, both of Freedom.

CHAIRMAN SIMONS: So it was clear that Freedom people knew what the Otto Bock people thought was a good idea and what the plan was with respect to the Quattro product?

MR. ZACH: Oh, they participated in the meeting. If you -- we have the minutes of the meeting. So from the Freedom side, on November 7th and 8th of 2017, Mr. Carkhuff, Mr. Ferris, a number of Freedom employees, are attending and participating and forming the plan, because they're one company at this point.

COMMISSIONER CHOPRA: So just so I understand, pre-acquisition, there are multiple documents regarding the acquisition that refer to it as the C-Leg 4 Killer?

MR. ZACH: Oh, yes. In fact, the chairman of Freedom told the ultimate owner of Otto Bock, Hans Georg Näder, it was called the C-Leg 4 Killer back in October of 2016, when they started their discussions to try to acquire them.

COMMISSIONER CHOPRA: And is there any other record evidence that that was contributing to the price that Otto Bock was going to pay?

MR. ZACH: What the documents clearly show on the Otto Bock side in the runup to the merger was that

they were closely evaluating how good of a product it would be. Going so far as to actually have somebody put it on and test it for four hours. And then Mr. Schneider wrote an extensive email to top executives of Otto Bock and explained that the consequences of not buying Freedom was that the Quattro in anyone's hands was going to take share from us.

COMMISSIONER CHOPRA: I see.

MR. ZACH: And ultimately, that's not the only document. There's a long body of pre-deal evidence showing that keeping Quattro out of the hands of a competitor was one of the primary motivations of the deal. And that's all detailed in our findings of fact after trial.

After a 31-day trial, the ALJ determined that the merger clearly violated Section 7. In his detailed, thoroughly supported and well-reasoned decision, Judge Chappell explained that he evaluated the entire record and considered every argument. He did so exclusively on page 4.

He also properly applied the law. Despite his explanation to the contrary, Respondent now alleges the ALJ must have ignored its evidence. In reality, the ALJ simply found Respondent's arguments unsupported by credible evidence.

On appeal, nothing has changed. Respondent's old arguments still lack merit. Its new arguments, such as its vague and unsupported Constitutional claims, also lack merit.

There is one issue, I guess at this point it may make sense to respond directly to something that came up earlier, and that is the idea that the logic of Arch Coal or Atlantic Richfield applied to this case, and I would respectfully point the Commission back to the Commission's order in April of 2018 when it explicitly held that those two cases were inapposite here, and held that the only role in the facts that are present in this case that any proposal, if it were ever to become nonspeculative, which the ALJ found even the proposal on the record at the end of trial were too speculative to warrant evaluation, but that any proposal could only be used for the limited purpose of remedy or as rebuttal argument in the context of harm that might theoretically happen after a point in time with the divestiture could take place.

COMMISSIONER PHILLIPS: Counsel, is yours just sort of a black-and-white straight position that in a consummated merger case you never consider the divestiture as part of the prima facie case?

MR. ZACH: In a consummated deal with these

facts, it's impossible, and I would say the case law suggests there is an extremely narrow set of conditions where it has ever been viewed as part of the underlying transaction. That's Arch and Atlantic Richfield, and those facts were there was a concrete divestiture proposal, which we don't have here; made before a complaint was filed, before the merger was consummated, and that's obviously an important point that I will get to in a second; and they would have been effective, become implemented, simultaneously, or essentially simultaneously. And under those very discrete set of facts, those two courts and only those two courts have ever indicated that they could be part of the underlying transaction.

So what I'm struggling with is whether in a consummated merger, you could ever have a situation where some proposal would be so close to becoming fully effective and concrete, close in time to the consummated deal, that that logic could even hope to apply. I can't think of one, but that's the -- that's the best I could think of in this setting of what ever could be consummated.

COMMISSIONER WILSON: So, counsel, you used the word "concrete." This asset purchase agreement, and I don't know if we need to wait until we go in camera, but

the asset purchase agreement that we have is 55 pages long and it's incredibly detailed. There may be issues with whether you believe it is likely to fully restore competition otherwise lost by the merger, but do you not view this as concrete in terms of addressing all of the issues that would normally be addressed in an asset purchase agreement?

MR. ZACH: It is not concrete as would be required by the law, and for the reasons Judge Chappell identified in his opinion. So setting aside whether it could ever restore competition, which is I think the second step of the analysis, the material terms of the proposal have too many uncertainties to meet the concreteness required.

For instance, on its face, it's unclear how many employees any divested buyer could ever hire. The terms of the -- of the APA restrict to only seven without some additional approval from Otto Bock. Without making it clear what happens when there's a disagreement in the future, particularly when a buyer has articulated the need to hire people beyond those identified. That is a problem of the concreteness of the agreement.

COMMISSIONER CHOPRA: Aren't those step two issues, though?

MR. ZACH: Those are also step two issues

because if they ultimately can't get them, that's another reason they may not be able to fully restore competition, but it's the uncertainty on what happens when there's a disagreement. There's nothing but a proposal from Otto Bock saying, well, we'll deal with that later, and maybe approve it, maybe not.

COMMISSIONER CHOPRA: But that's common in purchase agreements of deferring decisions. That doesn't make the agreement less concrete.

MR. ZACH: I think it does because there's a process that there's uncertainty embedded in it that's important for whether the Commission could be confident in knowing what the divested entity is going to look like if they said, this rebutted the prima facie case. We don't need to issue an order, but this will be implemented.

The Commission couldn't possibly know which employees would be there. Nor would they know, for instance, in a proposal where manufacturing assets aren't going over, and the company is going to rely on Otto Bock to make those MPKs, what costs they're going to buy those MPKs from them for and then resell.

It's the uncertainty about how that would play out that's important for the first element. They all play a role for the second element, whether they restore

competition, but we believe Judge Chappell got it right, that those undermine the concreteness of the proposal such that it doesn't warrant evaluation.

COMMISSIONER CHOPRA: So putting that aside, how should we look -- is there ever cases where the hold separate engaged that is entered into post-consummation, when would we ever weigh that heavily?

MR. ZACH: It's hard to know when that would be particularly important. I mean, if you look at General Dynamics, the actions by a company that's been sued or knows it's about to be sued, and chooses to take certain actions just to not look like it's being anticompetitive in the moment, can't cure the anticompetitive nature of the underlying transaction.

In addition to that, hold separates are an imperfect vehicle for keeping competition robust and alive during the pendency of a transaction. It's been now more than a year that Freedom has been operating in flux, not as a truly independent entity, reliant on Otto Bock for certain aspects of its operations, and customers recognize that uncertainty, react to it.

I believe that a hold separate by its nature can't really be a cure to a clearly anticompetitive consummated deal.

CHAIRMAN SIMONS: Is there an argument that

Freedom was in better competitive posture under the hold separate than it would have been in the but-for world, had there been no acquisition by Otto Bock?

MR. ZACH: No, because the evidence is very clear, someone else would have bought Freedom. There was already an offer in hand well above liquidation value.

CHAIRMAN SIMONS: Someone else who would have passed antitrust muster?

MR. ZACH: Certainly that would have been less anticompetitive than this deal, but also, there were expressions of interest from other companies that were denied, other companies who were never approached, but have expressed interest, and I think what's important in my mind when I think about this issue is to take a step back to the spring of 2017. At that point in time, there were a number of options, taking on a new capital investor, refinancing its debt, both of which would have allowed it to continue as an independent entity, or selling it to anyone other than its closest competitor.

It chose to do the latter, because it wanted the highest price possible, but to answer your question, any of those other paths would have kept it competing independently, and its future is very bright that, you know, with the launch of the Quattro and other products,

the R&D pipeline has been described as the strongest in the company's history. It would have been competing vigorously in any situation other than this merger.

COMMISSIONER PHILLIPS: Counsel, the process that you were just describing, as I recall, there was the initial outreach with Otto Bock, which we've already discussed, there was the outreach to others, one of which may also have presented competition issues, the other of which appeared not to be interested, and I take your point, there wasn't further outreach, but not having further outreach doesn't seem fully to answer the question or to support your statement that in the but-for world, someone would have bought them.

So help me understand why we know that.

MR. ZACH: Well, so we know that one company would have bought them, they made a final bid. What I'm trying to say is that there was a choice made by Freedom to pick a very narrow path to sell itself to Otto Bock, and the evidence is clear that there is a lot of interest from other companies who would be willing to buy all of Freedom and the evidence indicates they would have.

Frankly, many of them are being attempted to be stood up as potential buyers in a different setting. I mean, there's just a lot of evidence that they would

have been able to continue to be a competitive force. There is no evidence that Freedom would have exited the market absent this merger. In fact, they've never even calculated their own liquidation value. They were investing more heavily in R&D in 2017 than in years past. They were hiring salespeople. I mean, this is a company that had not even contemplated the notion of exiting the market but for that deal.

COMMISSIONER CHOPRA: So the revolver, the note that was due, you know, how should we think about the question of could they have refinanced? You know, given their financial condition that they would not have been able to potentially meet certain obligations?

MR. ZACH: To answer your question, I'm going to do two things: Explain why the timing wasn't particularly important, first, and then explain the evidence as to why they would have had some form of capital to keep going.

COMMISSIONER CHOPRA: Okay, and if there's anything confidential, you can defer that back to the in camera.

MR. ZACH: I will be careful about that, but I think we should be okay. The timing just before the acquisition was consummated was a result of the design of the merger. They decided to take it from earlier in

the spring of 2017 and move it to that time frame because they knew they would pay it off when Otto Bock purchased them.

Now, if we take a step back to the spring of 2017, you have a company that all of the evidence pre-merger and post-merger shows there's a company that's improving its health, financially, but has an extremely attractive pipeline in the product that Freedom certainly thinks is going to increase its market share, revenues and profits significantly. Otto Bock certainly agreed with the strength of the Quattro product when they evaluated it, as have potential buyers when they've looked at that same R&D pipeline.

And so what the evidence shows is that there was an attractive company, they weren't focused on getting a new lender or necessarily a new equity investor. In fact, there's evidence saying that was not the preferred option, because the existing owners didn't -- either didn't want to dilute their shares and/or wanted to be out of the business and just be done with it and have the sale and cash it out.

And so they didn't pursue that is what the evidence shows. But I would suggest that the financial condition of Freedom suggested it would have been an opportunity.

COMMISSIONER CHOPRA: So you're saying that we should look at the financial trajectory as well as their actions on whether or not they pursued certain capital sources to determine, even in spite of evidence that there was going to be an event that might not have been able to make whole?

MR. ZACH: I think the Commission should consider its options in restructuring its lending as the fourth or fifth option it had available in how it was going to continue as an ongoing enterprise, because it had the opportunity to sell itself to anyone, and I just don't think the evidence shows had they not wanted to sell themselves, that they couldn't have actually gotten financing as well. I don't think we have to get there.

COMMISSIONER PHILLIPS: Counsel, they go back to their equity investors, right, after already having gone to that till once, and the answer from the equity investors is, put yourself on the path, right, go engage the bankers, right? That doesn't seem like an infinite source of financing available to them.

COMMISSIONER CHOPRA: It's a bridge loan.

MR. ZACH: What the evidence shows is that one of the existing lenders were actually likely willing to stay on board. The other one seemed that they were less likely to stay on board, but when they approached other

sources of capital, there was interest, but the valuation for the company, while above liquidation value, wasn't as high as they would like. So when they started getting interest from Otto Bock, suggesting they'd make a lot more if they sold it to Otto Bock, they pursued that path. But the evidence does show that there was -- there were people out there willing to at least entertain investing, but they weren't going to pay as much as Otto Bock, and under the failing firm defense, you can't make the failing firm defense with those facts.

Moving into the specific arguments raised by Respondent counsel, the ALJ's product market definition is not vague. The U.S. MPK market is perfectly clear. In fact, the ALJ identifies each specific MPK product contained in that market on page 36.

He did not ignore MPK differentiation. He determined a narrower market that included only the C-Leg, the Plié, the Rheo, the Orion, Allux and DAW's MPKs would also establish a strong presumption of illegality. And the evidence showing mechanical knees are not in the relevant product market is overwhelming, as we've already discussed.

Respondent has the burden to show repositioning will fill the competitive void. Collective

repositioning by Össur, Endolite and Proteor would not fill that void. That's why Respondent plans to raise the price of the Plié post-merger because it knows customers won't switch to those other MPKs in sufficient numbers to make that unprofitable.

There is no evidence in the record that any MPK supplier plans to change its strategy as a response to the merger. And the ALJ cited a large volume of evidence showing why Össur, Endolite and Proteor weren't going to fill that competitive void.

Össur's Rheo is an unattractive alternative to Respondent's MPKs, because of its functional differences, and safety and reliability issues. Össur's executive vice president of R&D testified at trial that the C-Leg and Plié are closer to one another than either is to the Rheo because the Rheo is based on this fundamentally different technology. It makes patients feel less stable on their knee than Respondent's MPKs. That's the words of their own executive.

Several clinics and Respondent's own documents support this conclusion that Rheo is not a close substitute for the Plié and C-Leg. And the record contains no evidence showing Össur plans to expand.

Also, there is clear evidence from the document I referenced earlier, drafted by Mr. Schneider of Otto

Bock, that Quattro will compete far more closely with C-Leg four than Rheo does, which is why Otto Bock sought to prevent Össur from buying Freedom.

Endolite would not prevent harm because it has a very small share. Low single digits, despite being here for 20 years. Endolite has no plans to upgrade its MPK. It has long suffered from a poor reputation, and Endolite's executive chairman, who testified at trial, explained that those clinicians have very long memories.

Endolite's documents show the company still has serious reliability issues. A document from the second quarter of fiscal year 2017, 2018, shows the top challenge identified was product returns for the Orion, due to a liability incident. So the ALJ's conclusion on this is very sound.

Proteor would not fill the competitive void either. The Allux has tiny sales. Proteor describes itself as a tadpole in the ocean and admits that Nabtesco is not very well known. Those are the words of the only Proteor executive to testify at trial.

Many customers have never heard of the Allux, and of the few who have, several believe it has serious reliability and customer service issues.

I'm going to skip failing firm just because I think we've covered that, but obviously if there are

specific questions, I don't want to do so if you would rather have me linger, but moving on, Respondent failed to prove a powerful buyer will prevent harm from the merger. As the Wilhelmson Court recently held, normally a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer.

Hanger, the evidence shows, used the presence of Freedom to negotiate lower prices for the C-Leg and the Plié. By eliminating Freedom, Otto Bock will be able to raise prices on Hanger. And in any event, any negotiating leverage possessed by larger clinics won't protect smaller clinics where prices are negotiated in one-off events.

COMMISSIONER CHOPRA: Counsel, is there any points you wanted to make with respect to remedy?

MR. ZACH: Yeah. Let me quickly move on to the second to last bullet and the third to last bullet. We've talked a little bit about the ALJ's determination of the APA as being too speculative, but even if it weren't, I do want to talk for a moment about why it wouldn't restore competition, as it's Respondent's duty to show, or burden to show, rather.

The APA, and all of the proposals in this case, did not include, they were never offered to any buyer, a

set of assets that included the Kinnex ankle, which was designed to be integrated and sold with Quattro, any of Freedom's prosthetic feet, which a voluminous record shows were extremely important to Freedom's success as a competitor in the MPK market. And the IP rights we were talking about, I think a little bit earlier, are clearly insufficient to allow any buyer of these assets to compete effectively in the future.

COMMISSIONER PHILLIPS: So, counsel, if the APA in question doesn't provide for the proposed buyer to receive those IP rights and those assets, why shouldn't we defer to their business judgment about what they need to make the product work?

MR. ZACH: To be -- so I understand the question, is the "they" the buyer or Respondent?

COMMISSIONER PHILLIPS: The buyer.

MR. ZACH: So the evidence shows, and I'm going to talk just now about the buyer who has an APA, not --

COMMISSIONER PHILLIPS: That was my question.

MR. ZACH: One is, I mentioned some of these assets, all of the assets I just talked about, were never even offered to the buyer. So the buyer does not -- my time has run out. May I have 30 seconds?

CHAIRMAN SIMONS: Sure.

MR. ZACH: The buyer has never done any due

diligence on those assets. There's facial problems like the IP that I think any buyer the Commission would say would be hobbled in a way that's problematic if they can't make an MPK after the Quattro, but if we get out of the technical details and take a step back, the buyer's incentives aren't aligned necessarily with consumers or the Commission's. The buyer may very well be happy to buy a smaller set of assets that are really low priced, and go and make a profit, but not compete as effectively as Freedom would have.

But that's not what the Commission's role or the antitrust laws goal would be. It would be to fully restore Freedom. And given a buyer who has no experience in the MPK space, and who has proposed a business model that is viewed by anyone who competes there as not an optimal model by relying on distributors rather than the sales force, I think there is ample reason to question the credibility of the testimony of that buyer.

With that, that was the end of my presentation.

CHAIRMAN SIMONS: Thank you, Mr. Zach.

Mr. McConnell?

MR. McCONNELL: Thank you. Just to rebut some of those points as quickly as possible. First, Administrative Law Judge Chappell looked to testimony

from four clinics to conclude that the C-Leg and Plié were the top two choices, not next best choices, but top two choices. It was an executive from Hanger, an executive from COPC, an executive from Ability, and a prosthetist, Tracy Ell, at Mid-Missouri. All four of those individuals testified at trial that they don't select MPKs. Hanger has 800 clinicians, every one of its 800 clinicians has different preferences and different choices, okay?

Mr. Asar, the CEO of Hanger, cannot represent all 800 clinicians at his clinic. Neither can COPC's, Mr. Sen, and neither can Ability's, Mr. Brandt, and neither can --

COMMISSIONER PHILLIPS: These are business people, though?

MR. McCONNELL: Exactly correct.

COMMISSIONER PHILLIPS: They are in the market to buy products for their clients?

MR. McCONNELL: They do not buy. They put out -- they defer the purchasing decision to the prosthetists that work at their clinics. They were very clear and explicit in their testimony that they don't make the choices.

CHAIRMAN SIMONS: Who negotiates the prices with the supplier, with Otto Bock and the other suppliers of

MPKs?

MR. McCONNELL: The evidence is a mix, Mr. Chairman. It depends. There's different --

CHAIRMAN SIMONS: It's not the clinicians, right?

MR. McCONNELL: Sometimes it is the clinician, depending on the size of the clinic. Sometimes the prosthetist does negotiate. And I just want to point out COPC, and direct the Commission to PX03114, the purchasing guidelines from COPC. One of those clinics that complaint counsel and the ALJ relies on for closeness of competition, in their purchasing guidelines, it is Endolite's Orion that is the closest positioned competitor to the Plié 3, based on different types of insurance. And it is the C-Leg 4 that is for people with premium insurance. So I just want to direct the Commission to look at that. That's the example of the insurance differences.

COMMISSIONER WILSON: Counsel, just a couple of questions about the divestiture. The end date in the asset purchase agreement is past. Can you tell us the current status of this agreement between the parties to the agreement?

MR. McCONNELL: The agreement is, as far as I know, is not only in place, but has provisions within

the APA for extensions through the conclusion of these proceedings.

If I could just really quickly turn to these claims that the November 7th and 8th meeting was any type of plan. I defer the Commission to please look at the minutes of those meetings. That was the first time people from Germany ever met the people from California at Freedom, and they got together, and they proposed many ideas, including determining whether they could reposition Quattro, including determining whether they could increase the price of the Plié.

They certainly considered that, they did not decide to do that. There are no plans. I would ask the Commission to please look at that document and look at the testimony at trial, the sworn testimony of the individuals that were at that meeting, from both Freedom and Otto Bock, that said that no plans were reached at that meeting. And, in fact, the dual-brand strategy in December kept the Plié in the market at a low price. So please review that document.

COMMISSIONER PHILLIPS: The action items from that meeting, are those part of the minutes?

MR. McCONNELL: Yes, they are part of the minutes, and the action items are to go investigate, and that's what they did. And they worked with A. T.

Kearney to develop a plan, and the plan that was developed does not involve any price increases on Plié or any repositioning of Quattro. So please look at that document very carefully. It was mischaracterized by complaint counsel.

Next I want to talk about the differences with the Plié 3. Complaint counsel said there's no evidence in the record about the material difference in how the Plié 3 works. The instructions for use that come with the Plié say you need to carry around your Allen wrench and your bicycle pump with you. And, in fact, Dr. Prince and Mr. Schneider testified, even going from outside in the humidity, indoors, to an air-conditioned room, would require you to make manual changes to the knee. It is materially different and the record evidence is clear. Please look at the individuals with first-hand knowledge for how these products work. Dr. Prince, Mr. Schneider and Dr. Kannenberg.

Also, the Plié Fast Fit, the evidence is very clear, John Robertson, who was the head of R&D, testified under oath that the Plié Fast Fit was stopped because of a lack of resources, and the fact that they couldn't develop any improvements to the Plié 3, because it was a dead product in July of 2017. It is very clear evidence. And Mr. Smith, who testified at trial, said

he would defer to Mr. Robertson, who was the head of R&D, who said that the Plié Fast Fit was put on hold months before the acquisition because Freedom was a failing firm, had no ability to meet $27.5 million, just to satisfy its credit obligations, let alone significant other money.

And I would just ask the Commission, I know my time is up, if I could just have a few seconds. Please look at the documentation from 2016 forward from clinicians about the competitiveness of the other players in the market, their plans. They all had plans for next generation MPKs, they're going to be better than the Quattro. Please look at those, please look at the expansion, it's very important.

CHAIRMAN SIMONS: Thank you, Mr. McConnell.

MR. McCONNELL: Thank you.

CHAIRMAN SIMONS: Would any of the Commissioners want to ask in camera questions and have an in camera session?

COMMISSIONER CHOPRA: Yeah, I would propose so.

CHAIRMAN SIMONS: Well, then I'm going to move that we close the oral argument now, so that we may discuss the in camera material pursuant to 5 USC 552(b)(C)(4) and (10), under the Sunshine Act. The general counsel is here?

COUNSEL: Yes.

CHAIRMAN SIMONS: And you agree that this portion of the meeting can be closed under the cited exemptions?

COUNSEL: Yes, Mr. Chairman.

CHAIRMAN SIMONS: Okay, and is there a second?

COMMISSIONER CHOPRA: I second.

CHAIRMAN SIMONS: All right, then I will ask the Commissioners to vote in order of reverse seniority.

Commissioner Wilson?

COMMISSIONER WILSON: Yes.

CHAIRMAN SIMONS: Commissioner Slaughter?

COMMISSIONER SLAUGHTER: Yes.

CHAIRMAN SIMONS: Commissioner Chopra?

COMMISSIONER CHOPRA: Yes.

CHAIRMAN SIMONS: Commissioner Phillips?

COMMISSIONER PHILLIPS: Yes.

CHAIRMAN SIMONS: And I vote yes. And at this point, I will ask the courtroom to be cleared, except for the complaint counsel, the Respondent's counsel and members of the Commission staff. I ask the acting secretary and her staff and the general counsel and his staff remain, and, of course, the court reporter should continue to transcribe the proceedings.

(Whereupon, there was a recess in the

proceedings.)

(Whereupon, the proceedings were held in in camera session.)

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(The following proceedings were held in in camera session.)

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(Whereupon, at 4:02 p.m., the hearing was adjourned.)

CERTIFICATE OF REPORTER

I, Sally Jo Quade, CERT, do hereby certify that the foregoing proceedings were recorded by me via stenotype and reduced to typewriting under my supervision; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

SALLY JO QUADE, CERT