PUBLIC

ORIGINAL

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

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

RESPONDENT'S POST-TRIAL REPLY BRIEF

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INTRODUCTION

Complaint Counsel's Post-Trial Brief is totally divorced from the record that was thoroughly established during 13 weeks of trial. It is littered with highly misleading and incomplete excerpts from testimony, citations to outdated and irrelevant documents that were never discussed at trial, and an assortment of exaggerated distortions and one-liners taken grossly out of context. At the same time, Complaint Counsel simply ignores fundamental facts about Freedom and competitive conditions that were consistently confirmed by witness after witness and that are, at this point, beyond dispute:[1]

- Freedom was a terribly managed company that had been [redacted] for years and was [redacted] because it could not repay approximately $27.5 million in debt just days before the Acquisition closed; Ottobock thus paid Freedom's debt, saved the Plié (and Freedom's many foot products) from exiting the market entirely, and [redacted]

- Respondent has finalized a [redacted] to completely divest all of Freedom's MPK assets – *i.e.*, 100% of the assets in the alleged market – which, if approved by the FTC, would result in [redacted]

- Freedom's prosthetic knee product, the Plié, is a low quality product that does not compete directly with, or function like, the long-standing, gold standard MPK available in the United States, Ottobock's C-Leg. In fact, the Plié is far more similar to a Sophisticated Non-MPK.

- At least three other MPK manufacturers – [redacted] – have the ability and incentive for timely, likely, and sufficient expansion of MPK production to more than replace Freedom's approximately [redacted] unit annual output of the Plié. [redacted]

- Hanger – the instigator of the FTC investigation and [redacted] – is so powerful in the prosthetics industry that it is able to control and manipulate the prices charged by MPK manufacturers to its approximately 800

[1] Capitalized terms not otherwise defined herein shall have the same meaning assigned in Respondent's Post-Trial Brief.

prosthetic clinics in the United States. [redacted]

- The third-party payer system in the United States absolutely constrains the ability of Ottobock and other MPK manufacturers to raise prices, according to the testimony of the prosthetic clinics who actually purchase MPKs.

- There is not a scintilla of evidence that Freedom's [redacted] in launching the so-called "Quattro Project" have anything to do with the Acquisition or any conduct by Ottobock. [redacted]

Because these facts, and the evidence supporting them, essentially gut Complaint Counsel's case, it has resorted to gross distortions of the record evidence and imbalanced reliance on witnesses who severely lack credibility. The following are just *some* nonexhaustive examples comparing Complaint Counsel's mischaracterization of the evidence with the reality of the record:[2]

Complaint Counsel's False Claims Versus Reality

Complaint Counsel's False Claim	Record Evidence Reality
Complaint Counsel Claim: [redacted]	***Reality:*** Respondent served [redacted] with all of its other trial exhibits on the date that its final proposed exhibit list was due – May 29, 2018 – pursuant to the Fourth Revised Scheduling Order. Response to CCFF ¶ 236. Complaint Counsel misrepresented the timing of Respondent's disclosure of [redacted] by citing the out-of-date Third Revised Scheduling Order in CCFF ¶ 236.

[2] Citations to the parties' respective Post-Trial Briefs and Proposed Findings of Fact are as follows: (i) Respondent's Post-Trial Brief ("R. Br."); (ii) Respondent's Proposed Findings of Fact ("RFOF"); (iii) Complaint Counsel's Post-Trial Brief ("C.C. Br."); (iv) Complaint Counsel's Proposed Findings of Fact ("CCFF"); and (v) Respondent's Responses to Complaint Counsel's Proposed Findings of Fact ("Response to CCFF").

Complaint Counsel's False Claim	Record Evidence Reality
Complaint Counsel Claim: Freedom's Plié 3 is the "most innovative MPK on the market." C.C. Br. at 64.	***Reality:*** Freedom's former CEO says, with the Plié 3 alone, [redacted] Response to CCFF ¶ 1458 (Carkhuff, Tr. 390).
Complaint Counsel Claim: [redacted] C.C. Br. at 79.	***Reality:*** [redacted] Response to CCFF ¶ 1451.
Complaint Counsel Claim: [redacted] C.C. Br. at 93.	***Reality:*** [redacted] CCFF ¶ 1453; Response to CCFF ¶ 1453.

Complaint Counsel's False Claim	Record Evidence Reality
Complaint Counsel Claim: [redacted] C.C. Br. at 88.	***Reality:*** A "Dual Brand Strategy" was adopted under which Freedom continued to operate as an independent entity making its own decisions about pricing and product positioning. Freedom did not increase the price of the Plié 3 after the Acquisition. The section of the document cited by Complaint Counsel as Ottobock's alleged "post-merger plans" (PX01306) was presented as part of a brainstorming session and the idea was rejected because "it made no sense at all." Response to CCFF ¶ 141.
Complaint Counsel Claim: [redacted] C.C. Br. at 92; CCFF ¶ 1468.	***Reality:*** [redacted] [redacted] Response to CCFF ¶ 1119.
Complaint Counsel Claim: Complaint Counsel claims that Freedom's Consolidated Income Statements for the month ending August 31, 2017 reflected [redacted] CCFF ¶ 1901.	***Reality:*** The Consolidated Income Statements for the month of August 2017 reflects a [redacted] Response to CCFF ¶ 1901.
Complaint Counsel Claim: At the time of the Acquisition, Freedom was able to meet its financial obligations in the near future. CCFF ¶ 1945.	***Reality:*** Complaint Counsel's expert, Chritine Hammer, admitted at trial that at the time of the Acquisition, Freedom owed Lenders $27.5 million and it had no ability to pay that debt obligation when due, absent an acquisition or refinancing. Response to CCFF ¶ 1816; (Hammer, Tr. 3043).
Complaint Counsel Claim: [redacted] C.C. Br. at 131 (citing CCFF ¶¶ 2203-2205).	***Reality:*** [redacted] Response to CCFF ¶¶ 2045, 2203-2205.

Complaint Counsel's False Claim	Record Evidence Reality
Complaint Counsel Claim: Dr. Fiona Scott Morton (Complaint Counsel's expert) concludes that, [redacted] Response to CCFF ¶ 1006.	***Reality:*** Dr. Scott Morton testified: [redacted] Response to CCFF ¶¶ 1006-1007.
Complaint Counsel Claim: [redacted] C.C. Br. at 34 (citing CCFF ¶¶ 659 – 662).	***Reality:*** [redacted] [redacted] Response to CCFF ¶ 659 (citing Ferris, Tr. 2372).
Complaint Counsel Claim: Switching patients from MPKs to Non-MPKs would be "a disservice to patients and poor patient care," according to Keith Senn. C.C. Br. at 38 (citing CCFF ¶ 598).	***Reality:*** Keith Senn is not a prosthetist, and he testified that he is not familiar with Non-MPKs, does not know the difference between a fluid-controlled and a constant friction Non-MPK, and has never observed a patient wearing an MPK navigate terrain. Response to CCFF ¶ 1004 (citing Senn, Tr. 152, 153, 163, 173, 201, 251).
Complaint Counsel Claim: Christine Hammer (Complaint Counsel's expert witness) concludes that "Freedom's sales process did not amount to a good-faith effort to elicit reasonable alternative offers." Response to CCFF ¶ 2074.	***Reality:*** By her own admission, Hammer is not qualified to speak in court about merger and acquisition ("M&A") transactions or sale bidding processes. She is an accountant and expressly not an "M&A" person and has no experience working on a sale bidding process. Response to CCFF ¶ 1816.

Complaint Counsel's False Claim	Record Evidence Reality
Complaint Counsel Claim:. CCFF ¶ 2464.	***Reality:***. Response to CCFF ¶ 2464.
Complaint Counsel Claim: CCFF ¶ 2881.	***Reality:*** RFOF ¶ 1225. RFOF ¶ 1225 ; Response to CCFF ¶ 2881.

Complaint Counsel also chooses to attempt to make its case through the testimony of several witnesses who are unreliable and simply not credible. In fact, virtually all of the witnesses Complaint Counsel called to testify were severely undermined on cross-examination. Complaint Counsel's chief witness is a disgruntled former Ottobock executive, Matthew Swiggum. Swiggum was fired by Ottobock for poor performance just before the discovery period began in this proceeding, and he then offered Complaint Counsel an implausible explanation for his termination: that he supposedly refused to terminate several Ottobock employees who not only remain at Ottobock today, but who received promotions after Swiggum's departure while Swiggum has been unemployed. This explanation, and much of Swiggum's testimony, strains credulity. And even

though it was established beyond any doubt that [redacted], Swiggum's testimony is nonetheless cited by Complaint Counsel more than one hundred times. Similarly, Complaint Counsel relies heavily on the testimony of Vinit Asar, the CEO of Hanger – [redacted] – even though Asar is not a prosthetist and has no foundation to testify about knee products in the alleged market. Consistent with this theme, Complaint Counsel also relies repeatedly on citations to the discovery depositions of witnesses who never even appeared at trial so this Court would not be able to judge their credibility (or lack thereof).

When viewed as a whole, the evidence introduced at trial was strongly in Respondent's favor. On all of the key elements, Complaint Counsel repeatedly came up short – *e.g.*, an ever-shifting and ambiguous alleged market definition, strong evidence of market realities that rebut any presumption of harm to competition, repeated evidence of Freedom's financial failure avoided only by the Acquisition, and [redacted] to resolve any doubt regarding harm to competition through an MPK Divestiture. Indeed, it should be remembered that Complaint Counsel alleges only *unilateral effects* – without an iota of concern for potential coordinated effects – that could immediately be offset or cured through an MPK Divestiture.

Judicial decisions in antitrust trials must be about real world facts, not hyperbole or speculation. After 13 weeks of trial, the testimony of 68 witnesses live and by deposition, the introduction of 2198 exhibits, and thousands of pages of post-trial briefing and proposed findings of fact, Complaint Counsel is unable to identify a single shred of evidence demonstrating that Freedom could have survived, let alone thrived, as an independent competitor beyond September 2017. All the evidence shows that Freedom was wounded and insolvent, [redacted] and woefully short of the millions of dollars of cash that it needed to pay its creditors

and fund its on-going operations. Unquestionably, the market for MPKs today is more competitive than it was prior to the Acquisition. Four competitors (Össur, Endolite, Nabtesco, and DAW) are competing head-to-head against Ottobock with the capacity and capability to expand in order to produce additional MPKs well in excess of the [redacted] MPKs Freedom sold each year. [redacted]

It is time for this case to end in Respondent's favor so that Ottobock and Freedom are able to return to their respective missions of providing important relief to America's current and former military and other patients with limb loss in the United States.

SUMMARY OF ARGUMENT

In its Post-Trial Brief, Respondent laid out at least seven general grounds to reject Complaint Counsel's challenge to the Acquisition. R. Br. at 1-2. The following flaws in Complaint Counsel's Post-Trial Brief further support that result.

First, Complaint Counsel failed to clearly define a market. Witness after witness testified that their respective clinics fit Sophisticated Non-MPKs on patients in the very same patient population that are also eligible to receive MPKs. In fact, more than half of patients who are deemed eligible to receive MPKs receive Sophisticated Non-MPKs instead. Prosthetic knees are highly differentiated products and there has been no evidence (or allegation) of coordinated effects in this case, imposing a high burden on Complaint Counsel to clearly state what products are "in" the alleged market, what products are "out," and why these distinctions make sense in the real world. Respondent's economics expert, Dr. David Argue, constructed a model of clinic profitability, based on real world evidence about clinic expenses and margins, that demonstrated

that Sophisticated Non-MPKs should be included in the relevant market. His testimony and conclusions stand in sharp contrast to Complaint Counsel's expert, Dr. Scott Morton, who relied on a thoroughly discredited theory, the so-called Lerner Condition, as the lynch-pin of her analysis and arrived at a nonsensical result with a market consisting of *only* MPKs sold by Ottobock and Freedom. It was quite evident at trial that Complaint Counsel failed to meet its burden not only of *proving* that its alleged market makes sense, but of even *clearly defining* it in the first place. Complaint Counsel's Claims should fail for this reason alone.

Second, there is no likelihood of harm to competition from the Acquisition stemming from the elimination of a close competitor. Because prosthetic knee brands are very unique, highly differentiated, and personal products, it was incumbent on Complaint Counsel to establish that Freedom's MPK, the Plié, is the closest substitute for Ottobock's C-Leg. Complaint Counsel did not even come close. Scores of witnesses testified that the C-Leg and the Plié are not close substitutes. On the contrary, the C-Leg is well-known in the industry as a more expensive product that is both higher in quality and functionality, while the Plié is known as a cheap, low quality product that functions in a dramatically different fashion than the C-Leg. The Plié is not, as Complaint Counsel has unsuccessfully tried to portray it, a lower price, higher quality option.

Third, expansion by existing MPK manufacturers would (and indeed has been) timely, likely, and sufficient to eliminate any alleged anticompetitive effects. Freedom was not a significant player in the prosthetic knee market before the Acquisition, having sold approximately [redacted] units of the Plié in the last full calendar year before the Acquisition. [redacted] alone have the ability and incentive to quickly increase capacity by at least [redacted], respectively. Their respective products are higher quality than the Plié and are far closer in functionality to the C-Leg. Nabtesco also manufactures MPKs, and through its partnership with

Proteor, Inc., is quickly growing. Nabtesco has been on a steady rise since the introduction of the Allux, the world's first four-bar MPK, in 2017. While the product is relatively new, the evidence at trial shows that manufacturers, like Freedom, were keenly aware of the competitive threat posed by the Allux. Nabtesco anticipates increasing MPK sales from [redacted] units in 2018 to [redacted] units in 2020, which will further enhance the already vigorous competition for MPK sales. Complaint Counsel desperately tries to attack and disparage Nabtesco, but the inescapable truth is that Freedom was in *far worse* condition than any existing prosthetics company in the world at the time of the Acquisition. In that context, Complaint Counsel's criticisms of the business acumen and MPK offerings of other competitors ring hollow and fall on their face.

Fourth, Complaint Counsel failed to side-step the dominance of Hanger in the prosthetics industry. Hanger has [redacted]. Hanger admittedly instigated the FTC's investigation of the Acquisition and [redacted]. Indeed, Hanger has no reason to fear price increases because it is able to unilaterally control and manipulate the prices that manufacturers charge to its approximately 800 clinics across the United States. So powerful is Hanger that it is has, [redacted]

Fifth, the testimony of clinic representatives was uniform that the third-party payer system in the United States prosthetic industry absolutely constrains the ability of Ottobock and other

MPK manufacturers to raise prices. Complaint Counsel does not meaningfully engage with that unique reality of this particular industry.

Sixth, Complaint Counsel failed to rebut the overwhelming evidence establishing that Freedom was a "failing firm" at the time of the Acquisition. In challenging Freedom's status as a failing firm, Complaint Counsel continues a recurring theme in its Post-Trial Brief of contesting the uncontestable. But there was not a single witness who disputes that Freedom owed its Lenders approximately $27.5 million that it had no ability to pay. While substantial additional evidence was introduced regarding Freedom's [redacted] financial state, the existence of this unresolvable debt obligation alone should remove any doubt whether Freedom had the ability to meet its financial obligations in the near future; it clearly could not. Confronted with a mountain of evidence in support of any additional requirements for a successful failing firm defense, Complaint Counsel counters with only the unsupported "say so" of its accountant expert, Christine Hammer. However, Hammer lacks the requisite qualifications to offer any expert opinions in court regarding efforts to reorganize under Chapter 11 or to elicit reasonable alternatives in a sale bidding process. Consequently, this Court should disregard Hammer's opinions as they pertain to the failing firm defense, and apply the defense as a complete bar to Complaint Counsel's Claims.

And, ***seventh***, the Acquisition, together with an MPK Divestiture, poses no harm to competition in any alleged market. Because an MPK Divestiture would release 100% of Freedom's MPK assets to [redacted] Complaint Counsel distorts the evidence and makes up facts in a misplaced attempt to demonstrate that harm to competition *might* have occurred since the date the Acquisition closed and before the closing of an MPK Divestiture, but introduced no evidence of such harm. In point

of fact, the record is undisputed that there has been *no* observed harm to competition between the closing of the Acquisition and entry into the Hold Separate Agreement, and there has been *no* observed harm since entry into the Hold Separate Agreement, which has been faithfully honored by Respondent. [redacted]. Resolution of this litigation in Respondent's favor will permit the parties to close the MPK Divestiture. Further, to the extent the Court deems a remedy appropriate, it would be overbroad and unduly punitive to impose any remedy broader than divestiture of Freedom's MPK assets – the only assets in the alleged market – and not a full divesture of Freedom's business, which is effectively what Complaint Counsel seeks in its proposed order.

LEGAL ARGUMENT

I. COMPLAINT COUNSEL FUNDAMENTALLY MISCHARACTERIZES THE NATURE OF THE PROSTHETICS INDUSTRY.

Complaint Counsel fundamentally misapprehends how the prosthetic industry functions. It attempts to portray prosthetic component selection for below-the-knee amputees as a process with two distinct steps: (Step 1) a decision as to what is "medically necessary," covered by the patient's insurance carrier, and what would most benefit the patient; and then (Step 2) the purchase of that selected component. Complaint Counsel puts the rabbit in the hat by arguing wrongly that the Court should only pay attention to "Step 2" in deciding what products are in the relevant market. That is akin to ignoring the process by which consumers weigh the pros and cons of a car and focusing only on the specific type of car purchased to determine a relevant market.

However, weighing pros and cons is precisely what competition is all about, and it is no different in the prosthetics industry. Response to CCFF ¶ 467. Though component selection is certainly constrained by third-party coverage and patient mobility level (*i.e.*, K-Levels), so too are car purchases constrained by factors, like budget and vehicle size, that shape the discussion, but

do not force a particular outcome or product selection. RFOF ¶ 394. It is in the decision of *which* prosthetic component to purchase for the patient – factoring in a clinician's preference, clinician's financial considerations, patient preference, and the patient's financial considerations – that the locus of competition takes place. RFOF ¶¶ 392-406. Within the universe of components that are medically appropriate for a patient, and are covered by insurance, is a full suite of components from which to choose. RFOF ¶ 396, 398. For K-3 patients, this universe includes both MPKs and Non-MPKs. RFOF ¶ 398. The evidence shows that once the product is selected, then medical necessity can always be established for either an MPK or Non-MPK in this patient population. Response to CCFF ¶ 466.

A colloquy at trial between the Court and Dr. Scott Morton, Complaint Counsel's economics expert, is illustrative:

> JUDGE CHAPPELL: So you believe the average patient for a knee, if there is one, has thousands of choices?
>
> THE WITNESS: They would have – let's assume they're medically indicated for a microprocessor knee. They would have all the knees from Össur that are microprocessor, all the knees from Otto Bock that are microprocessor, and the knees from Plié, the Freedom knees, to choose among, along with the little ones, that would all be paid for by the insurance company.
>
> JUDGE CHAPPELL: And you don't believe that the insurance company would also pay for a mechanical knee?
>
> THE WITNESS: I think the insurance company would be delighted to do that because –
>
> JUDGE CHAPPELL: So then that makes that an option for that patient; correct?
>
> THE WITNESS: It does except the patients – if it has a lower functionality, the patient is going to be unlikely to want it compared to the microprocessor knee.
>
> JUDGE CHAPPELL: And you're talking about high-end mechanical knees or you're just talking about those thousands of knees you told me about.

> THE WITNESS: Well, I think the – it's likely that the prosthetist would be showing someone who's got the medical need for a microprocessor knee a high-end mechanical knee. I agree with you.
>
> But if the – if that high-end mechanical knee doesn't have the functionality of the microprocessor knee, ***then the patient and the prosthetist are going to be weighing the pros and cons, I mean, this one is resistant to saltwater, but yet it doesn't have as good a gait, or whatever the issue is for that patient***. And if the microprocessor knees are better, which is what the record reflects, and the insurance company is paying for it, then I think the prosthetist and the patient together are going to want the better knee.
>
> JUDGE CHAPPELL: So I believe I heard you say 'microprocessor knees are better, which is what the record reflects,' so your opinions are based on the fact that a microprocessor knee is better for every patient.
>
> THE WITNESS: I would not say every, Your Honor, because there are the marathon runners, the fishermen, the people whose weight is incorrect for a microprocessor knee, the people who are too short for a microprocessor knee. ***There are people who will not find the knee to be better, definitely***.

Response to CCFF ¶ 467 (emphasis added). In the above exchange, Dr. Scott Morton does not claim that the healthcare system sorts patients into a Non-MPK bucket and an MPK bucket, as Complaint Counsel claims. Instead, she simply claims that patients and prosthetists would be "unlikely" to select a Non-MPK over an MPK because Dr. Scott Morton – who has no experience in the prosthetics industry outside of this case – deems MPKs better products. Response to CCFF ¶¶ 467, 953. However, the evidence shows that prosthetists and patients routinely compare and contrast the features of MPKs and Non-MPKs and make the choice between them. RFOF ¶¶ 392-419.

In reality, prosthetists typically receive a very general referring prescription that does not identify a specific type or brand of knee to be fit on a patient, but may indicate the physician's assessment of mobility level. RFOF ¶ 130. Once the treating physician clears a patient to receive a definitive prosthesis, the prosthetist begins consulting with the patient to determine the best prosthetic componentry for that patient. RFOF ¶ 115. The prosthetist begins the consultation by

talking with the patient, understanding the patient's goals, activities of daily living, and history. RFOF ¶ 115. During the initial evaluation, the prosthetist also does functional level testing in order to determine the patient's K-Level, which must be corroborated by the physician. RFOF ¶ 115.

After the K-Level is determined, prosthetists and their patients have discretion to choose among different prosthetic knees that are appropriate for the designated K-Level based on financial considerations of the prosthetic clinic and the patient, as well as based on myriad other factors, including the patient's mobility level, weight, and vocation, among other things. RFOF ¶ 117 (citing Sabolich, Tr. 5834 (testifying that there are a hundred knees to choose from, and after the consultation he narrows the selection down to a few different options)). Both MPKs and Sophisticated Non-MPKs are medically appropriate for patients with K-3 or K-4 mobility levels. RFOF ¶¶ 115, 449, 451. Patients make their choice between different prosthetic knees that are medically appropriate based on financial considerations as well as the fit and features of the prosthetic knee. RFOF ¶ 107.

"Medical necessity" refers to eligibility for a particular device. RFOF ¶¶ 446, 448. For example, CMS deems MPKs to be "medically necessary" for K-3 and K-4 patients. RFOF ¶ 448. This means that MPKs are available to that patient population, but does not mean that every eligible patient must get an MPK. RFOF ¶¶ 446, 448. Indeed, prosthetists consistently testified that they can establish medical necessity for an MPK or a Non-MPK for all patients designated as K-3. RFOF ¶ 457.

In addition, the use of the term "medical necessity" itself in this context is highly misleading, as it is not a health determination that is being made. RFOF ¶ 447. Medical necessity constitutes a spectrum, and does not have the same meaning in all medical scenarios. RFOF ¶ 456.

On one end of the medical necessity spectrum is an emergency medical condition, such as a patient with an appendix about to burst. RFOF ¶ 456. No approval from insurance is necessary to perform that emergency procedure. RFOF ¶ 456. On the other end of the spectrum is prosthetic componentry, where one component may potentially make someone's life incrementally better even if not an "emergency" in the medical context, but the term "medical necessity" is still used even though the choice is very different than emergency live-saving surgery. RFOF ¶ 456.

If an insurance company determines that an MPK is "medically necessary" for a patient as defined by the applicable insurance plan, the prosthetist, physician, or patient can still decide to select a Non-MPK. RFOF ¶ 459. This happens often. RFOF ¶ 459. "The medical necessity is just setting a ceiling to the availability, so medical necessity is usually something that you need to make as a threshold for the coverage criteria which says is the top that you could go. But that does not stop you from going down below." RFOF ¶ 459 (citing Schneider, Tr. 4405). By way of example, Dr. Douglas Smith, a highly experienced orthopedic surgeon who has performed more than 4,000 amputation surgeries, has had patients who are initially fit with an MPK who later decide that they prefer a Non-MPK. RFOF ¶ 460.

II. COMPLAINT COUNSEL HAS FAILED TO ESTABLISH A CLEARLY DEFINED RELEVANT MARKET.

Complaint Counsel bears the heavy burden of proving a clearly defined relevant antitrust market as a threshold to success on its claims. Here, Complaint Counsel has failed to clearly define its alleged market, let alone introduce sufficient evidence to prove that the market is appropriate in the context of the prosthetics industry. For this reason alone, Complaint Counsel should not prevail. Further, the market share and concentration calculations that Complaint Counsel has

offered for its ill-defined alleged market should not control. Substantial evidence introduced at trial contradicts any presumption of market power attributable to Respondent.

A. Complaint Counsel Has Failed To Meet Its Burden With Respect To Market Definition.

Complaint Counsel alleges that the relevant product market is "no broader than the manufacture and sale of microprocessor prosthetic knees to prosthetic clinics in the United States." CCFF ¶ 177. That alleged market is impermissibly both too broad and too narrow. Complaint Counsel's assertion that all prosthetic knees that contain a microprocessor somewhere in the knee's structure constitute a relevant market ignores significant evidence that patients, prosthetists, physicians, and payers consider Sophisticated Non-MPKs to be very reasonable and appropriate substitutes for certain MPKs, as they are all medically appropriate options for the same patient population. RFOF ¶¶ 392-406. Complaint Counsel repeatedly claims that there are "distinct end-users" who require only an MPK, and for whom a Sophisticated Non-MPK is inadequate, but Complaint Counsel has entirely failed to identify and describe the members of that alleged population. *See* C.C. Br. at 36. Complaint Counsel's exclusion of all Non-MPKs from its alleged market renders it fatally narrow.

Complaint Counsel also incorrectly includes in its alleged market High-End MPKs, like the Genium and X3, that are about three times the price of a typical MPK and are only available to a very small patient population (*e.g.*, DOD, VA, and Workers' Compensation patients). For this reason, Complaint Counsel's alleged market is also far too broad. RFOF ¶¶ 496-509.

In differentiated product markets, as is the case here,[3] market definition is particularly nuanced because: "to make a sharp distinction between products 'in' and 'out' of the market can

[3] The economics experts on both sides agree that this case involves a differentiated product market. Morton, Tr. 3924; Argue, Tr. 6337.

be misleading if there is no clear break in the chain of substitutes." *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1120 (N.D. Cal. 2004) (quoting Carl Shapiro, *Mergers with Differentiated Products,* 10 Antitrust 23, 28 (1996)). The consequences of getting the definition wrong in a unilateral effects case can be severe, because "if products 'in' the market are but distant substitutes for the merging products, their significance may be overstated by inclusion to the full extent that their market share would suggest; and if products "out" of the market have significant cross-elasticity with the merging products, their competitive significance may well be understated by their exclusion." *Id.* (citing Shapiro, 10 Antitrust at 28).

"If products can be used for the same purpose, the products are deemed 'functionally interchangeable.'" *In re Polypore,* 149 F.T.C. 486, 804 (F.T.C. March 1, 2010) (quoting *United States v. Chas. Pfizer & Co.,* 246 F. Supp. 464, 468 (E.D.N.Y. 1965) and citing *FTC v. Arch Coal, Inc.,* 329 F. Supp. 2d 109, 119 (D.D.C. 2004)). "Courts generally place functionally interchangeable products in the same product market." *Id.* (citing *Arch Coal*, 329 F. Supp. 2d at 119). "However, products are only included in the same market if they are both functionally and reasonably interchangeable." *Id.* (citing *Pfizer*, 246 F. Supp. at 468 n.3); *see also United States v. E.I. Du Pont de Nemours & Co.,* 351 U.S. 377, 399, 404 (1956). "Customer preferences for one product versus another do not negate reasonable interchangeability." *Polypore*, 149 F.T.C. at 804 (quoting *Oracle,* 331 F. Supp. 2d at 1130-31). "[T]he issue is not what solutions the customers would like or prefer for their . . . needs; the issue is what they could do in the event of an anticompetitive price increase by [the merged entity]." *Id.* (quoting *Oracle,* 331 F. Supp. 2d at 1131) (substitutions and omission in original).

Here, Complaint Counsel provides no basis for its selected "break in the chain of substitutes." *See Oracle*, 331 F. Supp. 2d at 1120 (quoting Shapiro, 10 Antitrust at 28). The

analytical disconnect in Complaint Counsel's alleged market stems from its failure to define specifically and consistently what constitutes an MPK, and its related failure to articulate why some knees are included in its market, but others are excluded. Recognizing that details and reality do not help them, Complaint Counsel speaks in generalities and broad strokes, and chooses to describe MPKs and Non-MPKs (or as Complaint Counsel calls them, "mechanical knees") as two monolithic groups. Response to CCFF ¶¶ 612-614, 617, 620, 648, 656, 697, 762. In doing so, Complaint Counsel overstates the distinction between MPKs and Non-MPKs, and blurs the distinctions among the many different prosthetic knees within those two categories. Response to CCFF ¶¶ 612-614, 617, 620, 648, 656, 697, 762. Ignoring the fact that prosthetic knees are highly differentiated products with a range of features, Complaint Counsel instead selects just one feature – the presence of a microprocessor – to be definitional, which has no basis in reality or economics. That approach is inadequate, and Complaint Counsel is thus not entitled to a presumption of anticompetitive effects as a result.

B. Brown Shoe *Indicia* Do Not Support An MPK-Only Market.

1. MPKs and Sophisticated Non-MPKs Have The Same End-Users.

The evidence at trial establishes that, if a patient is properly characterized as K-3, that patient is eligible for, and would benefit from, either an MPK or a Sophisticated Non-MPK. Patients and prosthetists routinely compare and contrast various features of MPKs and Sophisticated Non-MPKs in order to determine which knee to fit on each unique patient. For example, Scott Sabolich, owner of Scott Sabolich Prosthetic & Research ("SSPR"), RFOF ¶ 56, provides an example of the significant pros and cons for both MPKs and Non-MPKs:

> I can give you a C-Leg 4 and give you stability at heel strike that you can't get in your [Non-MPK], but I am going to . . . give you a lot more weight than you want. Or I can give you a lightweight [Non-MPK] that has a manual lock, that's stable, but doesn't have

> the stumble recovery like the C-Leg, so everything is a little different.

Response to CCFF ¶ 520.

Complaint Counsel appears to argue that first, "medical necessity" of an MPK is established, and once that happens, the patient simply cannot be fit with a Non-MPK. That view is grossly out of step with industry reality. Significantly, it overstates the importance of what is essentially an insurance coverage criteria term, misapprehends the order of operations, and understates the degree to which patients and prosthetists choose between and among MPKs and Non-MPKs.

Importantly, the term "medical necessity" as it is used in coverage criteria for prosthetic devices is not the same as the term is used in a medical setting. Response to CCFF ¶ 496. The record shows that there is no consistent definition of "medical necessity" in coverage criteria among the many third-party payers at issue. Response to CCFF ¶ 496. Further, for most patients, a letter of medical necessity is not needed for reimbursement purposes. Response to CCFF ¶ 496. If a letter of medical necessity is prepared, it is always written ***after*** a patient, prosthetist, and physician have already weighed the pros and cons of various prosthetic knees and have decided to provide an MPK. Response to CCFF ¶ 496. In other words, competition has already taken place because the knee has been selected. Medical necessity is then documented "after-the-fact." Response to CCFF ¶ 496. This process occurs in this sequence because, for K-3 patients, medical necessity can be established for either a Non-MPK or an MPK. Response to CCFF ¶ 496 (citing Oros, Tr. 4801; Sabolich, Tr. 5956-5957).

What Complaint Counsel attempts to frame as "necessity" really is just an additional feature that an MPK can provide to a patient. RFOF ¶¶ 454, 456, 349. This additional feature comes with some drawbacks, however, and thus factors into the prosthetist's and patient's calculus

as to which knee to choose. RFOF ¶ 347 (identifying some benefits of Non-MPKs); RFOF ¶ 349 (prosthetists comparing MPKs and Non-MPKs). In addition, "medical necessity" for an MPK can be established for any K-3 patient. RFOF ¶ 457 (citing Sabolich, Tr. 5855; Oros, Tr. 4801). And there is frequently no clear choice between an MPK and Non-MPK. RFOF ¶ 449 (citing Oros, Tr. 4801; Schneider, Tr. 4405; [redacted]). The record evidence is undisputed that, just because a patient may receive some functional benefit from an MPK (meaning that "medical necessity" could be established), it *does not* mean that the patient and prosthetist will definitively choose an MPK for the patient. Response to CCFF ¶ 520.

Though prosthetists have an ethical obligation to select appropriate devices, there is significant evidence in the record that finances also play a significant role in the decision to fit particular components as part of a prosthetic device. RFOF ¶¶ 407-419. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a Non-MPK. RFOF ¶¶ 392-406. For example:

- Dr. Douglas Smith testified that, even if an MPK would clinically benefit a patient, the patient absolutely has a choice not to get fit with an MPK based on lifestyle. Response to CCFF ¶ 530.

- Keith Senn, a representative of Center for Orthotic and Prosthetic Care ("COPC"), agreed with Dr. Smith's statement. Response to CCFF ¶ 530.

- Mark Ford, a representative of Prosthetic and Orthotic Associates ("POA"), testified that patients, physicians, and prosthetists frequently weigh the pros and cons of an MPK versus a Non-MPK. Response to CCFF ¶ 530.

- Tracy Ell, a representative of Mid-Missouri Orthotics and Prosthetic ("Mid-Missouri"), testified that prosthetists allow patients to trial various knees, including both MPKs and Non-MPKs. Response to CCFF ¶ 530.

- Scott Sabolich of SSPR testified that there is often no clear choice between an MPK and Non-MPK. Response to CCFF ¶ 530.

- Michael Oros, a representive of Scheck & Siress Prosthetics, Inc. ("Scheck & Siress"), testified that similarly situated K-3 patients come to different decisions on whether to get an MPK or a Non-MPK. Response to CCFF ¶ 530.

- Jeff Brandt, a representative of Ability Prosthetics and Orthotics ("Ability P&O"), testified that if he had a choice between a MPK and Non-MPK, he would prefer a Non-MPK for his own personal use. Response to CCFF ¶ 538.

- Vinit Asar, the CEO of Hanger, which sparked the investigation that lead to this litigation, testified that [redacted]

- Scott Schneider and Dr. Kannenberg of Ottobock characterized MPK eligibility as a "ceiling" that would not prevent someone from choosing a Non-MPK instead. RFOF ¶¶ 448, 459.

Complaint Counsel's alleged market – to the extent the boundaries of that market can even be ascertained – simply makes no sense in light of this testimony and the realities of the prosthetics industry. While the Court does not even need to consider an alternative market since Complaint Counsel has failed to meet its burden, *Oracle*, 331 F. Supp. 2d at 1107, Respondent's proposed market makes far more practical sense from the perspective of a "distinct group of end users," because it is based on established categories of users in the industry—K-3 and K-4 patients that are reimbursed by mainstream insurance.

MPKs and Sophisticated Non-MPKs are not typically available to K-1 and K-2 patients because they do not have access to CMS or private insurance reimbursement for those components. RFOF ¶¶ 251-253. K-Level determination is frequently the gatekeeper for access to prosthetic components, and as a result, manufacturers and clinicians frequently divide lower-limb prosthetic components by activity level, rather than by feature. RFOF ¶¶ 469-495. By contrast, Complaint Counsel's proposed market includes Ottobock's Kenevo, which was specifically designed for K-2 patients, even though K-2 patients generally cannot obtain reimbursement for that MPK. Kenevo and C-Leg are not designed for the same patient group (even though they are both MPKs by virtue

of the presence of a microprocessor in their respective structures); C-Leg and Ottobock's 3R80 are designed for the same patient group (even though one is a Non-MPK and one is an MPK). RFOF ¶ 478. Defining a market by K-Level is superior to defining a market by the presence of a microprocessor in a knee, because it comports with the business realities of the prosthetics industry.

2. MPKs Do Not Possess Material Unique Characteristics That Are Not Also Possessed By Sophisticated Non-MPKs.

The evidence demonstrates that there is significant overlap in technology between MPKs and Non-MPKs. Response to CCFF ¶ 617. Complaint Counsel consistently and incorrectly treats MPKs and Non-MPKs as two distinct groups. It was, however, established at trial that there is a range of MPKs that vary with respect to the extent and scope of microprocessor control and functionality, that there is also a range of Non-MPKs that vary with respect to functionality as well, and that the industry does not divide these knees into the categories espoused by Complaint Counsel. RFOF ¶¶ 135-239 (describing various features of the many MPKs and Non-MPKs available), 337 (describing how prosthetists differentiate prosthetic knees based on various features).

In particular, the Plié 3 functions more like a Sophisticated Non-MPK than an MPK, even though it technically contains a microprocessor. That is because the only task that the Plié 3's microprocessor controls is the switch between stance phase resistance and swing phase resistance. Response to CCFF ¶ 609. Otherwise, the Plié 3 functions as a Sophisticated Non-MPK would, except not as well: the Plié 3's pneumatic cylinder leaks over time and must be manually pumped up by the user with a hand pump. Not surprisingly, many industry participants characterize the Plié 3 as a hybrid knee that is somewhere between an MPK and a Non-MPK. Response to CCFF ¶ 617.

There is significant evidence in the record that indicates that there are many Sophisticated Non-MPKs available in the market that are complex, enable ambulation, and facilitate activity, particularly for active amputees. RFOF ¶¶ 140-163; ¶¶ 335-349; *see also* RFOF ¶ 143 (citing Schneider, Tr. 4335 (Ottobock's Scott Schneider described the 3R60, introduced at trial as RDX-0009, as a "super cool knee" with "lots of sophistication.")). For example, Marine veteran, Kristie Ennis, transitioned from wearing Ottobock's X3 MPK to Ottobock's 3R80 Non-MPK because her "lifestyle is very active, she's a mountaineer, she's constantly rock climbing and she's made the decision that the mechanical knee was a better option for her everyday life, so that's what she chooses to wear now." Response to CCFF ¶ 608. As Dr. Doug Smith testified, "hydraulics and pneumatics are great. They actually really work. The microprocessor just adds one more little level of control to make it work a little better." Response to CCFF ¶ 608.

Complaint Counsel relies heavily on clinical studies purportedly showing that MPKs have peculiar characteristics that are not possessed by Non-MPKs. *See* C.C. Br. at 33-36. However, that claim was resoundingly debunked during trial. The studies cited by Complaint Counsel simply do not, and cannot, support the conclusion that *all* MPKs have peculiar characteristics because they do not analyze *all* MPKs. Importantly, there are no published studies that establish any benefits whatsoever of Freedom's Plié. RFOF ¶ ¶ 350-363. There are also no studies, published or otherwise, that analyze whether the Plié provides any benefits when compared specifically to Sophisticated Non-MPKs. RFOF ¶¶ 350-363, 380-381.

In addition, the studies upon which Complaint Counsel relies have serious limitations that Complaint Counsel ignores before overstating their importance. For example, the RAND Report – which involved the American Orthotic and Prosthetic Association ("AOPA") – is not a clinical study at all. It is a literature review that creates a simulation model on which it bases its

conclusions. Response to CCFF ¶ 632. The RAND Report does not take into account the differences among various prosthetic knees, and it speaks in generalities regarding MPKs versus Non-MPKs. Response to CCFF ¶ 632. It does not distinguish among types of Non-MPKs (*i.e.*, Sophisticated Non-MPKs versus other Non-MPKs), or among different types of MPKs. Response to CCFF ¶ 632. In addition, because there are no published clinical studies that examine the Plié, the RAND Report does not review or include any evidence relating to the Plié. [redacted] Response to CCFF ¶¶ 632, 634.

Complaint Counsel also relies heavily [redacted]

[redacted]

Complaint Counsel has not and cannot show that the Plié 3 belongs in a different product market than Sophisticated Non-MPKs based on functionality. Any product market that contains the Plié 3 must also include Sophisticated Non-MPKs.

3. Sophisticated Non-MPK Prices Are Extremely Relevant In Clinic Price Negotiations.

It is untrue that Non-MPK prices are not relevant in clinic price negotiations. The evidence clearly shows that what is relevant to clinics is the margin they receive on prosthetic components, not the gross acquisition cost of the component. The margins on Non-MPKs and MPKs are extremely close, particularly for patients who are covered by private insurance. Manufacturers are also well-aware of the importance that clinics place on reimbursement margin, and price their products accordingly. RFOF ¶¶ 312-323. For example, [redacted] RFOF ¶ 427. Importantly, prosthetic knee manufacturers notice the impact that Non-MPK sales have on MPK sales. RFOF ¶¶ 479-495.

4. Sophisticated Non-MPKs Are Closer In Price To Most MPKs Than High-End MPKs Are To Most Other MPKs.

Complaint Counsel argues that the price difference between MPKs and Non-MPKs puts them in separate markets. There are several problems with Complaint Counsel's argument.

First, the documents and testimony cited by Complaint Counsel do not distinguish between the acquisition costs of constant friction Non-MPKs that are appropriate for K-1 or K-2 patients

and Sophisticated Non-MPKs that are appropriate for K-3 and K-4 patients. Response to CCFF ¶¶ 701-706. The same applies to the testimony cited regarding the reimbursement rates for Non-MPKs versus MPKs. Complaint Counsel cites non-specific evidence that appears to aggregate all Non-MPKs together. Response to CCFF ¶¶ 708-711. This evidence would only be relevant to market definition if it detailed the differences in price and reimbursement between and among MPKs and Sophisticated Non-MPKs, which it does not.

Second, record evidence contradicts Complaint Counsel's overgeneralization regarding reimbursement for Non-MPKs. Indeed, a Non-MPK can garner a reimbursement of nearly $11,000. RFOF ¶ 149 (citing Schneider, Tr. 4336-4337 (testifying that 3R60 with vacuum system would sell for $4,000 with $11,000 reimbursement resulting in a gross margin to the clinic of $7,000)).

And, ***third***, Complaint Counsel's argument is eviscerated by its inclusion of High-End MPKs in the same market as other MPKs. High-End MPKs are far more expensive than other MPKs. Further, the difference in price between a High-End MPK and all other MPKs can be ***three times greater*** than the difference in price between other MPKs and Sophisticated Non-MPKs. RFOF ¶ 508. The substantial price difference between High-End MPKs and other MPKs did not prevent Complaint Counsel from including those products in the same alleged market. Accordingly, it is not possible to reconcile how a much smaller price difference between Sophisticated Non-MPKs compared to MPKs that are not high-end would somehow exclude Sophisticated Non-MPKs from the market.

5. MPKs Are Not Sold By Specialized Vendors.

Complaint Counsel appears to argue that MPKs are sold by "specialized vendors," whereas Non-MPKs are sold by distributors. C.C. Br. at 43. That argument has absolutely no support in the record. Freedom sells its only knee product, the Plié, through both direct sales and through

SPS's distribution channel. Response to CCFF ¶ 563. Moreover, the evidence at trial established that none of the manufacturers of MPKs in the United States use "specialized" sales forces to sell MPKs. RFOF ¶¶ 463-466. Instead, sales representatives sell a wide range of prosthetic componentry (including knees, feet, and liners) and manufacturers divide their respective sales force by geography. RFOF ¶¶ 463-468. There is no evidence that any clinics specialize in MPK fittings; they opt instead to provide complete care to all amputees regardless of componentry. RFOF ¶¶ 463-466. Because prosthetic clinics do not typically specialize in a particular type of care that they provide, manufacturers do not segregate their sales forces by product. All prosthetic sales are marketed toward the same customer touchpoint, and prosthetics sales representatives market each manufacturer's full line of prosthetic products. RFOF ¶ 465.

6. Prosthetic Industry Documents Show MPKs In The Same Market As Non-MPKs.

Complaint Counsel relies on cherry-picked documents discussing estimated sales of MPKs that do not fairly describe the appropriate prosthetic knee market. *See, e.g.*, Response to CCFF ¶¶ 718, 720, 722. Complaint Counsel cites the testimony of a former executive, Matthew Swiggum, for the idea that Ottobock calculates MPK market shares on a regular basis, but Complaint Counsel ignores the testimony of Brad Ruhl who is the current Managing Director of Ottobock. At his deposition, Complaint Counsel asked Ruhl: "So in – in estimating the potential for C-Leg 4 in the market, it's most relevant to look at microprocessor knee sales?" Response to CCFF ¶ 717. Ruhl responded:

> No. No. ***I think it's critically important to look at the entire market.*** . . . I mentioned we launched the first [swing-and-stance controlled MPK] product in the U.S. market in 1999. Prior to that time, there was a few years that Endolite had introduced a swing-only microprocessor knee. Prior to that, the market was dominated by mechanical knees, and even wooden knees. So as the market has developed, there's a certain umbrella over those products that are microprocessor-controlled, but mechanical knees continue to outsell

> microprocessor knees probably four or five to one. So when we launched C-Leg in the market, it -- ***it had to compete with [Non-MPKs]*** . . . So to just, with a razor, slice out the existing MPK market, and only try to say that that's the whole market is completely dismissing the fact that the majority of the market today is still mechanical knees. ***So every microprocessor knee is competing against mechanical knees in -- in the total market to provide knees to amputees***.

Response to CCFF ¶ 717 (emphasis added). Further, the "market" described by these documents is extraordinarily inconsistent and impermissibly vague. Several Ottobock and Freedom witnesses testified that estimating market share in the prosthetics industry is nearly impossible, so the market shares cited by Complaint Counsel are unreliable and should be disregarded. Response to CCFF ¶¶ 718-720. More fundamentally, in the documents cited by Complaint Counsel, the contours of the market – *i.e.*, which knees are "in" and which knees are "out" – is not at all clear. Response to CCFF ¶¶ 718-720.

Even if some of the documents purport to describe an "MPK market," that "market" does not match the market advanced by Dr. Scott Morton (Complaint Counsel's economics expert). Dr. Scott Morton's proposed market contains every *prosthetic knee* that happens to contain a microprocessor and is sold in the United States, but none of the "ordinary course" documents cited by Complaint Counsel reflect such a market. For example, [redacted] Response to CCFF ¶ 719.

Complaint Counsel wholly ignores other documents that analyze MPKs and Non-MPKs side-by-side. For instance, [redacted] Response to CCFF ¶ 534. In addition, both Össur and Endolite present their products by

K-Level. RFOF ¶¶ 483, 490. Kim DeRoy of Össur testified that it makes sense for Össur's product brochure to be segmented by K-Level, because their audience is prosthetic clinics who Össur wants to educate and provide a clear overview of every knee solution that Össur has, and to educate customers on the full range of products offered for K-3 and K-4 patients. RFOF ¶ 490.

C. Complaint Counsel's Alleged Market Fails Under The Hypothetical Monopolist Test.

1. Dr. Scott Morton's Critical Loss Analysis Is Deeply Flawed And Unreliable.

Complaint Counsel claims that Dr. Scott Morton's application of the hypothetical monopolist test somehow leads to the conclusion that MPKs constitute a relevant product market. C.C. Br. at 46. However, Dr. Scott Morton did not perform a hypothetical monopolist test to assess whether Non-MPKs should be included in the relevant market. Instead, she utilizes a flawed economic approach to conclude that all of Ottobock MPKs – not only the C-Leg – and the Plié constitute their *own* relevant product market. RFOF ¶ 538. After she arrived at this narrow market definition, Dr. Scott Morton concludes that it is appropriate to simply start including additional knees in the alleged market, without analyzing whether or not those knees are properly included or articulating any reason for including them. RFOF ¶ 539.

The Court should not credit Dr. Scott Morton's alleged market, because she utilized a deeply flawed methodology that has received significant and fundamental criticism in economic literature, including by FTC Chairman Joseph Simons. *See, e.g.*, Joseph Simons, *The Potential Impact of New Economic Tests in Merger Analysis: A New Direction*, ABA Antitrust Section Spring Meetings (March 5, 2010); Malcolm B. Coate & Joseph J. Simons, *Critical Loss v. Diversion Analysis, Clearing up the Confusion, Competition Policy International*, December 2009, at p. 5; *see also* RFOF ¶ 541. The flaws in Dr. Scott Morton's methodology go to an issue that is so central to her analysis that it seriously calls into question the utility and validity of her opinions.

Dr. Scott Morton applies the Lerner Condition to conclude that the MPKs manufactured by Ottobock and Freedom, respectively, together constitute their own product market. Response to CCFF ¶ 774. Mr. Simons has written that the Lerner Condition results "in extremely narrow markets" consisting of "only the two merging firms." RFOF ¶ 541. Indeed, Mr. Simons has criticized that "virtually all unilateral effects models utilizing the Lerner Condition produce Price increases for any horizontal merger." RFOF ¶ 541. Because every merger is predicted to raise prices under this analysis, Simons has stated that the method that Dr. Scott Morton has used "has no empirical support and would face serious *Daubert* issues if used in court." RFOF ¶ 541.

The only pieces of record evidence that Dr. Scott Morton used in her diversion analysis – which underlies her entire market definition – are margin information and a diversion rate. Neither are reliable, according to the individuals who created them. RFOF ¶ 548; Response to CCFF ¶ 722. In particular, Dr. Scott Morton used just *one piece* of one document (PX01003) to conduct her diversion analysis. Response to CCFF ¶ 783. The most current version of PX01003 is in *draft* form, and is not sufficiently reliable to form the basis of the key portion of Dr. Scott Morton's "expert" analysis. Response to CCFF ¶ 783. Dr. Scott Morton applied no "economic rigor" – as Complaint Counsel characterized her work in opening statements (Complaint Counsel Opening Statement, Tr. 43) – to the numbers that she hand-picked from one piece of a *draft* document. She simply accepted it at face value. Compounding this issue, and highlighting Complaint Counsel's repeated reliance on cherry-picked evidence, is that to "verify" the contents of the document, Complaint Counsel chooses to rely on the testimony of a disgruntled former executive, Swiggum, who was not particularly engaged in the Acquisition, rather than the testimony of the author of this document, Alex Gück. Response to CCFF ¶¶ 722, 783. Guck testified that "this document is a ***draft*** which summarizes the results of the due diligence. It also contains ***preliminary***

considerations as to integration, and considerations made back then as to the evaluation of Freedom Innovations." Response to CCFF ¶ 722 (citing PX05131 (Gück, Dep. at 104)).

For these reasons, this Court should not consider Dr. Scott Morton's analysis in evaluating Complaint Counsel's proposed market definition. *In the Matter of Mcwane, Inc.,* 2012 WL 3719035, at *3 (F.T.C. Aug. 16, 2012) (Chappell, J.) (holding that courts "examine the methodology the expert used in reaching the conclusions at issue"); *In the Matter of Basic Research, LLC*, 2006 WL 159736, at *5 (F.T.C. Jan. 10, 2006) (recognizing that "courts . . . examine the methodology the expert used in reaching the conclusions at issue," and, following "vigorous cross-examination . . . the Court will either exclude it at that point, or give it whatever weight it deserves") (internal citations and quotations omitted).

2. The Results Of Dr. Scott Morton's Critical Loss Analysis Are Inconsistent With Undisputed Evidence Regarding Competition For Prosthetic Knee Sales.

Applying the highly-criticized Lerner Condition with an inaccurate diversion ratio for good measure, Dr. Scott Morton arrives at the nonsensical conclusion that all of Ottobock's MPKs and Freedom's lone MPK together constitute their own relevant antitrust market, a conclusion that completely lacks support in the record, given that the Plié is a distant substitute for any of the Ottobock MPKs. RFOF ¶¶ 577-602; *see also* Section III.B, *infra*. Having declared this narrow market "proven," Dr. Scott Morton incorrectly claims that it simply does not matter what other knees she adds to the market, because it would still "pass." She articulates no reason – record-based, economic, or otherwise – for including every knee that contains a microprocessor in her market, and excluding every knee that does not contain a microprocessor on that very fact alone. Responses to CCFF ¶¶ 767-794. This proposed market is completely divorced from the economic realities of the industry and should not be credited here.

This Court recognized the conflict between Dr. Scott Morton's analysis and the record evidence during trial:

> JUDGE CHAPPELL: Did I understand you to say that once your test is passed with the Plié and the C-Leg, you can add the other MPKs, and of course they fit within the market? Did you say that?
>
> THE WITNESS: It's – it would be – the test would pass more easily the more close substitutes you include because, of course, then when you raise price, there's nowhere for people to go.
>
> JUDGE CHAPPELL: Okay. So following that logic, you could throw in high-end mechanical knees also; correct?
>
> THE WITNESS: You could, that's correct.

Response to CCFF ¶ 792 (citing Morton, Tr. 4043). The reality of the prosthetics industry is that patients and prosthetists have the choice to select among all knees that are medically appropriate for that patient, and that will be covered by insurance. The best way to define that available set of knees is by K-Level, because that is how CMS determines what is medically appropriate, and what is available for reimbursement to a particular patient. RFOF ¶¶ 335-349. The same patient population, K-3 and K-4 patients, could benefit from and are eligible for MPKs and Non-MPKs. RFOF ¶¶ 392-406; Response to CCFF ¶ 559. There is *no population* that consists of patients who have the choice among all of the MPKs in Dr. Scott Morton's proposed market – *e.g.*, the Kenevo, designed for K-2 patients, and the X3, designed for high activity K-3 and K-4 patients who are not covered by Medicare or private insurance, would never be appropriate for the same patient. It thus makes no sense to define a market simply by the inclusion of a microprocessor even though the microprocessor does very different things across MPKs.

3. Dr. Argue's "Model Of Clinic Profitability" Further Undercuts Dr. Scott Morton's Analysis.

There is ample record evidence establishing that clinics would switch some patients to Non-MPKs in the face of a price increase on all MPKs. RFOF ¶¶ 420-432. Dr. Scott Morton did

not engage with this evidence in her analysis and did not test whether Sophisticated Non-MPKs should be included in the relevant market. RFOF ¶ 539. Conversely, Dr. Argue, Respondent's economics expert, has created a "Model of Clinic Profitability" which demonstrates that a sufficient number of clinics would switch some patients to Non-MPKs in the face of a price increase. RFOF ¶¶ 433-436. Dr. Argue concludes that clinics would switch in large enough numbers (in comparison to the small critical loss threshold here) that would defeat a SSNIP, confirming that that Sophisticated Non-MPKs should be included in the relevant market. RFOF ¶ 436.

Dr. Argue used the following inputs in his model: the reimbursement that the clinic receives, the cost that it has to pay for the knee, non-billable costs (costs not associated with acquiring the knee), and the profit remaining for the clinic. RFOF ¶ 434. Through this model, Dr. Argue determined that costs associated with MPKs were such that a price increase on MPKs would cause clinics to lose money on fitting some patients with MPKs, specifically patients with private insurance reimbursing well-below the Medicare rate. RFOF ¶ 435. At trial, clinicians admitted that if they were to lose money on an MPK fitting, they would consider switching some patients to Non-MPKs. RFOF ¶ 425.

Dr. Argue concluded that based on his model and based on the small critical loss number at issue, prosthetists would switch patients in sufficient numbers to Non-MPKs to render a SSNIP unprofitable. RFOF ¶ 436. This confirms that Sophisticated Non-MPKs should be included in the relevant market, and that Complaint Counsel's proposed relevant market is too narrow. RFOF ¶ 436. Dr. Scott Morton does not adequately respond to this model. Instead, Dr. Scott Morton equates reimbursement margin with clinic profit, fails to take into account the costs associated

with fitting MPKs, and miscalculates the critical loss threshold applicable in this case. Response to CCFF ¶¶ 774, 783, 785.

D. Complaint Counsel's Market Concentration Analysis Is Highly Flawed.

Complaint Counsel's over reliance on market shares and concentration is contrary to both prevailing legal authority and the Merger Guidelines. Merger Guidelines § 4.3 (characterizing market concentration as one "often useful indicator" of a merger's likely anticompetitive effects); *id.* § 5.3 (characterizing concentration thresholds not as a "rigid screen" but as "one way to identify some mergers" that may or may not be likely to raise competitive concerns); *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008) (market concentration should be analyzed within the context of long-term trends and market structure); *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 46 (D.D.C. 2009) (merger to duopoly still requires assessment of how the relevant markets "operate in fact"); *Moore Corp. v. Wallace Computer Servs.*, 907 F. Supp. 1545, 1580 (D. Del. 1995) (noting that more than market share required for merger analysis). Here, several market conditions impede Respondent's ability to exploit any increased concentration resulting from the Acquisition. *See, e.g.*, RFOF ¶¶ 565-576.

First, Ottobock's pre-Acquisition position overstates the competitive impact of the Acquisition. Applying only Complaint Counsel's market definition and share calculations, before the Acquisition, Ottobock's share of MPK sales was around [redacted], and Ottobock and Össur together accounted for [redacted] percent of Complaint Counsel's proposed MPK-only market. CCFF ¶ 964. According to Complaint Counsel, prior to the Acquisition, Ottobock has enjoyed anywhere between [redacted] of the alleged MPK-only market since Ottobock introduced the original C-Leg in 1999. CCFF ¶¶ 1008-1010.

The Acquisition did little to change the state of the market alleged by Complaint Counsel. Again, applying Complaint Counsel's own market definition and share calculation, Respondent's combined share of MPK sales is barely increased from [redacted] times that of Össur, and Respondent and Össur together account for [redacted] percent – compared to [redacted] percent before the Acquisition – of MPKs sales. CCFF ¶ 964. Despite Ottobock's leading position in MPKs since 1999, it is undisputed that MPK prices have gone down and that several new competitors have entered the marketplace. RFOF ¶¶ 782-940 [redacted] Indeed, Complaint Counsel alleges that the pre-Acquisition market was highly competitive despite Ottobock's alleged overwhelming share, and Complaint Counsel has failed to show how the Acquisition negatively impacted that purported market. RFOF ¶¶ 565-940.

Second, ease of expansion – *i.e.*, the ability of existing firms to respond to price increases by repositioning their products in the market to compete with Respondent – would undermine any efforts by Respondent to raise prices, even in this highly concentrated industry. *See* Section IV, *infra*. [redacted] Össur's Rheo is the closest competitor to the C-Leg 4, and Össur's Rheo XC is the closest competitor to Ottobock's Genium and X3. *See* Sections III and IV, *infra*. [redacted] *See* Section IV.A, *infra*. Endolite's Orion and Nabtesco's Allux compete most closely to the Freedom Plié 3. [redacted] *See* Section IV.C, *infra.* [redacted]

[redacted]

Third, the weight of the evidence shows that the competitive significance of Freedom was on the sharp decline at the time of the Acquisition. *See* Section VI, *infra*. Regardless whether Freedom qualifies for the "failing firm" defense, Complaint Counsel cannot escape that Freedom's extremely weakened state at the time of the Acquisition minimized its ability to impact the alleged market. *See* Section VI.C, *infra*.

Statistics related to shares and concentrations are merely one indicator of potential market power. However, "only further examination of the particular market – its structure, history, and probable future – can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *United States v. General Dynamics*, 415 U.S. 486, 498 (1974) (quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 322 n.38); *see also United States v. Baker Hughes,* 908 F.2d 981, 992 (D.C. Cir. 1990) ("The Herfindahl-Hirschman Index cannot guarantee litigation victories."). Here, the weight of the evidence leads to the conclusion that, based on the structure, history, and probable future of Complaint Counsel's alleged MPK-only market, there is no substantial likelihood of anticompetitive effects from the Acquisition. RFOF ¶¶ 565-1290.

III. COMPLAINT COUNSEL FAILED TO INTRODUCE ANY EVIDENCE OF HARM TO COMPETITION.

A. Complaint Counsel's Theory Of Anticompetitive Harm Is Unfounded.

Complaint Counsel's only theory harm is that the Acquisition reduced the number of competitors in the alleged MPK-only market from six to five, and that the remaining four competitors will not be able or willing to compete for market share, leaving Ottobock with the ability to unilaterally raise prices or curtail innovation. Complaint ("Compl.") ¶¶ 39-58. Such a theory of harm requires particularized evidence sufficient to establish reason to believe the

Acquisition violates Section 7 of the Clayton Act and should not depend virtually entirely on a "rigid market screen." Merger Guidelines § 5.3.

To meet this standard, Complaint Counsel must prove that: (i) Respondent's MPKs are differentiated; (ii) Ottobock's MPKs and Freedom's lone "MPK" are close substitutes; (iii) other MPKs are sufficiently different from Ottobock's MPKs and Freedom's "MPK" such that the Acquisition would make a SSNIP profitable; and (iv) repositioning by Össur, Endolite, Nabtesco, and DAW is unlikely. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1118 (N.D. Cal. 2004). In a unilateral effects case, the extent of direct competition between the products sold by the merging parties is paramount. *See, e.g., ProMedica Health Sys., Inc., v. FTC,* 749 F.3d 559, 569 (6th Cir. 2014); *FTC v. Staples, Inc.,* 970 F. Supp. 1066, 1083 (D.D.C. 1997); *FTC v. Swedish Match,* 131 F. Supp. 2d 151, 169 (D.D.C. 2000). Because the record evidence shows very little head-to-head competition between Ottobock and Freedom related to MPKs, and because repositioning by Össur, Endolite, Proteor, Inc., and DAW [redacted], Complaint Counsel failed to meet its burden.

B. The Acquisition Did Not Eliminate Head-To-Head Competition Between Ottobock And Freedom.

1. Freedom's Presence In The Industry Has Not Impacted Ottobock.

Direct competition between Ottobock and Freedom before the Acquisition was minimal. Specifically regarding prosthetic knees, there is no evidence in the record that competition between the Plié 3 and C-Leg 4 resulted in lower prices or higher quality products and services for clinics and patients.

Ottobock is undisputedly the "gold standard" for microprocessor swing-and-stance controlled knees. Response to CCFF ¶¶ 1006-1007, 1021, 1492; RFOF ¶ 607. Ottobock has operated in the United States since 1958. RFOF ¶ 3. It employs between 220 and 250 people in

its United States manufacturing and R&D facilities in Salt Lake City, Utah. RFOF ¶ 3. In the United States alone, Ottobock employs another 75 to 100 people that work in the field as sales representatives, clinical specialists, or reimbursement specialists. RFOF ¶ 3.

No other firm has ever seriously rivaled Ottobock with respect to prosthetic knee innovation. In addition to more rudimentary constant-friction knees for K-1 and K-2 patients, Ottobock has been the global leader in developing Sophisticated Non-MPKs and MPKs for K-3 and K-4 patients. The 3R60 and 3R80, to name just two, were groundbreaking technological achievements that paved the way for more mobile and active users to ambulate with the use of a prosthetic knee. RFOF ¶¶ 144-148. These products are waterproof, lightweight, durable, and provide swing-and-stance control and stumble recovery. In other words, Ottobock's Sophisticated Non-MPKs can switch between the stance phase and swing phase of the gait cycle using an advanced mechanical system. RFOF ¶¶ 144-148.

Despite its significant position in the Sophisticated Non-MPK segment, Ottobock further revolutionized the market for K-3 and K-4 patients with the introduction of its C-Leg in 1999. RFOF ¶¶ 191-197, 1099. The C-Leg was the first microprocessor-controlled swing-and-stance knee. RFOF ¶ 191. In the C-Leg, various sensors and a computer can change the resistance levels in the knee throughout both the swing and stance phases to constantly apply the appropriate resistance level for the user. RFOF ¶¶ 192-196. Ottobock's C-Leg has been considered the gold standard in the industry ever since it was introduced. Response to CCFF ¶¶ 1006-1007, 1021, 1492; RFOF ¶ 607. Despite its dominant position in the alleged MPK market, Ottobock continued to pursue its legacy of innovation. It has not only introduced several new iterations of the C-Leg – C-Leg 2, C-Leg 3, and C-Leg 4 – it has also developed the Compact and Kenevo for patients that prefer microprocessor control of only the stance phase of the knee as well as the X3 and

Genium for more active K-3 and K-4 patients, including active duty and retired men and women of the United States military. RFOF ¶¶ 181-186, 504-507.

Neither Freedom nor the Plié 3 has challenged Ottobock. Even Complaint Counsel's main witness, a terminated former executive, warned Ottobock's sales team that "Plié is NOT the competition. Rheo IS. Plié is a fly and Rheo is a vulture." Responses to CCFF ¶¶ 1028, 1039, 1494. The Plié 3 has been differentiated from other MPKs on the market because it is a hybrid knee. RFOF ¶¶ 383-384. The Plié 3 shares most of its functionality with Sophisticated Non-MPKs, including its IP67 rating and fixed swing-and-stance control set by using a combination of a wrench and air pump. RFOF ¶¶ 383-384, 577-582. Unlike Sophisticated Non-MPKs, the Plié 3 does technically contain a microprocessor, but the Plié 3 lacks the fundamental functionality of true MPKs: microprocessor swing-and-stance control. Response to CCFF ¶¶ 612-613.

Prosthetists do not consider the Plié 3 and C-Leg 4 to be close substitutes. [redacted] describes the Plié 3 as having a mechanical stance feature that is [redacted] RFOF ¶ 386. [redacted] explains that [redacted] making billing it with an L5856 swing-and-stance L-Code questionable. RFOF ¶ 604. A [redacted] explained that [redacted] Response to CCFF ¶ 998. [redacted] Response to CCFF ¶ 1013.

Freedom's Plié functions most similarly to Sophisticated Non-MPKs, such as Ottobock's 3R80 and Össur's Mauch Knee. RFOF ¶¶ 577-602. Sophisticated Non-MPKs use complex hydraulic and/or pneumatic fluid to provide swing-and-stance control in the patient's gait cycle. RFOF ¶¶ 140-163. The resistance levels in each phase, swing and stance, respectively, of these Sophisticated Non-MPKs are pre-set by the prosthetist using various tools, typically a wrench. RFOF ¶¶ 140-163. As such, Sophisticated Non-MPKs do not offer variable resistance control in the swing and stance phases of the knee – the fundamental feature of true swing-and-stance MPKs, like the C-Leg 4. RFOF ¶¶ 140-163, 189-239. Freedom's Plié 3 functions virtually identically to the Sophisticated Non-MPKs and not like swing-and-stance MPKs. RFOF ¶¶ 164-173. The Plié 3's stance phase resistance is pre-set by a wrench, and its swing phase is pre-set by the combination of a wrench and an air pump to offer fixed flexion and extension resistance. RFOF ¶¶ 168-173. The sole function of the Plié's microprocessor is to switch the knee between the fixed stance and swing phases, a function performed mechanically in other Sophisticated Non-MPKs. RFOF ¶¶ 168-173.

2. Complaint Counsel's Characterization Of The Plié 3 Is Inconsistent With The Record Evidence.

Freedom's specious sales and marketing claims regarding the attributes of the Plié 3 were consistently debunked at trial. And Complaint Counsel certainly failed to prove its bold, and somewhat ridiculous, assertion that the Plié 3 is "the most innovative MPK on the market." C.C. Br. at 64. Tellingly, Complaint Counsel cites no evidence in support of that claim.

Overwhelming testimony and documents established that the Plié 3 does not offer microprocessor swing-and-stance control or clinically verifiable stumble recovery. RFOF ¶ 361; Response to CCFF ¶¶ 991, 993-1007, 1013-1023. Other "features" claimed by the Plié 3, like supposed "submersibility" and "super-fast microprocessor speed," were exposed at trial as red

herrings. Response to CCFF ¶¶ 991, 993-1007. [redacted]

Freedom's own documents and the testimony of its employees at trial corroborate the inferior functionality in the Plié 3. [redacted] Even Freedom's former CEO testified at trial that the Plié is at the very end of its product life cycle. RFOF ¶ 584. Specifically, he testified that Freedom's engineers believe that Plié is an old design, and having been redesigned a number of times, that there are very few improvements that they can make to the product based on its current technology platform. RFOF ¶ 585.

It is also misleading to claim that Freedom's pricing and promotion of the Plié 3 related more to the C-Leg 4 than it did to Freedom's functional inferiority. Freedom's aggressive "penetration pricing" strategy for the Plié is consistent with its poor quality. Response to CCFF ¶¶ 1024, 1142. From the time it was initially released, Plié 3 has been a low-cost option for price-sensitive prosthetists and patients. Response to CCFF ¶ 1024. Complaint Counsel dedicates pages and pages of its Post-Trial Brief to Freedom's Plié 3 pricing strategy apparently to conjure an inference that the "strategy" somehow relates to competition from Ottobock. C.C. Br. at 70-72. Freedom's pricing and promotions in 2016 and 2017, however, were primarily related to the

functional inferiority of the Plié 3 and Freedom's efforts to sell its business and were not in direct response to Ottobock or the C-Leg 4. Response to CCFF ¶¶ 1074-1139.

Freedom's sales and marketing strategy specifically attempted to closely address the inferior technology and functionality inherent in the Plié 3. Response to CCFF ¶¶ 1079, 1102, 1114, 1146. In 2016, Freedom lowered the price of the Plié 3 in 2016 due to five primary factors:

- The introduction of Nabtesco's Allux;
- Aggressive price competition from the Endolite Orion 3;
- Strong competition from Sophisticated Non-MPKs;
- Poor Plié 3 quality; and
- Issues with the Plié 3 loaner program.

RFOF ¶ 643 (citing RX-0277); Response to CCFF ¶¶ 1114, 1117. This "ordinary course" Freedom document does not identify any Ottobock activity, including the launch of the C-Leg 4, as a "top five" issue contributing to the 2016 decline in Plié 3 sales. RFOF ¶¶ 643-644.

In addition, long before the launch of the C-Leg 4, Freedom was utilizing versions of the so-called "Ideal Combo" as a discount due to the Plié 3's inferiority. Response to CCFF ¶¶ 1079-1080, 1085-1086. Freedom has kept different versions of the Ideal Combo in place since before 2015 because it has been unable to upgrade the Plié 3. Response to CCFF ¶ 1080. The rationale for Freedom's Ideal Combo is apparent from the trial testimony of customers and competitors who consider the Plié 3 inferior, and even from Complaint Counsel's own economics expert, Dr. Scott Morton, who admits that in differentiated product markets, price reflects quality. Response to CCFF ¶ 1142.

Freedom's pricing and promotions in 2016 and 2017 were likely the only reasons that customers continued to buy its inferior product. Response to CCFF ¶¶ 1093-1096. Many clinics

face very tight margins on MPKs due to higher servicing, fitting, and reimbursement costs relative to Sophisticated Non-MPKs. RFOF ¶¶ 415-419. Many patients face difficulties funding the out-of-pocket portions of acquiring an MPK. RFOF ¶ 411. For those price-sensitive clinics and patients, the Freedom Plié 3 is a "hybrid" option between a Sophisticated Non-MPK and a traditional MPK. RFOF ¶ 596. It is not, however, a reasonable substitute for a C-Leg 4. RFOF ¶ 596; Response to CCFF ¶ 994. [redacted] RFOF ¶ 591; Response to CCFF ¶ 994. Freedom's consistent practice of aggressive pricing is entirely consistent with the fact that the Plié 3 is a lower quality, essentially hybrid knee. Response to CCFF ¶ 1142.

3. Ottobock Did Not Compete Against Freedom On Quality, Functionality, Or Price.

The C-Leg 4 did not "close the technology gap" with the Plié 3. CCFF ¶ 1068; Response to CCFF ¶ 1068. Clinic testimony on the impact of the C-Leg 4 does not show that the Plié 3 is the C-Leg 4's closest competitor. Response to CCFF ¶¶ 1070, 1073. Complaint Counsel's claims that Freedom made "inroads" with the Plié 3, causing Freedom to "gain market share" at the same time Ottobock was "steadily losing market share" refers to competition between the Plié 3 and C-Leg 3 back in 2014. See C.C. Br. at 64; *see also* Response to CCFF ¶¶ 1026, 1027, 1030. However, Ottobock was launching the C-Leg 4 around this time and thus its promotions and discounts on the C-Leg 3 in 2014 and 2015 related to that launch and not the Plié 3. Response to CCFF ¶¶ 1013-1023, 1028-1029, 1032-1034. There is no evidence that the Plié 3 ever truly competed head-to-head with the C-Leg 4. Response to CCFF ¶¶ 996-999, 1051.

Similarly, there is no evidence that Ottobock developed the C-Leg as part of a "head-to-head" rivalry with Freedom. *See* C.C. Br. at 71-74 (proposing misleading examples of "head-to-

head" competition). To the contrary, Ottobock's C-Leg 4 launch was a response to new product offerings from Össur and Endolite, not Freedom. Response to CCFF ¶ 1039. In point of fact, Ottobock had been developing the C-Leg 4 well before the release of the Plié 3 in September 2014, and there is no evidence in the record to support Complaint Counsel's inference that the releases were in any way related. Response to CCFF ¶¶ 1011, 1039.

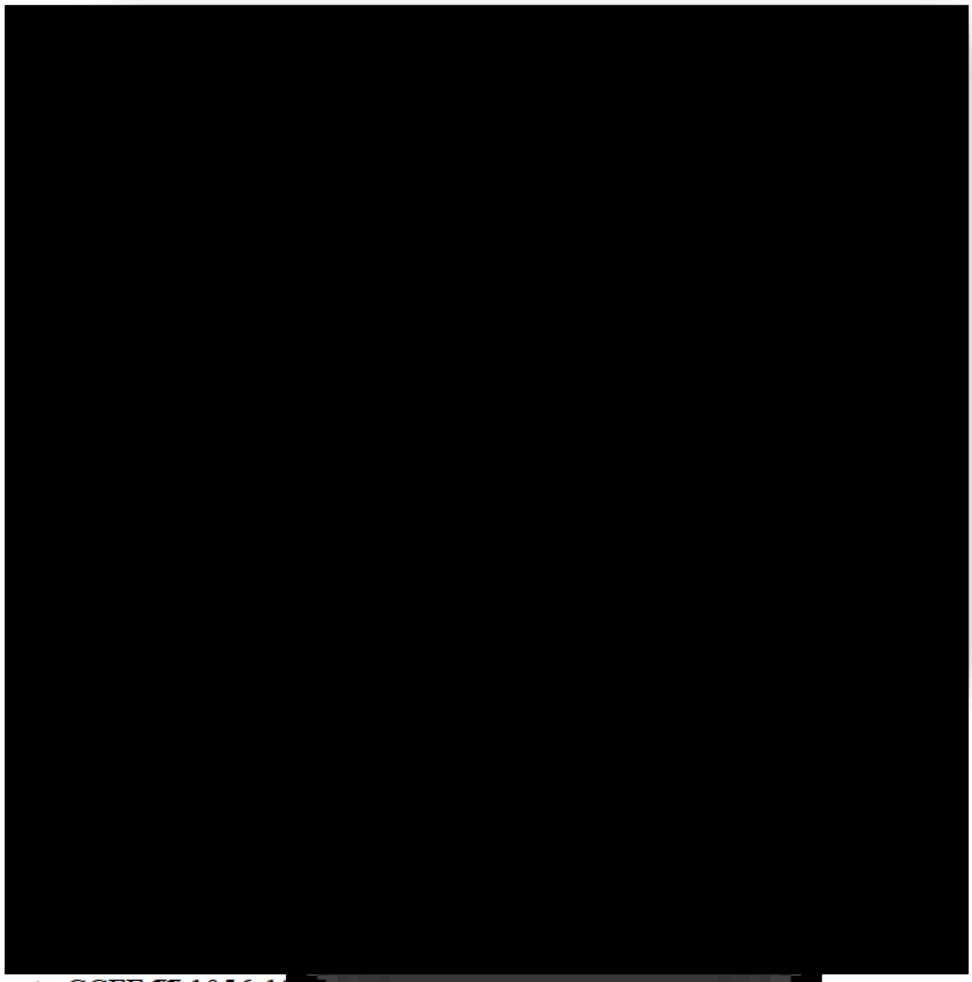
For example, the evidence shows that Ottobock intended to release the C-Leg 4 with an IP67 rating prior to the release of the Plié 3. *See* Response to CCFF ¶ 1039, 1047. The fact that both products happened to launch within months of each other does not alone support Complaint Counsel's inference that they were somehow related. Response to CCFF ¶¶ 1011, 1039, 1047. Besides the IP67 rating – which both products share – all of the remaining features and functionality of the C-Leg 4 are vastly different from and superior to the Plié 3. Response to CCFF ¶¶ 1011, 1039, 1047; RFOF ¶¶ 607-616. [redacted] Response to CCFF ¶ 1039.

[redacted] CCFF ¶1046; Response to CCFF ¶ 1046. [redacted] Response to ¶¶ 1011, 1039.

The pricing strategy for the C-Leg 4 was not impacted by the Plié 3. Response to ¶ 1052. [redacted] Response

to ¶ 1052. The battle cards developed by Ottobock to sell the C-Leg 4 highlighted the closeness in competition between the C-Leg 4 and the Rheo and Orion, relative to the Plié 3. CCFF ¶¶ 1054-1055; Response to CCFF ¶¶ 1054-1055. Freedom testimony and evidence that the C-Leg 4 [redacted] is not supported by the record. CCFF ¶ 1048; Response to CCFF ¶¶ 1048, 1072. The C-Leg 4 has been a major success that has impacted all MPK suppliers. [redacted]

Response to CCFF ¶¶ 1056-1057. [redacted]



Response to CCFF ¶¶ 1056-1[redacted]

Complaint Counsel infers that Freedom's financial problems in 2015 and 2016 were somehow based only on the launch of the C-Leg 4. C.C. Br. at 67-68. That is plainly not true. Substantial evidence shows the many reasons for Freedom's financial problems, including [redacted] *See* Section VI, *infra*. Indeed, [redacted] RFOF ¶¶ 1335, 1339. Complaint Counsel cites a note from one of Freedom's Lenders suggesting that the C-Leg 4 was impacting Plié 3 sales, but this single piece of evidence stands in contrast to the overwhelming internal Freedom evidence to the contrary, much of which would not have been shared with the Lenders. Response to CCFF ¶ 1069. Indeed, it is not surprising that Freedom would not have shared with its Lenders the fact that management was [redacted]

There is simply no evidence that Ottobock competed with the Plié 3 on price. CCFF ¶¶ 1134-1135; Response to CCFF ¶¶ 1134-1135. Freedom's aggressive discounting of the Plié 3 in 2017 related to Freedom's effort to drive up top-line revenue to make the company look more attractive in the sale process that was going on at the same time and also related to the fact that the market considered the Plié 3 to be obsolete in 2017. RFOF ¶¶ 1346-1348. Freedom's own assessments of the Plié 3 in due diligence documents show that [redacted]

4. There Is No Evidence That Competition Between Ottobock and Freedom Uniquely Benefits Consumers.

No clinic customers have been able to point to specific examples of head-to-head competition between Ottobock and Freedom leading to better prices on the C-Leg 4. The cherry-picked testimony from a few customers cited by Complaint Counsel is taken out of context and not credible or reliable.

[redacted] Response to CCFF ¶¶ 1147, 1530; RFOF ¶ 857.

Vinit Asar's testimony regarding the Plié 3 is particularly unreliable. Response to CCFF ¶¶ 574, 1154, 1171, 1434, 1172. Asar is Hanger's CEO. He is also not a prosthetist and is not involved in patient care. Response to CCFF ¶¶ 1154. Asar's testimony also lacks credibility

because Hanger is the third party that complained to the FTC about the Acquisition. Response to CCFF ¶ 1154. However, Asar did not testify that Hanger benefits only from sustained, head-to-head competition between Ottobock and Freedom; he testified that [redacted] CCFF ¶¶ 1171, 1434; Responses to CCFF ¶¶ 1171, 1434. However, Freedom – primarily focused on surviving financial collapse – has produced nothing new in the alleged market since 2014, while Endolite, Össur, Nabtesco, and Ottobock have been launching new generations and new products. Response to CCFF ¶ 1172.

[redacted] Responses to CCFF ¶¶ 1156-1157.

Rob Yates' testimony is that Jonesboro has benefited from competition in the marketplace, but not specifically by sustained, head-to-head competition between Ottobock and Freedom. CCFF ¶ 1158; Response to CCFF ¶¶ 1158. Yates testified that he was not concerned about the Acquisition having a negative effect on Jonesboro's business; he was more concerned with Ottobock eventually entering the patient care space, which is irrelevant to this case. Response to CCFF ¶¶ 1004, 1158.

Mark Ford of POA is not a prosthetist and is not involved in patient care. Response to CCFF ¶ 1167. Ford's testimony about "sustained, head-to-head competition" is belied by POA's

own documents. Response to CCFF ¶ 1167. [redacted] Response to CCFF ¶ 1167.

There is no evidence that Plié 3 and C-Leg 4 are built on similar "platforms." CCFF ¶ 1433; Response to CCFF ¶ 1433. There is no evidence that Ottobock and Freedom "essentially one-up each other to keep the attention of clinicians as to which product they prefer." CCFF ¶ 1167; Response to CCFF ¶¶ 1167. There is no evidence that Freedom has added any new benefits or any new versions of the Plié 3 since 2014, which may explain why [redacted] Response to CCFF ¶¶ 1167, 1456-1468.

Tracy Ell did not testify about any specific instances of "sustained, head-to-head competition" between Ottobock and Freedom but rather described the overall competitive nature of the industry. Response to CCFF ¶ 1159. Ell's testimony confirms that the Acquisition will not be anticompetitive because of the "continued evolution of technology in microprocessor control knee field." CCFF ¶ 1159; Response to CCFF ¶ 1159.

Moreover, there is no evidence of specific customer concern about losing any benefits from supposed "intense, head-to-head competition" between Ottobock and Freedom. Any general concern about "innovation" raised by a few thirdparties is totally unfounded. Freedom has failed to meaningfully participate in the significant innovation that has characterized the prosthetic knee marketplace over the last three years, with the latest version of the Plié released in 2014, so any "innovation" concerns could not apply to an acquisition of Freedom. RFOF ¶¶ 565-576, 595. [redacted] RFOF ¶¶ 577-602.

Since the Plié 3's introduction, the other MPK manufacturers have all released innovative, new MPK products. RFOF ¶ 576. Ottobock launched the C-Leg 4 in 2015 and is in development of the [redacted]. RFOF ¶¶ 1074-1075. Össur introduced the Rheo 3 in 2015, the weatherproof Rheo 3 in 2016, the fourth generation Rheo in 2017, and [redacted] RFOF ¶¶ 789-807. Endolite launched the Orion 3 and Linx in 2016, [redacted] RFOF ¶¶ 789-807. Nabtesco fully launched the Allux in 2017, which is the first MP swing-and-stance knee to also utilize four-bar technology for additional safety and stability. RFOF ¶¶ 860-926. Even DAW, [redacted] launched the MTX. RFOF ¶¶ 927-940. Any perceived concern about future innovation is thus more than addressed by existing participants. Had the Acquisition not occurred, Freedom would not have released any innovative products because it would have been liquidated by the Lenders.

C. The Acquisition Had No Impact On The Development Of The Quattro Project Or The Development Of [redacted].

[redacted]

[redacted]

[redacted]

Response to CCFF ¶ 1500. Many MPKs are long in length, meaning that many shorter people or people with longer residual limbs cannot be fit with an MPK. RFOF ¶ 717. [redacted] RFOF ¶ 717. Many MPKs are also heavy. RFOF ¶ 716. The microprocessor, sensors, and other electronic componentry make MPKs heavier and less desirable than their Sophisticated Non-MPK competitors. RFOF ¶ 349. [redacted]

[redacted]

RFOF ¶ 1326. After many delays, the Kinnex was launched in late Summer of 2016, but after customers experienced significant quality problems with the product, the Kinnex was ultimately pulled from the market in 2018. RFOF ¶ 1327. [redacted]

RFOF ¶ 1328. [redacted]

Complaint Counsel's claim that [redacted] Responses to CCFF ¶¶ 1452-1453.

Without citation, Complaint Counsel also declares that [redacted]

[redacted]

[redacted] RFOF ¶¶ 783, 861, 927.

D. Elimination Of Competition Was Not A Rationale For The Acquisition.

1. Pre-Due Diligence Discussions Do Not Support Complaint Counsel's Mischaracterization Of Ottobock's Intentions For The Acquisition.

While many alternatives were considered, Ottobock's primary intention for the Acquisition was consistent during early discussions. [redacted]

[redacted]

Response to CCFF ¶¶ 1941, 1331. However, bold marketing claims do not equate to truth. [redacted]

2. There Is No Evidence That Ottobock Perceived The Quattro Project As A Credible Threat To Prosthetic Knee Competition.

[redacted]

[redacted]

[redacted]

[redacted]

Responses to CCFF ¶¶ 1131, 1355, 1357, 1361.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Response to CCFF ¶ 1910 (Carkhuff, Tr. 668-669); *see also* Section VI.B.3.c.iii, *infra*.

3. There Is No Evidence That The Plié 3 Was A Rationale For The Acquisition.

There is absolutely no record evidence that Ottobock purchased Freedom because it wanted the Plié 3. On the contrary, Ottobock's due diligence efforts also focused [redacted] Response to CCFF ¶ 1080 (Carkhuff, Tr. 616). [redacted] Carkhuff's characterization is a far cry from Complaint Counsel's imaginary view of the Plié 3 as "the most innovative MPK on the market." C.C. Br. at 64.

[redacted]

[redacted]

Long before due diligence, however, Ottobock had recognized that the Plié 3 was improperly coded as a microprocessor swing-and-stance controlled knee. Response to CCFF ¶ 1368. Ottobock even reported to CMS that Freedom was recommending the Plié 3 for reimbursement for an inappropriate L-Code. Response to CCFF ¶ 1368. [redacted]

[redacted] As the record evidence makes clear, many prosthetics clinics offer both a Plié 3 and a C-Leg 4 for customers with different price sensitivities. Responses to CCFF ¶¶ 1353-1354, 1364, 1399. [redacted] Response to CCFF ¶¶ 1353-1354, 1364, 1399. It is highly unlikely that Ottobock would capture such sales given the price-point of the C-Leg 4.

Moreover, when Ottobock and Freedom executives met for an integration workshop in Irvine, California on November 7-8, 2017, [redacted] Responses to CCFF ¶¶ 1353, 1368, 1360. Ottobock ultimately determined that the Plié should be operated under the Freedom brand pursuant to a "Dual Brand Strategy" under which Freedom could independently manage the pricing and promotional activities related to the Plié 3. Responses to CCFF ¶¶ 1350, 1368, 1360. [redacted]

Response to CCFF ¶¶ 1350, 1368, 1360.

E. Post-Acquisition Evidence Confirms That The Acquisition Poses No Harm To Prosthetic Knee Competition.

Post-acquisition evidence relating to an acquisition's effect on competition is admissible to show that anticompetitive effect is not likely. *United States v. Int'l Harvestor Co.*, 564 F.2d 769, 777-80 (7th Cir. 1977) (relying on post-acquisition evidence regarding lack of anticompetitive conduct on the part of the acquiring firm); *Chicago Bridge & Iron Co.*, 138 F.T.C. 1392, 1552 (2003) (initial decision) (Chappell, J.) (disregarding evidence of post-acquisition price increases as "unreliable" and "speculative"), *aff'd*, 138 F.T.C. 1024 (2004), *aff'd*, 534 F.3d 410 (5th Cir. 2008); *United States v. Falstaff Brewing Corp.*, 383 F. Supp. 1020, 1027 (D.R.I. 1974) (relying on post-acquisition evidence of intense competition and acquired firm's loss of share and profits). Here, Complaint Counsel has failed to adduce any evidence of post-Acquisition harm to

competition, and the overwhelming record evidence indicates there has not been, and will not be, any such harm in the future.

1. There Is No Record Evidence Of Post-Acquisition Harm To Competition.

Immediately following the Acquisition, Freedom employees received the same message from Ottobock: Freedom will operate "business as usual" as a separate company vigorously competing against Ottobock. RFOF ¶ 1048 (citing Kim, Tr. 2668 [redacted]; RFOF ¶ 1051 (citing Testerman, Tr. 1299 ("The plan was that we were to move forward as two separate entities under the one umbrella, that we would deploy a dual-brand strategy and move forward under that strategy.")); Response to CCFF ¶¶ 1325, 1432 (citing Carkhuff, Tr. 707 ([redacted] Response to CCFF ¶ 1476 (citing Ferris, Tr. 2477 ("This is the first I'd heard of this dual-brand strategy that Professor Näder wanted to introduce in the market, and – and that broadly defined meant we were going to compete with Otto Bock and we were all kind of on our separate agendas and . . . keep doing what you're doing.")). Notably, Ottobock delivered these instructions to Freedom to continue to compete vigorously in the marketplace *before* Respondent was even aware of the FTC investigation. Response to CCFF ¶¶ 1392, 1394-1395, 1432 (citing Carkhuff, Tr. 707-708).

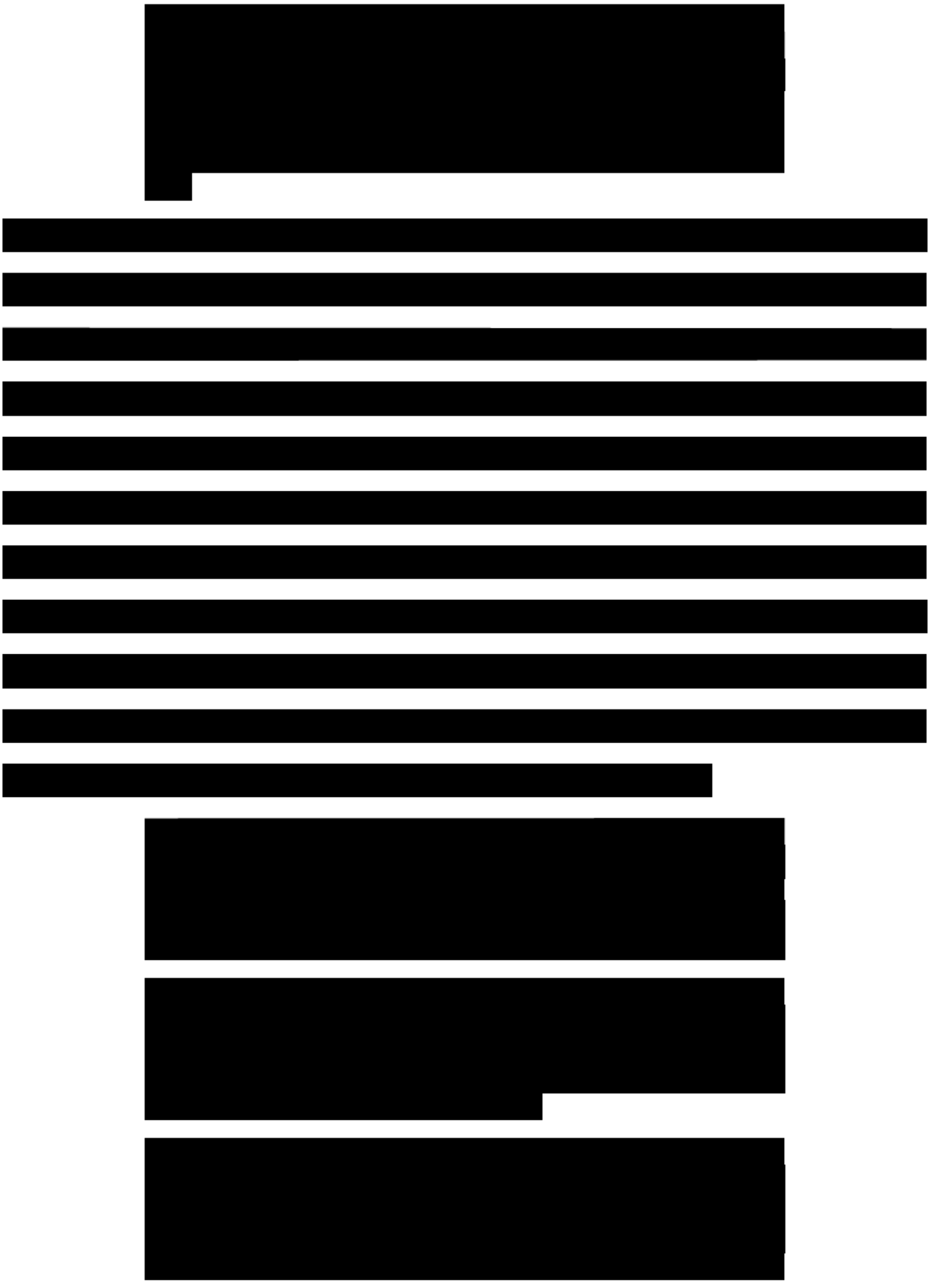
Shortly after the closing, Ottobock and Freedom executives met on November 7-8 for a sales workshop. CCFF ¶ 1384; Response to CCFF ¶¶ 1384. [redacted]

[redacted] Complaint Counsel's assertion that "one of the primary purposes" of the November 2017 workshop was to discuss "implementing a strategy that would fully exploit the elimination of competition between former rivals" is not supported by the evidence. C.C. Br. at 87; *see also* Response to CCFF ¶¶ 1392-1396. Indeed, the November 2017 workshop covered many topics, including, most notably, prosthetic feet and the Dual Brand Strategy. Response to CCFF ¶¶ 1392.

[redacted]

[redacted]

Complaint Counsel attempts to counter these undisputed facts with questionable economics. Specifically, Dr. Scott Morton's testimony regarding her Gross Upward Pricing Pressure Index analysis is fundamentally flawed because it ignores key evidence. Dr. Scott Morton's component of the diversion rate between the product of one firm to the product of the merging partner was proven to be inaccurate at trial. [redacted]



[redacted]

2. Complaint Counsel Mischaracterizes Respondent's Post-Acquisition Plans For The Quattro Project.

Complaint Counsel compounds its mischaracterization of the November 2017 workshop with unfounded allegations regarding Respondent's "plans" for the Quattro Project. Response to CCFF ¶¶ 1407, 1409. [redacted] Response to CCFF ¶¶ 1407, 1409, 1472-1474; RFOF ¶¶ 1074-1075.

3. No Customers Have Voiced Concern That The Acquisition Will Harm Competition Between Freedom And Ottobock.

Despite Complaint Counsel's vague and unfounded claims otherwise, no prosthetic clinics have, other than possibly Hanger, raised specific complaints about the Acquisition. Response to CCFF ¶¶ 1419, 1422-1424. On the contrary, most clinic organizations support the Acquisition. Response to CCFF ¶¶ 1416-1417.

[redacted]

Hanger's status as a "power buyer" in the prosthetics industry is well-known and summarized at length in Respondent's Post-Trial Brief (pages 70-74). [redacted]

[redacted] Response to CCFF ¶¶ 1422-1424. Indeed, Hanger has the ability to control

manufacturer pricing. [redacted] In fact, Hanger lists as a "competitive strength" on its 10-K the fact that it has purchasing power for O&P components and that its purchasing power promotes the usage by its patient care clinics of clinically appropriate products that also enhance its profit margins. RFOF ¶ 980. Asar testified that he expects to get better pricing and discounts from manufacturers as a result of Hanger's purchase volume. RFOF ¶¶ 980, 983.

Not only is Hanger a large and important customer, it has structures and tools in place that enable it to constrain MPK prices moving forward. RFOF ¶¶ 985-990. As Dr. Argue testified, upon learning of the Acquisition, [redacted]

[redacted]

Hanger aside, no other clinic organizations have raised any specific concerns about the Acquisition generally or with respect to an alleged market for MPKs specifically. Complaint Counsel exaggerates a smattering of vague and half-hearted "concerns" from three of its own witnesses – all of whom were repeatedly impeached and severely discredited at trial. Jeffrey Brandt of Ability P&O claims that industry prices have historically increased in prior years, but provides no specific reason why he believes those prior price increases might occur again *as a*

result of the Acquisition. CCFF ¶ 1428; Response to CCFF ¶ 1428. Keith Senn of COPC raised vague concerns, but those concerns are belied by his own testimony. Senn testified that [redacted] Response to CCFF ¶¶ 1429-1430. Lastly, the spoon-fed "concerns" raised by Mark Ford of POA are belied by the lack of evidence of any head-to-head competition between Ottobock and Freedom on the basis of price or innovation at POA because [redacted]

The majority of clinics, however, either do not have any concerns about the Acquisition, or they believe it will be affirmatively beneficial to patients. Response to CCFF ¶¶ 1416-1417 (citing [redacted]**;** PX05135 (Weber, Dep. at 77-78 (given Freedom's financial situation and their strong foot line, combined with Ottobock's reputation for quality, the Acquisition could be "great" for his clinic's patients)); PX05168 (Sprinkle, Dep. at 73-74 ("Q: Mr. Sprinkle, we established earlier that Sprinkle Prosthetics has only purchased microprocessor knees from Ottobock and Freedom in the past few years. Correct? A: Correct. Q: Do you have any concerns that the merger

of Ottobock and Freedom essentially combines the sole two microprocessor knee products that Sprinkle Prosthetis purchases? A: I really don't. No.")).

IV. EXISTING COMPETITORS HAVE INCENTIVE AND ABILITY FOR TIMELY EXPANSION SUFFICIENT TO CURE ANY HARM TO COMPETITION.

A. Repositioning By Össur, Endolite, Proteor, and DAW Would Prevent Any Alleged Anticompetitive Unilateral Effects.

The evidence shows that repositioning by Össur, Endolite, Nabtesco, and DAW would more than prevent or reverse what could otherwise be potential anticompetitive effects. *See, e.g.*, *Oracle*, 331 F. Supp. 2d at 1118; *United States v. Gillette Co.*, 828 F. Supp. 78, 84-85 (D.D.C. 1993) (producers of fountain pens could not unilaterally raise prices because producers of other pens could reposition themselves). It is even more unlikely for an acquisition to generate substantial unilateral price increases where, as here, non-merging parties offer close substitutes to the merging parties' products. Merger Guidelines § 6.1. The crux of Complaint Counsel's entire case is that post-Acquisition Respondent will somehow be able to either raise prices on or discontinue Freedom's Plié 3 and/or Respondent will have the ability to stop innovating and simply maintain its leading market share. C.C. Br. 92-100.

Historically, Freedom has only sold approximately [redacted] units of the Plié 3 per year, and based on Freedom's own analysis, Plié 3 is at the end of its life cycle with outdated technolgoy that the marketplace will not accept for much longer. Response to CCFF ¶¶ 1080-1095, 1164-1166; RFOF ¶¶ 577-606. Direct evidence in this case shows that the Plié 3's closest MPK competitors based on price and functionality, the Endolite Orion 3 and the Nabtesco Allux (and to some extent, Össur's Rheo), [redacted] R. Br. 74-92. The evidence is also crystal clear that the Acquisition has had no impact (and will not have any impact in the future) on innovation in the MPK segment as advancements are speeding ahead at a

lightning-fast pace. R. Br. 74-92. [redacted] Response to CCFF ¶¶ 1519, 1529, 1536, 1555, 1560.

Rather than performing a forward-looking assessment, Complaint Counsel attempts to undermine the competitive significance of Respondant's rivals by viewing them through the rear-view mirror. C.C. Br. 95-100. For example, Complaint Counsel relies on testimony from certified prosthetist, Scott Sabolich, about a problem with one Rheo from 2015, CC. Br. 97, but ignores Sabolich's trial testimony that the current Rheo is the next-best performing MPK after C-Leg 4 and is also C-Leg 4's closest competitor. Response to CCFF ¶ 1502 (showing that Össur has launched two new generations of the Rheo since 2015). Similarly, Complaint Counsel tries to diminish Endolite by arguing only that Endolite's reputation [redacted]. Response to CCFF ¶ 1536 (citing only evidence related to Endolite's first swing-and-stance MPK, the Adaptive, which is no longer on the market and ignoring [redacted]). Complaint Counsel knocks Allux's beta-model sales in 2015, but it ignores the fact that the seller of the Allux released a full-launch version of the Allux in 2017 and purchased Ability Dynamics (including its RUSH foot line and experienced ex-Freedom salesforce) in June 2018. Response to CCFF ¶¶ 1564-1566.

Complaint Counsel's arguments attempting to downplay Respondent's rivals ignore the principle that it otherwise acknowledges in certain parts of its Post-Trial Brief, C.C. Br. at 87, that any unilateral effects analysis requires a "forward-looking assessment." C.C. Br. 87. This is especially true where, as here, Freedom's future competitive significance post-Acquisition would

have been substantially weakened absent the Acquisition. *U.S. v. General Dynamics Corp.*, 415 U.S. 486, 497-498 (1974).

B. The Evidence Is Undisputed That Össur Alone Has Sufficient Capabilities To Expand MPK Production In Excess Of Freedom's Annual Output.

Össur's Rheo and Ottobock's C-Leg 4 are closest competitors from a functionality and quality standpoint, regardless of the fact that their underlying platforms use different technologies. RFOF ¶¶ 646-670. At trial, witness after witness testified that the most important functionality that a swing-and-stance MPK must have is variable resistance in both phases of the knee that is actually controlled by the microprocessor. RFOF ¶¶ 390-391, 588. Regarding this critical feature, the following is indisputable:

- Ottobock's C-Leg 4, Genium, and X3 all have it. RFOF ¶¶ 191-197.
- Össur's Rheo, Rheo XC, and Power Knee all have it. RFOF ¶¶ 198-203.
- Endolite's Orion 3 and Linx both have it. RFOF ¶¶ 204-208.
- Nabtesco's Allux has it. RFOF ¶¶ 209-214.

In stark contrast, Freedom's Plié 3 stands alone among these MPKs because the Plié 3 does ***not*** have it. RFOF ¶¶ 168-173, 596 (noting that physicians and clinics do not consider Plié 3 to be a substitute for other MPKs because it lacks variable resistance control).

Grasping at straws to somehow avoid this reality, Complaint Counsel tries to distinguish Össur's MPKs for their magnetorheologic ("MR") technology. C.C. Br. at 95-98. This is a red-herring. Össur's MR technology does precisely what the Plié 3 cannot do. It provides variable resistance control in both the swing and stance phases of the knee. Response to CCFF ¶¶ 901-905. Users of the Rheo do not need to use wrenches and/or air pumps to control resistance in the swing and stance phases of the knee, as they would with the Plié 3. Response to CCFF ¶¶ 901-903. Össur's Rheo is technologically sophisticated and uses a microprocessor and sensors to adjust

magnetorheological fluid to control the way the knee swings and locks during stance phase. Response to CCFF ¶¶ 901-905. The Rheo transitions between functions and all different modes automatically through the intelligence of the knee – *i.e.*, there is no need to switch the modes manually. Response to CCFF ¶¶ 901-905.

Plié 3's technology is far more similar to a Sophisticated Non-MPK than it is to the Ottobock C-Leg 4, the Össur Rheo, the Endolite Orion 3, or the Nabtesco Allux. Response to CCFF ¶ 903. The record evidence establishes that, from a functionality and quality perspective, the Rheo and C-Leg 4 compete most closely, followed next by the Orion 3 and Allux, and then at the bottom is the Plié 3. Response to CCFF ¶ 903. [redacted]

[redacted]

[redacted]

[redacted] Ottobock's 3R80 and Össur's Mauch knee use hydraulic technology and provide functionality very similar the Plié 3. Response to CCFF ¶¶ 994, 1015, 1481.

The Össur Rheo and Ottobock C-Leg 4 are also PDAC verified for L5856, the L-code associated with microprocessor swing-and-stance control, but the Freedom Plié 3 is not PDAC verified for L5856. Response to CCFF ¶ 901. Health economic studies support the benefits of the Össur Rheo and Ottobock C-Leg relative to Sophisticated Non-MPKs, whereas Össur's Executive VP of R&D (or anyone else that testified in this case) is not familiar with any studies showing any benefits of the Freedom Plié 3 relative to Sophisticated Non-MPKs. Response to CCFF ¶¶ 901, 1482. Indeed, no evidence was introduced at trial that there has ever been a study establishing the benefits of the Plié 3 relative to Sophisticated Non-MPKs because none exist in the world. Response to CCFF ¶¶ 1002, 1015, 1301, 1482; RFOF ¶¶ 350-381).

Certified prosthetists that testified at trial consider the Össur Rheo to be the closest competitor to the Ottobock C-Leg 4. Response to CCFF ¶ 905 (Sabolich, Tr. 5858-5859; Oros, Tr. 4816-4817). The only witnesses relied upon by Complaint Counsel to state otherwise – Ford, Senn, and Endrikat – are not, and never have been, prosthetists, certified or otherwise. Responses to ¶¶ 999, 1501 (citing Ford, Tr. 918; Senn, Tr. 152-154; PX05116 (Endrikat, Dep. at 16-17)). However, Sabolich, a certified prosthetist and expert in MPK fittings, testified:

> Q. What microprocessor knee that is not manufactured by Otto Bock and is available in the United States is the closest substitute for a C-Leg 4, in your view?
>
> A. A Rheo Knee. The Rheo 3.

Response to CCFF ¶ 1502 (Sabolich, Tr. 5858); *see also* RFOF ¶¶ 650.

Scott Schneider, a former prosthetist with significant MPK experience, also testified that Rheo's MR fluid has benefits over the hydraulic fluid used in both Ottobock's Sophisticated Non-MPKs and MPKs. Response to CCFF ¶ 1494. Schneider testified that he did not believe there to be a significant difference between Össur's Rheo and Ottobock's C-Leg stating that "I believe that Össur, when they came out with theirs, felt that that was a superior product and fluid type and therefore used it for the benefits that I stated." Response to CCFF ¶ 1494.

In addition, Schneider testified at trial that Össur's Rheo is the C-Leg 4's closest competitor and one of only two products (the other being the Rheo XC) that Ottobock considers when setting the price of the C-Leg 4:

> Q. What competitor knee does Otto Bock consider to be the C-Leg 4's closest competitor in the United States?
>
> A. Both the Rheo and the Rheo XC is our closest competitor to the C-Leg 4.
>
> JUDGE CHAPPELL: Do you base that on price or function?
>
> THE WITNESS: I base that on function first, and price is also close to it.

Response to CCFF ¶ 1494.

Complaint Counsel also focuses only on MR technology in an apparent attempt to distract from the several other factors that make Össur and Ottobock closest competitors with respect to MPKs. For example, Össur is the only competitor with the size, scale, R&D budget, employees, sales force, and clinical team similar to that of Ottobock. Össur employs between 300 and 400 people in the United States alone, and its sales force consists of fifty people that assist with sales, education, and reimbursement issues. RFOF ¶ 34. [redacted]

[redacted] Ottobock employs close to 500 people in the United States and has a team of 75 to 100 people that work in the field as sales representatives, clinical specialists, or reimbursement specialists. RFOF ¶ 3. Freedom, on the other hand, had only 13 sales representatives and 3 clinical sales personnel prior to the Acquisition. Response to CCFF ¶ 885.

Furthermore, Complaint Counsel's claim that certain technology is a more important differentiator than functionality appears disingenuous in light of its other positions in this case that: (i) the Quattro will compete closely with Ottobock's C-Leg and (ii) that Sophisticated Non-MPKs are in a different market than the Plié 3. *First*, the record is clear that [redacted] RFOF ¶¶ 697, 702; CCFF ¶¶ 1659, 2501-2508. *Second*, Complaint Counsel concedes that many Sophisticated Non-MPKs, including the Ottobock 3R80 and Össur Mauch knee, utilize hydraulic technology similar to the C-Leg 4 and Plié 3, CCFF ¶¶ 361; RFOF ¶¶ 140-151, but Complaint Counsel nonetheless contends Sophisticated Non-MPKs are not in the same market as the C-Leg 4 and Plié 3. C.C. Br. 28-44.

C. Endolite's Reputation And Sales Are Growing Rapidly And Significantly.

Complaint Counsel's argument that Endolite "is even less likely to replace competition" lost from the Acquisition is also contrary to the evidence. C.C. Br. at 98. Rather than address current or forward-looking evidence, Complaint Counsel attempts to downplay Endolite's competitive significance by focusing on seriously outdated evidence. C.C. Br. at 98-99. Complaint Counsel's critique of Endolite is that it has [redacted] and has been [redacted] than other MPK suppliers in the past. C.C. Br. at 98-99. Neither argument is supported by the evidence.

The only quality reputation issues specifically identified by Complaint Counsel relate to either the Adaptive, Endolite's first swing-and-stance MPK or early versions of the Orion – they do ***not*** relate to the Orion 3. Responses to CCFF ¶¶ 964, 1531, 1533-1536. Endolite's Orion 3 is light years ahead of Endolite's predecessor MPKs, and the market has been, and will likely continue to be, reacting very positively to Orion 3's functionality and quality. Responses to CCFF ¶¶ 964, 1531, 1533-1536.

After the Acquisition in September 2017, Ottobock noted that Endolite was "[q]uietly building a following through positive experience with performance, customers are commenting on improved functionality with latest version [Orion 3]." Responses to CCFF ¶¶ 964, 1531, 1533-1536. Clinic customers also have no specific issues with the quality of the Orion 3. Response to CCFF ¶ 1553. Senn testified at his deposition and at trial: "***The Orion I think is becoming more interchangeable as they improve that product***." Response to CCFF ¶ 1533 (emphasis added).

[redacted]

[redacted]

Endolite's Chairman, Stephen Blatchford, who has been working in the industry for over thirty years and is heavily involved in product development testified at trial as follows:

> Q. And you believe, don't you, that the Orion3 is the closest competitor to the C-Leg 4?
>
> A. I do.
>
> Q. And you believe, don't you, sir, that the Orion3 is functionally as good as the C-Leg 4?
>
> A. I do.
>
> Q. And although there may have been some problems with earlier versions of the Orion, you've now worked through those, and the Orion3, in your view, is as good as the C-Leg 4.
>
> A. Yes.

Response to CCFF ¶ 1536 (Blatchford, Tr. 2213-2214).

[redacted] Ottobock's head of mechatronic marketing in the United States testified at trial that "Endolite has improved a lot on their Orion product with that latest iteration of it, the Orion 3." Response to CCFF ¶ 1536 (Solorio, Tr. 1647). Quality improvements to the Orion 3 and Endolite's increased trialing of the product have allowed Endolite to grow its market share and

become a stronger competitor, according to an Ottobock marketing executive. Response to CCFF ¶ 1536 (Solorio, Tr. 1647).

The impact of the Orion 3's high quality and low price was a point of serious concern at Freedom. Mark Testerman, Freedom's Vice President of National and Key Accounts, wrote to his boss, Vice President of Sales, Jeremy Mathews, that pricing of Endolite's Orion 3 was a primary cause in the decline of Plié 3 sales, and that competition from the C-Leg 4 was ***not***. RFOF ¶¶ 643-644 (RX-0277 at 001); RFOF ¶¶ 832 (Testerman, Tr. 1298) (testifying that "Endolite was taking a very aggressive approach in the pricing of their knee"). Testerman also testified at trial that a key account in Memphis, Tennessee, Human Technologies, was shifting purchases from Pilé 3 to Orion 3. Response to CCFF ¶ 1545 (Testerman, Tr. 1298).

To the extent it was ever true, Complaint Counsel's claim that Endolite [redacted] is clearly a thing of the distant past. Responses to ¶¶ 1539-1541. [redacted] Responses to CCFF ¶¶ 1541, 1539, 1540. The market is taking note. Indeed, Freedom's Vice President of National and Key Accounts told his boss that the Plié 3 was in decline because of "aggressive" pricing by Endolite with the Orion 3. Responses to CCFF ¶¶ 1541, 1539, 1540. [redacted] Response to CCFF ¶¶ 1529-1530, 1542. [redacted]

[redacted]

Complaint Counsel's claim that "Endolite is even less likely to replace the competition lost" from the Acquisition also totally ignores critical evidence establishing otherwise. C.C. Br. 98-99. Complaint Counsel ignores that Endolite employs 900 people throughout the world, including approximately 80 people in the United States. RFOF ¶¶ 808, 814. Endolite's United States sales force consists of two regional sales managers, fifteen sales representatives, and five clinical support specialists located across the country. RFOF ¶¶ 38, 815. Notably, Endolite's United States sales force is larger than Freedom's sales force prior to the Acquisition. RFOF ¶ 1014 (Testerman, Tr. 1077, 1114) (noting that Freedom had just 14 sales representatives at the time of Acquisition).

Complaint Counsel's claim also ignores Endolite's R&D plans. [redacted]

[redacted]

D. Nabtesco Is A Quickly Growing Competitor [redacted]

Consistent with its claims about other competitors, Complaint Counsel attempts to disparage the future competitive significance of Nabtesco and Proteor by focusing on outdated evidence and ignoring current and forward-looking developments. C.C. Br. 99-100. [redacted]

First, Nabtesco upgraded the Allux from a beta model to a full-launch model in June 2017. Response to CCFF ¶¶ 1562-1566.

Second, Proteor acquired Ability Dynamics in June 2018. Response to CCFF ¶¶ 1562-1566, 1571-1572, 1588-1589. Proteor's acquisition of Ability Dynamics changed the competitive significance of the Allux in two ways: (i) it gave Proteor seven new salespeople with significant experience selling MPKs; and (ii) it provides Proteor's new, expanded salesforce with the RUSH line of prosthetic feet to pair with the Allux. Response to CCFF ¶¶ 1562-1566, 1571-1572, 1588-1589.

And, *third*, Proteor entered into an exclusive agreement with Nabtesco to be the exclusive distributor of the Allux in the United States. Responses to CCFF ¶¶ 1548, 1555,

1587-1589. [redacted]

Complaint Counsel's claim that Nabtesco and Proteor have a "negligible presence in the market" ignores substantial evidence about the growing reputation and future competitive significance of Nabtesco and Proteor in the United States. C.C. Br. at 99-100. Mattear testified that "Nabtesco has a wonderful reputation of a long history of producing quality prosthetic components," which included "microprocessor knees." Response to CCFF ¶ 1587. Mattear also testified that Proteor is improving Nabtesco's reputation in the industry. Response to CCFF ¶ 1587.

[redacted]

Proteor's acquisition of Ability Dynamics has also significantly enhanced its reputation and competitive significance in the United States MPK segment. Prior to June 2018, Proteor had only two salespeople selling the Allux in the United States. Response to CCFF ¶ 1548. As of September 19, 2018, Proteor employs eight total salespeople, one salesperson that has remained with Proteor, Inc. and seven additional salespersons from Ability Dynamics, which Proteor acquired in June 2018. Response to CCFF ¶¶ 1548, 1559. ***Signifiticantly, five of Proteor's new salespeople have prior experience working for Freedom***. Response to CCFF ¶ 1559. According to Freedom's Vice President of Key and National Accounts, those five former Freedom salespeople have "extensive knowledge of microprocessor knees and the Plié" and have significant experience and relationships with large MPK customers. Response to CCFF ¶ 1559. Indeed, one of the new Proteor sales people is Freedom's former National Sales Director. Response to CCFF ¶ 1559.

In addition to a new, robust sales team, Proteor also employs a certified prosthetist, Craig Armstrong, who helps Proteor's sales force sell directly to prosthetic clinics in the United States. Response to CCFF ¶ 1559, 1573, 1577, 1590. In addition to being a certified prosthetist, Armstrong is an above-the-knee amputee. Response to CCFF ¶ 1559. Armstrong is a very experienced clinician and before joining Proteor, he was a core and critical Quattro Project development team member at Freedom. Response to CCFF ¶ 1559. Amstrong is taking a leading role in advancing the Allux's reputation in the United States market. For example, Armstrong presented the Allux at the Hanger Education Fair in 2018, a meaningful opportunity to educate prosthetists from around the country on the features and benefits of the Allux. Response to CCFF ¶ 1559, 1577.

As a result of these combined efforts, Proteor's sales of the Allux [redacted]

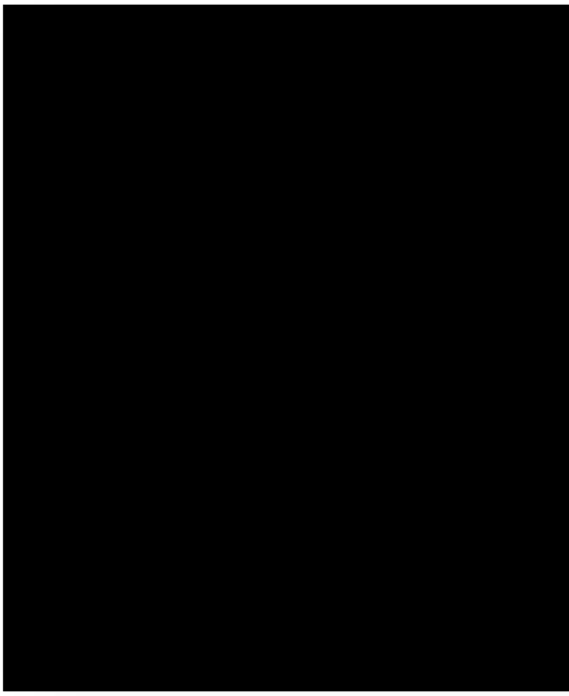
The market is being forced to respond to Nabtesco and Proteor. Ottobock's Vice President of Government Affairs, Medical Affairs, and Future Development testified at trial that, with respect to Nabtesco's Allux, "we're getting reports back from customers that are using it" and those customers are noting that it is microprocessor-controlled swing and stance knee. Response to ¶ 1572. Specifically, Schneider testified as follows:

> Q. Are you familiar with the functionality of Nabtesco's Allux product?
>
> A. I am.
>
> Q. Has Nabtesco's Allux been able to make inroads in the United States market within the last year?
>
> A. It has. The Allux product is very intriguing. They had used a distributor in the United States that was pretty small, but dedicated, and they have recently purchased the company Ability, which has a prosthetic foot which is called the RUSH, that has done a tremendous job marketing and has taken a lot of – earned a lot of sales of their foot product. And now they have – the Allux product will have a truly dedicated sales staff and aggressive marketing staff and many more feet on the street and people in the United States that will be marketing and selling the Allux product.
>
> Q. How is Otto Bock addressing Proteor Nabtesco's recent acquisition of Ability Dynamics?
>
> A. We're monitoring it.

Response to ¶ 1572.

Direct evidence from Freedom also shows that Freedom's top executives were seriously concerned by the inroads being made by the Allux. Response to CCFF ¶¶ 1573, 1585. The introduction and penetration of the Allux in the United States was causing Freedom "heartbreak" in 2016 in the form of a decline in Plié 3 sales, even while the Allux was still only available in beta. Response to CCFF ¶¶ 1573, 1585, 1590. Freedom's Vice President of National and Key Accounts testified at trial that Proteor now employs one of Freedom's top former clinicians, one of Freedom's former National Sales Directors, four or five of Freedom's former sales representatives, and a former representative from SPS that has over 20 years' experience in the prosthetics industry and "great relationships and [knows] the industry inside and out." Response to CCFF ¶ 1585. Freedom's Vice President of Marketing and Product Development also testified at trial that the Nabtesco Allux was "making progress in the market." Response to CCFF ¶ 1573 (noting that the introduction of the Nabtesco Allux was discussed at the highest levels at Freedom).

Dr. Prince of Freedom also testified that [redacted] Response to CCFF ¶ 1573. [redacted]



[redacted]

Certified prosthetists at large clinics testified at trial that the Allux is having an impact in the marketplace. For example, Michael Oros testified his clinic, Scheck & Siress, has fit the Allux on its patients. Responses to CCFF ¶¶ 1580, 1593. [redacted]

E. DAW Is Able To Satisfy Additional Demand For MPKs.

DAW also manufacturers and sells MPKs. [redacted]

DAW MPKs have put competitive constraints on other suppliers, particularly on the West Coast. For example, Tracy Ell from Mid-Missouri testified that MPKs from DAW are available to users at his clinic. RFOF ¶ 767. Ultra Prosthetics in Nevada also sells DAW MPKS. RFOF ¶¶ 934-937. Shortly before the Acquisition, Freedom's Vice President of Key and National Accounts was [redacted]

[redacted]

Complaint Counsel also ignores fundamental facts about DAW that make it able to expand. DAW sells a full line of prosthetic products, including feet, ankles, liners, skins, foam, and titanium components, along with three different MPKs. RFOF ¶¶ 927-928. DAW also employs six or seven sales representatives that it uses to sell all of DAW's prosthetic products directly to United States clinic customers. RFOF ¶ 929. Dr. Doug Smith, a prominent orthopedic surgeon testified at trial that he has a high opinion of the MPKs sold by DAW. RFOF ¶ 931 (testifying that DAW sells Teh Lin MPKs in the United States). [redacted]

F. Respondent Has Exceeded Its Burden Of Producing Evidence Showing That Expansion Of Close Substitutes Will Be Timely, Likely, And Sufficient.

In addition to using outdated market evidence, Complaint Counsel also attempts to segregate out each competitor in an apparent attempt to argue that no one competitor alone could prevent or reverse what could otherwise be potential anticompetitive effects from the Acquisition. C.C. Br. at 95-100. In doing so, Complaint Counsel mischaracterizes Respondent's burden. Expansion "by a single firm that will replicate at least the scale and strength of one of the merging firms is sufficient," and expansion "by one or more firms operating at a smaller scale may be sufficient if such firms are not at a significant competitive disadvantage." Merger Guidelines

§§ 9.3, 6.1 (noting that repositioning is a supply-side response that is evaluated like entry, with consideration given to timeliness, likelihood, and sufficiency).

Here, even though Össur alone has the scale and strength to replicate the scale and strength of Ottobock, Endolite, Nabtesco, and DAW, collectively, also easily have the collective ability to replicate the scale and strength of Freedom. R. Br. 73-91. Therefore, Respondent has met, and exceeded, its burden of showing that expansion by existing manufacturers would prevent any competitive harm resulting from the loss of Freedom as an independent competitor. *Swedish Match*, 131 F. Supp. 2d at 170.

V. THE EFFICIENCIES GENERATED BY THE ACQUISITION WILL OFFSET ANY ALLEGED HARM TO COMPETITION.

Complaint Counsel's claim that Respondent has failed to demonstrate verifiable and cognizable efficiencies is unavailaing. Ottobock and Freedom both analyzed the efficiencies created by the Acquisition, and determined that the Acquisition would result in cognizable efficiencies that are specific to the Acquisition, ranging from [redacted]

The Dual Brand Strategy contemplates substantial efficiencies. RFOF ¶ 1545. [redacted] AT Kearney and

Ottobock identified and quantified substantial efficiencies at approximately $[redacted] per year by 2022, or approximately {[redacted]}% of Freedom's 2022 revenue. RFOF ¶ 1549.

Before the Hold Separate Agreement, Freedom's management also participated in strategic discussions with AT Kearney and Ottobock regarding efficiencies. RFOF ¶¶ 1538-1539. Freedom's current CEO, David Reissfelder, testified that efficiencies would be realized because of the Acquisition, including at least $[redacted] Ottobock's detailed integration plans show that Freedom would realize gross margin improvements of nearly ${[redacted] by 2022. RFOF ¶ 1552. In addition, a combined Ottobock and Freedom would have increased buying power that would allow them to negotiate lower supply costs, providing the ability to pass down the savings to customers. RFOF ¶ 1553. These Acquisition-specific efficiencies would result in gross margin improvements allowing both companies to: (i) improve the quality of their respective products through increased spending on research and development; (ii) maintain and/or lower the prices of their current respective prosthetic products, including MPKs; and (iii) develop new technology for future prosthetic devices. RFOF ¶ 1554.

Respondent's efficiencies expert, James Peterson, further analyzed the efficiencies work performed by Ottobock and AT Kearney through, among other things, an Efficiencies Sensitivity Analysis. RFOF ¶¶ 1555, 1564. Peterson concluded that the Acquisition offered material and achievable efficiencies. RFOF ¶ 1569. In reaching his conclusion, Peterson analyzed and critiqued the synergies and efficiencies identified by Ottobock and AT Kearney. RFOF ¶ 1555. Peterson concluded that Ottobock management and AT Kearney performed significant work to attempt to quantify the efficiencies of the transaction and the economic benefits of the Dual Brand Strategy.

RFOF ¶ 1556. The result of Ottobock's and AT Kearney's efficiencies analysis resulted in a robust "Financial Model." RFOF ¶¶ 1535, 1545. Peterson also concluded that the Financial Model was extremely complex and heavily detailed based on Peterson's extensive experience with efficiency models. RFOF ¶ 1546. According to Peterson, the level of detail and methodology used by Ottobock and AT Kearney is consistent with the typical efficiency analysis used to inform investment and integration decisions. RFOF ¶ 1561.

Peterson specifically identified the following Acquisition-specific efficiencies: [redacted]

Due to Freedom's history of [redacted] Peterson was not surprised that Ottobock was able to identify material and achievable efficiencies through its due diligence and development of the Financial Model. RFOF ¶ 1568. [redacted] RFOF ¶ 1570.

VI. FREEDOM WAS A BOTH A "FLAILING" AND "FAILING" FIRM AT THE TIME OF THE ACQUISITION.

Overwhelming evidence presented at trial leaves no room for reasonable dispute that Freedom was on the [redacted] at the time of the Acquisition. Freedom's ongoing

financial decline in 2017 – [redacted] – is not in serious question by anyone other than Complaint Counsel's purported accounting expert who was severely discredited at trial. More significant than Freedom's general financial condition, however, was the simple fact that Freedom owed its Lenders approximately $27.5 million in September 2017 that it had no ability to pay. If Ottobock had not purchased Freedom, the Court does not need to speculate about what would have happened: [redacted] As a result, Respondent is entitled to the benefit of the "failing firm" defense as a complete defense to Complaint Counsel's claims, and the Court should also consider Freedom a "flailing firm" that was too weak to pose a competitive threat in any alleged market for purposes of the Court's competitive effects analysis.

A. Complaint Counsel's Reliance On The Testimony Of Christine Hammer Is Misplaced And This Court Should Disregard Her Opinions.

Complaint Counsel's responses to Respondent's failing and flailing firm defenses rely almost entirely on the testimony of its purported accounting expert, Christine Hammer, whose team has been paid around $1 million by the FTC to assist Hammer in making a series of unsupported conclusory declarations that she is not qualified to make. While the legal and evidentiary support for Respondent's failing firm firm defense is set forth in Respondent's Post-Trial Brief (pages 99-133) and in Sections VI.B and VI.C, *infra*, Hammer's testimony should be disregarded by this Court for the following reasons.

First, Hammer is not qualified to offer expert opinions regarding the third prong of the failing firm defense articulated in the Merger Guidelines – *i.e.*, Freedom's efforts to elicit reasonable alternative offers. Hammer is an accountant who spends 90 to 100 percent of her recent time preparing opinions for litigation. Response to CCFF ¶ 1816 (citing Hammer, Tr. 3018, 3022-

3023). She is not qualified to offer opinions in a legal proceeding regarding the processes involved in M&A transactions. Indeed, Hammer expressly declared at trial that she is "not an M&A person" and that the sale bidding process for a company seeking acquirers has never been her focus. Response to CCFF ¶ 1816 (citing Hammer, Tr. 3018-3020). In fact, during her trial testimony, Hammer made very clear how unqualified she is to render opinions regarding good faith efforts to elicit offers in a sale process:

> Q. You have no experience identifying or researching potential bidders who might purchase a company in a sale bidding process; correct?
>
> A. Correct.
>
> Q. You have never been involved in negotiating a company's engagement of an investment banker for the purpose of a sale process, other than an initial public offering.
>
> A. That's correct.

Response to CCFF ¶ 1816 (citing Hammer, Tr. 3195). Hammer simply has no relevant experience that would enable her to offer any opinion whether Freedom employed good faith efforts to elicit reasonable alternatives to the Acquisition that any lay person reviewing the record could not offer. Her "opinions" regarding the sale process should thus be ignored by this Court. *In the Matter of McWane, Inc.,* 2012 WL 3719035, at *3 (F.T.C. Aug. 16, 2012) (Chappell, J.) (holding that courts consider "whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue"); *In the Matter of Basic Research, LLC,* 2006 WL 159736, at *5 (F.T.C. Jan. 10, 2006) (precluding expert testimony beyond scope of expertise and stating that "courts traditionally consider whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue," and, following "vigorous cross-examination . . . the Court will either exclude it at that point, or give it whatever weight it deserves"); *In the Matter of Evanston Nw. Healthcare Corp.,* 2005 WL 400731, at *3

(F.T.C. Jan. 13, 2005) (quoting Federal Rule of Evidence 702's requirement for expert testimony that "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise").

In addition to having no qualifications to offer opinions about the sale process, Hammer's opinions on that subject are directly contrary to the undisputed record evidence. Hammer was confronted during trial with the testimony of Smith, Thomas Chung (a representative of Freedom's majority owner, HEP), and Jon Hammack (a representative of Moelis) all stating that Freedom worked very hard and exhausted all available options to find alternatives to the Acquisition and failed. Response to CCFF ¶ 1816 (citing Hammer, Tr. 3223-3226). In response to the undisputed testimony of these witnesses, Hammer admitted on the stand that her opinion that Freedom did not make good faith efforts to obtain reasonable alternatives is "inconsistent" with the testimony of these witnesses who were personally involved in the sale process and have substantial experience in M&A transactions. Response to CCFF ¶ 1816 (citing Hammer, Tr. 3226); RFOF ¶ 77 (Hammack has been involved in more than twenty sale bidding processes and forty to fifty M&A transactions); RFOF ¶ 73 (Smith has been involved in 130 to 150 M&A transactions). Hammer has no basis to substitute her uninformed judgment for the observations of actual M&A experts, like Smith and Hammack.

Second, Hammer is not qualified to offer any opinions regarding the second prong of the failing firm defense as set forth in the Merger Guidelines regarding Chapter 11 reorganization. Hammer has no relevant experience that would make her an expert in Chapter 11 reorganization efforts. Hammer identied no specific experience with Chapter 11 reorganization as an accountant or otherwise, and the information she relied upon in reaching her opinions regarding Chapter 11 reorganization consists of information Hammer collected on the internet (with no apparent

methodology) and a dissertation from a student at the Univestiy of Munich that was originally published in German. Response to CCFF ¶ 1816 (citing Hammer, Tr. 3231-3232). Hammer also has no experience with debtor-in-possession ("DIP") financing, which Hammer admitted Freedom would have required in order to successfully emerge from Chapter 11 reorganization. Response to CCFF ¶ 1816 (citing Hammer, Tr. 3252). Hammer has never worked with a company to identify and obtain DIP financing. Response to CCFF ¶ 1816 (citing Hammer, Tr. 3253). Further, even though Hammer acknowledged that Freedom would have needed DIP financing to successfully reorganize under Chapter 11, she performed no analaysis – likely because she is not qualified to perform such an analaysis – of how much DIP financing Freedom would have required. Response to CCFF ¶ 1816 (citing Hammer, Tr. 3255).

Third, Hammer's opinions regarding the first prong of the failing firm defense – whether Freedom had the ability to meet its financial obligations in the near future – are unreliable because they are at odds with undisputed record evidence. Most notably, Hammer attempts to completely sweep under the rug the undisputed testimony from Freedom's former CEO, David Smith, that [redacted] Response to CCFF ¶ 1816 (citing Smith, Tr. 3118-3132). Hammer admitted during trial that, on the one hand, she did not disagree with any of the testimony in the case, including Smith's testimony, but on the other hand, Hammer also admitted that Smith's testimony is inconsistent with her opinions and she cited no counterveiling record evidence supporting her opinions. Response to CCFF ¶ 1816 (citing Hammer, Tr. 3012, 3134).

Hammer's "opinion" regarding the Lenders' mental state – which is not even an appropriate subject for expert testimony – is both inherently inconsistent and without any external evidentiary support. Hammer's "say-so," which is directly contradicted by the record, is not a sufficient basis for expert testimony and should thus be rejected.

For all of these reasons, Hammer's opinions regarding any of the elements of the failing firm defense should be entirely disregarded by this Court.

B. Respondent Has Met All Three Elements Of The Failing Firm Defense.

1. Freedom Was Unable To Meet Its Financial Obligations In The Near Future At The Time Of The Acquisition.

In its Post-Trial Brief (pages 93-112), Respondent set forth substantial evidence presented during trial demonstrating that at no time between February 16, 2017 and September 22, 2017 did Freedom have the ability to meet its financial obligations in the near future. *See also* RFOF ¶ 1517. This resulted from a combination of historically poor financial performance and mismanagement with an insurmountable debt obligation that at no point in 2017 could Freedom satisfy when due. RFOF ¶ 1518.

Complaint Counsel goes to great lengths in its Post-Trial Brief to attempt to obfuscate what was plainly obvious at trial: [redacted] The Court does not, therefore, need to speculate about what might have happened to Freedom absent the Acquisition. Freedom would have been liquidated by the Lenders and its assets would have exited the relevant market – the precise result that the failing firm defense tries to prevent. For these reasons, Respondent's corporate finance expert, James Peterson, opined: "Due to the historical trend of declining financial performance and the pending maturity of [Freedom's] Credit Facility,

Freedom was unable to meet its financial obligations in the near future."[4] Response to CCFF ¶ 1945 (citing RX-1048 at 006).

a. The undisputed evidence shows that Freedom's Lenders would have forced Freedom into liquidation absent the Acquisition.

Perhaps the most absurd of Complaint Counsel's misstatements regarding Freedom's business is its claim that Freedom's Lenders were somehow unlikely to force Freedom into bankruptcy as an alternative to the Acquisition. C.C. Br. at 123. The record evidence was overwhelming and undisputed at trial [redacted] RFOF ¶ 1374. The Credit Agreement was ultimately amended eight times. RFOF ¶ 1375. The first through sixth amendments were executed on March 31, 2013, June 7, 2013, November 24, 2014, June 30, 2016, August 15, 2016, and August 22, 2016, respectively. RFOF ¶ 1376. None of the first six amendments changed the Term Loan Maturity Date of February 16, 2017. RFOF ¶ 1377.

[4] Peterson has substantial experience with hundreds of transactions in which he performed analyses of whether companies would be able to meet their financial obligations in the near future. RFOF ¶ 82.

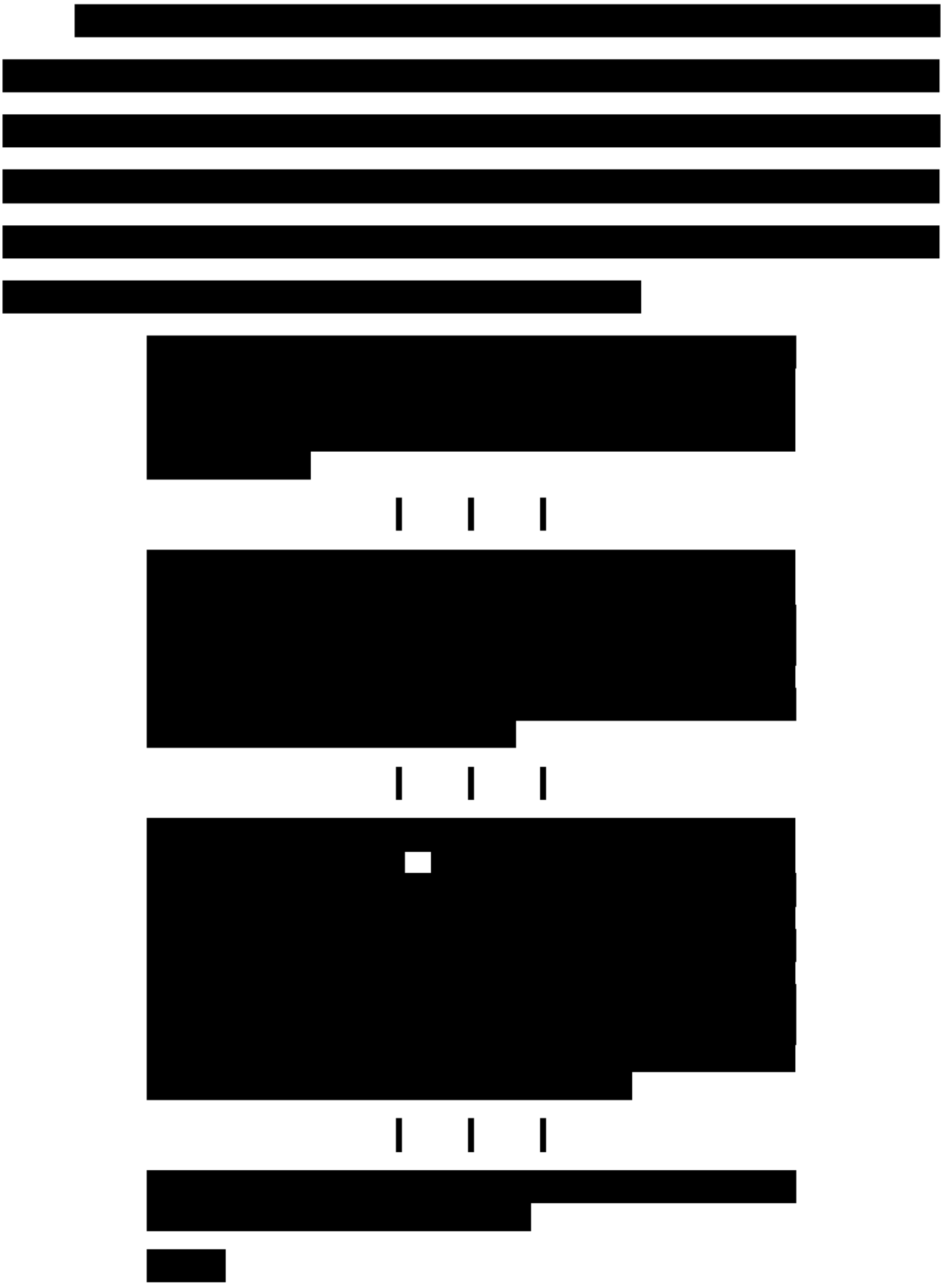
When he became CEO in April 2016, Smith immediately began communicating with the Lenders about Freedom's debt crisis. RFOF ¶ 1378. Smith was the only person at Freedom with authority to negotiate the terms of amendments to the Credit Agreement with the Lenders. RFOF ¶ 1379. Smith assumed that role with the Lenders because the Lenders "didn't like" the Freedom management team in place when Smith became CEO. RFOF ¶ 1380. [redacted] RFOF ¶ 1382.

By the end of 2016, Freedom owed the Lenders approximately $27.5 million, but had no capital to pay that obligation by the existing Term Loan Maturity Date of February 16, 2017. RFOF ¶ 1383. Consequently, Freedom did not have the ability to meet its financial obligations in the near future. RFOF ¶ 1384. [redacted]

[redacted]

[redacted] Freedom also formally engaged Moelis in May 2017 in compliance with Section 6 of the Seventh Amendment. RFOF ¶ 1398. Freedom selected Moelis because Moelis had been advising Freedom about potential refinancing and sale options throughout 2016 and 2017. RFOF ¶ 1399.

[redacted]



RFOF ¶ 1405. [redacted]

Freedom continued to owe the Lenders approximately $27.5 million. RFOF ¶ 1412. [redacted]

b. Complaint Counsel mischaracterizes Freedom's financial condition before the Acquisition.

Complaint Counsel grossly mischaracterizes the record evidence regarding Freedom's financial state in 2017. Relying solely on unsustainable modest improvement in one financial metric – top-line revenue – during the first six months of 2017, Complaint Counsel relies on the conclusory assertion of its accounting expert, Hammer, that Freedom "would have been able to meet its financial obligations in the near future," and further that Respondent supposedly "introduced no evidence at trial proving otherwise." C.C. Br. at 117. These assertions have no relationship to reality.

Complaint Counsel's reliance on the turnaround plan that Freedom's CEO, David Smith, tried to implement is misplaced. Smith was very clear at trial that he did not have sufficient time to implement that turnaround plan. [redacted] However, he quickly realized these goals were unattainable. For example, Complaint Counsel casually overlooks the fact that, when he became CEO in April 2016, Smith complained not only of poor financial performance by Freedom, but that [redacted] RFOF ¶¶ 1335, 1339. [redacted] "So my goal was to increase revenues without spending money so I have more on the bottom so that I could pay debt and maybe hit my covenants or have money to fix the problems that I could see." RFOF ¶ 1337. As a result of Smith's efforts, Freedom did experience limited improvement in top-line revenue during the first two quarters of 2017. RFOF ¶ 1340. However,

that top-line improvement did not indicate a material change in Freedom's financial health in 2017. RFOF ¶ 1341. Carkhuff believed that [redacted] RFOF ¶ 1342. [redacted]

In addition, Freedom created its 2017 financial plan (the "2017 Plan") based off of its 2016 financial results. RFOF ¶ 1347. Because 2016 was Freedom's worst financial year ever, it caused Freedom to create an extremely conservative 2017 Plan that was not difficult to exceed. RFOF ¶ 1348. [redacted]

Further, Freedom was failing to even achieve its conservative 2017 Plan in many respects. RFOF ¶ 1349. In May 2017, [redacted]

[redacted]

In other words, it would be highly misleading to characterize 2017's financial performance as a material improvement in Freedom's financial health. RFOF ¶ 1354.

Smith simply did not have sufficient time before Freedom's outstanding debt was due to implement a turnaround plan. RFOF ¶ 1355. Smith believes that he needed at least an additional 18 months to implement the plan, assuming he could have obtained sufficient financing of $27.5 million to pay off the debt, [redacted] RFOF ¶ 1358.

c. Freedom's auditor's substantial doubt about Freedom's financial condition is consistent with Freedom's inability to meet near-term financial obligations.

Complaint Counsel inexplicably argues that the approach taken by Freedom's outside auditor, Squire and Company ("Squire"), to Freedom's 2016 audited financial statements somehow belies the reality that Freedom was on the verge of failure in 2017 before the Acquisition.[5] C.C. Br. at 120. On the contrary, Squire's opinion strongly supports the conclusion that Freedom was unable to meet near-term financial obligations. At the time Freedom's 2016 audited financial statements were finalized, Squire had ***s*** [redacted] RFOF ¶¶ 1441-1446.

Complaint Counsel relies solely on the discredited memo prepared by Lee Kim in March 2017 (the "Kim Memo") in support of its argument regarding [redacted] The Kim Memo – and Complaint Counsel's arguments regarding the Kim Memo – should be disregarded for the following reasons.

[redacted]

[5] Freedom's 2016 audited financial statements were finalized in April 2017. RFOF ¶ 1414. It is thus important to recognize that the view of Freedom's auditors as of April 2017 does not even reflect Freedom's worsened financial condition after April 2017 resulting from, among other things, [redacted]

[redacted]

[redacted]

Second, the circumstances under which the Kim Memo was prepared and almost instanteously accepted by Squire are highly suspicious and cast significant doubt on its reliability.

[redacted]

[redacted]

[redacted]

For these reasons, the Kim Memo and Squire's treatment of Freedom's 2016 audited financial statements do not support Complaint Counsel's claim that Freedom could meet its financial obligations in the near future. [redacted]

d. Freedom's actions were consistent with a company on the verge of failure.

Complaint Counsel mischaracterizes Freedom's actions at and around the time of the Acquisition as "inconsistent with inabaility to meet near term financial obligations." C.C. Br. at 122. The opposite is true.

[redacted]

[redacted] RFOF ¶ 1516.

Freedom's owners also had every reason to delay a sale if they could have obtained a purchase price anywhere near these valuations. RFOF ¶ 1507-1510. However, by September 2017, Freedom had exhausted good faith efforts to obtain reasonable alternatives to the Acquisition by Ottobock. RFOF ¶ 1511. Freedom's decision to sell in September 2017 [redacted]

2. Freedom Was Unable To Successfully Reorganize Under Chapter 11 Of The Bankruptcy Act.

The evidence at trial was undisputed that Freedom's circumstances at and around the time of the Acquisition would have prevented successful reorganization under Chapter 11 of the Bankpruptcy Act.[6] [redacted]

[6] Section 11 of the Merger Guidelines articulates the second prong of the failing firm defense as requiring that the allegedly failing firm "would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act." However, "[t]he weight of authority suggests that dim prospects for bankruptcy reorganization are not essential to successful assertion of the failing company defense." *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 778 (D. Md. 1976). Whether required or not, the evidence introduced at trial was undisputed that Freedom would not have been able to successfully reorganize under Chapter 11. RFOF ¶¶ 1521, 1523.

[redacted]

For similar reasons, Peterson reviewed the record and opined that "[t]o the extent Freedom had filed for protection under Chapter 11 of the U.S. Bankruptcy Code . . . it is unlikely that a reorganization would have been successful."[7] RFOF ¶ 1528. Peterson identified factors that would have been significant obstacles for Freedom, including [redacted] RFOF ¶¶ 1524, 1525. In addition, Peterson recognized that, in order to reorganize under Chapter 11, Freedom would have needed to obtain financing in order to operate as a stand-alone business. RFOF ¶ 1525. However, given the position of the existing Lenders and Freedom's inability to secure additional financing, there was no reasonable prospect for Freedom to obtain

[7] Peterson has substantial experience working with dozens of companies that have considered whether to reorganize under Chapter 11 as well as companies that are already in the Chapter 11 reorganization process. RFOF ¶ 82.

the financing necessary to survive Chapter 11. RFOF ¶ 1525. Indeed, [redacted] RFOF ¶ 1525.

[redacted]

Freedom was simply out of options to avoid liquidation. [redacted]

RFOF ¶ 1531. Further, Peterson ultimately concluded that liquidation would have been the most likely outcome for Freedom absent an acquisition. RFOF ¶ 1528.

Complaint Counsel has failed to engage with any of the foregoing facts – including the admissions made by its own expert – and instead declares in a conclusory fashion that "there is no reason to believe that Freedom could not have reorganized under Chapter 11 if necessary." C.C. Br. at 125. The only apparent basis for Complaint Counsel's conclusion is the fact that Freedom did not actually initiate Chapter 11 proceedings, but an actual Chapter 11 filing is not a requirement to satisfy the second prong of the failing firm defense under the Merger Guidelines or any legal authority. Further, Complaint Counsel's reliance on Hammer is misplaced for reasons set forth in Section VI.A., *supra*. For all of these reasons, Complaint Counsel has failed to rebut Respondent's showing that Freedom was unable to successfully reorganize under Chapter 11 at the time of Acquisition.

3. Freedom's Good Faith Efforts To Elicit Reasonable Alternative Offers Were Unsuccessful.

Freedom exhausted efforts to elicit reasonable alternatives to the Acquisition, but failed. Complaint Counsel attempts to obscure this fact by nitpicking Freedom's substantial efforts to find alternatives that took place over the course of more than a year. However, neither applicable legal authority or the Merger Guidelines impose an obligation to contact every possible financing partner or strategic alternative; only good faith efforts to obtain ***reasonable alternative*** offers are required. "The failing firm should not be required to do more than make a canvass sufficient to indicate that further efforts would be unlikely to bear fruit." PHILLIP E. AREEDA & HERBERT HOVENKAMP, IV *Antitrust Law* ¶ 954d (4th ed. 2016); *see* also RX-1048 at 038 ("In my experience, sale processes do not involve direct contact with every conceivable potential financial or strategic buyer, including every participant within a relevant industry."). Complaint Counsel also fails to explain why Freedom would not have made every effort to find alternatives to the Acquisition given the substantial loss that its investors realized on the sale to Ottobock. The simple reason for

this failure is that the record evidence shows that Freedom exhausted every available alternative to the Acquisition before realizing that it had no options left to avoid liquidation.

a. There is no evidence that Freedom focused exclusively on a sale to Ottobock.

Chief among Complaint Counsel's criticisms of Freedom's efforts to obtain reasonable alternatives is that Freedom was somehow exclusively focused on a sale to Ottobock to the exclusion of all other options beginning in 2016. C.C. Br. at 126-127. That claim bears no relationship to the undisputed evidence presented at trial, which established that Freedom engaged in extensive efforts to identify any conceivable option to rescue Freedom from the brink of collapse. Freedom's debt crisis left it with two possible avenues to explore to avoid bankruptcy: a refinancing or a sale to a strategic acquirer. RFOF ¶ 1449. From the time Smith became CEO in April 2016 until the closing of the Acquisition in September 2017, Freedom exhausted good faith efforts to find both potential investors and potential acquirers. RFOF ¶ 1450. In addition, as required by Section 6 of the Seventh Amendment, Freedom formally engaged Moelis in May 2017 to assist with those efforts. RFOF ¶ 1451. Freedom selected Moelis because Moelis had already been advising Freedom about potential refinancing and sale options throughout 2016 and 2017. RFOF ¶ 1399. Freedom's search for potential alternatives was robust, exhaustive, and consistent with typical sale and refinancing processes employed by similar companies. RFOF ¶ 1452.

i. The record evidence demonstrates that Freedom was actively engaged in searching for potential refinancing options during the same time period Complaint Counsel contends Freedom was exclusively focused on Ottobock.

Freedom's preferred alternative to an acquisition was a refinancing, not an acquisition. RFOF ¶ 1453. However, any refinancing would have needed to provide Freedom with at least $27.5 million to pay its debt obligations [redacted]

[redacted] RFOF ¶ 1455. Freedom nonetheless made extensive efforts to attempt to obtain new financing that would satisfy its debt obligations and provide the company with sufficient funds to operate in the near future. RFOF ¶ 1456.

During trial, David Smith provided a detailed summary of his efforts to contact as many financing sources as possible between April 2016 and September 2017 that involved contacting scores of financing sources that were in his rolodex and the rolodexes of everyone involved with the Freedom sale. RFOF ¶ 1457; *see also* R. Br. at 115-117. From the time he became CEO in April 2016 and through the Acquisition in September 2017, Smith worked with Moelis, HEP, and Freedom's board to exhaust as many contacts as possible in order to identify potential financing sources. RFOF ¶ 1458. Moelis maintained a contact log that sets forth some of the refinancing sources contacted by Freedom representatives, including: [redacted] RFOF ¶ 1459. Smith's search for refinancing options was not, however, limited to the entities identified in the contact log. RFOF ¶ 1461.

[redacted] RFOF ¶ 1463.

A salient example of how unattractive Freedom was to potential investors is [redacted] RFOF ¶ 1467. During the same time period, Freedom exhausted all reasonable efforts to identify potential refinancing sources. RFOF ¶ 1468.

ii. The record evidence demonstrates the Freedom was actively searching for many alternative acquirers at the same time Complaint Counsel claims Freedom was focused exclusively on Ottobock.

Because Freedom could not obtain refinancing, a sale to a strategic acquirer was Freedom's only viable option to avoid liquidation. RFOF ¶ 1470. Moelis conducted a formal sale bidding process for Freedom that began in May 2017 and continued until the Acquisition closed in September 2017. RFOF ¶ 1471. The sale process was "robust" and typical in the M&A field of sale processes for companies similar to Freedom. RFOF ¶ 1472.

[redacted]

[redacted] RFOF ¶ 1475.

As a result of the importance of speed and certainty, Freedom was not able to – and the failing firm defense did not require Freedom to – contact every conceivable company in the prosthetics industry that might have made an offer because doing so would have delayed the process and ultimately been fruitless. RFOF ¶ 1476. By way of example only, Freedom was particularly concerned that the financial state of several companies in the prosthetics industry would prevent such companies from assembling financing necessary to close an acquisition of Freedom at any price – including a price that was a significantly below the price paid by Ottobock and around liquidation value. RFOF ¶¶ 1476-1483. The decision not to contact certain companies proved appropriate because the evidence suggests they would not have even attempted to bid. RFOF ¶ 1484. For example, both Hanger and [redacted] knew that Freedom was going through a sale process before the Acquisition closed in September 2017 and chose not to make an offer. RFOF ¶ 1484. If a [redacted] representative had expressed interest in purchasing Freedom, Smith would have invited them to submit an offer. RFOF ¶ 1485.

Freedom ultimately did contact a substantial number of companies that had at least some reasonable degree of likelihood to timely close an acquisition of Freedom. RFOF ¶ 1486. Some examples of potential purchasers considered during the sale process are [redacted] RFOF ¶ 1486. After a robust investment bank-led sale process, Freedom only received a modicum of interest – by way of [redacted] – from two potential strategic buyers: Ottobock and Össur. RFOF ¶ 1488. No other person or entity made a proposal to purchase Freedom. RFOF ¶ 1489.

iii. Freedom had no economic or other incentive to focus exclusively on Ottobock as its acquirer.

To be sure, Freedom was certainly willing to be acquired by Ottobock because the alternative was liquidation, but there is no basis for Complaint Counsel's allegation that such an acquisition was Freedom's sole focus. [redacted] RFOF ¶ 1510.

All of those involved in the decision to sell Freedom to Ottobock had every incentive in the world to avoid the Acquisition if possible. Indeed, there is no question that, between a refinancing and a sale, the refinancing was the preferred option. RFOF ¶ 1513. A refinancing was preferred because [redacted] RFOF ¶¶ 1515-1516. Freedom's owners thus had every reason to delay a sale if they could have obtained a purchase price anywhere near these valuations. RFOF ¶ 1507-1510.

However, by September 2017, Freedom had exhausted all reasonable efforts to obtain reasonable alternatives to the Acquisition by Ottobock. RFOF ¶ 1511. Peterson opined that the sale process run by Moelis reflected "reasonable efforts" to [redacted]

[redacted] RFOF ¶ 1469.

There is simply no evidence that Freedom ignored, or even failed to vigorously pursue, any altneratives to the Acquisition, and in fact, as demonstrated above, the record evidence shows the opposite – *i.e.*, that Freedom was fully engaged in contact with altnerative refinancing partners or potential acquirers. As set forth in greater detail in Section VI.A., *supra*, Hammer is not qualified to offer any expert opinions regarding an acquisition or refinance efforts because she is an accountant who has never worked on such a process, and the opinions she attempts to offer on that subject are in any event entirely contradicted by the record evidence. Response to CCFF ¶ 1816.

b. Freedom exhaustively searched for any willing potential purchasers and did not preclude any potential purchaser from bidding.

Ignoring the substantial efforts undertaken by Freedom to contact alternatives to Ottobock, Complaint Counsel cites a small number of small prosthetics companies that were not contacted during the sale process as supposed evidence that Freedom's efforts were not sufficiently exhaustive and in good faith. C.C. Br. 128-129. Complaint Counsel is wrong.

"The failing firm should not be required to do more than make a canvass sufficient to indicate that further efforts would be unlikely to bear fruit." PHILLIP E. AREEDA & HERBERT HOVENKAMP, IV *Antitrust Law* ¶ 954d (4th ed. 2016); *see* also RFOF ¶ 1487 ("In my experience, sale processes do not involve direct contact with every conceivable potential financial or strategic

[8] Peterson has substantial experience with hundreds of M&A transactions generally and dozens of M&A transactions involving a sale bidding process. RFOF ¶¶ 82-83.

buyer, including every participant within a relevant industry."); Response to CCFF ¶ 2121 (citing Hammer, Tr. 3198) (Complaint Counsel's accounting expert agreeing that the Merger Guidelines "did not require Freedom to contact every company in the prosthetics industry as a potential acquirer"). Thus, the fact that Complaint Counsel identified a very small number of potential purchasers that were not contacted is insufficient on its face to defeat Respondent's failing firm defense. However, the record evidence shows that Freedom's decision not to contact certain of these smaller prosthetics companies was extremely reasonable under the circumstances.

[redacted]

Complaint Counsel specifically mentions less than a handful of companies that it contends should have been contacted, but were not. Complaint Counsel ignores, as a threshold matter, the obvious fact that contacting too many competitors about a sale could have jeopardized Freedom's already weak financial state. Response to CCFF ¶ 2121 (citing Hammer, Tr. 3218). However, even more important, the record evidence indicates that it was generally known in the industry that Freedom was for sale, but most companies were simply not interested in buying it. Most notable among these companies is [redacted]

[redacted][9] [redacted] Response to CCFF ¶ 2155 (citing PX05002 (Asar, IHT at 52); PX05153B (Asar, Dep. at 179-180)).

[redacted] is another prosthetics company that apparently learned that Freedom was for sale but waited until days before the closing of the Acquisition and Freedom's Term Loan Maturity Date to do anything about it. Specifically, [redacted] RFOF ¶ 1482; Response to CCFF ¶ 2124 (citing Hammer, Tr. 3197) [redacted]

[9] [redacted]

Complaint Counsel also inconceivably questions the absence of [redacted] in the Freedom sale process. Smith testified that [redacted] It simply would have been unreasonable to expect Freedom to contact a company that had no interest in buying the entire business, and in any event, could not afford to close a transaction at any price even close to Freedom's liquidation value.

Thus, while Complaint Counsel has listed a very small number of potential acquirers who were not contacted, failing firm defense legal authority is very clear that every conceivable purchaser in the world does not need to be contacted in order to satisfy the elements of the defense. Even Complaint Counsel's purported expert, Hammer, agrees with that. Here, Freedom was particularly concerned that the poor financial state of some of the small prosthetic companies would prevent them from assembling financing necessary to close an acquisition of Freedom at any price – including a price that was a significantly below the price paid by Ottobock. RFOF ¶ 1483 (citing Smith, Tr. 6478). The decision not to contact certain companies proved to be wise because it is now known through discovery that they generally knew Freedom was available for sale, and for one reason or another, had no interest in buying Freedom. Had Freedom risked

involving these companies in the sale process, it would have likely delayed the closing [redacted]

c. Össur's [redacted] was not a reasonable alternative offer.

Össur's [redacted] in Freedom does not qualify was a "reasonable alternative offer" as that phrase applies to the failing firm defense because it was [redacted]

i. [redacted]

Given Complaint Counsel's allegations in this case regarding the Aquisition, there can be no serious dispute that [redacted]

[redacted] "A 'preferred purchaser' is an acquirer (1) who would remain in the market; and (2) whose acquisition would be lawful a) even if the acquired firm were not failing, or b) simply on proof that [failure was impending]." CCFF ¶ 1713 (citing AREEDA & HOVENKAMP, IV ANTITRUST LAW ¶ 954c). The policy underlying the failing firm defense clearly does not intend to deny the defense because an anticompetitive alternative may have been available:

> ***A 'preferred purchaser' should be significantly more attractive from a competitive standpoint*** than the proposed acquirer. Slight differences would not justify intervention even if the offers seemed comparable and private interests are equally well served;

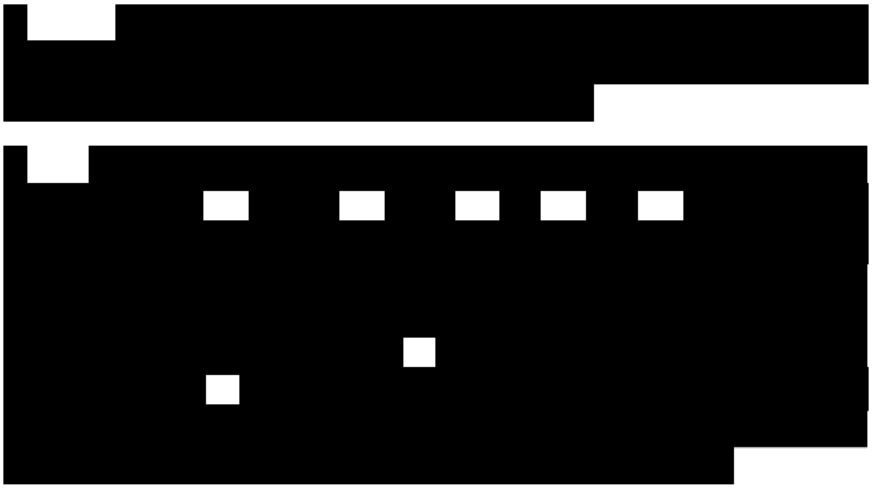
> determining comparability would raise difficult judgmental questions that should be avoided if at all possible.

AREEDA & HOVENKAMP, IV ANTITRUST LAW ¶ 954c (emphasis added). "As a basic premise, [an] alternative acquirer should be deemed preferable only when its market share is substantially less than that of other acquirers, including the proposed acquirer." *Id.* ¶ 954c3.

As set forth in Respondent's Opening Brief and in Section II, *supra*, Complaint Counsel has failed to meet its burden to establish a relevant antitrust market that is no broader than all MPKs sold in the United States. R. Br. at § II. However, applying Complaint Counsel's alleged market definition to an [redacted] RFOF ¶ 1505. [redacted] RFOF ¶ 1505.

In addition, [redacted]

[redacted]



[redacted] Dr. Scott Morton's assessment captures the same concept expressed by Areeda & Hovenkamp that a reasonable alternative offer must be ***significantly*** more attractive from a competitive standpoint than the proposed acquirer. The purpose of the reasonable alternative offer requirement is not, as Complaint Counsel has construed it, to play "gotcha" and require acceptance of a presumptively anticompetitive bid that might be ever so slightly less competitive than that of the chosen acquirer. Here, [redacted]

[redacted]

ii. Össur's [redacted] does not constitute a sincere offer that would qualify as a reasonable alternative for purposes of the failing firm defense.

Össur's interest in purchasing Freedom was proven at trial [redacted] RFOF ¶ 1498. A mere expression of interest does not constitute an "offer." *See, e.g., United States v. Culbro Corp.*, 504 F. Supp.

[10] [redacted] Respondent does not contend that a transaction must be closed and absolutely final in order to constitute a reasonable altenrative offer, but the "reasonable alternative offer" requirement clearly mandates more than a mere [redacted] that imposes absolutely no duty or obligation on the part of the interested party. *See, e.g., United States v. Culbro Corp.*, 504 F. Supp. 661, 669 (S.D.N.Y. 1981); *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1136-37 (N.D. Cal. 2001).

661, 669 (S.D.N.Y. 1981); *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1136-37 (N.D. Cal. 2001).[11] For this reason alone, [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted] Given the Freedom faced liquidation if the acquisition did not timely close, it was

[11] In the context of secuirities transactions, "an indication of interest does not amount to an offer to buy." *Department of Enforcement, Complainant, v. Salam Aburas (Crd No. 2969004), Respondent*, Disciplinary Proceeding No. C8A010014, 2001 NASD Discip. LEXIS 59, at *8 n.3 (quoting *In the Matter of Armstrong, Jones & Co., et al.**, 43 S.E.C. 888, 889 n.28 (Oct. 3, 1968)).

very reasonable for Freedom to prefer Ottobock – a more serious purchaser – to Össur. RFOF ¶ 1474 [redacted]

iii. Complaint Counsel's liquidation value analysis is wrong.

Össur's proposed purchase price of $[redacted] was too unreasonably low to qualify as a "reasonable alternative offer." "[T]he law has some obligation to waive its preference for an alternative purchaser where necessary to protect the failing firm against 'unreasonably' low offers." AREEDA & HOVENKAMP, IV ANTITRUST LAW ¶ 954d. An offer that is too low is deemed unreasonable not just to protect the failing firm, but also because it raises questions about whether the acquirer intends to keep the purchased assets in the market. For that reason, in the context of determining whether a divestiture is an appropriate remedy, the government "will not approve a purchaser if the purchase price clearly indicates that the purchaser is unable or unwilling to compete in the relevant market. A purchase price that is 'too low' may suggest that the purchaser does not intend to keep the assets in the market." U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* at 30-31 (June 2011).

Here, Össur's proposal of [redacted] was so far outside the range of reasonable corporate valuations that it should not be credited as a reasonable alternative. [redacted]

[redacted]

C. The Acquisition Does Not Pose Harm To Competition Because Freedom Was A "Flailing Firm" At The Time Of The Acquisition.

For reasons stated in Section VI.B, *supra*, the evidence introduced at trial was overwhelming that Freedom was also a "flailing firm" at the time of the Acquisition. An acquisition does not reduce competition where the acquired entity's weakened position makes it of little competitive significance. In *General Dynamics*, the Supreme Court explained that the acquired firm, a coal company, "had no coal reserves and was unable to obtain additional ones. Thus, . . . the acquired company was an insignificant factor as a competitor and the merger did not have an anticompetitive impact on the market." *FTC v. National Tea Co.*, 603 F.2d 694, 699-700 (8th Cir. 1979) (affirming district court's consideration of acquired firm's probable exit from the market) (citing *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974)).

The "weakened competitor" defense may be satisfied even where an element of the failing firm defense is technically lacking in some respect. For example, in *Arch Coal*, the court found that the failing firm defense was not satisfied, but held that the financially weakened condition of the target was a defense to the government's case of anticompetitive effects. *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 157 (D.D.C. 2004). In that case, the target, a mining company, was

showing positive financial measures, but the court held that this ignored that the mine's reserves were depleted. *Id*.

Complaint Counsel attempts to rebut that Freedom was flailing, first, by pointing to the alleged past and present interest of a small number of companies in purchasing Freedom and, second, by pointing to Freedom's pre-Acquisition projections that the Quattro Project would cause Freedom to gain market share. Both arguments miss the mark.

First, for the reasons discussed in Section VI.B.3.b, companies identified by Complaint Counsel were aware that Freedom was for sale [redacted] The argument that some of these companies may now claim that they are interested in purchasing the entire Freedom business in the context of discovery and trial in connection with an FTC proceeding is simply not reliable. None of the companies identified by Complaint Counsel have made an offer to purchase the entire company, [redacted] These are not reliable indications of interest. The fact that some companies claim that they *might* be interested in purchasing Freedom during the FTC proceeding for a price below liquidation value does not defeat a failing or flailing firm defense.

Second, [redacted]

[redacted]

[12] [redacted] RFOF ¶¶ 553-558.

As explained at length in Section VI.B.1, *supra*, Freedom was days away from liquidation at the time of the Acquisition because it could not pay approximately $27.5 million in debt obligations. Moreover, Freedom had been engaging in an unsustainable pricing strategy that was contributing to [redacted] In short, [redacted] While the failing firm defense applies in this case, Freedom's status as a flailing firm at the time of the Acquisition would also rebut Complaint Counsel's alleged presumption of harm to competition in the alleged relevant market.

VII. THE ACQUISITION TOGETHER WITH AN MPK DIVESTITURE WILL NOT ADVERSELY IMPACT COMPETITION.

A. The Proposed MPK Divestiture Should Be Considered In Assessing Any Alleged Harm To Competition.

As established in *FTC v. Arch Coal, Inc.*, No. 1:04-cv-00534, at 7 (D.D.C. July 7, 2004), the proper analysis under *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) where merging parties have agreed to divest assets is whether the merger *including the divestiture* will have a substantially adverse effect on competition. In other words, the entire transaction, including the divestiture, must be considered in assessing competitive effects. *Id*. As explained in Respondent's Post-Trial Brief, where a defendant proposes a curative divestiture or other modification to the original transaction, courts will consider the divestment or other modification in assessing whether the government has met its burden of proving anticompetitive effects. *See, e.g., Arch Coal, Inc.*, No. 1:04-cv-00534, ECF No. 67 at 7 (D.D.C. July 7, 2004) (where defendant proposed curative divestiture, court held that it was required "to review the *entire* transaction in question."); *White Consol. Indus., Inc. v. Whirlpool Corp.*, 781 F.2d 1224, 1228 (6th Cir. 1986)

(affirming vacating injunctive relief after curative divestiture occurred); *United States v. Conn. Nat'l Bank*, 362 F. Supp. 240 (D. Conn. 1973).

Thus, Complaint Counsel is wrong in asserting that "[e]vidence related to divestiture is only material to the remedy that the Commission may order . . . or to assessing the likelihood and significance of continuing anticompettive effects after any divestiture occurs." C.C. Br. at 142. That is because to establish liability, it is not enough to show that a merger had an effect on market concentration; a showing of anticompetitive effects is required. *See New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321, 358 (S.D.N.Y. 1995) (quoting *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1066 (S.D.N.Y. 1969) (the government "has the burden of showing that the acquisition is reasonably likely to have 'demonstrable and substantial anticompetitive effects.'"); *see also United States v. Baker Hughes Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990) ("The Herfindahl-Hirschman Index cannot guarantee litigation victories."). In this case, Complaint Counsel has failed to produce any evidence of actual harm to competition to this point, and an MPK Divestiture ensures that there will be no effect on competition going forward.

Nonetheless, Complaint Counsel argues that even if there was no competitive harm before the Hold Separate Agreement, that somehow does not foreclose anticompetitive effects in the future, because otherwise "violators could stave off [enforcement] actions merely by refraining from aggressive or anticompetitive behavior." C.C. Br. at 143-144 (quoting *Gen. Dynamics*, 415 U.S. at 504-505). Even if that were true in a typical case, where no divestiture was planned, it is not true here. The result of an MPK Divestiture is that Ottobock will no longer control any of the Freedom MPK assets. Thus, the point of the MPK Divestiture and the Hold Separate Agreement is not merely to "stave off" an enforcement action; it is to guarantee that anticompetitive effects will not occur in the future. While it is true that antitrust deals "in probabilities," C.C. Br. at 143,

the probability that Ottobock will be able to use Freedom's MPK assets to achieve anticompetitive harm is zero if, as the MPK Divestiture would necessitate, Ottobock no longer controls those assets.

Further, the FTC's April 18, 2018 Order concluded that the MPK Divestiture does not constitute an affirmative defense only because "the planned [MPK Divestiture] cannot eliminate the potential for demonstrating likely anticompetitive effects during the intervening period" before the divestiture. April 18, 2018 Order at 4. However, as stated above, Ottobock entered the Hold Separate Agreement as of December 19, 2017. There record was undisputed at trial that the parties have faithfully abided by their respective obligations under the Hold Separate Agreement. RFOF ¶¶ 1042, 1084, 1111-1115, 1160, 1686. And Complaint Counsel has introduced no evidence of anticompetitive effects from the Acquisition either before or after the date of the Hold Separate Agreement. To the contrary, the evidence establishes [redacted]

RFOF ¶¶ 1042, 1084, 1111-1115, 1160, 1686.

Thus, despite the FTC's refusal to characterize the MPK Divestiture as an "affirmative defense" – a distinction that may have been appropriate *before* trial – at this point, it is clear that because the Acquisition, subject to the MPK Divestiture, is not likely to result in a substantially adverse effect on competition in any relevant market, it is effectively a complete defense to Complaint Counsel's claims.

Complaint Counsel cites no authority supporting its position that a post-transaction divestiture, combined with no evidence of anticompetitive effects until the time of suit, cannot be a complete defense to a Section 7 claim. One case considering the effect of a post-transaction

divestiture is *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850 (6th Cir. 2005). There, the government brought suit against a milk marketing organization and milk processing plant alleging that the organization's acquisition of the plant resulted in a monopoly. After the transaction, the parties entered a revised acquisition agreement (six days before filing for summary judgment) that would modify the acquiring entity's governance rights over the plant. *Id.* at 853.

The district court granted summary judgment based on the revised agreement, rather than the original agreement, and the Sixth Circuit reversed. However, the basis of the Sixth Circuit's decision was not that anticompetitive effects had already occurred from the date that the original agreement was entered. Instead, the Sixth Circuit held that the defendants had not proven that they would not "revert to the original agreement." *Id.* at 857. In *Dairy Farmers*, that was a concern because the revised agreement was simply another agreement among the defendants. In this case, there is no risk that Respondent will "revert" to the original transaction – *i.e.*, a transaction not involving the MPK Divestiture – because a third-party will control Freedom's MPK assets following the closing of the MPK Divestiture.

Contrary to Complaint Counsel's assertion, Freedom has maintained its independence since the Acquisition. RFOF ¶¶ 1042, 1084, 1111-1115, 1160, 1686. Contrary to Complaint Counsel's assertion that [redacted] Response to CCFF ¶ 124.[13] [redacted]

[13] [redacted]

[redacted] Response to CCFF ¶ 127. [redacted] Response to CCFF ¶ 127.

Complaint Counsel cites the Hold Separate Agreement as evidence that [redacted] In particular, Complaint Counsel is wrong that Freedom has not continued to compete aggressively against Ottobock. Despite Complaint Counsel's claim that Ottobock discouraged discounting after the Acquisition, Ottobock's top executives decided to pursue a Dual Brand Strategy, [redacted] Response to CCFF ¶ 1477. [redacted][14] Response to CCFF ¶ 1477. [redacted] RFOF ¶ 1164.

[redacted]

[14] Prior to the Hold Separate Agreement, [redacted] RFOF ¶ 1166.

[redacted]

B. Respondent Has Established That [redacted] MPK Divestiture Would Fully Rebut Complaint Counsel's *Prima Facie* Case.

[redacted] identified by Respondent would be suitable to ensure there is no harm to competition. [redacted] to compete more effectively than Freedom was before the Acquisition. [redacted]

[redacted]

[redacted]

C. **Complaint Counsel Has Materially Mischaracterized [redacted] Proposed By Respondent.**

1. [redacted]

[redacted]

[redacted]

[redacted]

D. There Is No Material Risk That An MPK Divestiture Would Not Maintain And Promote Competition In The Alleged Market.

1. Freedom's MPK Assets Are Easily Separable From The Remainder Of Freedom's Business.

Complaint Counsel argues that [redacted] But that only underscores the fact that Freedom is mainly a foot business with limited MPK-related assets – in fact, only one Freedom knee product, the Plié, has ever gone to market. RFOF ¶¶ 5-7. Complaint Counsel's assertion that [redacted]

[redacted]

2. [redacted]

a. Prosthetic foot products will not assist with MPK sales.

Complaint Counsel is wrong that Freedom has relied on its foot products to sell its Plié effectively. C.C. Br. at 148. In fact, foot and ankle products are not necessary to manufacture, market, or sell MPKs. Prosthetists make purchasing decisions as to MPKs based first and foremost on the needs of the particular patient, not the ability to obtain a discount, and prosthetists routinely mix-and-match MPKs from one supplier with feet from another supplier for the most appropriate combination for the patient. RFOF ¶ 1261; Response to CCFF ¶ 2441. It is not the specific marketing offer of a Freedom foot that is important, but rather a company's ability to offer a marketing incentive, which can be done in a variety of ways, including through straight discounts and bundles with various products. RFOF ¶ 1262; Response to CCFF ¶ 2441. Freedom has proven

that direct discounts increase sales without bundling. [redacted] In particular, Complaint Counsel is incorrect that the "Ideal Combo" is the main way that Freedom sells the Plié. C.C. Br. at 151. Complaint Counsel's statistics about the percentage of Plié sales that were made in conjunction with an "Ideal Combo" do not establish that any other form of discount or bundling would not have been equally successful. *See* C.C. Br. at 158. To the contrary, Freedom's Vice President of Marketing, Customer Service, and Product Development, Eric Ferris, explained that "you may see half the orders utilize [the Ideal Combo], but I don't think half the orders were not there without the use of the promotion." Response to CCFF ¶ 2557. As such, it is misleading to attribute to the Ideal Combo a "direct impact on Plié 3 sales." C.C. Br. at 159. Likewise, Freedom's claim at a marketing conference that a combination of the Kinterra and the Plié 3 knee provides "rock solid stability and safety" is quite obviously marketing puffery. C.C. Br. at 160; Responses to CCFF ¶¶ 2582-2583. No clinical studies are cited to support that contention – perhaps because there is a lack of research on the Plié 3. *See* Response to CCFF ¶ 482, 514, 998. In fact, Testerman testified that his sales force would not be disappointed if the Ideal Combo were discontinued, so "long as we came up with another solution that allowed them to continue to take share from other microprocessor knees." Response to CCFF ¶ 2562. In his assessment, offering feet with knees is "not imperative to get the sale." Response

to CCFF ¶ 2562. In Ottobock's experience, bundling feet did not help drive sales of the C-Leg. Response to CCFF ¶ 2576.

In addition, Complaint Counsel misrepresents the facts in suggesting that [redacted] Response to CCFF ¶ 2571.

Complaint Counsel concedes that "other promotions certainly exist" but set up a straw man argument to suggest that the *only* effective marketing strategy is to combine feet with knees. C.C. Br. at 160. In particular, there are alternatives to a foot combination besides "a free Yeti cooler or some other gimmick." C.C. Br. at 160. Complaint Counsel notes that "[w]hen clinics receive a free foot with the purchase of the Plié 3, they do not need to inform the insurance company." C.C. Br. at 160. But the same is true of *any* L-code billable device that a clinic may receive. *See* Response to CCFF ¶¶ 1095, 2563, 2567, 2575-76, 2578, 2580. The same is also true of a simple discount. Either option provides "more margin for your practice" than the gimmicky marketing strategies that nearly-bankrupt Freedom tried to implement. C.C. Br. at 160.

[redacted]

[redacted]

b. The Kinnex will not assist with MPK sales.

For the same reasons, Complaint Counsel is also wrong that the Kinnex ankle, which has been pulled from the market due to quality problems, [redacted]

c. [redacted]

[redacted]

[redacted]

d. [redacted]

e. [redacted]

[redacted]

f. [redacted]

[redacted]

15 [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

16 [redacted]

[redacted]

[redacted]

g. [redacted]

i. [redacted]

[redacted]

[redacted]

[redacted]

ii. [redacted]

[redacted]

[redacted]

iii. [redacted]

[redacted]

[17] [redacted]

[redacted]

iv. [redacted]

[redacted]

[18] [redacted]

[redacted]

[redacted]

E. [redacted]

[redacted]

F. [redacted]

[redacted]

[redacted]

[redacted]

VIII. COMPLAINT COUNSEL'S PROPOSED REMEDY IS OVERBROAD, UNNECESSARY, AND INAPPROPRIATELY PUNITIVE.

A. Section 7 Remedies Should Be Narrowly Tailored To Restore Demonstrated Likely Harm To Competition And Not Be Overbroad Or Punitive.

Complaint Counsel's untenable position is essentially that, so long as any violation of Section 7 is established, the only acceptable remedy is a full divestiture of all of the acquired assets. However, much of its cited authority on this point is entirely inapposite. The salient difference here is that there exists a discrete set of assets – Freedom's assets – that comprise 100% of the assets in the market in which competitive harm is alleged, and these assets can easily be separated from the remainder of the business. In contrast, in *United States v. Ford Motor Co.*, 405 U.S. 562 (1972), the divestiture involved a manufacturer's only plant and related assets. In *Polypore Int'l Inc.*, 149 F.T.C. 486, 2010 WL 9434806 (FTC 2010), the FTC disagreed with respondent's contention that certain assets were not in the relevant product market and thus, according to respondent, should not be divested. *Id.* at *258-259. In this case, the proposed MPK Divestiture includes 100% of the assets in the alleged product market – a fact that is not in dispute with Complaint Counsel. *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946) was not an antitrust case. In *RSR Corp. v. FTC*, 602 F.2d 1317 (9th Cir. 1979), the FTC did fashion a limited divestiture remedy.

In opposing an MPK Divestiture, Complaint Counsel relies heavily on its own FTC "Remedy Study." "The Commission voted to authorize the [Remedy Study] on January 19, 2017 – the day before President Trump's inauguration – and the study was released in early February. Similar to the 1999 study, the current analysis is limited to FTC actions; the DOJ did not participate in the current study, and so the report does not formally account for the efficacy and any lessons

learned from transactions reviewed by DOJ." David P. Wales, et al., *FTC Merger Remedies Report Signals Tougher Enforcement*, 21 No. 3 M & A Law. NL 2 (March 2017). Complaint Counsel notes that, according to its own study, remedies of asset packages constituting less than an entire business unit are less successful. C.C. Br. at 183. However, such partial divestitures were still ***70% successful***. *See Wales*, *supra*.

In addition, the Remedy Study's methodology has been criticized:

> It did not report and apparently did not conduct a single retrospective analysis of divestiture cases. Its judgments about remedy outcomes were not based on actual pre and post-remedy price data for analyzing outcomes. It did not use difference-in-difference methodology now common in the literature . . . . It did not put on the record any new statistical evidence with respect to its cases, or even report which divestitures they believed were successful and which not.
>
> ***Rather, the FTC study reports that for a little over half the cases, it relied on interviews and some data (not including price) that it had secured from the parties to arrive a[t] its own judgment as to whether its remedy had preserved competition***. Inadequate as that process and evidence may be, ***for another quarter of the remedy cases the FTC study did not use any data at all, but simply relied on responses to questionnaires to some market participants***. And for the remaining cases, ***it failed even to solicit any outside information, much less data, but instead decided whether its own remedies were successful based entirely on its internal records and views of its own staff that oversaw certain industry sectors***.
>
> Compounding this, for almost half the cases the FTC declared divestiture remedies to be successful even if they did not necessarily preserve or restore competition – which is, of course, the objective of a remedy. For some cases, the FTC assessed the remedies based only on whether the divested assets were still in operation in the industry, and for others the criterion was weaker yet – simply whether the assets that were ordered to be divested were in fact divested. Both of these latter criteria do not answer the question of whether the remedies preserved competition.
>
> ***Thus, the FTC study appears to be more of a missed opportunity than a sound study that truly advances our understanding***.

John Kwoka, *Comment on 'Are Merger Enforcement and Remedies Too Permissive? A Look at Two Current Merger Studies' By John Harkrider*, 32-SPG Antitrust 101 (Spring 2018) (emphasis added). In short, the Remedy Study is an analytically light advocacy piece intended to bolster the FTC's merger remedies agenda. It should be given no more weight than the unsupported declarations of Complaint Counsel. Indeed, ten of the eighteen FTC lawyers listed on Complaint Counsel's Post-Trial Brief are listed as co-authors of the Remedy Study. As such, citing the Remedy Study is tantamount to allowing Complaint Counsel to provide expert testimony on the effectiveness of its own proposed remedy.

The fact that partial divestitures can effectively remedy the anticompetitive effects of a merger is evident in that the FTC and courts frequently approve settlements that involve partial divestitures. *See, e.g., United States v. US Airways Grp.*, 38 F. Supp. 3d 69 (D.D.C. 2014) (approving a proposed consent decree resolving a civil antitrust suit against two merging airlines requiring the divestiture of slots, gates, and ground facilities at seven airports); *United States v. SBC Communications, Inc.*, 489 F. Supp. 2d 1, 7 (D.D.C. 2007) (approving proposed settlements of civil antitrust cases against telecommunications companies with fiber optic connections to commercial buildings requiring the defendants to divest indefeasible rights of use for last-mile connections to certain buildings in certain metropolitan areas, along with transport facilities to use them); *United States v. Abitibi-Consolidated, Inc.*, 584 F. Supp. 2d 162, 164 (D.D.C. 2008) (approving a consent decree resolving an antitrust action involving merging newsprint producers required the merged firm to divest a particular newsprint mill); *United States v. Newpage Holdings, Inc.,* 2015 U.S. Dist. LEXIS 175650, at *7 (D.D.C. Dec. 11, 2015) (approving a settlement of a civil enforcement action against two merging producers of certain paper products requiring the divestment of two mills); *United States v. Sinclair Broadcast Grp., Inc.*, 74 F. Supp. 3d 468, 473-

74 (D.D.C. 2014) (approving settlement of a civil action against two broadcasting corporations requiring divestiture of assets required to operate a particular TV station).

Partial divestitures have also been held appropriate in litigated matters. In *United States v. Reed Roller Bit Co.*, 274 F. Supp. 573 (W.D. Okla. 1967), the government challenged an acquisition of one manufacturer by another. The court held that the merger would illegally reduce competition in a market for certain drilling equipment. Recognizing that consideration of "[t]he practicability and equitableness of the remedy . . . will not permit a substitution of a less effective remedy for a more effective one," the court nonetheless held that a partial – and not a full – divestiture was appropriate. *Id.* at 585. Where a merger does not have anticompetitive effects in some markets, "such divestiture of part of the assets may be appropriate." *Id.* at 586 (citing *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961)). The Court expressly rejected the argument that sales of the acquired company's other product lines was necessary to promote sales of its products in the relevant markets. *Id.* at 586-87. Indeed, the Court noted that by requiring only a partial divestiture, the pool of potential buyers was greater, because the cost to purchase the assets would be less, and also because it would allow firms to participate that might raise competitive concerns in other markets if they were to acquire the entire business. *Id.* at 590.

The Second Circuit employed similar reasoning in declining to enjoin a merger in *FTC v. PepsiCo, Inc.*, 477 F.2d 24 (2d Cir. 1973), reasoning that an injunction was not necessary because, even if the merger violated antitrust laws, a full divestiture may not be necessary. As the Second Circuit stated, "[w]hile complete divestiture is 'simple, relatively easy to administer, and sure' . . . it is not necessarily the most appropriate means for restoring competition.'" *Id.* at 29 n.8 (quoting *du Pont*, 366 U.S. at 331); *see also In re Warner-Lambert Co.*, 88 F.T.C. 503 (F.T.C. 1976)

(holding that complete divestiture was not appropriate); *United States v. Waste Management, Inc.*, 588 F. Supp. 498 (S.D.N.Y. 1983), *rev'd on other grounds*, 743 F.2d 976 (2d Cir. 1984).

[redacted] However, Complaint Counsel's preference for litigating this case rather than settling it does not mean that a partial divestiture is any less likely to be an effective remedy than it is in numerous other cases in which cases are settled by way of a partial divestiture. Indeed, Complaint Counsel opposed Respondent's motion to remove this case from adjudication so that the FTC could consider the proposed MPK Divestiture [redacted] *See* Complaint Counsel's Response to Respondent's Motion to Withdraw Matter from Adjudication for Consideration of Proposed Settlement (Filed July 9, 2018).

B. An MPK Divestiture Would Be The Only Appropriate Remedy For Any Finding Of A Section 7 Violation In Connection With The Acquisition.

For the reasons set forth in Section VII, *supra*, Complaint Counsel is wrong that "[a]nything less than divestiture of Freedom's ongoing business" would be an inadequate remedy. C.C. Br. at 183. In particular, Complaint Counsel is wrong that [redacted]

[redacted]

C. Divestiture Of Freedom's Entire Ongoing Business Is An Inappropriate Remedy Because It Is Overbroad, Unnecessary, and Punitive.

Complaint Counsel's proposed order and effective request therein for a complete divestiture of the entire Freedom business is overbroad, unnecessary, and improperly punitive.

Complaint Counsel fails to dispute – because it cannot – the principle that a remedy for its Claims should not be punitive. *See United States v. E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 326 (1961) ("Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive."); *see also Gilbertville Trucking Co. v. United States,* 371 U.S. 115, 129-30 (1962); *Reed Roller Bit*, 274 F. Supp. at 589-90 ("[S]ince this is a situation where divestiture of part of the assets is at least as effective as a divestiture of all of the assets it is appropriate to take into consideration at least to some degree the hardship imposed on the defendants."). As the FTC has recognized, "[i]nclusion of assets used to produce items not included in the" relevant market "would not aid in restoring competition in that line of commerce. In fact, ordering such divestiture could be construed as a punishment, and civil proceedings to punish antitrust violators are not authorized. The relief must not be punitive." *In re Jim Walter Corp.*, 90 F.T.C. 671, 1977 FTC LEXIS 10, at *117-18 (F.T.C. 1974) (citation omitted), *vacated on other grounds,* 625 F.2d 676

(5th Cir. 1980). Thus, "total divestiture is not an automatic remedy which must be applied in all cases." *Id.* (quoting *In re Union Carbide Corp.*, 59 F.T.C. 614, 659 (F.T.C. 1961)); *see also Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404 (S.D.N.Y. 1978) (holding divestiture not appropriate), *rev'd in part on other grounds*, 603 F.2d 263 (2d Cir. 1979).

As set forth in Section VII, *supra*, a divestiture of Freedom's MPK assets is sufficient to restore any alleged harm to competition from the Acquisition. As such, any greater divestiture would be punitive and inappropriate in a civil action. In addition, the specific provisions of Complaint Counsel's proposed order are unnecessary, punitive, and unworkable.

Complaint Counsel asserts that it is necessary for Ottobock "to divest the ongoing Freedom business to a Commission-approved buyer." C.C. Br. at 186. Respondent understands the importance of having an upfront buyer – [redacted]

Complaint Counsel suggests that the harshness of its total divestiture proposal is mitigated by the fact that a potential buyer may opt not to acquire certain prosthetic foot products (in "Divestiture Products Group B") if the buyer concludes that they are not necessary to compete in the MPK market, provided that the buyer has, in the view of Complaint Counsel, conducted "proper and complete due diligence" and manages to convince the FTC that its conclusion is correct. C.C. Br. at 187. As a practical matter, it is unlikely that [redacted] will agree to forego acquiring any assets, even if they are not necessary to successfully market and sell MPKs,

where those assets could be had at a fire-sale price – which will be the inevitable consequence of Complaint Counsel's punitive divestiture order. Products in "Divestiture Products Group A" may be retained by Ottobock "unless the divestiture buyer demonstrates that it needs any or all of them." C.C. Br. at 187. However, given Complaint Counsel's refusal to engage in good faith settlement negotiations, it is doubtful that the FTC will approve anything less than a total divestiture. This Court should reject Complaint Counsel's overbroad and punitive order, and should limit any remedy in this matter to divestiture of only the assets in the alleged market, which are Freedom's MPK assets.

CONCLUSION

For the foregoing reasons, and those reasons set forth in Respondent's Post-Trial Brief and at the trial of this matter, Respondent respectfully requests that the Court reject Complaint Counsel's Claims and find in favor of Respondent.

Dated: December 20, 2018

Respectfully submitted,

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ATTACHMENT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, **Plaintiff,** **v.** **ARCH COAL, INC., et al.,** **Defendants.**	**Civil Action No. 04-0534 (JDB)**
STATE OF MISSOURI, et al., **Plaintiffs,** **v.** **ARCH COAL, INC., et al.,** **Defendants.**	**Civil Action No. 04-0535 (JDB)** **(Consolidated Cases)**

MEMORANDUM OPINION

On May 29, 2003, defendant Arch Coal, Inc. ("Arch") entered a Merger and Purchase Agreement to acquire defendant Triton Coal Co. ("Triton") -- including two mines, the Buckskin mine and the North Rochelle mine -- from Triton's parent, defendant New Vulcan Coal Holdings, LLC ("Vulcan"). Arch and Triton filed pre-merger notification forms on July 11, 2003, with the Department of Justice and the Federal Trade Commission ("FTC" or "Commission") under the Hart Scott Rodino ("HSR") Act, 15 U.S.C. § 18a. In August 2003, the FTC sent Arch and Triton Requests for Additional Information ("Second Requests") to aid in its investigation of the

proposed acquisition. Arch informed the FTC in early December 2003 that it was contemplating the sale of the Buckskin mine to Peter Kiewit Sons, Inc. ("Kiewit"). Arch notified the FTC in late January 2004 that an agreement to sell Buckskin to Kiewit had been signed ("Kiewit transaction"). The FTC considered the Arch-Triton merger in light of the additional information concerning the proposed Kiewit transaction, but nevertheless issued an administrative complaint challenging the merger.

On April 8, 2004, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), the FTC filed a motion for preliminary injunction to enjoin Arch from acquiring, directly or indirectly, any stock, assets, or other interests in Triton. That same day, plaintiffs States of Arkansas, Illinois, Iowa, Kansas, Missouri, and Texas ("States") filed a similar motion for a preliminary injunction pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26.[1] Presently before the Court is the motion in limine filed by the FTC to exclude, for the purposes of the preliminary injunction proceeding, all evidence and argument on the issue of Arch's proposed sale of the Buckskin mine to Kiewit. In effect, the FTC asks this Court to assess the proposed merger as if Arch would retain both the North Rochelle and Buckskin mines.

DISCUSSION

The FTC characterizes the proposed post-merger divestiture of Buckskin to Kiewit as a "self-help permanent remedy" that is not properly before this Court. FTC Mot. at 3. The FTC argues that the Court should exclude consideration of the Kiewit transaction because, as a question of "remedy," it cannot be considered by this Court in a Section 13(b) action for

[1] By minute entry order issued on April 21, 2004, this Court consolidated the FTC and States cases for purposes of the preliminary injunction hearing and all discovery and pre-hearing proceedings related thereto.

preliminary relief, and because the proposed Kiewit transaction is not a sufficiently binding commitment in any event. In their responses to plaintiffs' complaints and requests for a preliminary injunction, defendants have explained that the proposed acquisition challenged by the FTC is properly seen as a set of two transactions involving, first, the acquisition of Triton's North Rochelle and Buckskin mines by Arch, and then the "concurrent divestiture" of the Buckskin mine to Kiewit. Arch Answer at 1. Defendants argue that ignoring the second transaction would be tantamount to the Court assessing "a purely hypothetical transaction of the Commission's making -- that none of the parties are proposing." Defs.Opp. at 2.

The Court's analysis centers initially on the task of defining the transaction that is being challenged by the FTC. The FTC argues that the Kiewit transaction is merely a proposed remedy to the Arch-Triton merger, while defendants argue that it is a central component of what they are proposing to do and hence what the FTC is challenging. The case most directly on point is Federal Trade Comm'n v. Libbey, 211 F.Supp.2d 34 (D.D.C. 2002). In Libbey, the FTC brought a Section 13(b) preliminary injunction proceeding to enjoin the acquisition of one glassware manufacturer by another. About a month after the FTC had voted to seek a preliminary injunction, and a week after the FTC had filed its complaint in district court, the parties to the merger amended their agreement to allow one party to acquire only a part of the other's manufacturing plants and glassware business, while the rest of the assets would be transferred to another entity. Id. at 38. The court in Libbey, noting that the parties had made a good-faith effort to address the FTC's concerns regarding the original merger agreement in amending that agreement, concluded that

> . . . parties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in

> an effort to address the government's concerns. And when they do so under circumstances as occurred in this case, it becomes the new agreement that the Court must evaluate in deciding whether an injunction should be issued.

Id. at 46.

The FTC makes much of the fact that here defendants Arch and Triton, unlike the defendants in Libbey, have not amended their merger agreement to include the sale of Buckskin to Kiewit. The Commission notes that the Kiewit transaction is separate and distinct from the Arch-Triton merger agreement, that the Arch-Kiewit contract is contingent upon the successful acquisition of Triton by Arch and contains provisions that allow one or both parties to walk away from the deal, and that the deal might be renegotiated. The Commission therefore argues that the only transaction squarely in issue before this Court is the Arch-Triton merger.

While it cannot be denied that Arch, Triton, and Kiewit have chosen to structure the proposal as two separate transactions rather than one three-way agreement, the Court does not find this structural choice to be dispositive on the issue whether the Kiewit transaction should be considered in the preliminary injunction proceeding. In Libbey, the court noted that even after the parties had amended their merger agreement, the FTC remained capable of vetting the amended agreement and had in fact voted to enjoin the amended merger agreement. The court therefore concluded that it was the amended merger agreement that the FTC was challenging and that was properly before the court for review on the FTC's motion for preliminary injunction. Libbey, 211 F.Supp.2d at 46. Here as well, Arch informed the Commission in late January 2004 that it had signed an agreement with Kiewit and the FTC then issued its administrative complaint challenging the merger after "determin[ing] that the competitive concerns posed by Arch's acquisition of Triton were not remedied by Arch's offer to sell the Buckskin mine to Kiewit."

FTC Mot. at 4. Thus, the FTC has assessed and is in reality challenging the merger agreement imcluding the Buckskin divestiture.

The fact that the Kiewit transaction is contingent on the successful acquisition of Triton by Arch is not only a logical matter of course, but also reinforces, rather than casts doubt on, the representation the parties have made that the sale of the Buckskin mine will in fact take place after the Arch-Triton merger. The uncontroverted facts, as presented to the Court by both parties, reveal that the Kiewit transaction was proposed as a good faith response to the Commission's investigation and concerns regarding the competitive effects of the Arch-Triton merger. Arch and Kiewit, through senior officers, have testified unequivocally that each is fully committed to the transaction if the Arch-Triton merger is allowed, and that the Buckskin sale will definitely occur. The contract termination provisions referenced by the FTC do state that either Arch or Kiewit may terminate the agreement after a certain set "expiration date," if the closing on the Kiewit transaction, as determined by the closing of the Arch-Triton transaction, has not occurred by that date. But that is little more than a restatement of the obvious fact that the Arch-Kiewit contract is contingent upon the successful acquisition of Triton by Arch. Although theoretically the parties could renegotiate the Kiewit deal, senior officers have affirmed their intent to consummate all aspects of the transaction if not enjoined by this Court. The Court therefore concludes that the transaction that is the subject of the FTC's challenge is properly viewed as the set of two transactions involving the acquisition of Triton by Arch and the immediate divestiture of the Buckskin mine to Kiewit.

The FTC also argues that consideration of the Kiewit transaction is beyond the purview of this Court in a Section 13(b) preliminary injunction hearing and would impinge on the authority of

the FTC . The FTC contends that, absent a preliminary injunction from this Court, if Arch were permitted to acquire Triton and then sell Buckskin to Kiewit, the Commission would be unable to order Triton's current operations to be reconstituted in the hands of a new competitor if the Commission were to permanently enjoin the challenged transactions.[2] Therefore, the argument goes, the Commission would be irreparably prejudiced in its ability to fashion a complete and effective permanent remedy at the end of the administrative proceedings. The Court notes again, however, that the FTC, in bringing its administrative complaint against defendants in this Court, first determined that the Kiewit transaction did not resolve its concerns about the transaction. Consistent with the review structure created by Section 13(b), the burden is on the FTC to convince this Court that its judgment is correct that the Arch-Triton merger including the Kiewit transaction raises questions so serious, substantial, difficult and doubtful as to make the challenged transactions fair ground for permanent injunction proceedings before the Commission.

The role of the district court, according to the FTC, is not to sit as the ultimate fact-finder. See Federal Trade Comm'n v. Food Town Stores, Inc., 539 F.2d 1339, 1342 (4th Cir. 1976) ("The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in FTC in the first instance. The only purpose of a proceeding under § 13 is to preserve the status quo until FTC can perform its function."). Rather, this Court's role is simply to determine whether the FTC has established a likelihood of success on the merits of its case by "raising questions going to the merits so serious, substantial, difficult and

[2] This argument is not much different from the competing problems presented in considering whether to allow any merger. If not enjoined preliminarily but later found to violate the law, can pre-merger competition really be recreated; and if enjoined preliminarily, would the merger be abandoned and thus no longer possible even if ultimately found lawful? See Federal Trade Comm'n v. Heinz, 246 F.3d 708, 726 (D.C. Cir. 2000).

doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." Federal Trade Comm'n v. Heinz, 246 F.3d 708, 714-15 (D.C. Cir. 2000) (citations omitted). The FTC therefore argues that the DOJ antitrust cases cited by defendants are not applicable because in those cases the district court does sit as the finder of fact. This distinction, however, does not affect the applicability of the observation in United States v. Franklin Electric Co., Civ. A. No. 00-c-0334-c (W.D.Wisc. July 19, 2000) (order denying plaintiff's motion in limine), that a proposed transaction to resolve government antitrust concerns regarding a proposed merger or acquisition should be considered by the district court as "relevant to the determination whether, considered as a whole, defendants' transaction will lessen future competition substantially." Even under Section 13(b), this Court's task in determining the likelihood of the FTC's success in showing that the challenged transaction may substantially lessen competition in violation of Section 7 of the Clayton Act requires the Court to review the entire transaction in question. Given this Court's conclusion, based on all circumstances including the evidence presented at the preliminary injunction hearing, that the Arch-Kiewit transaction will in fact occur as agreed if the Arch-Triton merger goes forward, the Court is unwilling simply to ignore the fact of the divestiture of Buckskin to Kiewit.

CONCLUSION

Because this Court regards the challenged transaction as consisting of both the acquisition of Triton by Arch and the divestiture of the Buckskin mine to Kiewit, and because its role under Section 13(b) requires it to give the challenged transaction a thorough, good-faith review, the Court concludes that excluding evidence and argument regarding the Kiewit transaction would be

tantamount to turning a blind eye to the elephant in the room. The FTC's motion in limine will therefore be denied. A separate order accompanies this memorandum opinion.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Dated: July 7, 2004

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I HEREBY CERTIFY that on December 20, 2018, I caused a true and correct copy of the foregoing Respondent's Post-Trial Reply Brief via the FTC E-Filing System and e-mail upon the following:

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