UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of **Otto Bock HealthCare North America, Inc.,** **a corporation,** **Respondent.**	**DOCKET NO. 9378** **PROVISIONALLY REDACTED PUBLIC VERSION**

OPINION OF THE COMMISSION

By Commissioner Rohit Chopra:

I. INTRODUCTION

In competitive markets, even when an individual firm leads its industry in market share, its owners, managers, and employees know that they must continue to innovate if they want to maintain or grow that market share. When a market-leading firm is threatened by challengers and responds by offering new and better products and services at competitive prices, we all benefit. Alternatively, when a market leader reduces the threat from a smaller aggressive competitor through an anticompetitive acquisition, we all lose. In this case, the Commission challenged a consummated acquisition in which a market leader eliminated a primary competitive threat. As explained further below, the Commission addresses a host of issues that may be particularly salient in consummated mergers, such as whether an agreement to "hold separate" the acquired assets eliminated anticompetitive effects and whether a proposed divestiture absolved the merging parties of liability. The Commission also considers contentions that liquidity concerns would have led to the acquired firm's failure, absent the acquisition.

This matter arises from the consummated acquisition ("the Acquisition") by Respondent Otto Bock HealthCare North America, Inc. ("Respondent" or "Otto Bock") of FIH Group Holdings, LLC ("Freedom"). Prior to the Acquisition, the companies were two of the most significant U.S. suppliers of lower-limb prosthetics used by amputees. Among other products,

both firms manufacture microprocessor-equipped prosthetic knees ("MPKs"), which offer certain improvements over conventional, mechanical prosthetic knees. At the time of the Acquisition, Otto Bock and Freedom were the first and third largest manufacturers of MPKs by revenue and competed vigorously against each other on both price and innovation. The Acquisition gave Otto Bock an 80-plus percent market share in an already highly concentrated all-MPK relevant market.

The Commission challenged the Acquisition out of concern that it had harmed and would continue significantly harming amputee patient populations and prosthetic clinics by eliminating significant, beneficial, competition between Otto Bock and Freedom, and would further entrench Otto Bock's position as the dominant supplier of MPKs. The Commission's Complaint alleged that the Acquisition removed from the market a firm that had directly competed against Otto Bock and other suppliers of microprocessor prosthetic knees by offering low prices and attractive promotions to prosthetic clinic customers to win sales. The Complaint also alleges that the Acquisition would likely affect ongoing product development competition between the two firms, which provides amputees with significant improvements in the MPKs they use.

We conclude that anticompetitive effects have indeed already occurred, and that the Acquisition is likely to cause future anticompetitive effects in the form of higher prices and less innovation for amputee patients and prosthetic clinic customers. The record compiled during a full administrative trial lasting 31 days confirms that eliminating a significant competitor from the highly concentrated all-MPK market has lessened, and will continue to lessen, competition substantially. That record includes documents from Otto Bock confirming that it viewed Freedom as a direct and serious competitive threat and demonstrating that eliminating that threat was a strategic objective and an expected result of the Acquisition; testimony from prosthetic clinics that they had been able to negotiate lower prices based on competition between Otto Bock and Freedom; and testimony from Otto Bock's CEO at the time of the Acquisition that Otto Bock's incentives had changed after the acquisition.

As outlined in the Commission's Complaint, prosthetic legs are used by individuals who have had a transfemoral, or above-knee, amputation. Amputation can occur in any age group, but the prevalence is highest among people aged sixty-five years and older. Diseases such as vascular complications and cancer account for approximately 70 percent of above-knee amputations, with another 20 percent resulting from trauma such as combat injuries to soldiers. Compl. ¶ 3.

Microprocessor-controlled knees provide unique benefits to individuals who require a lower-limb prosthetic. By utilizing a continuous flow of data from electronic sensors located in the knee, MPKs regulate the movement and positioning of the knee in real time based on the user's needs. IDF 102-04.[1] MPKs can assist the user to recover from stumbles, to walk safely

[1] This Opinion uses the following abbreviations for citations to the record:

Compl.:	Complaint
Ans.:	Answer and Affirmative Defenses of Respondent Otto Bock HealthCare North America, Inc.
ID:	Initial Decision
IDF:	ALJ Findings of Fact
RAB:	Respondent's Appeal Brief

on ramps or down stairs, and to walk at a variable cadence; these benefits help prevent falls. IDF 331-39, 345-53. As compared to mechanical knees (*i.e.*, knees that do not contain a microprocessor), studies have shown the use of MPKs to improve the quality of life of amputees who are medically eligible to use them. IDF 372-93.

The acquiring firm, Otto Bock, is considered a pioneer in the development and sale of MPKs and possesses the leading share of U.S. MPK sales. Otto Bock's current best-selling MPK is the C-Leg 4. In addition to MPKs, Otto Bock also sells mechanical knees and a variety of other lower-limb and upper-limb prosthetics, orthotics, mobility solutions, and medical-related services.

The acquired firm, Freedom, was founded in 2002, and is headquartered in Irvine, California. At its founding, Freedom sold a range of prosthetic foot products. The company released its first MPK, the Plié, in 2007. Freedom was also developing a new MPK, the Quattro, that was intended to improve upon Freedom's then-current product, the Plié 3. The Quattro's nickname the —"C-Leg Killer"[2]— reflected Freedom's competitive aspirations before the Acquisition.

In October 2016, Otto Bock's representatives began discussions with Freedom's CEO and Vice Chairman about acquiring Freedom. After some months elapsed, and at the conclusion of an investment bank-led process by Freedom to solicit interest from other buyers, Otto Bock was the higher bidder and Freedom accepted its offer. On September 22, 2017, Otto Bock acquired Freedom for approximately [redacted]. Upon consummation, Freedom became a wholly owned subsidiary of Otto Bock.

Complaint Counsel began an investigation into the Acquisition in September 2017. IDF 14.[3] On December 20, 2017, the Commission issued a Complaint that challenged Respondent's acquisition of Freedom as a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

CCAB:	Complaint Counsel's Answering Brief on Appeal
RRB:	Respondent's Reply Brief on Appeal
RPTB:	Respondent's Post-Trial Brief
RPTRB:	Respondent's Post-Trial Reply Brief
RPF:	Respondent's Proposed Findings of Fact and Conclusions of Law
RRF:	Respondent's Reply to Complaint Counsel's Post-Trial Proposed Findings of Fact and Conclusions of Law
PX:	Complaint Counsel's Exhibit
RX:	Respondent's Exhibit
JX:	Joint Exhibit
Tr.:	Trial Transcript
IHT:	Investigational Hearing Transcript

[2] [redacted]

[3] The transaction was not subject to the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, and the Commission did not become aware of it until after the acquisition had closed.

After the Complaint issued, Respondent offered to divest certain Freedom MPK assets to an identified buyer; Respondent contends that such a divestiture would prevent or eliminate any purported competitive harm from the Acquisition. RAB at 28-36. In response, Complaint Counsel assert that Respondent's proposed divestiture is "speculative," partial, and inadequate to restore competition in the relevant market. CCAB at 32-38.

After a trial on the merits, Chief Administrative Law Judge D. Michael Chappell ("the ALJ") issued an Initial Decision in which he ruled that the Acquisition of Freedom by Otto Bock may substantially lessen competition in the relevant market for the sale of MPKs to prosthetic clinics in the United States. ID at 3, 87. He further found that Respondent's proposed divestiture of certain MPK assets of Freedom is insufficient to eliminate the likely competitive harm from the Acquisition, and that the appropriate remedy is the divestiture of all assets Respondent acquired, with the possible exception of certain prosthetic foot products that are not necessary to competition in the relevant MPK market.

Based on our *de novo* review of the facts and law in this matter, we find that the Acquisition is likely to, and indeed already has, substantially lessened competition in the relevant market for MPKs in violation of Section 5 of the FTC Act and Section 7 of the Clayton Act.[4] We hold that, to fully restore the competition lost from the Acquisition, Respondent must divest Freedom's entire business with the limited exceptions granted by the ALJ. We enter an order consistent with this Opinion.

II. FACTUAL BACKGROUND

A. THE PROSTHETIC KNEE INDUSTRY

Above-the-knee amputees, also known as transfemoral amputees, and individuals born with partial lower limbs often receive lower-limb prostheses to enable them to walk. IDF 68. The prosthesis typically includes: (1) either a suspension or a sock-like liner that is rolled onto the residual limb; (2) a socket, which is a rigid or semi-rigid negative of the residual limb; (3) a knee joint; (4) a pylon that connects the knee to a foot; and (5) a foot with a shell. Schneider, Tr. 4303-04.[5] The entire apparatus may then have a cosmetic covering. *Id.* In general, there are two kinds of prosthetic knees: non-microprocessor (or "mechanical") and microprocessor. IDF 95. Respondent's website explains:

> Mechanical knees all use a mechanical hinge to replace your knee joint. How quickly or easily the hinge swings is often controlled by friction, some type of hydraulic system or a locking mechanism.

[4] We adopt the ALJ's findings of fact to the extent not inconsistent with this Opinion.

[5] Some patients may use a combination ankle joint and foot. An example is Freedom's Kinterra, a hydraulic ankle/foot system. IDF 595 n.59.

> Microprocessors, on the other hand, provide a more sophisticated method of control to a prosthetic knee. These more complex knee joints are designed to help you walk with a much more stable and efficient gait that more closely resembles a natural walking pattern.

PX08013. Clinic customers assert that MPKs provide increased safety, stability, and ability to overcome environmental barriers, among other benefits. IDF 365-67. Microprocessor knees are significantly more expensive than mechanical knees, often costing four to eleven times as much, or more. IDF 394-95, 397-99.

As a practical matter, most patients can obtain an MPK only if their insurance company will reimburse for it. Medicare's coverage guidelines, which most private insurers follow, base a patient's eligibility for an MPK on his/her mobility as defined by "K-Level." ID at 9-10. The Centers for Medicare and Medicaid Services ("CMS") established the K-Level system to describe various mobility levels, ranging from K-Level 0 (nonambulatory) to K-Level 4 (very active, *i.e.*, child, active adult, or athlete). IDF 86-90.

Medicare and most third-party payers will reimburse MPKs only for K-3 or K-4 patients. IDF 162-64. K-2 or K-1 ambulators are typically ineligible for MPKs but are covered for mechanical knees. *Id*.; Ford, Tr. 990-91.[6]

In order to obtain payment from Medicare or the insurance company for an MPK, a prosthetist must demonstrate "medical necessity." IDF 187, 190. The prosthetist must document that the patient has unmet needs that can be fulfilled by an MPK but not by a less expensive alternative, such as a mechanical knee. IDF 189.

Patients typically acquire their prosthetic knees through specialized prosthetic clinics that provide the knee pursuant to a prescription written by the patient's surgeon. IDF 75-77. The surgeon's prescription typically includes the specific goals of and justification for the device, but rarely includes a specific brand of prosthesis. IDF 137, 141. It may or may not specify a particular type of knee. IDF 137-38. Clinics do not generally stock prosthetic knees, but instead purchase them when needed for a particular patient. IDF 313. At the clinic, a certified prosthetist fits the prosthesis to the patient and provides follow-up care. IDF 81. The process for fitting a new patient with an above-the-knee prosthesis can take over 10 visits spread out over six months to a year. IDF 82.

Insurers do not separately reimburse the clinics for providing fitting services and follow-up visits. IDF 122. Rather, Medicare and most private insurance companies reimburse prosthetic clinics according to "L-Codes" for each component of the prosthesis provided (socket, liner, foot, knee, etc.). IDF 117-21. CMS has established L-Codes that represent the features and functions of each component, including the knee joint. ID 117. Some L-Codes apply only to MPKs. Other L-Codes apply only to mechanical knees. Some L-Codes apply to features that may be found on either an MPK or mechanical knee. IDF 440. Each L-Code carries an

[6] K-2 and K-1 ambulators are less functional ambulators for whom a prosthesis nonetheless would enhance mobility or quality of life. IDF 86-88.

associated fee that is the same regardless of the component's actual cost to the clinic or who manufactures it. IDF 120-21. The clinic submits all of the L-Codes associated with a particular prosthesis to the insurance carrier (Medicare, private insurer, etc.), and the associated fees for each L-Code are added together and reimbursed to the clinic less the percentage that is the patient's responsibility. IDF 124-25, 127.[7] CMS sets the L-Code at a rate designed to compensate the clinic for the entire patient-care episode, including time spent by the prosthetist in seeing the patient for initial and follow up care, and any overhead. IDF 322-24. The clinic earns a margin based on the difference between the acquisition cost for the prosthetic and the L-Code reimbursement that it receives. Thus, all else equal, the lower the price of an MPK, the higher the clinic's margin. IDF 324-26.

B. THE PARTIES

1. Otto Bock

Otto Bock is a Minnesota corporation headquartered in Austin, Texas. IDF 3. It is a subsidiary of Otto Bock Germany, which has over 7,000 employees worldwide and operates in 50 countries. IDF 1-2. Among other locations in the United States, Otto Bock has manufacturing and research and development facilities in Salt Lake City, Utah, that employ between 220 and 250 people. IDF 3. Otto Bock also employs between 75 and 100 people who work in the field as sales representatives, clinical specialists, or reimbursement specialists in the United States. *Id.*

Otto Bock launched the first C-Leg in 1999. IDF 233. Industry participants have described the C-Leg as the "gold standard" in the MPK industry. [redacted]. Otto Bock also offers four other models of MPK including the Kenevo, Compact, Genium, and X3. IDF 232. Otto Bock sells its MPKs directly to clinics via its field sales force. PX05148 (Swiggum Dep.) at 38. In 2017, the year of the Acquisition, Otto Bock was on pace to sell over [redacted] MPK units for [redacted] (annualized) in the United States.[8] IDF 479-80. This equates to a [redacted] unit share and a [redacted] revenue share of a U.S. market defined to include all sales of MPKs. *Id.*; IDF 907.

2. Freedom

Prior to the Acquisition, Freedom was privately-held. IDF 10. Freedom's majority shareholder was Health Evolution Partners Fund I (AIVI), LP ("HEP"), a private-equity fund. *Id.* Now a wholly-owned subsidiary of Otto Bock, Freedom employs approximately 150 people. IDF 7, 12. Over [redacted] of Freedom's revenues come from the sale of prosthetic feet. RAB at 43; Carkhuff, Tr. 603-04.

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[7] Many private insurers reimburse at amounts discounted off the rate set by the CMS L-Code, sometimes significantly. Oros, Tr. 4802-03 [redacted] PX05140 (Weott Dep.) at 30-31 (commercial health plans' allowable amounts are generally 10-40% below Medicare's).

[8] Partial-year sales figures reported by the sellers for 2017 have been annualized. PX06001A (Scott Morton Expert Report) at p. 83.

Freedom launched the original Plié MPK in 2007. IDF 255. Its current model, the Plié 3, is an "improve[d]" and [redacted] product that Freedom launched in 2014. IDF 255; PX05162 (Ruhl Dep.) at 92-93; Carkhuff, Tr. 492. The Plié 3 [redacted]. Carkhuff, Tr. 492. According to the CEO of the industry's largest clinician group, Hanger, Inc. ("Hanger"), the Plié 3 [redacted] Asar, Tr. 1415. Clinicians appreciated Plié 3's performance in stumble recovery, prevention of falls, and water resistance, among other benefits. Carkhuff, Tr. 333; IDF 565.

Like Otto Bock, Freedom sells MPKs directly to prosthetic clinics through a field sales force. At the time of trial, Freedom had 14 field sales representatives, whom it referred to formally as regional sales managers. Testerman, Tr. 1093, 1114-15. Freedom also sells MPKs to Southern Prosthetic Supply, a distributor that Hanger owns. IDF 43, 717. In 2017, Freedom was on pace to sell [redacted] Plié 3 units corresponding to over [redacted] in annualized revenue. IDF 479-480; PX00825. These sales would equate to a [redacted] unit share and a [redacted] revenue share in a U.S. market defined to include all MPKs. IDF 479-80, 907.

C. OTHER MPK SUPPLIERS

1. Össur

Össur hf ("Össur") is a prosthetics and medical device manufacturer headquartered in Reykjavik, Iceland, with its U.S. headquarters in Foothill Ranch, California. IDF 27. Össur employs between 300 and 400 people in the United States. *Id.* Its U.S. sales force consists of 50 employees who educate and assist clinicians with reimbursement and fittings. *Id.* Össur offers both non-MPKs and MPKs. *Id.* Its MPK offerings include the Rheo and Rheo XC products, which use a unique magnetorheologic technology, *i.e.*, magnetic particles suspended in oil and activated by a magnetic field, to control the level of resistance in the knee. IDF 275. In 2017, Össur was on pace to sell [redacted] MPKs in the United States corresponding to [redacted] million in annual revenue. IDF 479-80. This equates to shares of [redacted] (units) and [redacted] (revenue), respectively, in the U.S. MPK segment. *Id.*

2. Charles A. Blatchford & Sons Limited d/b/a Endolite

Charles A. Blatchford & Sons Limited, which sells products under the trade name Endolite, is a family-owned business that manufactures lower-limb prosthetic devices. IDF 30-31. Endolite sells a range of prosthetic products in the United States, including energy-storing feet, hydraulic ankles, microprocessor-controlled feet, mechanical knees, and an MPK called the Orion. *Id.*; IDF 286. Endolite employs roughly 80 people in the United States, including 15 sales representatives and 5 clinical support specialists. IDF 31. In 2017, Endolite's U.S. MPK sales (annualized) were [redacted] units or approximately [redacted], approximating [redacted] of the MPK units sold in the U.S. and [redacted] of the revenues. IDF 479-80.

3. Other Sellers

DAW Industries ("DAW") sells prosthetic components, including MPKs, in the United States. IDF 304. DAW does not manufacture its own MPKs, but serves as a distributor of MPKs manufactured by a company called Teh Lin, located in Taiwan. IDF 305. In 2017, DAW sold [redacted] MPK units (annualized) in the U.S. corresponding to approximately [redacted] in sales. This equated to an MPK market share of [redacted] by units and [redacted] by revenue. IDF 479-80.

Nabtesco Corporation ("Nabtesco"), headquartered in Kobe, Japan, manufactures prosthetic devices including MPKs, mechanical knees, microprocessor feet, and non-microprocessor feet. IDF 292-93. Nabtesco does not manufacture any products in the United States. IDF 293. As of the Acquisition, Nabtesco sold its products in the United States through four distributors, including Proteor, Inc. ("Proteor"). IDF 294. In September 2018, Proteor became the exclusive distributor of Nabtesco's products in the United States. IDF 295; Mattear, Tr. 5547.

In 2017, Nabtesco sold [redacted] MPK units (annualized) in the U.S., corresponding to approximately [redacted] in sales. These sales equated to U.S. MPK market shares of approximately [redacted] by units and [redacted] by revenue. IDF 479-80.

D. FREEDOM'S FINANCIAL CONDITION AND EFFORTS TO REFINANCE OR SELL

Prior to Freedom's sale of its business, the company was struggling financially. Freedom experienced net losses on an annual basis, with biggest losses occurring in 2015 and 2016. IDF 765. Freedom ascribed its declining performance in 2015-16 to various internal and external factors, including durability and service issues with the Plié 3, regulatory audits that affected reimbursements for K-3 patients, and failures to keep costs in line with forecasted revenue growth. IDF 771-73. Otto Bock's 2015 launch of its C-Leg 4 also played a role, because the new C-Leg ate into sales of the Plié 3. IDF 600, 771.

In April 2016, Freedom's board of directors and its majority shareholder, HEP, hired a new CEO for Freedom, David Smith. IDF 774. Smith took a number of steps to turn Freedom around, including replacing the company's chief operating officer and head of sales; improving quality and service; enhancing the company's R&D pipeline; and restructuring the sales force. IDF 777. Freedom's turnaround plans began to bear fruit in late 2016 into 2017, and the company began to enjoy increased revenue and EBITDA[9] during the first two quarters of 2017 until Otto Bock acquired it in September 2017. IDF 781-97.

Freedom also had substantial debt, however. In particular, as of the end of 2016, the company still owed approximately [redacted] on a [redacted] term loan that it had obtained in 2012. IDF 743, 745, 748. [redacted]

[9] Analysts use EBITDA, which refers to earnings before interest, (income) taxes, depreciation, and amortization, to focus on a particular measure of cash flow used in valuation. IDF 761.

. ID at 66; IDF 751.[10] During 2016 and 2017, Freedom explored various refinancing options for its debt. IDF 843-48. Freedom also explored potential sale options to companies including Otto Bock. IDF 860-61, 863. Ultimately, Freedom received two final offers for a sale of the company, one from Össur in the amount of and one from Otto Bock for the higher sum of . IDF 869, 871. Otto Bock acquired Freedom for approximately on September 22, 2017. IDF 11, 872.

E. HOLD SEPARATE AGREEMENT AND RESPONDENT'S DIVESTITURE PROPOSAL

Just prior to the filing of the Commission's Complaint, on December 19, 2017, Respondent entered into a Hold Separate and Asset Maintenance Agreement (Hold Separate Agreement) with Complaint Counsel with respect to Freedom. IDF 15. The Hold Separate Agreement requires Respondent ID, App. D, Sections I.A-E, II.A, VI at 1-6, 8.

IDF 37, 916, 923. IDF 911; RX-1042 (May 29, 2018). IDF 958; ID at 80-81. Respondent characterizes this agreement as a proposed divestiture of "the entire Freedom MPK business." RAB at 1; *see also id.* at 28.

IDF 960-963. ID at 77. RX-1042, Section 9.01(a)(iv) at 28; Oral Arg. Tr. 78-79, *in camera*.

[10] IDF 756-57.

[11]

The parties differ as to whether the Hold Separate Agreement and/or the proposed divestitures effectively prevent competitive harm. *See* Oral Arg. Tr. 11-12, 59; CCAB at 32-37.

III. PROCEDURAL HISTORY

A. PLEADINGS, MOTIONS, AND TRIAL

On December 20, 2017, the Commission issued a Complaint against Respondent alleging that the Acquisition violated Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleged that the Acquisition would harm competition in a relevant market consisting of the manufacture and sale of microprocessor prosthetic knees to prosthetic clinics in the United States. Compl. ¶ 17. The Complaint asserted that the Acquisition was presumptively unlawful by virtue of increased concentration in the relevant market, and further that it eliminated what had been vigorous, sustained price and innovation competition between Otto Bock and Freedom. Compl. ¶¶ 35-58.

On January 10, 2018, Respondent filed an Answer in which it denied that the Acquisition harmed consumers or competition. Ans. ¶ 57. Respondent denied many of the substantive allegations of the Complaint, including the existence of a relevant market for the sale of MPKs. *Id.* at ¶ 17. Respondent asserted various affirmative defenses, including, *inter alia*, a Seventh Affirmative Defense that "Ottobock's planned divestiture of the microprocessor controlled knee business of Freedom addresses any conceivable anticompetitive effect in the one narrow segment of microprocessor controlled knees in which the Complaint alleges anticompetitive effects." Ans. at p. 30.

Complaint Counsel moved to strike Respondent's Seventh Affirmative Defense, arguing that an acquirer's subsequent plan to divest assets is not, as a matter of law, a valid defense to a transaction that has already taken place in violation of the Clayton Act. On April 18, 2018, the Commission issued a ruling that accepted Complaint Counsel's position in part, but that denied the motion to strike. Opinion and Order at 6. Specifically, the Commission held that the Seventh Affirmative Defense did not qualify as an affirmative defense because it could not completely defeat liability. *Id.* at 3-4. The Acquisition was already consummated, and any future divestiture could not eliminate the anticompetitive effects that may have occurred prior to the divestiture. *Id*. at 4.

Although the proposed divestiture could not constitute an affirmative defense, the Commission nonetheless did not strike the defense, finding instead that the claim should be treated as a denial. *Id.* at 5-6. The Commission reasoned that "a divestiture of assets could potentially be relevant to rebut a showing of likely anticompetitive effects for the period after a speculated divestiture is completed," and therefore held that "Respondent remains entitled to develop and present relevant evidence regarding the impact of such a divestiture on the existence and magnitude of likely post-divestiture competitive harms." *Id*. at 6. Furthermore, the Commission ruled, the Respondent could "develop and present relevant evidence regarding the adequacy of the planned divestiture as a remedy for any violation found." *Id*.

The trial took place from July 10, 2018 through October 4, 2018. ID at 2-3. The trial record included the testimony of 69 witnesses presented live or by deposition, and over 3,130 exhibits. ID at 4.

B. INITIAL DECISION

The ALJ issued an Initial Decision on April 29, 2019, in which he held that the Acquisition may substantially lessen competition in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. ID at 3, 233. The ALJ held that the relevant market consists of the sale of MPKs to prosthetic clinics in the United States. ID at 35. He based this holding on (1) clinics' unwillingness to substitute mechanical knees for MPKs in the event of a small but significant price increase on MPKs, (2) unique characteristics of MPKs, including improved safety and performance versus mechanical knees, (3) industry recognition of an MPK-only market, (4) distinct prices for MPKs, coupled with evidence that MPK sellers set their prices solely in reference to other MPKs, and (5) economic evidence, including a critical loss analysis offered by Complaint Counsel's expert. ID at 19-35. The ALJ determined that Complaint Counsel had proved a reasonable likelihood of competitive effects in the relevant market, based on both the market share / market power presumption of *Philadelphia National Bank*, 374 U.S. 321, 363 (1963), and on Complaint Counsel's evidence of direct competition between C-Leg and Plié. ID at 36-49. The ALJ did not address Complaint Counsel's additional arguments that the Acquisition is likely to lessen competition between Otto Bock and Freedom as to future products that are currently in development. He stated that a decision on these arguments was unnecessary given his other findings. ID at 49 n.25.

The ALJ rejected Respondent's rebuttal arguments and defenses. First, he found that the evidence failed to establish that other competitors are poised to expand their sales in a way that would timely, likely, and sufficiently deter or counteract the potential anticompetitive effects. *Id.* at 51. He also rejected Respondent's assertions that any price increase by the post-acquisition firm would be constrained by the bargaining power of certain "power buyers" or by the cap on allowable insurance reimbursement rates. *Id.* at 54-60.

The ALJ found Respondent's failing company defense unpersuasive, ruling that Respondent failed to demonstrate (1) that Freedom was in imminent danger of failure and (2) that it had made a reasonable, good faith attempt to locate an alternative, less anticompetitive buyer. *Id.* at 60-74. He similarly rejected Respondent's assertion that Freedom was a "flailing firm"—a weakened company of little competitive significance. *Id.* at 74-76. And, he rejected Respondent's argument that a proposed divestiture of Freedom's MPK assets to [redacted] would counteract any likely anticompetitive effects of the Acquisition. The ALJ found that the proposed divestiture was too speculative and did not set out all the terms necessary for him properly to evaluate whether the divestiture would replace the lost competition. *Id.* at 76-81. Finally, the ALJ rejected Respondent's argument that efficiencies to be generated by the Acquisition would outweigh its likely anticompetitive effects, as Respondent failed to show that the asserted efficiencies are merger specific, verifiable, or would benefit consumers in the relevant geographic market. *Id.* at 81-87.

As a remedy, the ALJ ordered Respondent to divest Freedom's entire business, with

potential exceptions for certain prosthetic foot lines, to a buyer approved by the Commission. *Id.* at 239-45. The ALJ rejected Respondent's argument that the remedy should be limited to divestiture of Freedom's MPK assets, finding that the evidence fails to support the position that those assets can easily be separated from Freedom's business as a whole or that divestiture of just the MPK assets would be sufficient to restore competition to the relevant market. *Id.* at 89-90. Consequently, the ALJ's Order requires Otto Bock to divest the Freedom business with two potential exceptions. Under the first exception, Otto Bock *may retain* certain Freedom foot products unless the acquirer demonstrates to the Commission that such assets are necessary to achieve the purpose of the Order and the acquirer needs such assets to effectively operate the Freedom business. *Id.* at 92-93. Under the second exception, Otto Bock *must divest* certain other Freedom foot products (specifically, those foot products that Freedom previously sold in combination with its MPKs), unless the acquirer demonstrates that such assets are not necessary. *Id.* at 93.

IV. STANDARD OF REVIEW

The Commission reviews the ALJ's findings of fact and conclusions of law *de novo*, considering "such parts of the record as are cited or as may be necessary to resolve the issues presented." 16 C.F.R. § 3.54(a) (2019). The Commission may "exercise all the powers which it could have exercised if it had made the initial decision." *Id.*; *see also* 5 U.S.C. § 557(b) (2018). The *de novo* standard of review applies to both findings of fact and inferences drawn from those facts. *See Realcomp II, Ltd.*, 2007 WL 6936319, at *16 n.11 (F.T.C. Oct. 30, 2009), *pet. for review denied*, 635 F.3d 815 (6th Cir. 2011).

V. JURISDICTION

Respondent does not dispute that the Commission has jurisdiction over it and over the Acquisition challenged in the Complaint. Section 5(a) of the FTC Act grants the Commission authority to prevent "unfair methods of competition in or affecting commerce" by "persons, partnerships, or corporations." 15 U.S.C. § 45(a)(1)-(2). Section 11 of the Clayton Act, 15 U.S.C. § 21, vests jurisdiction in the FTC to determine the legality of corporate acquisitions under Section 7 of that Act, 15 U.S.C. § 18. Otto Bock is a corporation as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, over which the Commission has jurisdiction. *See* JX1 (Complaint Counsel's and Respondent's Joint Stipulations of Law and Fact) ¶ 5. Otto Bock's acts and practices at issue regarding the Acquisition are in or affect commerce as "commerce" is defined in Section 4 of FTC Act, 15 U.S.C. § 44, *see* JX1 at ¶ 1, and are subject matter over which the FTC has jurisdiction. *See* Ans. ¶ 13.

VI. LEGAL FRAMEWORK

Section 7 of the Clayton Act prohibits the acquisition of assets "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Section 7 prohibits acquisitions that create a reasonable probability of anticompetitive effects. *See, e.g.*, *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991)*; Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 274 (7th Cir. 1981). "Congress used the

words 'may be substantially to lessen competition' to indicate that its concern was with probabilities, not certainties." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). "Thus, to establish a violation of Section 7, the FTC need not show that the challenged merger or acquisition *will* lessen competition, but only that the loss of competition is a 'sufficiently probable and imminent' result of the merger or acquisition." *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009) (quoting *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 623 n.22 (1974)).

Merger enforcement seeks to prevent the unlawful acquisition, enhancement, and exercise of market power. Acquisitions "that enhance market power can enable the merged firm to profitably alter its marketplace decisions to the detriment of consumers, for example, by raising prices, cutting output, or reducing product quality or variety." *ProMedica Health Sys., Inc.*, 2012 WL 1155392, at *12 (F.T.C. Mar. 28, 2012), *adopted as modified*, 2012 WL 2450574 (F.T.C. June 25, 2012), *pet. for review denied*, 749 F.3d 559 (6th Cir. 2014).

Courts and the Commission have traditionally analyzed Section 7 claims under a burden-shifting framework. *See, e.g., United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990); *ProMedica*, 2012 WL 1155392, at *12-13. Under this framework, the government can establish a presumption of liability by defining a relevant product and geographic market and showing that the transaction will lead to undue concentration in that market.[12] *See Phila. Nat'l Bank*, 374 U.S. at 363; *Baker Hughes*, 908 F.2d at 982-83. The typical measure for determining market concentration is the Herfindahl-Hirschman Index (the "HHI"). *CCC Holdings*, 605 F. Supp. 2d at 37. The HHI calculates market power by summing the squares of the individual market shares of all the firms in the market. *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 166 n.11 (D.D.C. 2000).[13]

Of course, in keeping with the admonition of the *Horizontal Merger Guidelines* that market shares are only the beginning of the inquiry, a plaintiff can bolster the presumption based on market structure with evidence showing that anticompetitive effects are likely. *Heinz*, 246 F.3d at 717. For example, the plaintiff may show that the merger would eliminate significant head-to-head competition, a particularly aggressive competitor in a highly concentrated market, or significant future competition. *See, e.g., FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1082-83 (D.D.C. 1997) (crediting evidence in those categories); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 81-82 (D.D.C. 2011) (crediting evidence of head-to-head competition). Common sources of evidence for showing anticompetitive effects include the merging parties, customers, other industry participants, and industry observers. U.S. Dep't of Justice & Fed. Trade Comm'n,

[12] *See infra* Section VII.B.1 (discussing application of the market concentration presumption and the role of additional evidence of unilateral anticompetitive effects).

[13] We have noted in prior cases and the courts have also recognized that proving a relevant market and showing undue concentration in that market "does not exhaust the possible ways to prove a § 7 violation on the merits." *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008); *see also ProMedica*, 2012 WL 1155392, at *13; *Evanston Nw. Healthcare Corp.*, 2007 WL 2286195, at *74-76 (F.T.C. Aug. 6, 2007). While a market share-based approach is a common way to prove a Section 7 violation and market share statistics support a finding of liability here, we need not rely solely on market shares in this case.

Horizontal Merger Guidelines § 2.2 (2010) ("*Horizontal Merger Guidelines*").

"Once the Government establishes the *prima facie* case, the respondent may rebut it by producing evidence to cast doubt on the accuracy of the Government's evidence as predictive of future anti-competitive effects." *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *accord Baker Hughes*, 908 F.2d at 982-983; *see also id.* at 991 *and Heinz*, 246 F.3d at 725 (the stronger the government's *prima facie* case, the greater the respondent's burden of production on rebuttal). "[E]vidence on a variety of factors can rebut a prima facie case," *Baker Hughes*, 908 F.2d at 984, including "ease of entry into the market, the trend of the market either toward or away from concentration," the "continuation of active price competition," or "unique economic circumstances that undermine the predictive value of the government's statistics." *Heinz*, 246 F.3d at 715 n.7 (internal quotation marks omitted). Rebuttal evidence may also include other factors relating to competition in the relevant market or the competitive or financial weakness of the acquired company. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 494-504 (1974); *Baker Hughes*, 908 F. 2d at 985 (citations omitted).

Finally, if the respondent successfully rebuts the *prima facie* case, the burden of production shifts back to the government and merges with the ultimate burden of persuasion, which remains with the government at all times. *Chicago Bridge*, 534 F.3d at 423. Although the burden shifting analysis "conjures up images of a tennis match," *Univ. Health*, 938 F.2d at 1218-19 & n.25, in reality the evidence is often considered all at once and the burdens are analyzed together. *Id.*; *see also, e.g., Chicago Bridge*, 534 F.3d at 424-25.

VII. LIABILITY

A. THE RELEVANT PRODUCT MARKET

As the ALJ observed, a relevant product market consists of "products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325; *see du Pont*, 351 U.S. at 395. Cross-elasticity of demand refers to the extent to which sales of one product are responsive to changes in the price of another, *i.e.*, whether "an increase in the price for Product A causes a substantial number of customers to switch to Product B." ID at 20 (quoting *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 25 (D.D.C. 2015)).

The enforcement agencies and many courts employ the "hypothetical monopolist test" to assess whether a candidate set of products constitutes a relevant market. *See Horizontal Merger Guidelines* § 4.1.1; *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 121-22 (D.D.C. 2016). The test operationalizes and builds on the cross-elasticity inquiry by asking whether a hypothetical, profit-maximizing firm that is the only present and future seller of the products in the candidate market likely would impose at least a small but significant and non-transitory increase in price (a "SSNIP," usually defined as a five percent price increase) on at least one product in the market, including at least one product sold by one of the merging firms. *Horizontal Merger Guidelines* §

4.1.1-.2. If the hypothetical seller would lose sufficient sales to make the SSNIP unprofitable, the candidate market is too narrow and the analysis must add substitute products to the candidate market until the test is met. *See United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 20-21 (D.D.C. 2017); *Sysco Corp.*, 113 F. Supp. 3d at 33.

In addition to the hypothetical monopolist test, the case law also identifies and relies on "practical indicia" of market definition such as industry or public recognition of the market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. *Brown Shoe*, 370 U.S. at 325 (enumerating practical indicia to define the relevant product market). *See, e.g.*, *Staples*, 970 F. Supp. at 1075-80; *Sysco*, 113 F. Supp. 3d at 27-30; *Swedish Match*, 131 F. Supp. 2d at 159-64; *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46-48 (D.D.C. 1998).

Market definition must "take into account the realities of competition." *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1039 (D.C. Cir. 2008). Ordinary course of business documents reveal the contours of competition from the perspective of the parties, who may be presumed to "have accurate perceptions of economic realities." *Id.* at 1045 (Tatel, J., concurring) (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986)). Thus, in determining the relevant product market, courts pay "close attention to the defendants' ordinary course of business documents." *H&R Block*, 833 F. Supp. 2d at 52.

Applying these principles, the ALJ found that MPKs sold to prosthetic clinics in the United States constitute a relevant product market.[14] We agree.

1. Interchangeability of Use and Cross-Elasticity of Demand

As discussed above, the Supreme Court identified interchangeability of use and cross-elasticity of demand as key indicators of relevant market definition. *Cf. Brown Shoe*, 370 U.S. at 325. The hypothetical monopolist test assesses these factors by measuring the ability and willingness of buyers to switch their purchases to alternative products in the face of a small but significant price increase. Thus, we look to the available evidence to determine whether alternative products are sufficiently close substitutes for MPKs to constrain price increases (or other competitive harm) in MPKs. As discussed below, the evidence regarding functional interchangeability and cross-elasticity of demand shows that they are not.

MPKs exhibit a significantly greater level of interchangeability with each other than with their next-nearest substitute, mechanical knees. In the view of customers, MPKs provide more safety and stability than mechanical knees, leading to fewer stumbles and falls; MPKs allow patients to more easily traverse environmental barriers such as curbs, steps, and slopes, and to walk in crowded areas; and MPK users demonstrate a much better gait, and are better able to walk with a variable cadence, compared to users of mechanical knees. ID at 19-20; IDF 362-68. Clinical studies confirm these benefits, IDF 369-93, and the sellers of MPKs (even those who

[14] The ALJ found, and the Respondent does not dispute, that the relevant geographic market is the United States. ID at 17. We adopt this finding.

also sell mechanical knees) tout these advantages of MPKs over mechanical knees. IDF 331-61.

Furthermore, evidence demonstrates a lack of cross-elasticity of demand between mechanical knees, on the one hand, and MPKs, on the other. This evidence reveals that price-based switching between MPKs and mechanical knees is not substantial, IDF 449-53, which suggests that a hypothetical monopolist of MPKs could profitably impose a SSNIP. Many prosthetists and clinic owners testified that they would not switch patients to mechanical knees even if prices of MPKs were increased by 5 to 10%. *See, e.g.*, IDF 450 (Ability Prosthetics and Orthotics would not move its patients to mechanical knees if the cost of MPKs increased by 5%); IDF 451 (the Center for Orthotic and Prosthetic Care would not begin recommending more mechanical knees if MPK manufacturers increased prices by 5 to 10%); IDF 452 (Sprinkle Prosthetics typically would not switch a patient who would otherwise medically benefit from an MPK and whose insurance provided coverage for an MPK to a mechanical knee based on a 5-10% price increase). Prosthetists have a reputational and ethical obligation to fit each patient with a prosthetic knee that best meets the patient's medical needs, and their decision to fit a patient with an MPK versus a mechanical knee (if insurance coverage is available for both products) is a clinical one, not a financial one. IDF 447-48. As one clinic customer explained, it would be a "disservice to the patients and poor patient care" to threaten to shift MPK volume to mechanical knees because MPKs are "a much better knee, and if a patient is [an] eligible candidate for one, that is the knee they would prefer and deserve." IDF 449. Other customers testified similarly. *See* IDF 368 (collecting testimony of clinics regarding non-substitution to mechanical knees).

The determination of what constitutes the relevant product market "hinges . . . on a determination of those products to which consumers will turn, given reasonable variations in price." *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 767 (9th Cir. 2001); *see also du Pont*, 351 U.S. at 380-81, 400 (the products in a relevant market would be characterized by cross-elasticity of demand, *i.e.*, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market); *cf. FTC v. Sanford Health*, 926 F.3d 959, 963-64 (8th Cir. 2019) (defining relevant geographic market based on whether health insurers could defeat a small but significant nontransitory price increase by a hypothetical monopolist of the relevant physician services). We concur in, and adopt, the ALJ's findings that interchangeability of use and cross-elasticity of demand support a relevant market limited to MPKs.

2. *Brown Shoe* Factors

The factors that the Supreme Court identified in *Brown Shoe* further buttress the relevant market of MPKs. ID 22-32. The Court described the *Brown Shoe* factors as "practical indicia" rather than requirements, 370 U.S. at 325, and courts have used them to define markets even when only some of the factors are present. *See, e.g., Staples*, 970 F. Supp. at 1075 (citations omitted).

a. Product's peculiar characteristics

The microprocessor in an MPK allows it to function, operate, and perform in a way that

is different from a mechanical knee. IDF 330. An MPK's microprocessor uses a continuous stream of electronic data from movement and position sensors in the knee to make decisions in real time regarding the function of the knee. IDF 103-04; 332; 360. As one supplier put it, an MPK "relies on a microprocessor or computer to monitor the activity of a patient and steer the function of the knee to ensure appropriate reaction and response of that knee to whatever situation the patient might find themselves in." IDF 103 (quoting De Roy, Tr. 3542). By contrast, mechanical knees use other means such as friction-brakes, pneumatic cylinders, or hydraulic cylinders to regulate the swing and stance phases of a user's gait. ID 23; IDF 96-101. Unlike a microprocessor that "thinks instantaneously," a mechanical knee "has to go through a [gait] cycle for the knee to figure out what to do," and cannot respond "until it goes through that cycle." IDF 367 (quoting PX05119 (Kahle Dep.) at 33-34).

Copious evidence links the unique characteristics of MPKs to distinct functional advantages for amputees. Peer-reviewed research articles have repeatedly found increased safety and performance of MPKs over mechanical knees. IDF 369. Documented benefits of MPKs over mechanical knees include improved gait, reduction in falls, improved ability to walk on uneven ground as well as to climb or descend stairs, lower energy consumption from walking, increased patient activity, and greater patient satisfaction. IDF 374-80; 385-93. Surgeons and clinic customers see similar benefits. They believe that MPKs provide better safety and reduced likelihood of falls, allow more variation in walking speed, and improve walking efficiency. IDF 362-67. A better gait, in turn, causes less wear and tear on the body and can reduce risk for low back pain and osteoarthritis. IDF 362, 365.

Sellers of MPKs, including Respondent, recognize and tout the benefits that MPKs offer over mechanical knees. ID at 23-25. As Respondent's website explains, microprocessors provide "a more sophisticated method of control to a prosthetic knee. These more complex knee joints are designed to help you walk with a much more stable and efficient gait that more closely resembles a natural walking pattern." PX08013. The ALJ's decision catalogues the voluminous evidence showing sellers' recognition of the distinct benefits that MPKs offer to amputees. IDF 331-61. Rather than repeat these findings, which we adopt, we summarize several highlights:

- A presentation sent by Respondent's executive medical director to a certified prosthetist highlighted several benefits of MPKs, specifically Otto Bock's C-Leg 4 and Compact, over mechanical knees, and represented that these benefits were supported by clinical evidence. The benefits included: "improved safety – less stumbles and falls (up to 80%!), improved balance and confidence"; "improved and faster slope negotiation"; "improved and faster negotiation of uneven terrain and obstacles"; "improved stair descent"; "reduced cognitive demand to walk and improved multi-tasking"; and "potential to increase overall mobility / K-Level." IDF 339.

- The head of Respondent's business unit for prosthetic lower-limb mechatronic systems, Andreas Eichler, testified that the primary benefits of MPKs are "safety and comfort." IDF 334. Eichler elaborated that safety meant "[t]hat patients can rely on their knee joints that it will be stiff when it's supposed to be stiff and it will be pliable when it's supposed to be pliable," and comfort meant "[l]ess pain.

So less pain and subsequent damages as a result of everyday use and walking on the prosthetic." *Id.* Eichler also agreed that MPKs are more responsive than mechanical knees, which, as he explained, "are not responsive at all." *Id.*

- A 2015 Freedom presentation titled "Microprocessor Controlled Knees" includes slides titled, "What makes MPC Knees different?" (PX00814 at 003, 007-08). The listed differences are: "Increases stability and confidence"; "Reduces cognitive burden because of stumble recovery feature"; "Studies have shown that MPC knees can elevate some user's functional abilities (K-level) compared to conventional knees"; "Studies also suggest that [MPKs] actually are responsible for variable cadence achievement"; "Stability can reduce fear of falling"; "Studies show 88.1% increase in confidence"; "Studies also show 88.4% improvement of gait agility compared to non-MPK's"; "Reported that MPC knees can decrease frequency of falls by as much as 64%"; and "Amputees no longer have to watch every step." IDF 352.

- Freedom's CEO at the time of the Acquisition, David Smith, asserted that Freedom's Plié 3 and mechanical knees are "completely different products [at] completely different price points." IDF 344. He distinguished a mechanical knee from an MPK as follows: "One is rudimentary and one is sophisticated. One doesn't allow mobility and ambulation and one does. One restricts activity or limits your activity, or you want it limited for safety reasons because the patient is incapable. The other one allows it and facilitates it." *Id.*

Based on the entire record, we, like the ALJ, find that the peculiar characteristics of MPKs support their delineation as a distinct relevant market.

b. Industry recognition of the market as a separate economic entity

As the ALJ found, Otto Bock, Freedom, and mechanical knee manufacturers all view the market for MPKs as a distinct market from mechanical knees. ID at 28-30.

In Otto Bock's ordinary course of business documents, the company analyzes MPKs as comprising their own relevant market. In numerous documents, Otto Bock estimates its market share only in relation to other MPKs. IDF 411-16. Otto Bock tracks sales of its MPKs separately from sales of its mechanical knees. IDF 417. In its analysis of competition, Otto Bock compares the C-Leg 4 only to the Plié 3, Endolite's Orion 2, and Össur's Rheo 3 MPKs. IDF 418-21. According to Otto Bock's vice president of government, medical affairs, and future development, these are the "primary competitors" for the C-Leg 4 in the United States. IDF 419.

Freedom and other MPK manufacturers categorize their products similarly. In its ordinary course of business documents, Freedom examines the market share for Plié only in relation to shares of other MPKs (C-Leg, Rheo, and Orion), and views the Plié as competing in that market. IDF 422-26. Other manufacturers' ordinary course documents do the same. IDF 428, 430. According to the testimony of Endolite's executive chairman, Endolite "only look[s]

at other MPKs" and not mechanical knees when analyzing competition for its MPK, the Orion 3. IDF 430. Using only MPKs, rather than MPKs and mechanical knees, as a reference point is appropriate because "the price point is completely different" and "customers don't tend to think of [the two types of knees] in the same way." *Id.* Similarly, College Park Industries ("College Park"), a mechanical knee manufacturer, did not identify any MPK as a competitive target for its pneumatic mechanical knee in development because it does not "believe they compete in the same market." IDF 435 (quoting PX05107 (Carver Dep.) at 106).

We find that this evidence supports an MPK-only market. *See Whole Foods Mkt.*, 548 F.3d at 1045 (Tatel, J., concurring) (cataloging evidence that competitors viewed themselves as competing in a market for premium natural and organic supermarkets; court found a likelihood of success defining a market accordingly); *H&R Block*, 833 F. Supp. 2d at 52-53 (finding relevant market of digital do-it-yourself tax preparation products because, *inter alia*, defendants' ordinary course documents showed that they viewed themselves as competing primarily against such products).

c. Distinct prices and sensitivity to price changes

Evidence regarding the price and price-setting of prosthetic knees also supports an MPK-only market. An MPK costs on average at least four to eleven times more than a mechanical knee. *See* IDF 395, 397-98 (providing examples). In 2017, the estimated average sale price for an MPK was [redacted] versus [redacted] for a mechanical knee. IDF 398. Reflecting this difference, payers reimburse prosthetic clinics at much higher rates for MPKs than for mechanical knees. IDF 401-04.

Further, in setting prices for the C-Leg 4, Otto Bock looked at prices and reimbursement rates of only three other products, all of which are MPKs—Freedom's Plié 3, Össur's Rheo 3, and Endolite's Orion. IDF 405. When setting its price for the Plié 3, Freedom looks at the prices of other MPKs and does not look to pricing of mechanical knees. IDF 406. Similarly, Össur and Endolite do not consider the prices of mechanical knees when setting the prices of their MPKs. IDF 407-08. Össur does not consider the prices of MPKs when setting the prices for its K-3 mechanical knees because Össur believes MPKs "play in a different segment." IDF 431. Furthermore, various clinics reported that prices of MPKs do not respond to price changes of mechanical knees and that clinics are unable to use prices of mechanical knees when negotiating with manufacturers for the price of MPKs. IDF 409-10.

As the ALJ correctly held, evidence that a seller develops "pricing and business strategy with [a particular] market and those competitors in mind" is "strong evidence" of the relevant product market. ID at 31, quoting *H&R Block*, 833 F. Supp. 2d at 53; *see also Swedish Match*, 131 F. Supp. 2d at 165 (holding that the product market for loose leaf tobacco did not include moist snuff where, among other factors, "loose leaf pricing is determined upon the basis of competition with other loose leaf products, not moist snuff"); *Aetna*, 240 F. Supp. 3d at 24-25 (noting that evidence that Aetna does not assess the price of Medicare Advantage plans when it sets the price of MedSupp plans indicates that the two types of plans are not in the same relevant product market); *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132-33 (D.D.C. 1986) (evidence that concentrate companies "make pricing and marketing decisions based primarily on

comparisons with rival carbonated soft drink products, with little if any concern about possible competition from other beverages" shows that carbonated soft drinks are a relevant product market), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987).

For the above reasons, the "distinct prices" and "sensitivity to price changes" indicia support a distinct relevant product market consisting only of MPKs.

d. Distinct customers

Although the ALJ did not find this factor dispositive,[15] the record shows that the population of MPK users is largely distinct from that of non-MPK users. Only select customers are eligible for insurance reimbursement for an MPK, and patients who do not receive coverage very rarely purchase an MPK out-of-pocket. IDF 215. In order for the patient to obtain reimbursement, the prosthetist must demonstrate "medical necessity"—*i.e.*, that the patient has unmet needs that can be fulfilled by an MPK but not by a less expensive alternative such as a mechanical knee. IDF 187, 189. Often, this determination requires documentation not only that the amputee is a K-3 or K-4 level ambulator but also that the MPK would provide a clinically significant improvement to the amputee's life. *See* IDF 205-206, 213-14. Although some MPK-eligible patients may seek a mechanical knee,[16] as a general matter MPKs and mechanical knees "don't really compete for the same population." IDF 427 (quoting PX05124 (De Roy Dep.) at 184-85). As another clinician testified, he would not fit a patient with a mechanical knee if he determined that an MPK would best serve the patient and the insurance provider would cover it, "[b]ecause they will fall and they will hurt themselves, and I don't like it when my patients fall and hurt themselves." *See* IDF 368 (collecting testimony of various prosthetists that, generally speaking, MPK-eligible patients will receive an MPK if insurance covers the cost); IDF 427 (quoting testimony of Össur's executive vice president of research and development that the patient population for MPKs includes "people with access to certain funds" and, if such patients "have access to a microprocessor knee, they'll buy a microprocessor knee"). Typically, as long as clinics can fit an MPK on a patient who has an MPK prescription and insurance coverage without losing money, they will. ID at 21; IDF 447-53.

Because MPKs are generally selected for a distinct population of users, we find that this *Brown Shoe* factor supports an MPK-only relevant market.

3. Respondent's Arguments Regarding Market Definition

Respondent argues that an MPK product market is "impermissibly vague" and therefore insupportable. RAB at 37-38. On appeal, Respondent does not advocate for an alternative market that it would have us adopt, but claims that the market the ALJ defined is "unusable." RAB at 38. According to Respondent, prosthetic knees are highly differentiated, and there is

[15] *See* ID at 22 n.13.

[16] For example, some patients who engage in sports such as cycling, weightlifting, or CrossFit may prefer a mechanical knee because it is cheaper, more durable, and easier to replace if it breaks. IDF 220. Similarly, those who fish may prefer mechanical knees because of superior water resistance. IDF 222-23.

"significant technology overlap between knees that contain microprocessors, and those that do not." *Id.* at 37. In particular, Respondent states that the evidence does not support the exclusion from the market of what it calls "sophisticated non-MPKs," a term that Respondent does not define. *Id.* Conversely, Respondent argues that among knees that contain microprocessors, there is a wide range of price points, features, and levels of microprocessor control. *Id.* Respondent objects to a market comprising all of these products.[17] *See* RPTB at 2-4 (arguing that an MPK market is both "too narrow" and "too broad").

Respondent's argument, even if accepted, would not change the outcome of this case. In the administrative hearing, Respondent's expert opined that the relevant product market consists of prosthetic knees for K-3 and K-4 mobility levels, including some non-MPKs and excluding certain high-end and integrated MPKs. ID at 38; IDF 486. Even in such a market, and using the market share calculations of Respondent's own expert witness, the post-acquisition HHI of 4,359 would be well above 2,500 points, which indicates a highly concentrated market. ID at 38; IDF 486; *Horizontal Merger Guidelines* § 5.3. And the increase in HHI from Otto Bock's acquisition of Freedom would be at least 599 points, much greater than the 200-point increase that causes a presumption of anticompetitive effects under the *Horizontal Merger Guidelines* when a merger results in a highly concentrated market. ID at 38; IDF 486; *Horizontal Merger Guidelines* § 5.3.[18]

In any event, we find Respondent's critique of the ALJ's market definition unpersuasive. To begin with, the market definition is not vague. It is clearly defined in terms of a specific feature, the use of a microprocessor. Otto Bock had no difficulty understanding and referring to this group of products in its ordinary business practice. *See, e.g.*, PX08013 (webpage of Respondent) ("In general, there are two kinds of prosthetic knees: non-microprocessor (or 'mechanical') and microprocessor"); Swiggum, Tr. 3329-30 (Otto Bock North America estimated its market shares for microprocessor knees in the U.S.).

As to Respondent's other objections, the fact that products may be differentiated does not prevent their being in the same market if they closely constrain each other's prices. *See generally* 2B Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* ¶ 563a at 407-08 (4th ed. 2014). Conversely, the existence of technological or functional overlap between MPKs and some non-MPKs, while relevant, does not mandate their inclusion in the same market. The key question is whether, when faced with a reasonable price variation, more than a "limited number" of customers would switch from MPKs to non-MPKs. *See Times-Picayune Pub'g Co. v. United States*, 345 U.S. 594, 612 n.31 (1953). If a hypothetical monopolist of MPKs could profitably raise price by a small amount, even with the loss of some customers, then MPKs constitute the relevant market. *See Sysco*, 113 F. Supp. 3d at 33. Respondent ignores the overwhelming body of evidence, described above and detailed in the ALJ's opinion, that a hypothetical seller of all MPKs would not lose substantial sales to non-MPKs in the event of a

[17] Respondent also argues that the ALJ relied on a faulty opinion of Complaint Counsel's economic expert to support the relevant market. RAB at 38-39. Because we hold that the record evidence amply proves an MPK-only market even without the expert's opinion, we do not reach this argument.

[18] Similarly, the transaction also generates a presumption of harm using a narrower market that excludes lower-end and higher-end MPKs. ID at 36-37; *see* Section VII.B.1 below.

small but significant price increase. *See United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 248 (8th Cir. 1988) (functionally interchangeable sweeteners were separate product markets because "a small change in the price of [one] would have little to no effect on the demand for [the other]"). The abundant evidence that sellers view the relevant market as composed solely of MPKs, and that they price their MPKs in relation to each other and not to products outside the market, reinforces this conclusion. IDF 405-19; 422-31; 435.

Finally, we note that the extensive evidence of head-to-head competition adduced at trial demonstrates rivalry between and among MPKs and not other products. *See* Section VII.B.2 below. The existence of such head-to-head competition, and the resulting potential for competitive harm, can inform market definition. *Horizontal Merger Guidelines* § 2.1.4; *see also Staples, Inc.*, 190 F. Supp. 3d at 122 (head-to-head competition in the "B-to-B space" found to support relevant market defined as such). We turn to this competition, and these harms, after addressing the rebuttable presumption of competitive harm generated by the high market concentration in this case.

B. ANTICOMPETITIVE EFFECTS

1. Concentration in the Relevant Market

Under the applicable legal framework discussed in Section VI above, "[s]ufficiently large HHI figures establish [a] prima facie case that a merger is anti-competitive." *Heinz*, 246 F.3d at 716; *see also Polypore Int'l, Inc.*, 2010 WL 9933413, at *22 (F.T.C. Dec. 13, 2010) (applying presumption of competitive harm in markets for various types of battery separators). This presumption of harm is, of course, rebuttable. *See Gen. Dynamics*, 415 U.S. at 497-98.

Under the *Horizontal Merger Guidelines*, mergers that cause an increase in the HHI of more than 200 points and result in a highly concentrated market—*i.e.*, with an HHI over 2,500—are presumptively anticompetitive. § 5.3; *see also ProMedica*, 749 F.3d at 568-70 (upholding Commission's presumption of competitive harm from HHI increases of over 1,000 points to a total exceeding 4,000 points).

Here, the results of the HHI analysis are substantially above the levels that would trigger a presumption. The Acquisition combines the first- and third-largest sellers of MPKs in a market that is already highly concentrated. Complaint Counsel's economic expert calculated, and we adopt as our findings, concentration levels and changes in HHI as follows:

- In a market consisting of all MPKs, using United States revenue in 2017, the Acquisition combined Otto Bock's [redacted] market share with Freedom's [redacted] share to yield a merged entity holding more than [redacted] of the market. It would increase HHI by 1,522 points to 6,767. ID 36; IDF 479.

- Using the same relevant market but calculating by unit share rather than revenues, the Acquisition combined Otto Bock's [redacted] share with Freedom's [redacted] share, yielding a merged entity with a share exceeding [redacted]. HHI increased by

1,799 points to 6,813.[19] ID 36-37; IDF 480.

Respondent argues that we should give the market share presumption no weight in a case that, like this one, relies on showing unilateral effects in a differentiated products market. RAB at 22 n.5.[20] Respondent would allow an exception if Complaint Counsel first established a correlation between market share and market power, which Respondent acknowledges the court found in *ProMedica.* 749 F.3d at 570; Oral Arg. Tr. 29. Had the court not found such evidence, Respondent argues, the presumption would not apply at all. RRB at 2. We take Respondent's argument to mean that proof of high concentration by itself would tell us little about a central element of unilateral effects cases: the closeness of competition between the merging parties' products, which we discuss *infra* at Section VII.B.2.

Courts have long recognized that market share statistics are important, but they "[a]re not conclusive indicators of anticompetitive effects . . . ." *Gen. Dynamics*, 415 U.S. at 498 (citation omitted). As the *Horizontal Merger Guidelines* indicate, the antitrust enforcement agencies do rely "much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products." § 6.1; *ProMedica*, 749 F.3d at 569.[21] But "[e]ven in unilateral effects cases, at some point the Commission is entitled to take seriously the alarm sounded by a merger's HHI data." *ProMedica, id.* at 570. The Sixth Circuit in *ProMedica* found that, in a highly concentrated market like this one,[22] it was very likely that a significant fraction of the customers of one of the merging firms would turn to the other firm as a close substitute. *Id.* at 570. The court ultimately upheld the Commission's use of a presumption. *ProMedica*, 749 F.3d at 570. Likewise, here, the mere fact that Complaint Counsel allege unilateral effects in a differentiated product market does not nullify the presumption. In this case our finding of unilateral effects goes well beyond any market share-based presumption, so there is no need for the Commission to articulate the bounds of the *Philadelphia National Bank* presumption.

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[19] Complaint Counsel's expert also considered an alternative market that excluded lower-end and higher-end MPKs. IDF 478, 482-85. In that market, the Acquisition increased the HHI by 1,949 points to 6,240 on a revenue basis, and by 2,062 points to 6,542 on a unit basis. ID []; IDF 483-84. As does the expert's preferred all-MPK market, this market triggers a presumption of competitive harm under the *Horizontal Merger Guidelines.* IDF 485.

[20] Respondent also argues that a proposed divestiture of MPK assets must be incorporated into and undermines Complaint Counsel's *prima facie* case. As discussed below in Section VIII, because the transaction is already consummated, among other reasons, we find that in this case the divestiture would not affect liability and is properly assessed as a proposed remedy.

[21] The 2010 *Horizontal Merger Guidelines* reject a uniform, single factor analysis of competitive effects in favor of a holistic, fact-specific approach. *See* § 1. Some economic learning suggests that enforcers should avoid an overreliance on market shares or concentration in cases involving differentiated products and unilateral anticompetitive effects. *See, e.g.*, Gregory J. Werden & Luke M. Froeb, *Simulation as an Alternative to Structural Merger Policy in Differentiated Products Industries*, *in* THE ECONOMICS OF THE ANTITRUST PROCESS 65-88 (Malcolm B. Coate & Andrew N. Kleit eds., 1996); Christopher Garmon, The Accuracy of Hospital Merger Screening Methods, 48 RAND J. ECON. 1068 (2017).

[22] On smaller HHIs than presented here, the Sixth Circuit noted that the merger "blew through [the Guidelines'] barriers in spectacular fashion." *ProMedica*, 749 F.3d at 568 (comparing an HHI increase of 1,078 points, to 4,391, to the presumptions set out in the *Horizontal Merger Guidelines*).

However, as previously noted, the presumption of illegality is rebuttable. *General Dynamics*, 415 U.S. at 498 (discussing *Brown Shoe*); *Heinz*, 246 F.3d at 717 n.12. It does not conclusively establish a violation but merely shifts the burden of production. If Respondent believes that the presumption should not apply in this case, it may demonstrate that competitive forces in the market counteract the inference of competitive harm raised by market structure, or that this inference is otherwise flawed. Here, on the contrary, other evidence strongly buttresses the conclusion of likely competitive harm drawn from the evidence of undue concentration. *See infra* Section VII.B.2.

2. Additional Evidence of Loss of Competition

Even apart from the presumption based on HHIs, the record evidence of competitive harm establishes a compelling case for liability. This includes evidence that a significant fraction of clinical customers view the C-Leg and Plié as their first and second choice; evidence that the companies vigorously competed against each other prior to the Acquisition; evidence of Otto Bock's intent and plans with respect to the Acquisition; and evidence of changed incentives and reduced competition following the Acquisition.

a. Next-Best Choice Evidence

"Unilateral price effects are greater, the more the buyers of products sold by one merging firm consider products sold by the other merging firm to be their next choice." *ProMedica*, 749 F.3d at 569 (quoting *Horizontal Merger Guidelines* § 6.1). When purchasers of one merging party's products view the other merging party's products as their best alternative, the merged firm has an incentive to raise prices because lost sales will be diverted to its other products. *See Horizontal Merger Guidelines* § 6.1. "For a merger to raise concerns about unilateral effects, however, not every consumer in the relevant market must regard the products of the merging firms as her top two choices." *ProMedica*, 749 F.3d at 569. It is sufficient that "a significant fraction of the customers purchasing that product view products formerly sold by the other merging firm as their next-best choice," and the "significant fraction . . . need not approach a majority." *Id.* at 569 (quoting *Horizontal Merger Guidelines* § 6.1 at 20-21). Here, the record contains abundant evidence that a significant fraction of Otto Bock's and Freedom's MPK customers view the other party's MPKs as their next-best choice, such that the merger will likely produce adverse unilateral effects.

Just a few weeks before the merger, Otto Bock estimated that [redacted] of Plié customers would switch to the C-Leg if the Plié were discontinued. PX01473-023 [redacted]; PX01003-022 (same); Swiggum, Tr. 3372-76. *See also* Scott Morton, Tr. 4240-42 [redacted]; Swiggum, Tr. 3376-80. Even using the conservative "downside" estimate, where only [redacted] of Plié customers would be diverted to the C-Leg, the merged firm would have a very substantial incentive to raise prices. *See* Scott Morton, Tr. 3937-38. Respondent argues that we should ignore its own diversion estimate because it was taken from a draft document and based on

preliminary information. RAB 38-39; RRB 6-7. But Otto Bock's most senior executives used this "draft" document to evaluate the Acquisition, and Respondent does not provide any other diversion estimate that it purports to be more accurate. *See* Swiggum, Tr. 3361, 3380; Oral Arg. Tr. 32-33. Moreover, Otto Bock's former CEO corroborated the [redacted] diversion estimate. He testified that [redacted]. Swiggum, Tr. 3421-23. Further, nearly two months after the Acquisition, Otto Bock's top executives recommended increasing the price of the Plié based on the expectation of diverting sales to Otto Bock's MPKs. PX01302-081 [redacted]; Swiggum, Tr. 3420-22. Otto Bock itself believed that enough Plié customers would turn to the C-Leg such that a price increase would be profitable.

The record also contains evidence of substantial customer switching between the C-Leg and the Plié, as well as customer testimony that their clinicians prefer the functionality of the Plié and the C-Leg over other MPKs. This provides further proof that the Plié and C-Leg are the top two choices for a significant share of customers. For example, in 2017, clinicians from Hanger, the largest network of orthotic and prosthetic clinics in the United States, reported quality issues with the newly-released C-Leg 4, and some clinicians shifted their purchases from the C-Leg to other MPKs. Hanger's CEO testified that those clinicians who shifted away from the C-Leg turned primarily to the Plié. Asar, Tr. 1401, 1450. *See also generally* PX01091-012 [redacted] Similarly, the Center for Orthotics & Prosthetic Care ("COPC"), another customer, shifted volume from Otto Bock to Freedom in 2016 and 2017 due to Freedom's discounting. Senn, Tr. 221-22; IDF 515. COPC is currently not willing to move volume to Össur and Endolite, because its practitioners prefer the functionality of Otto Bock's and Freedom's knees. Senn, Tr. 223-25; IDF 650, 661. *See also* Ford, Tr. 937 ("C-Legs and the Plié knees are our clinicians' preference"); Ell, Tr. 1731 (Otto Bock and Freedom MPKs are the only ones Mid-Missouri O&P purchases because "[t]hey have clearly defined themselves as providing and servicing a better product for my patients").

Respondent argues that an assessment of whether a significant fraction of customers of one firm would turn to the other in response to a price increase cannot be based on the testimony of a few witnesses selected by Complaint Counsel to testify at trial. RAB at 27. Hanger, however, controls 25% to 30% of U.S. prosthetic clinics and is both Otto Bock's and Freedom's largest customer, accounting for over 50% of Freedom sales [redacted] IDF 713, 717; Swiggum, Tr. 3440. And Respondent itself describes COPC as [redacted] RRB at 12. Together, Hanger and COPC could constitute a "significant fraction" of customers in and of themselves. Complaint Counsel thus provided evidence of the experience of clinicians serving a substantial share of consumers.

Otto Bock's and Freedom's sales figures also provide evidence of customers shifting between the two companies in response to innovation and price changes. The launch of the Plié 3 in 2014 led to a decrease in Otto Bock's MPK sales. IDF 573. The launch of the C-Leg 4 in 2015 caused a significant decrease in sales of the Plié 3. *Id.* 592-600; PX03008-005 ("the introduction of the new C-Leg 4 resulted in a [redacted] decline in Freedom's knee unit sales from September 2015 to April 2016 compared to the same period for the prior year"). And, in turn, Freedom's subsequent discounting and bundling impacted Otto Bock's sales. IDF 637. This

evidence, too, suggests that the C-Leg and Plié are the first- and second-best choices for a significant number of customers.

Respondent argues that the C-Leg and Plié are not close substitutes and that other MPKs are closer substitutes for both products. RAB at 22-24. Respondent claims that Össur's Rheo is the closest substitute to Otto Bock's C-Leg, because it is most similar to the C-Leg 4 in terms of functionality, quality, and price, and it asserts that Freedom's closest competitors are Endolite, Proteor, and DAW. *See* RAB at 10-11, 23-24, 26-27; RRB at 7-9. But, a merger can cause unilateral effects even if the merging products are not each other's closest competitors. *See H&R Block*, 833 F. Supp. 2d at 83 (holding that the fact that another product "may be the closest competitor" to a merging product "does not necessarily prevent a finding" that unilateral effects are likely (citing Areeda & Hovenkamp, ¶ 914, 77-80 (explaining that the merging parties need not be the closest rivals for there to be unilateral anticompetitive effects) and Commentary on the Horizontal Merger Guidelines (2006) at 28 ("A merger may produce significant unilateral effects even though a non-merging product is the 'closest' substitute for every merging product . . .")); *see also ProMedica*, 749 F.3d at 569 (explaining that "a significant fraction" of a merging firm's customers must view the products of the other firm as the next-best choice, but that the fraction "need not approach a majority"). Moreover, Respondent's arguments regarding the substitutability of competing products, based largely on purported functional similarities and differences between the MPKs, are inconsistent with the much more direct next-best-choice evidence discussed above. That evidence shows that a significant portion of customers shift their purchases between the C-Leg and Plié and that the C-Leg would likely recapture at least 50% of Plié customers if the Plié were discontinued. In other words, Otto Bock's own diversion estimate undercuts its arguments about substitutability based on the functional differences between the products, because its diversion estimate accounts for consumer preferences *given* any such functional differences.

Moreover, Freedom's forthcoming MPK, the Quattro, which Freedom nicknamed the "C-Leg killer,"[23] is expected to be a closer competitor to the C-Leg than any other MPK, including the Rheo. *See infra* at VII.B.2.c. *See also* PX01471-003 (summary of in-person Quattro evaluation; Quattro "will compete better with the C-Leg 4" than the Rheo "because the stance phase functions will be much better than Rheo can achieve."); [redacted] Otto Bock's own documents repeatedly discuss the potential threat of the Quattro to its MPK business, [redacted] PX01471-003 ("Anyone who takes this product will cut in to C-Leg 4 market share. Especially in the U.S."). The closeness of competition between the C-Leg and the Quattro strongly supports a finding of likely competitive harm.

[23] *See, e.g.*, [redacted]

b. Evidence of Head-to-Head Competition Between Plié and C-Leg

Evidence that Otto Bock and Freedom vigorously competed before the merger further supports a finding of likely anticompetitive effects. "[M]ergers that eliminate head-to-head competition between close competitors often result in a lessening of competition." *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 216 (2017) (quotation omitted); *Aetna*, 240 F. Supp. 3d at 43 (same); *Staples, Inc.*, 190 F. Supp. 3d at 131 (same). "A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger." *Horizontal Merger Guidelines* § 6.2.

Customers testified that they have been able to negotiate lower prices based on competition between Otto Bock and Freedom. For example, the owner and chief prosthetist at Mid-Missouri Orthotics and Prosthetics ("Mid-Missouri O&P") testified that, in competing for its business, Otto Bock and Freedom have both offered discounts, and Otto Bock has matched Freedom's MPK prices. IDF 540; Ell, Tr. 1750-51. The president and managing partner of Prosthetic and Orthotic Associates testified that the company has used the option of purchasing the Plié from Freedom in negotiations with Otto Bock "to get better pricing on the C-Leg 4." IDF 547-548; Ford, Tr. 1004-05. The president and CEO of Jonesboro Prosthetic & Orthotic Laboratory ("Jonesboro O&P") testified that Freedom and Otto Bock compete on product features, customer service, as well as price, and that as a result of this competition, Jonesboro O&P has been able to obtain "relatively competitive pricing structures from both manufacturers." IDF 552; PX05108 (Yates Dep.) 72-73. And, after COPC increased its Plié purchases due in part to Freedom's lower pricing, Otto Bock responded by offering greater discounts on the C-Leg to get COPC to shift volume back to Otto Bock. IDF 513-15, 521; Senn, Tr. 221-22; *see also* PX05128 (Senn Dep.) at 24-25 (testifying that after COPC increased its purchases of Plié 3 in 2015, Otto Bock responded with "increasingly more aggressive pricing on . . . their C-Leg 3 and C-Leg 4," meaning greater discounts, in order to encourage volume). *See also* PX05149 (Brandt Dep.) at 71-72 (testifying that the price paid by Ability Prosthetics & Orthotics for the C-Leg has gone down significantly in the past six or seven years, in part due to competition from the Plié); PX05140 (Weott Dep.) at 40 (testifying that Orthotic & Prosthetic Centers saw the price for the C-Leg 3 decrease from [redacted] after the launch of the Plié 3).

As detailed in the ALJ's opinion, there is a substantial history of Otto Bock and Freedom responding competitively to each other not just on price, but on other metrics as well. For example, the competitors have tried to outmatch each other in innovation. *See* ID at 43-47. In the words of Hanger's CEO, "every time a new generation [MPK] from one manufacturer comes out, the other manufacturer is working on something to leapfrog it." Asar, Tr. 1393; IDF 505. In September 2014, Freedom launched its Plié 3. IDF 573. Freedom priced the Plié below Otto Bock's C-Leg 3 MPK and heavily emphasized its water resistance, which the C-Leg lacked. IDF 564, 570; PX05130 (Governor Dep.) at 131-32. Otto Bock responded with promotions and discounts on the C-Leg 3. IDF 576; PX01331 at 004-005; PX01519. It also provided its sales and marketing team with "arguments to convince customers" to buy C-Legs instead of Pliés.

IDF 579; PX05150 (Kannenberg Dep.) at 128-29. In July 2015, Otto Bock released the C-Leg 4, which among other things included a water resistance feature. IDF 581, 586. The launch materials prepared for the sales force contained a chart comparing the C-Leg 4 to other MPKs, including the Plié 3, which was listed first. IDF 582; PX01518-003. The C-Leg 4 launch plan included "Sales and Marketing Goals," with the first item listed being to "[r]egain market share from competitors especially from Plié in the US[.]" IDF 590; PX01057-023. After the release of the C-Leg 4, Freedom's marketing team brainstormed various ideas for "how to best combat the launch of the C-Leg 4" and created presentations and marketing materials comparing the Plié 3 with the C-Leg 4 to help the sales team compete. IDF 601-05; PX01247-001. Freedom also published on its website a "Plié 3 Microprocessor Knee Fact Sheet" that compared the Plié 3 with the C-Leg 4, identifying Plié functions comparable to those of the C-Leg and highlighting features that the C-Leg lacked. IDF 607-09; PX08008. In response to the competitive pressure from the C-Leg 4, Freedom lowered the price of the Plié 3 and offered a promotion called the "Ideal Combo," under which it provided a free or discounted foot with the purchase of a Plié. IDF 611-17, 633-38. In turn, in September 2015, Otto Bock provided its sales team with advice for countering Freedom's Ideal Combo promotion. IDF 632; PX01272 at 001-02. Although Freedom's discounting helped it stay competitive and regain some lost sales, it "kn[e]w [Otto Bock] will be responding in kind." IDF 638; PX01184-001.[24]

c. Evidence of Likely Competition Between C-Leg and Quattro

Competition between Otto Bock and Freedom was set to intensify even further with Freedom's impending introduction of the Quattro, dubbed the "C-Leg killer"[25] because of its [redacted]. The elimination of the Quattro as a potential competitor to the C-Leg is a further likely harm to competition. [redacted]

[24] Respondent argues that it started developing the C-Leg 4 and designing its features in 2012, more than two years before Plié 3's 2014 launch. RRB at 6. Even so, there is ample evidence that competition from Freedom motivated Otto Bock to innovate and discount and even more evidence that Freedom directly targeted Otto Bock in developing, pricing, and promoting its MPKs. *See, e.g.*, PX01570-011 (notes of April 2015 internal Otto Bock conference call; "C-Leg 4 is going to blow the Plié out of the water"); PX01057-023 (C-Leg 4 launch plan listing sales and marketing goal to "[r]egain market share from competitors especially from Plié in the US"); PX01004-056 [redacted]

[25] *See, e.g.*, [redacted]

[26] [redacted]

[redacted]

Freedom executives viewed the Quattro as a "crown jewel" that would increase its MPK sales and market share.[29] Otto Bock executives, on the other hand, viewed the Quattro as a serious competitive threat. *See, e.g.*, PX01471-003 (summary of Quattro in-person evaluation; "Anyone who takes this product will cut in to C-Leg 4 market share. Especially in the U.S."); [redacted]

Respondent downplays the Quattro's competitive significance. It asserts that the Quattro's benefits and likely impact on the MPK market are exaggerated. Respondent claims that Freedom has encountered technical difficulties in developing the Quattro [redacted] Respondent also emphasizes that Otto Bock placed no value on the Quattro in preparing its bid for Freedom. Oral Arg. Tr. 34-36.

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[27] [redacted]

[28] [redacted]

[29] PX02010-001; [redacted]

[30] Otto Bock also acknowledged that it may need to improve the C-Leg in the face of competition from the Quattro. After an in-person evaluation of the Quattro, Otto Bock executives observed that some of the Quattro's features would surpass the C-Leg and noted that if Otto Bock did not control the Quattro, Otto Bock would have to modify the C-Leg to add functions from the Genium, Otto Bock's higher-end MPK. PX01471-003; [redacted]

However, [redacted]

As for Otto Bock's failure to attribute value to the Quattro in its acquisition bid, that apparently stemmed from an overlap in the merging companies' product lines and did not reflect the true value of the knee. *See* [redacted] Otto Bock viewed the Quattro as an important product not because of how much it would make from selling that MPK but because of how much it would lose if Freedom retained or Össur or someone else acquired it. *See infra* Section VII.B.2.d. Otto Bock recognized potential hurdles to the Quattro's development, but still viewed it as a competitive threat. [redacted][32]

In any case, we need not conclude that, without question, the Quattro would have cut into the C-Leg's sales or induced Otto Bock to improve the C-Leg. The requirements of Section 7 are satisfied when a "'reasonable likelihood' of a substantial lessening of competition in the relevant market is shown." *See United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 171 (1964) (quoting *Brown Shoe*, 370 U.S. at 323). "Congress used the words 'may be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties." *Brown Shoe*, 370 U.S. at 323. The fact that, at the time Otto Bock acquired Freedom, Freedom was preparing to introduce a new MPK that it expected to take significant share away from Otto

[31] [redacted]

[32] Moreover, Otto Bock submitted its bid before it had an opportunity to test the Quattro; it had seen only videos of the Quattro in use. *See* [redacted]; IDF 871 (final bid submitted September 5, 2017); PX01471-001 (September 19, 2017 email summarizing that day's Quattro assessment). After an in-person evaluation, Otto Bock executives found the Quattro prototype to be substantially better than what they expected based on the videos. [redacted]; PX01471-001 ("The Quattro is better than we viewed in the Roosevelt videos").

Bock and that Otto Bock itself described as a "serious threat" provides further proof of the likely anticompetitive effects of the Acquisition.

d. Evidence of Strategic Objectives

"Evidence that sheds light on the strategic objectives of the merging parties is also probative of likely competitive effects." *Polypore Int'l, Inc.*, 150 F.T.C. 586, 600, 2010 WL 9549988, at *9 (Nov. 5, 2010), *aff'd*, 686 F.3d 1208 (11th Cir. 2012) (citations omitted). Although evidence of anticompetitive intent is not necessary to a finding of liability under Section 7, it is an "admission against interest" that "cannot be disregarded." 4A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 964a, c at 18, 20 (4th ed. 2016). "Explicit or implicit evidence that the merging parties intend to raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction, or curtail research and development efforts after the merger, or explicit or implicit evidence that the ability to engage in such conduct motivated the merger, can be highly informative in evaluating the likely effects of a merger." *Horizontal Merger Guidelines* § 2.2.1.

Here, the evidence shows that a key reason for Otto Bock's purchase of Freedom was to keep Freedom's MPKs out of the hands of its competitors, and in particular to prevent rival Össur from acquiring the Quattro. Swiggum, Tr. 3348-50, 3362-63; PX01299-006 [redacted] In Otto Bock's executives' own words, the acquisition of Freedom was a [redacted] Otto Bock executives believed the Quattro would give Össur a better product to compete against the C-Leg 4 than their Rheo MPK. [redacted] PX01471-003. Acquiring Freedom and its Quattro afforded Otto Bock the opportunity to [redacted]

During the due diligence phase, Otto Bock executives recommended [redacted] After the Acquisition (and after in-person testing), Otto Bock reevaluated its plans for the Quattro. [redacted]

On November 7 and 8, 2017, approximately a month and a half after the merger, top executives from Otto Bock and Freedom met for an integration workshop to discuss the future of Freedom's MPK products. Carkhuff, Tr. 576, 578-84; PX01306-002 (meeting minutes). At that meeting, [redacted]

[redacted]

As for the Plié, both before and after the Acquisition, Otto Bock executives proposed raising its price or discontinuing it. [redacted] During the same period, Otto Bock executives also discussed [redacted] Some of them expressed concern that continuing to sell the Plié post-Acquisition would cannibalize sales of the C-Leg. PX05148 (Swiggum Dep.) at 106.

[redacted].

Respondent claims that Otto Bock did not actually increase the price of the Plié or reposition the Quattro. Oral Arg. Tr. 73-74. It asserts that when Otto Bock had more complete margin, cost, and pricing data from Freedom, [redacted]. RRB at 7 (citing RRF 1362-64 and RPF 1540-1545). The materials Respondent cites, however, do not support this assertion. They establish only that, [redacted]. *See* RRF 1362-64; RPF 1540-45; [redacted]; RRB at 15; *see also* IDF 683. A "dual brand strategy," however, is not inconsistent with increasing the Plié's price. Given that the Plié is significantly cheaper than the C-Leg, Otto Bock could raise the price of the Plié and still offer it as a "value-priced" option relative to the C-Leg. Indeed, a presentation from the integration workshop recommended [redacted] PX01302-081; *see also* PX01462-002 [redacted] Otto Bock could also raise the price of both products. Further, relegating one product to "value-priced" status could suppress innovation for that product, as the merged company must ensure that the lower-priced product does not cannibalize sales of the higher-priced product. *See* PX01302-010 [redacted]

[redacted]. As the court found in *H&R Block*, even with a "dual brand strategy," a merger could "have the effect of stifling price and feature competition." 833 F. Supp. 2d at 85.[33] *See* PX1302-081 [redacted]

Nor could Respondent's assertion that Otto Bock did not actually raise prices [redacted] after the Acquisition refute Complaint Counsel's showing of likely anticompetitive effects. For one thing, as noted and as we discuss below, anticompetitive harm can occur even without a price increase. Moreover, Otto Bock may be forbearing from raising prices or repositioning the Quattro while the Acquisition is under antitrust review. As the Supreme Court explained, "[i]f a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit [i]s threatened or pending." *Gen. Dynamics*, 415 U.S. at 504-05; *see Chicago Bridge*, 534 F.3d at 434-35; *Polypore*, 2010 WL 9549988, at *8 n.16. Indeed, even the "dual brand strategy" may be a temporary measure. *See* [redacted].

e. Evidence of Past Harm and Impact on Incentives

Even though Complaint Counsel need not prove past anticompetitive harm to show that harm is likely in the future, and the evidence discussed above clearly suffices to find harm to competition from the date of the Acquisition forward, Complaint Counsel have produced direct evidence that the Acquisition has in fact changed the parties' incentives and substantially lessened competition between the companies.

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[33] The case concerned a merger between H&R Block ("HRB") and TaxACT. HRB sought to maintain both brands under a "dual brand strategy," with the HRB-brand focusing on higher-priced products and the TaxACT brand focusing on the lower-priced products. The court determined that the merger could have anticompetitive effects even with a dual-brand strategy, reasoning:

> HRB may feel comfortable raising its "premium" prices because it knows that consumers looking for lower-cost . . . options would be most likely to migrate to TaxACT, the established "value leader" in the market. Since HRB will also control TaxACT post-merger, however, HRB can still ensure that TaxACT's value proposition does not get "too good" and undermine the paid HRB products with the highest profit margins. For example, HRB might restrict the features of TaxACT's free and low-cost products to ensure they do not cannibalize sales of HRB's higher priced offerings. . . . Post-merger, TaxACT will not have the same incentives it has today to develop robust free and low-cost offerings that can compete with the functionality offered by HRB and Intuit[, another competitor]. Thus, this merger could potentially have the effect of stifling price and feature competition compared with maintaining TaxACT as an independent firm.

H&R Block, Inc., 833 F. Supp. 2d at 85 (citation omitted).

Respondent's counsel conceded that incentives had changed after the Acquisition, Oral Arg. Tr. 16-17, and the record confirms this. Otto Bock's CEO at the time of the Acquisition testified that he agreed that [redacted] PX05148 (Swiggum Dep.) at 193. And, indeed, almost immediately after the Acquisition, Freedom and Otto Bock personnel complained about and sought to chill the aggressive competition between the companies that preceded the Acquisition. For example:

- On October 5, 2017, Matthew Swiggum, Otto Bock's CEO at the time, wrote to Jeremy Mathews, Freedom's VP of Domestic Sales, to address a complaint from Freedom's Florida Territory Manager about an Otto Bock sales representative's disparaging claims regarding the Plié 3. PX01425 at 001-002. In response to this complaint, Swiggum wrote, "I am jumping on the sales calls again this week and next week and will try to be even more clear. . . . We are absolutely one company today and the target is not each other! This will be my message." PX01425-001. Mathews responded with, "as long as we are aligned in our messaging, we will get through this." *Id*.

- [redacted]

- David Reissfelder, the Freedom CEO put in place by Otto Bock after the Acquisition, testified that Swiggum and Andreas Schultz (Otto Bock's CFO) also expressed concern to him about perceived aggressive promotions and discounting on the Plié 3 after the Acquisition. Reissfelder testified that Swiggum and Schultz told him that "they felt like it was a lot of discounting" and "they thought that it wasn't something they would allow the OttoBock sales team to do, and therefore they recommended or they wanted us to stop doing it." PX05138 (Reissfelder Dep.) at 89-90.

Despite this, Respondent argues that there has been no harm to competition because Otto Bock executed and complied with a Hold Separate Agreement, dated December 19, 2017. RAB at 3, 31; RRB at 11. As to the three months before the Hold Separate, Respondent suggests that competition was not injured because Freedom and Otto Bock operated separately under a dual-brand strategy and continued to view each other as competitors. RAB at 3; RRB at 11. Respondent also suggests that [redacted]. RRB at 15.

The Hold Separate Agreement does not foreclose anticompetitive harm and does not rebut the evidence of chilled competition. As a general matter, hold separates prevent the intermingling of assets during the pendency of litigation to ensure that a transaction can be unwound and the acquired assets effectively divested. *See FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1075 (D.C. Cir. 1981); 4A Areeda & Hovenkamp, *supra* ¶ 990c4 at 131-36. But hold separate agreements do not preclude harm to competition or counteract the changed incentives

that result from unified ownership. "[E]ven if all or part of an acquired company is held separate from its acquiring parent, competition between the enterprises will not retain the vigor it had prior to the merger." *Weyerhaeuser*, 665 F.2d at 1086. In a company with multiple divisions, each division "will act to pursue the common interests of the whole corporation." *United States v. AT&T, Inc.*, 916 F.3d 1029, 1043 (D.C. Cir. 2019) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770 (1984)).

There are other reasons why the Hold Separate Agreement did not and could not prevent anticompetitive harm in this case. For one thing, the Hold Separate was signed *three months* after the Acquisition; it could have no effect on competition, or lack thereof, during those three months. Moreover, in early October 2017, Otto Bock and Freedom executives discussed being "aligned in our messaging" and "jumping on the sales calls" to make clear that "the target is not each other." PX01425-001. By the time the Hold Separate Agreement was signed, that message already would have been communicated to the sales teams, with a likely stifling effect on future competition.

Nor did Otto Bock's adoption of a dual-brand strategy ensure against competitive harm. As discussed above in Section VII.B.2.d, a dual-brand strategy can stifle innovation for the lower-priced product. Complaint Counsel argue this effect occurred here. Before the Acquisition, Freedom had been planning to launch a new version of the Plié 3, called the Plié 4 or Plié 3 Fast Fit, [redacted] Although [redacted] at the time of the Acquisition, it was still in Freedom's project pipeline. *See* [redacted] After the Acquisition, however, Freedom, now owned by Otto Bock, placed the Plié upgrade "on hold." [redacted] Although there is no evidence that Otto Bock was involved in this decision,[34] the Acquisition may still have influenced the outcome. Given that Otto Bock viewed the Plié as redundant of its own MPKs, sought to [redacted] and considered discontinuing the knee altogether, Freedom as part of Otto Bock would have had little incentive to continue to invest time, money, and effort into upgrading the Plié.

Respondent argues that we must focus not on the parties' incentives or communications, but on actual changes in the marketplace. Oral Arg. Tr. 18-19. It claims that Otto Bock continued to innovate and that prices did not rise after the Acquisition. RPF 1009, 1012-13, 1075-76. It even points to two instances after the Acquisition where Freedom [redacted]

[34] Freedom's Maynard Carkhuff testified that failure of the Plié 4 to materialize was unrelated to the Acquisition. Carkhuff, Tr. 687-88.

[redacted] RRF 141 [redacted] Respondent also asserts that Freedom's sales team continued to compete for C-Leg customers after the Acquisition and identifies one instance where that happened. RPF 1053; RRF 1476. But these examples do not foreclose an anticompetitive effect. The fact that Freedom reduced the price of the Plié for two customers does not mean that all customers received lower prices, and the favored customers may have negotiated even better prices absent the Acquisition. Similarly, the fact that Freedom attempted to sell Pliés to a C-Leg customer does not mean that competition continued as vigorously as it had before the Acquisition.

In all, we find that Complaint Counsel have put forward compelling evidence of substantial past, as well as likely future, harm from the Acquisition.

C. RESPONDENT'S REBUTTAL TO SHOWING OF UNILATERAL EFFECTS

Respondent argues that it has rebutted Complaint Counsel's *prima facie* case by producing evidence that expansion by other MPK manufacturers,[35] bargaining leverage of "power buyers," and the prevalence of open prescriptions and caps on insurance reimbursements would constrain its ability to raise prices. We find these arguments unpersuasive. Assessed separately or together, they are insufficient to overcome Complaint Counsel's strong showing of likely anticompetitive effects.

1. Expansion

Respondent claims that other manufacturers—Össur, Endolite, and Proteor—whose MPKs are part of the same "base class" as the Plié and C-Leg are poised to expand production and fill the competitive void left by the merger. RAB at 9, 23. It argues that this expansion would be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract" any potential anticompetitive effects resulting from the transaction. RAB at 9 (quoting *H&R Block*, 833 F. Supp. 2d at 74). Respondent asserts that "if [Otto Bock] were to try and raise prices above competitive levels, it would lose enough sales to competing manufacturers

[35] Respondent does not make the related argument that new entry would prevent any anticompetitive effects from the Acquisition. To alleviate concerns about anticompetitive effects, entry must be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." *Horizontal Merger Guidelines* § 9. Entry clearly would not be timely. For entry to be considered "timely," it typically must occur within approximately two years. *See, e.g., H&R Block*, 833 F. Supp. 2d at 73 n.28 (citing Commentary on the Horizontal Merger Guidelines (2006) at 45-46). Developing a new MPK takes several years, even for the few firms that are experienced manufacturers. *See, e.g.*, PX05007 (Carkhuff, IHT) at 155-56, 297-300 (it took Freedom approximately three years to develop the original Plié and a further three years to develop the second generation Plié 2); PX05133 (Eichler Dep.) at 114 (alterations on an MPK can take "up to two years, sometimes even three or four"). The highly patented nature of the MPK industry presents a formidable barrier. *See* PX05107 (Carver Dep.) at 117 **(**characterizing the MPK market as a [redacted]). A prospective entrant needs to develop a sales force, qualify for reimbursements, and undergo multiple phases of product testing. PX05133 (Eichler Dep.) at 115-16**.** The entrant must also develop a strong brand and reputation. *See, e.g.*, PX05007 (Carkhuff, IHT) at 297-300 (it took Freedom about three years after the launch of the Plié in 2007 for the company "to really gain credibility" and compete effectively in the market); PX05117 (Choi Dep.) at 95 (potential new entrant estimating three years post-launch to establish meaningful brand recognition in the United States).

that the price increase would be unprofitable." RAB at 9 (quoting Argue, Tr. 6149).

To support this assertion, Respondent claims that Össur, Endolite, and Proteor could expand production within one year by a total of [redacted] MPKs. RAB at 9. This, Respondent claims, would counteract any impact from the acquisition of Freedom, which sold just [redacted] MPKs in 2017. *Id.* at 1, 9-10. Respondent also points to Össur's substantial annual R&D investment and [redacted], and it touts the Rheo's strong reputation among prosthetists. *Id.* at 11. Regarding Endolite, Respondent states that it recently [redacted]. *Id.* at 13-14. Respondent maintains that Endolite has rehabilitated its blemished MPK reputation, which had been based on a product that preceded the Orion 3. *Id*. at 14-16. Regarding Proteor, Respondent claims that it transformed from "fringe" to "mainstream" in 2017 and 2018. Respondent highlights Proteor's launch of the full-release version of the Allux MPK, its acquisition of a successful foot products line, a new distribution agreement, as well as newfound customer interest and praise. *Id*. at 16-18.

To the extent Respondent's "expansion" argument rests on competing manufacturers' available capacities, the argument is deficient, because the mere ability to manufacture more units does not lead to greater sales in a differentiated product market. The argument looks solely to supply-side issues in a market where demand characteristics matter. *See* 4 Areeda & Hovenkamp, *supra* ¶ 914h at 146 (unilateral effects in a differentiated products market depend on "demand side" assessment of the "willingness of consumers to switch to other products" in response to an increase in price). Respondent's assertion that Endolite currently has idle capacity of [redacted] MPKs, *see* RAB at 13, underscores that merely having extra capacity does not mean that customers will choose to buy that product.

As to the more general assertion that other competitors would fill any competitive void and render a price increase unprofitable, this is inconsistent with more direct evidence, including Otto Bock's own course-of-business documents. The evidence shows that a significant portion of customers consider the C-Leg and Plié as their first and second choice. *See supra* VII.B.2.a. Otto Bock itself [redacted]. PX01473-023 [redacted] Moreover, the fact that Otto Bock proposed to discontinue or raise the price of the Plié post-acquisition shows that it believed such a plan would be profitable and that expansion or repositioning by any individual firm or all firms collectively would not prevent harm.

Furthermore, the evidence regarding Össur, Endolite, and Proteor does not support a finding that they would timely and sufficiently "fill the competitive void" left by the merger. *Swedish Match*, 131 F. Supp. 2d at 169. While some clinicians like Össur's Rheo MPK, many others view it as inferior to the C-Leg and the Plié or have concerns about its safety. *See, e.g.*, Senn, Tr. 223-24; PX05128 (Senn Dep.) at 44; Ell, Tr. 1732; Ford, Tr. 950-51, 1015-16; PX05001 (Endrikat, IHT) at 21-22; PX05141 (Bright Dep.) at 201-02; *see also* IDF 647-53; [redacted] Endolite is a small competitor with no more than a [redacted] share of the United States MPK market, despite

having been selling MPKs in the U.S. for 20 years. IDF 479-80, 656. Endolite is only just now overcoming the steep reputational barriers it has faced due to past reliability issues and poor customer support. IDF 658-63; [redacted] IDF 665; Blatchford, Tr. 2176-79.[36] As for Proteor, it has minimal presence in the U.S., with less than [redacted] market share. IDF 479-80. Many clinicians are unfamiliar with the Allux MPK or refuse to purchase it due to reliability and customer service concerns. IDF 667-72.[37]

Respondent argues that we cannot take a backward-looking view of the competitive landscape and must focus on market dynamics in the future. RAB at 10, 18. Even if these companies were not as relevant historically, Respondent asserts we must consider their competitive potential and product pipelines. But Respondent itself ignores the future by focusing only on the Plié and ignoring the Quattro. Freedom was primed to become an even more significant competitor to Otto Bock because of its planned introduction of the Quattro, the so-called "C-Leg killer." *See supra* Section VII.B.2.a and c. There is simply insufficient evidence that any future updates or developments by other manufacturers would timely, likely, and sufficiently counteract the anticompetitive effects of removing Freedom as an independent competitor. In all, we are unpersuaded by Respondent's argument that Össur, Endolite, and Proteor would replace the competition lost due to the Acquisition.

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[36] Respondent's argument that Endolite and other competitors could fill the competitive void left by the merger relies heavily on its repeated assertion that Hanger's CEO admitted that Hanger could shift 100% of its MPK purchases to Endolite, *see* RAB at 10, 15, [redacted]; RRB at [redacted], but this argument mischaracterizes the Hanger CEO's testimony. That testimony does not address the feasibility or likelihood of Hanger shifting any MPK purchases to Endolite in response to a price increase by Respondent. Rather, the witness was responding to the ALJ's hypothetical questions regarding the accuracy of corporate projections. *See* Asar, Tr. 1448 [redacted]

[37] Respondent asserts that we should not rely on much of the testimony of Keith Senn (President of Kentucky and Indiana Operations of COPC) and Mark Ford (President and Managing Partner of POA) because they are not prosthetists and lack first-hand knowledge of the functionality, features, and benefits of MPKs. RAB at 12. Respondent also asserts that Tracy Ell (Owner and Chief Prosthetist at Mid-Missouri O&P) "admitted that he does not have first-hand knowledge choosing MPKs." RAB at 13 (citing Ell, Tr. 1777). But Respondent itself relies on these witnesses' testimony when it supports Respondent's arguments. *See* RAB at 13, 25-27. More importantly, that Mr. Senn and Mr. Ford are not themselves prosthetists who fit these MPKs does not undermine their testimony; they testified not about their personal prosthetic choices but about their clinics' business practices and about the aggregate opinions and preferences of the companies' clinicians. With respect to Tracy Ell, Respondent mischaracterizes his testimony. He stated that doctors are the ones to select whether the patient should get a mechanical or microprocessor-controlled knee, Ell, Tr. 1776-77, but nothing in this testimony indicates that "he does not have first-hand knowledge of choosing MPKs." RAB at 12. On the contrary, Mr. Ell testified that, unless the physician prescribes a particular brand of MPK and indicates that no substitution is allowed, he facilitates the patient's MPK selection. Ell, Tr. 1759-64.

2. Impact of Power Buyers

Respondent argues that clinic customers have bargaining leverage vis-à-vis MPK suppliers because they obtain discounts based on the overall volume of MPKs they buy. RAB at 21. In the face of a potential price increase, argues Respondent, such customers can simply switch suppliers in order to realize an increased discount, preventing unilateral harm. *Id.*; RRB at 18.

This argument ignores or assumes away the crux of the matter—what the merger changed. In most markets that are not pure monopolies, buyers possess some leverage by virtue of their ability to switch suppliers or consolidate purchases. Thus, proper assessment of competitive harm takes as a backdrop the buyers' ability to use existing purchasing strategies and evaluates whether the buyers' alternatives have changed as a result of the transaction. *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 70 (D.D.C. 2018) ("In assessing a power buyer argument, the court should 'examine the choices available to powerful buyers and how those choices likely would change due to the merger,' keeping in mind that '[n]ormally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer'." (quoting *Horizontal Merger Guidelines* § 8)). The problem with a merger that enhances market power is that it increases the seller's leverage while leaving the buyer's unchanged. *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 346 (3d Cir. 2016) ("whatever leverage the payors will have after the merger, they have that leverage now"; the relevant question is whether the merger will increase the merging parties' leverage and allow them to impose a price increase).

Respondent also fails to account for harm to smaller buyers. Respondent argues that Hanger, the nation's largest customer of sellers of prosthetics, IDF 42, has buyer power. RAB at 21. But MPK prices are set through individualized negotiations with the different clinics, and MPK manufacturers charge different prices to different clinic customers. IDF 315-16. In these circumstances, even if Hanger had buyer power, Respondent provides no reason to conclude that any protection such power arguably could confer would extend to other clinics. *See Polypore*, 150 F.T.C. at 637-38.

The evidence before us shows that, in this highly-concentrated market, a significant fraction of customers—including "sophisticated" buyers like Hanger—have directly benefitted from head-to-head price and feature competition between Otto Bock and Freedom. *See supra* Section VII.B.2.b; *see also* IDF 507. The loss of such competition harms them. Like the defendants in *Wilh. Wilhelmsen*, Respondent has failed to point in mitigation to "any *new* [buying] strategy or alternative likely to emerge post-merger," 341 F. Supp. 3d at 71 (emphasis in original), such as the ability to sponsor entry or to integrate upstream. Instead, Respondent has "focused on strategies that are already part of the competitive landscape and which show no promise of becoming more effective." *Id*. Complaint Counsel proved that buyers would lose one proven strategy—the ability to play Otto Bock and Freedom against each other—while Respondent has failed to identify any equally or more effective option that buyers would gain. We therefore reject Respondent's "sophisticated customer" defense.

3. Effect of Open Prescriptions and Reimbursement Structure on Pricing

Respondent argues that the ALJ failed to accept rebuttal evidence that the prescription and reimbursement system for MPKs facilitates interbrand substitution and constrains Otto Bock's ability to raise prices above the competitive level. RAB at 19. Respondent points out that surgeons' prescriptions rarely specify a brand of prosthetic, so clinics are free to switch between MPKs for patients who clinically require an MPK. *Id.* A price increase would simply encourage clinics to change MPK brand. RRB at 18. At the same time, Medicare and private insurance companies reimburse clinics a fixed amount for each MPK based on the L-Codes associated with the MPK's features and functions, regardless of who manufactures the MPK. RAB at 20. The reimbursement level puts a ceiling on the ability of manufacturers to raise price. *Id.*

As we have discussed, even if some customers could switch MPK products in response to a post-Acquisition price increase, many of those switches would be to Respondent's own products, enhancing the profitability of the price increase to the Respondent. *See* PX01473-023 ([redacted]); PX01302 at 081 (internal Otto Bock slide presentation, recommending that Respondent [redacted]). This is a classic example of a unilateral anticompetitive effect. *See Horizontal Merger Guidelines* § 6.1; Section VII.B.2 *supra.* Moreover, the fact that some customers of Respondent's MPKs could switch to a different MPK in the face of a price increase does not mean that they could do so without sacrificing quality, service, or other characteristics that they prefer. Their pre-Acquisition purchasing pattern reveals their preference for particular MPK products, and, in a differentiated product market such as this one, a transaction that forces buyers to deviate from their preferred purchases in order to mitigate a price increase poses a harm. *See* PX06003 (Scott Morton Rebuttal Report) at ¶ 48 (explaining that a customer's current basket of purchases reveals its preferences for particular products).

Respondent further posits that the insurance reimbursement system "puts a ceiling on what the manufacturers can realistically charge the clinics for the purchase of the knee." RAB at 20 (quoting Argue, Tr. 6229). According to Respondent, [redacted] *Id.* Reimbursement "is part of the strategy of how much [the manufacturer] can put into that knee and how much they're going to be able to charge for that knee, because they have to leave enough margin for the clinics to cover their other costs, so it very much puts a restraint on their manufacturers." *Id.* (quoting Argue, Tr. 6229).

However, the existence of a reimbursement ceiling does not rule out competitive harm in the space below the ceiling. For example, there is ample room under the reimbursement ceiling for Respondent to raise the price of the Plié 3. By the estimate of Respondent's own expert, the average price of a Plié 3 in 2016 was [redacted] the average price of a C-Leg 4. IDF 494; ID at 59. The record shows that prosthetists are able to fit the C-Leg 4 at a positive margin, IDF 735, so presumably they would also be able to fit the Plié 3 profitably even after a

price increase. *See* PX06001A (Scott Morton Expert Report) at Table 3 and ¶ 74 (even with a 5% price increase, the contribution margin that a clinic earns on a Freedom MPK is still well above the contribution margin for an Otto Bock MPK). *See also* IDF 736 (Hanger could still make a profit if the price of the Plié or C-Leg were to increase by $1,000); IDF 737.[38]

The ALJ's concern about a potential price increase on the Plié 3 is justified. Otto Bock's executives contemplated just such an increase in November 2017. *See* PX01302 at 081.

D. EFFICIENCIES

One economic benefit of some mergers is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. *Horizontal Merger Guidelines* § 10. Respondent's Third Affirmative Defense avers that efficiencies and other unidentified procompetitive benefits resulting from the Acquisition outweigh any anticompetitive effects. Ans. at p. 29. Respondent asserts that its acquisition of Freedom will result in annual, Acquisition-specific, pro-competitive efficiencies of [redacted] EBITDA by [redacted]. RAB at 28. The claimed efficiencies purportedly would be realized under Respondent's proposed dual-brand strategy, which would position Otto Bock's and Freedom's brands differently in the same market while under common ownership. *Id.*; IDF 683. *See supra* Section VII.B.2 d. The burden-shifting framework requires us to assess these claims.

Only "merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service" are cognizable for this analysis. *Horizontal Merger Guidelines* § 10; *see Univ. Health*, 938 F.2d at 1223 (defendant must show that the acquisition "would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers"). Efficiencies must be "verifiable." *Penn State Hershey*, 838 F.3d at 348-50. This means that a party's claimed efficiencies must survive "rigorous analysis" to ensure that they represent "more than mere speculation and promises about post-merger behavior." *Heinz*, 246 F.3d at 721. The burden of proving efficiencies is on the proponent. *See* 4A Areeda & Hovenkamp, *supra* ¶ 970f at 42.

Here, Respondent asserts that the Acquisition will generate merger-specific synergies in the broad categories of [redacted][39] RX-1048 (Peterson Expert Report) at ¶ 132.a.

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[38] Moreover, as the ALJ correctly points out, a clinic's margin is not dictated only by the price of the MPK. ID at 59. The components of the overall lower-limb prosthetic, including the foot, socket, suspension mechanism, adapters, hardware, and liners, have additional L-Codes for which clinics obtain reimbursement and which allow some amount of margin for the clinic. *Id.* As Respondent's expert witness Dr. David Argue agreed, a clinic may earn a profit on the prosthetic leg as a whole even if the clinic does not make a profit on the MPK component. *Id.*; IDF 739.

[39] [redacted] *See Horizontal Merger Guidelines* § 10 ("Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.").

We find that Respondent's efficiencies are neither sufficiently concrete nor verifiable to rebut a showing of competitive harm. Respondent's claimed efficiencies are based on the work performed by its integration team. IDF 680-81, 684. Yet, Respondent's own integration consultant characterized the work relating to identifying synergies opportunities as "early stage" and "incomplete." IDF 686. [redacted] IDF 687. The team lead testified that, of the synergies that the team had identified, [redacted] IDF 688. As he further explained, [redacted] IDF 688. [redacted] IDF 691. Nor do the calculations by Respondent's financial expert, James Peterson, supply the needed verification. Mr. Peterson's work consisted of examining Respondent's financial model for calculating synergies, then conducting what he termed a "sensitivity analysis," which essentially meant discounting the model's calculations by [redacted] in order to be conservative. Peterson, Tr. 6673-74; RX-1048 (Peterson Expert Report) at ¶ 133 and Table 9; *see also* IDF 704. However, the fact that Peterson simply gave Respondent's estimates a "haircut," IDF 704 (citing PX05174 (Peterson Dep.) at 276), does not rectify Respondent's failure to come up with reliable calculations in the first place. *See H&R Block*, 833 F. Supp. 2d at 91 (rejecting claimed efficiencies that were not independently verifiable).

Furthermore, Respondent failed to prove that its claimed efficiencies are merger-specific. To do so, Respondent would have to show that its "efficiencies . . . cannot be achieved by either company alone because, if they can, the [Acquisition's] asserted benefits can be achieved without the concomitant loss of a competitor." *Heinz*, 246 F.3d at 722. Here, a substantial share of the claimed efficiencies relate to [redacted], which in turn purportedly is "driven by existing manufacturing infrastructure and expertise resident at Ottobock." IDF 705. This explanation is vague, and it gives us no basis on which to conclude that Freedom could not have obtained manufacturing infrastructure and expertise elsewhere. *See Horizontal Merger Guidelines* § 10 (merger-specific efficiencies are "only those [that are] likely to be accomplished with the proposed merger and unlikely to be accomplished in [its] absence . . . ."); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1091-93 (N.D. Ill. 2012) (rejecting claimed efficiencies because, *inter alia*, the court "cannot say . . . that they can only be achieved through the proposed merger").

The proponent of efficiency claims must also demonstrate that the savings will be passed through to consumers in order to rebut any showing of competitive harm from the transaction. *Anthem*, 855 F. 3d at 362 (citing *Univ. Health*, 938 F.2d at 1223 (savings must "benefit competition and, hence, consumers")). In a transaction that results in high market concentration levels, "extraordinary" efficiencies are required in rebuttal, *Heinz*, 246 F.3d at 720, and the greater the potential adverse competitive effect of a merger, "the more [the efficiencies] must be passed through to consumers." *Horizontal Merger Guidelines* § 10. Here, neither of Respondent's experts analyzed the degree to which, if at all, customers would benefit from the

projected savings. *See* Peterson, Tr. 6749; Argue, Tr. 6259-60; *see also* IDF 711. In fact, a substantial portion of the claimed efficiencies arise outside the United States. RX-1048 (Peterson Expert Report) at ¶ 131.a, b. Respondent has provided no reason why we should consider these savings, and we do not.

Because Respondent has failed to demonstrate the existence of independently verifiable, Acquisition-specific efficiencies that are likely to be passed through to consumers in the relevant market, its efficiencies defense fails. We need not reach Complaint Counsel's additional argument about whether the claimed efficiencies would result from an anticompetitive reduction in output or quality. CCAB at 29-30.

E. FAILING FIRM DEFENSE

Respondent argues that it has demonstrated the failing firm defense, which would be a complete defense to Complaint Counsel's showing of liability. RAB at 39-42; RRB at 18-20.

1. Legal Standard

The Supreme Court first recognized the failing firm defense in *International Shoe Co. v. FTC*, 280 U.S. 291 (1930), where it refused to enjoin the acquisition of a failing corporation by the only available purchaser. *Id.* at 301-03. The defense provides a safety valve for the parties when, in the absence of the proffered transaction, the competitive assets would otherwise exit the market. *Horizontal Merger Guidelines* § 11. The defense is, "in a sense, a 'lesser of two evils' approach, in which the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition" from the company's going out of business. *Gen. Dynamics*, 415 U.S. at 507.

The *Horizontal Merger Guidelines* explain that the antitrust agencies do not normally credit a failing firm defense unless all of the following circumstances are met: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the market and pose a less severe danger to competition than does the proposed merger. § 11; *see also Citizen Publ'g Co. v. United States*, 394 U.S. 131, 136-8 (1969). The *Horizontal Merger Guidelines* define a "reasonable alternative offer" as one that exceeds the liquidation value of the assets. § 11 n.16.

A successful failing firm defense effectively permits a transaction that otherwise would violate the antitrust laws. Thus, the Supreme Court has "narrowly confined the scope of the doctrine," *Mich. Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1288 (D.C. Cir. 1989), *aff'd per curiam*, 493 U.S. 38 (1989). *See also FTC v. Warner Commc'ns*, 742 F.2d 1156, 1164 (9th Cir. 1984) (noting that the defense has "strict limits"). The proponent of the defense bears the burden to prove each element, *Citizen Publ'g Co.*, 394 U.S. at 138-39, and failure to prove any element is fatal.

2. Element 1: Whether Freedom Was Failing

We first examine whether Respondent proved that Freedom's business was "failing" in the sense required by the first element of the defense.[40]

a. Background Regarding Freedom's Financial Condition

Respondent proved that Freedom experienced operating losses and certain financial challenges in the years leading up to the Acquisition. Freedom sustained operating losses [redacted]. PX01656; RX-0833; RX-0464 (summarized in RX-1048 (Peterson Expert Report) at 7, Table 1). Relatedly, Freedom's EBITDA was [redacted] RX-0464 (summarized in RX-1048 (Peterson Expert Report) at 7, Table 1).

As noted in Section II.D above, Freedom sought to address its financial challenges by overhauling its management and improving its operations. In April 2016, Freedom hired a new CEO, David Smith, who had extensive operating experience. IDF 774. Smith, in turn, made a number of changes to Freedom's management including [redacted] and hiring a new vice president of domestic sales. Smith, Tr. 6511; PX02034 at -049; PX05137 (Mathews Dep.) at 13. Under Smith's leadership the company embraced "[b]etter communication, direct meetings with customers, encouragement in communication with the sales force, improvements in general in business, [and] reversal of some very poor policies of previous management." PX05005 (Smith, IHT) at 121. [redacted] PX05122 (Smith Dep.) at 82. Of particular moment, Freedom also took actions to improve product quality and service for the Plié 3. PX02034 at -049. Freedom's chairman testified that [redacted] Carkhuff, Tr. 571.

Freedom's operational reforms began to show positive results from late 2016 into early 2017. On a monthly and quarterly basis during 2017, Freedom achieved revenue increases and improved its EBITDA over the prior year. IDF 781-97. For example, for the first quarter of 2017, Freedom's revenue was about [redacted] ahead of plan and about [redacted] ahead of revenue for the first quarter of the prior year. IDF 787. These improvements were due in part to the quality and service improvements for the Plié 3, which began to experience increased sales in late 2016 leading up to a [redacted] year-over-year increase for January-February 2017. IDF 646, 782.

Freedom had a term loan on its balance sheet that was due to mature on February 16, 2017. IDF 745. By the end of 2016, Freedom owed the lenders approximately [redacted]. IDF 748. [redacted]

[40] As noted above, the *Horizontal Merger Guidelines* describe the first element of the defense as asking whether the allegedly failing firm would be unable to meet its financial obligations in the near future. § 11.

[redacted] ID at 66; IDF 750-53. The lenders also required Freedom's primary shareholder, HEP, to infuse an additional [redacted] of equity capital into Freedom up front, IDF 752, plus up to [redacted] PX01677 at § 7.13.6.

Shortly after Smith became CEO, Freedom's lenders began to press the company to pursue alternative sources of capital. In June 2016, the lenders deferred a portion of Freedom's debt amortization payment due on June 30, 2016; [redacted] IDF 747; PX03008 at -002 and -007. During the approximately fourteen months that followed, Freedom explored possibilities for both a recapitalization and a sale, culminating in the Acquisition by Otto Bock in September 2017. *See infra* Section VII.E.4. Otto Bock satisfied Freedom's remaining debt to the lenders—$28 million—at the closing of the Acquisition. IDF 758-59.

b. Adequacy of Respondent's Showing that Freedom Was Failing

In order to demonstrate the first element of the defense, *i.e.*, that Freedom was unable to meet financial obligations, Respondent cannot simply show that it had an imminent payment that exceeded its existing cash on hand. Rather, the analysis must account for the commercially reasonable options that firms in today's markets can pursue when facing a liquidity shortfall. To meet the first element, Respondent needs to prove that Freedom had "resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure" absent the challenged transaction. *Int'l Shoe*, 280 U.S. at 302; *United States v. Pabst Brewing Co.*, 296 F. Supp. 994, 1002 (E.D. Wis. 1969).

We find that Respondent failed to meet the first prong of the defense by demonstrating a grave probability of Freedom's failure. At the time of the Acquisition and during the approximately one year leading up to it, Freedom was engaged in a turnaround that had begun to show results. Freedom hired its new CEO, Mr. Smith, in April 2016. IDF 774. By December 2016, many of Freedom's financial metrics were starting to improve. IDF 781 (quoting PX02034 at -050) [redacted] *see also* PX05005 (Smith, IHT) at 121, 133-34 (discussing "inflection point" in Freedom's recovery in December 2016); PX05126 (Kim Dep.) at 62 (revenue improved in late 2016-early 2017). Freedom's improving results continued into 2017. IDF 781-93. By August of that year, the month before the Acquisition, Freedom's year-to-date revenues were [redacted] of plan and [redacted] over the prior year; its year-to-date EBITDA was [redacted] ahead of plan; and its year-to-date cash balance was approximately [redacted] higher than anticipated by August 31, 2017. IDF 795.

Freedom's financial upturn stemmed from real operating improvements, including better service, sales, and quality. As Mr. Smith testified, [redacted]

[redacted] Smith, Tr. 6537, 6543, 6496-97. Product development accelerated during Smith's tenure, and Smith conveyed that the R&D pipeline was the "best it's ever been in the history of the company" as of July 2017, two months before the Acquisition. IDF 835. In the months leading up to the Acquisition, Freedom maintained an active R&D pipeline, increased expenditures on sales and marketing and R&D, hired additional sales employees in Europe, and even paid executive bonuses. IDF 830-31, 833, 837.

Respondent objects that Freedom's lenders would still have liquidated the company in September 2017, regardless of any financial or operational turnaround plan, because they had lost patience with Freedom and wanted to exit the loans at any cost. RPTB at 103. However, the record contains no testimony of the lenders. Moreover, the creditors' actions were consistent with a preference for an orderly sale of Freedom. Between March 2013 and August 2016, the lenders repeatedly amended the credit agreements rather than foreclosing. IDF 746-47. In June 2016, instead of seeking liquidation, Freedom's lenders directed the company to explore additional sources of capital. PX03008 at -002 and -007. As part of amending the credit agreement in August 2016, the lenders required Freedom to provide them an enterprise valuation, which Freedom did via its investment banker, Moelis & Company ("Moelis"), in October 2016. PX03009 at -001, -002. This valuation ranged from [redacted] PX03016 at -003, an amount that would have been sufficient to pay the lenders in full.[41]

By contrast, there is no evidence that Freedom or its lenders ever formally calculated a liquidation value for Freedom's assets. To the extent that Smith attempted a preliminary analysis, [redacted] and the estimates he generated were less than the [redacted] that Freedom owed the banks. Smith, Tr. 6554-56. In April 2017, rather than pursuing a liquidation, the lenders entered the Seventh Amendment to the Credit Agreement with the understanding that Freedom would have sufficient liquidity to withstand a long sale process in the second half of 2017, even without additional outside capital. IDF 828; PX03009 at -004. The lenders based this assessment on Freedom's cash flow forecasts through December 31, 2017. PX03009 at -004. Though Freedom may have been under pressure to sell or recapitalize, it had time to do so between June 2016 (the date the lenders first pressed Freedom to seek additional capital sources) and September 2017. As we discuss further in subsection VII.E.4.b below, Freedom failed to direct sufficient efforts during this time toward finding a less anticompetitive buyer than Otto Bock.

Finally, the existence of Freedom's pending debt repayment is not sufficient to show that the firm was insolvent. Respondent does not argue that conditions in credit markets were extraordinary or unusually constrained, so as to preclude refinancing or recapitalizing to help make the payments due at the conclusion of its term loan. *See* PX05172 (Hammer Dep.) at 139 (Freedom's greatest financial obstacle in 2017 was that "they weren't going out and refinancing when they could have"); PX06002 (Hammer Expert Report) ¶¶ 51-57 (describing Freedom's refinancing and recapitalization options). At a minimum, Respondent would have to show that

[41] Though Freedom apparently received a lower valuation from a different advisor, *see* RX-1048 (Peterson Expert Report) at ¶ 110 (citing [redacted] figure), that amount also far exceeded the amount owed to the lenders. *Id.*

the acquired company could not refinance or recapitalize despite reasonable efforts, taking into account that it may have had to accept non-preferred terms rather than enter an anticompetitive sale. As we discuss below, Respondent failed to meet this burden.

3. Element 2: Freedom's Prospects for Chapter 11 Reorganization

A second requirement of the failing firm defense is that a failing firm not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act. *See Citizen Publ'g Co.*, 394 U.S. at 138 (prospects of reorganization must be "dim or nonexistent" to make the failing company doctrine applicable); *Horizontal Merger Guidelines* § 11. As with the defense's other elements, Respondent bears the burden of proof. *Citizen Publ'g Co.*, 394 U.S. at 138-39.

Respondent argues that Freedom considered and rejected the possibility of Chapter 11, determining that it would not have successfully emerged from the process. RAB at 40-41. Freedom's then-CEO David Smith concluded, based on his prior experience with Chapter 11, that it would have been [redacted] Smith, Tr. 6485-86. Respondent's financial expert, James Peterson, echoed Smith's opinion: "I don't see any reason why they would have been a good candidate for Chapter 11, much less would they have emerged." Peterson, Tr. 6609. Respondent contends that Freedom would have no reasonable prospect to obtain financing to continue operating during Chapter 11 [redacted] RX-1048 (Peterson Expert Report) ¶¶ 106-07; Smith, Tr. 6485-86.

Complaint Counsel point out that [redacted] PX05113 (Chung Dep.) at 100. [redacted] *Id.* Thus, Freedom [redacted] PX05122 (Smith Dep.) at 47-48.

Although this element is a closer call, we find that Respondent has not demonstrated that prospects for Chapter 11 reorganization were "dim or nonexistent." *Citizen Publ'g Co.*, 394 U.S. at 138. Although Respondent asserts after the fact that, due to Freedom's limited cash position, it could not have afforded reorganization, Freedom [redacted] (describing this as [redacted] than she has seen with companies in bankruptcy). Freedom had valuable products in its pipeline, including Quattro, that drove its projected revenue growth and underpinned its investment bankers' [redacted] enterprise valuation. PX03016 at -003, -005. Yet Freedom did not, it appears, explore the possibilities [redacted] that could have helped it surmount its liquidity challenges and launch those products. *See* Hammer, Tr. 2968-70 [redacted]. The limited record evidence regarding Freedom's consideration of Chapter 11 reorganization suggests that [redacted]

[42] [redacted] PX06004 (Hammer Rebuttal Report) at ¶ 49 and n.106.

[redacted]. PX05113 (Chung Dep.) at 100. This approach, while perhaps understandable from the perspective of the shareholders' interests, is insufficient for a seller that seeks to invoke the failing firm defense to insulate an otherwise anticompetitive transaction from scrutiny.

4. Element 3: Freedom's Efforts to Refinance or Sell to a Less Anticompetitive Buyer

To sustain a failing firm defense, the proponent is called upon to demonstrate that the acquiring company was "the only available purchaser." *Citizen Publ'g Co.*, 394 U.S. at 138; *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 555 (1971) (defendant must show that there was "no other prospective purchaser" for the acquired company). The antitrust enforcement agencies have implemented this element of the failing firm defense by focusing on the respondent's efforts to elicit "reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition." *Horizontal Merger Guidelines* § 11. Defendant's burden is "quite heavy." *FTC v. Harbour Grp. Invs., L.P.*, 1990 WL 198819, at *3 (D.D.C. 1990). Like the ALJ, ID at 68-74, we hold that Respondent failed to meet its burden.

a. Factual Background of Freedom's Efforts to Refinance or Sell

In approximately September 2016, Freedom and HEP began to reach out to potential equity investors and explore ways to refinance the company's debt. PX05113 (Chung Dep.) at 148-49; *see, e.g.*, RX-0274 at -001, 002. Smith and Maynard Carkhuff, Freedom's vice chairman and chief innovation officer at the time, also met with the chairman and primary owner of Otto Bock Germany, Professor Hans Georg Näder, in Berlin, Germany in October, 2016, to gauge Otto Bock's interest in acquiring Freedom. IDF 849. The parties met again in New York later that month to further explore a sale. IDF 850.

Executives from Freedom and Otto Bock met again in Berlin in March 2017, and the following month, Otto Bock informed Freedom that Otto Bock viewed Freedom's valuation to be [redacted]. IDF 858-59. Unsatisfied with this potential offer, Freedom's board authorized its investment banker to communicate to Otto Bock that Freedom was disappointed in the valuation and that there was no need to submit an offer at [redacted]. PX02088 at -001; PX05113 (Chung Dep.) at 168-69. Freedom then launched a more expansive process to seek additional potential buyers. PX05113 (Chung Dep.) at 169. This process involved formally retaining an investment banker to conduct a bidding process. *Id.*

In April-May 2017, Freedom's investment banker reached out to approximately seven potential buyers regarding an acquisition of Freedom. IDF 861, 863. In June 2017, the investment banker sent letters to Össur and Otto Bock seeking written indications of interest in Freedom. IDF 864. These two firms eventually submitted final bids of [redacted] (Össur) and [redacted] (Otto Bock). IDF 869-71. Otto Bock acquired Freedom on September 22, 2017. IDF 872.

b. Adequacy of Freedom's Efforts to Refinance or Sell to a Less Anticompetitive Buyer

Respondent states that Freedom preferred a refinancing to a sale, but that it could not obtain refinancing, such that a sale to a strategic acquirer became the only option. RAB at 41. However, the evidence suggests that potential financing sources did express interest in Freedom, but on terms that the existing shareholders did not like. As of August 2017, for example, Freedom's minority shareholder Parker Hannifin Corporation ("Parker Hannifin") understood that [redacted] was considering replacing half of Freedom's debt with equity, but with a [redacted] valuation that was unfavorable compared to strategic players offering [redacted] IDF 846-47.[43] As a Parker Hannifin witness (and Freedom Board member) expressed it, a "[n]ew investor, if contributing equity will be very painful to both HEP and Parker [Hannifin] in terms of the dilution impact." PX0392-001. That same witness explained, "A few players were approached, but the terms of valuation were very unfavorable compared to the strategic bidders . . . [i]t was evident to us that . . . one of the strategic players and notably Ottobock would have the highest offer." IDF 848 (citing PX05125 (Dorotheou Dep.) at 111).[44] Perhaps for this reason, Freedom simply omitted to contact numerous potential financing sources that its investment banker had identified. *See* PX03016 at -007 (presentation by Moelis to Freedom listing various royalty and mezzanine funds, venture debt, and banks as "potential private capital sources"); Hammack, Tr. 6106-08 (identifying twelve of the listed sources that were never contacted).

As to the sales process, the evidence again shows that Freedom focused prematurely on Otto Bock. Freedom's representatives began to meet with Otto Bock regarding a potential sale in October 2016. IDF 849. Then, from October 2016 to April 2017, neither Freedom nor its investment banker contacted any potential alternative strategic buyers besides Otto Bock. IDF 860. They finally did so because they were not satisfied with Otto Bock's initial offer. PX05113 (Chung Dep.) at 169.

Freedom's belated outreach to strategic acquirers besides Otto Bock suffered from shortcomings similar to those experienced with its refinancing efforts. First, Freedom's investment banker, Moelis, did not contact companies about acquiring Freedom unless they had the ability to pay at least [redacted]. IDF 873. This floor exceeded Freedom's preliminary estimates of liquidation value by [redacted][45] and was therefore an unjustified

[43] Two firms, Bank of Montreal ("BMO") and Madison Capital Funding, LLC, each held 50% of the outstanding debt under Freedom's credit agreement. IDF 744. The [redacted] arrangement would have replaced the half of Freedom's debt held by BMO. IDF 846. As to the other half of Freedom's debt, existing lender Madison Capital expressed in July 2017 that it "can't lead refinancing, but [was] happy to participate in someone else's transaction." IDF 845.

[44] *See also* PX05113 (Chung Dep.) at 160 (Q. [regarding refinancing sources:] "[D]o you mean, they weren't returning your calls? A. More so that they weren't interested in engaging or *the valuations that they were, you know, verbally throwing around were not where we had marked them before.*") (emphasis added).

[45] Although neither party offered a formal estimate of Freedom's liquidation value, Smith's preliminary estimates of that value were less than the [redacted] that Freedom owed the banks. Smith, Tr. 6554-56.

limit on the search for offers. *See Horizontal Merger Guidelines* § 11 n.16 ("reasonable alternative offer" is one that exceeds the liquidation value of the assets).

Second, a respondent must make a "sufficiently clear showing" that it "undertook a well-conceived and thorough canvass of the industry such as to ferret out viable alternative partners for merger." *Pabst Brewing*, 296 F. Supp. at 1002. Here, Moelis contacted seven potential strategic acquirers, IDF 861, 863, but failed to contact several prosthetics makers who later expressed interest in Freedom. These companies included [redacted]. IDF 875-77, IDF 887-88; [redacted]. The bankers also did not reach out to other players in the prosthetics industry such as [redacted]. IDF 875. Some of the firms that Moelis neglected were small, but two—[redacted]—are firms that Respondent now touts as capable of replacing competition lost by the Acquisition. And "at least in some cases, approaching smaller companies in a given industry might be exactly what is required of a company seeking the protection of the failing company defense." *Harbour Grp. Invs.*, 1990 WL 198819, at *4.

Third, Freedom rejected overtures from two potential buyers, Nabtesco and Össur, that could have resulted in transactions with fewer anticompetitive effects than the Acquisition by Otto Bock. Nabtesco reached out to Freedom's chairman, Maynard Carkhuff, on September 7, 2017, regarding potentially acquiring Freedom. IDF 877. After Smith told Carkhuff that Freedom already had offers in hand—one of which was from Otto Bock—Carkhuff responded to Nabtesco that Freedom was not interested in Nabtesco's buying it. IDF 877-78.[46] Nabtesco, with its Allux MPK, possessed a [redacted] market share in the United States, IDF 479-80, and would not likely have posed a competitive problem in buying Freedom. Freedom also rejected an offer from Össur of [redacted], which exceeded Freedom's liquidation value, choosing Otto Bock's higher bid instead. ID at 72-73. Acquisition by Össur, while raising questions in its own right, may have been more favorable from a competitive standpoint than acquisition by Otto Bock. An Össur/Freedom transaction would have resulted in an HHI increase of 339 points in MPKs, IDF 908, presumptively problematic under the *Horizontal Merger Guidelines*, but less than the 1,522-point increase for the Otto Bock transaction.[47]

In sum, Freedom's executives and shareholders were focused on obtaining the highest possible offer, IDF 874,[48] which is a different objective from searching for a reasonable

[46] Respondent argued to the ALJ that Nabtesco's overture came too late: by the time Nabtesco reached out to Freedom, a closing with Otto Bock was days away, and it would have been "unreasonable" to halt that process. RPTRB at 127. Unreasonable or not, the problem was of Freedom's own making. Freedom had first reached out to Otto Bock to explore a sale in October 2016, *more than eleven months earlier*, yet never contacted Nabtesco—not even during its supposedly "robust" May 2017 process. RAB at 5; IDF 849, 863; PX03264.

[47] Respondent argues that an Össur/Freedom transaction would have caused a serious competitive problem in a putative relevant market for "K-3 and K-4 prosthetic feet." RAB at 42. We lack sufficient information to evaluate this claim. Respondent did not describe the products found in such a market, discuss *Brown Shoe* criteria such as industry recognition of a market, address the ease of entry, *etc.* In any event, Respondent's claim is non-dispositive because (1) Freedom's search for refinancers and purchasers was otherwise deficient, and (2) Respondent failed to meet the first two prongs of the failing firm defense. *See supra* Sections VII.E.3 and 4.

[48] *See also* PX05125 (Dorotheou Dep.) at 82; PX05113 (Chung Dep.) at 199.

alternative offer above Freedom's liquidation value. *See United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 446 (D. Del. 2017) (rejecting the failing company defense where the acquired company was "clearly focused on obtaining what it perceived to be . . . fair value, not an offer above the liquidation value"). Informed observers could foresee that Otto Bock would have the most favorable bid for Freedom because it had the most to protect in the form of preventing competition for its C-Leg sales.[49] A firm's willingness to pay a premium for its distressed competitor could signify a likelihood of consumer harm.[50] To meet the third prong of the failing firm defense, a seller must not simply have accepted the highest offer that presented itself, but must instead have exhausted reasonable efforts to find a less anticompetitive alternative buyer.

Freedom and its investment bankers did not consider whether the Otto Bock acquisition raised antitrust concerns. Carkhuff, Tr. 727; PX05110 (Hammack Dep.) at 176. We, however, must do so, and we conclude that Respondent failed to demonstrate a reasonable, good faith effort to engage in an alternative, less anticompetitive transaction.

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Because Respondent failed to establish the three elements of the failing firm defense—*i.e.*, that Freedom would be unable to meet its financial obligations in the near future, that it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act, and that it conducted a reasonable, good faith search for alternative offers that would keep its assets in the market and pose a less severe danger to competition—we find the defense inapplicable.

VIII. DIVESTITURE

Respondent has entered into [redacted] Respondent argues that the proposed divestiture [redacted] must be considered in determining whether Complaint Counsel have made a *prima facie* showing of anticompetitive effects.[51] RAB at 28-31. Respondent claims that a structural presumption of anticompetitive effects is inappropriate because, with the proposed divestiture, the HHI increase from the Acquisition is zero. RAB at 4, 28-29, 32; RRB at 1, 9-11. According to Respondent, Complaint Counsel ignored the divestiture and failed to establish a *prima facie* case. RAB 28-30, 32. Respondent cites to several cases to support its argument: *FTC v. Arch Coal*, No. 1:04-cv-00534, ECF No. 67

[49] Össur believed that, [redacted] De Roy, Tr. 3611.

[50] *See* PX01004-008, 064 [redacted].

[51] Although in the proceeding below Respondent argued that [redacted] should be assessed, on appeal it focuses on the [redacted]. *Compare* RAB at 3-4 *with* RPTB 84, 89-90.

(D.D.C. July 7, 2004); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002); *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969); and *White Consolidated Industries, Inc. v. Whirlpool Corp.*, 781 F.2d 1224 (6th Cir. 1986). In each of these cases, the court found that the divestiture agreement should be considered together with the merger in determining whether the merger would violate Section 7. *Arch Coal* and *Libbey* factored the divestiture into the *prima facie* analysis, as did the district court opinion in *White Consolidated Industries*, which was affirmed on appeal.[52] *See White Consol. Indus., Inc. v. Whirlpool Corp.*, 619 F. Supp. 1022, 1026 (N.D. Ohio 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986); *Arch Coal*, 329 F. Supp. 2d 109, 124 (D.D.C. 2004); *Libbey*, 211 F. Supp. 2d at 46.

All of those cases, however, are distinguishable in two important respects. First, in each case, the merger was unconsummated and would occur simultaneously or almost simultaneously with the divestiture. And second, in each case, the parties entered into the divestiture agreement before the plaintiff filed the complaint or soon after, such that the divestiture could be deemed part of the transaction being challenged.[53] Thus, in each of the cases Respondent cites, the challenged transaction consisted of both the merger and the divestiture, even if they were technically separate agreements. That is not the situation here.

Here, the Acquisition was consummated two years ago, while the divestiture is still in the future. The Commission filed its Complaint challenging the Acquisition long [redacted] Under these facts, the [redacted] divestiture is not part of the challenged transaction but is one of several post-Acquisition proposals that would override the Commission's choice of remedy. The cases that incorporate the divestiture into the *prima facie* analysis of the merger are entirely

[52] In *Atlantic Richfield*, the court stated that the Government could not establish a reasonable probability of success at trial by citing market share statistics while completely ignoring the sale agreement accompanying the merger, and that merging firms should be able to "eliminate probable anti-competitive effects by . . . a disposition of assets[.]" 297 F. Supp. at 1068-69.

[53] In *Arch Coal*, the court explained that the Commission brought its complaint after it was made aware of the divestiture agreement, such that the Commission had assessed and was in reality challenging the merger agreement with the divestiture. 1:04-cv-00534, ECF. No. 67, slip op. at *4. So, too, in *Atlantic Richfield*, the court noted that the sale was "fully known to the Government when the complaint was drawn." 297 F. Supp. at 1067. In *White Consolidated Industries*, the complaint sought to enjoin both the initial sale and the related divestiture. 612 F. Supp. 1009, 1012 (N.D. Ohio 1985). In *Libbey*, the complaint was filed one week before the parties finalized their agreement that included a third-party asset sale, but in that case the finalized agreement amended the original merger agreement, which was deemed abandoned. The FTC then voted to enjoin the amended merger agreement, which the court construed as an indication that the Commission was now challenging the amended transaction. *Libbey*, 211 F. Supp. at 46.

[54] [redacted]

inapposite.[55]

Further, in this case, the proposed future divestiture cannot preclude a finding of liability because the Acquisition has already harmed competition. Nearly two years have passed since the Acquisition, and nearly two years of competitive harm have accrued. A future divestiture cannot erase past competitive injury, and it cannot defeat liability based on the harm that already has occurred.

In any case, [redacted] We cannot fail to find liability on the facts of this case and allow an anticompetitive merger to stand based on a [redacted] agreement.

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Having concluded that Respondent has failed to rebut Complaint Counsel's showing of anticompetitive effects, including past and likely future competitive harm, and that Respondent failed to demonstrate efficiencies or establish a failing firm defense, we hold that the Acquisition violated Section 7 of the Clayton Act and Section 5 of the FTC Act.

IX. REMEDY

The purpose of relief in a Section 7 case is to restore competition lost through the unlawful acquisition. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961); *Polypore*, 2010 WL 9933413, at *32 (citing *inter alia Ford Motor Co. v. United States*, 405 U.S. 562, 573 n.8 (1972)). Divestiture is generally the proper remedy to accomplish this purpose. *See du Pont*, 366 U.S. at 331 (divestiture "should always be in the forefront of a court's

[55] Even if this were an unconsummated transaction on all fours with *Arch Coal* and other cases cited by Respondent, a divestiture of assets would not automatically result in an HHI change of zero. The HHI calculation would depend on our assessment of whether the divestiture would succeed in creating an effective new competitor. *See infra* Section IX.A (finding the proposed divestiture to [redacted] insufficient to restore competition). For instance, it would be inappropriate to assign the current market share of an existing successful competitor to a buyer of divested assets who is unlikely to be as effective a competitor. Acquiring a company and then divesting it to a buyer who is likely to fail would have a similar effect on competition as buying and then shelving the assets of a competing firm. *See White Consol. Indus.*, 612 F. Supp. at 1022 (regarding Whirlpool's planned purchase of KitchenAid and accompanying partial divestiture to Emerson: "[T]he importance of the [HHI] statistics hinges upon the viability and sincerity of Emerson as a new competitor in the dishwasher market. If Emerson will become a vibrant new force in the dishwasher market, the plaintiffs' assignment of KitchenAid's manufactured units market share to Whirlpool is inappropriate and the statistical warning system is never triggered. Still, if Emerson is overly optimistic about its prospects or disingenuous about its intentions, the assignment of the KitchenAid percentage points to Whirlpool is proper and the statistical warning system demands careful scrutiny of the transaction.").

mind when a violation of § 7 has been found"); *ProMedica*, 749 F.3d at 573 (quoting *du Pont,* 366 U.S. at 329) ("[O]nce a merger is found illegal, 'an undoing of the acquisition is a natural remedy'").

In *Ford Motor Co.*, 405 U.S. at 573, the Court observed that complete divestiture is "particularly appropriate" where asset or stock acquisitions violate the antitrust laws. Divestiture in such cases is "simple, relatively easy to administer, and sure." *du Pont,* 366 U.S. at 330. Thus, absent "unusual circumstances," total divestiture of the acquired assets has long been considered the best means of restoring competition. *See, e.g., RSR Corp.*, 88 F.T.C. 800, 1976 WL 180019 (F.T.C. Dec. 2, 1976), *aff'd, RSR Corp. v. FTC,* 602 F.2d 1317 (9th Cir. 1979); *see also Evanston Nw. Healthcare,* 2007 WL 2286195, at *77-79. The fact that the parties may have already consummated their transaction, while a relevant consideration, does not prevent us from ordering divestiture as a remedy for a violation when otherwise appropriate. *See ProMedica,* 2012 WL 1155392, at *1, 48-9 (ordering divestiture in consummated transaction), *upheld*, 749 F. 3d at 573; *Chicago Bridge & Iron Co.*, 138 F.T.C. 1024, 2004 WL 5662266, at *294 (2004) (citing *inter alia Olin Corp.*, 113 F.T.C. 400, 619, 1990 WL 10012633 (F.T.C. June 13, 1990) and *Crown Zellerbach Corp.*, 54 F.T.C. 769, 808, 1957 WL 16302 (F.T.C. Dec. 26, 1957), *aff'd*, 296 F.2d 800 (9th Cir. 1961)); *but cf. Ekco Prods. Co.*, 65 F.T.C. 1163, 1964 WL 72993, at *43 (F.T.C. June 30, 1964) (cautioning against structural relief "so drastic, or inequitable, that the cure would be worse than the disease").

A. ADEQUACY OF THE PROPOSED DIVESTITURE

Although Respondent's proposed divestiture does not preclude a finding of liability in this case, it is relevant to the question of remedy. *See United States v. Quad/Graphics, Inc*., No. 1:19-cv-04153, Dkt. No. 46 (N.D. Ill. July 10, 2019) (bifurcating merger trial to first address liability issues and then consider defendants' proposed divestiture remedies). "Defendants bear the burden of showing that any proposed remedy would negate any anticompetitive effects of the merger[.]" *Staples, Inc.*, 190 F. Supp. 3d at 137 n.15 (citing *H&R Block*, 833 F. Supp. 2d at 89). Thus, Respondent must show that its proposed divestiture to [redacted] would restore the pre-Acquisition level of competition. *See, e.g., Ford Motor Co.*, 405 U.S. at 573; *Aetna Inc.*, 240 F. Supp. 3d at 60; *Sysco*, 113 F. Supp. 3d at 72. "Restoring competition requires replacing the *competitive intensity* lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels." *Sysco*, 113 F. Supp. 3d at 72 (quoting Antitrust Div., U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 5 (Oct. 2004)) (emphasis in *Sysco*). "[T]he divestiture assets must be substantial enough to enable the purchaser to *maintain the premerger level of competition*, and should be sufficiently comprehensive that the purchaser will use [the acquired assets] in the relevant market and be unlikely to liquidate or redeploy them." *Id.*.

The proposed divestiture to [redacted] does not meet these standards and is likely to result in less vigorous competition than existed before the Acquisition, because the proposed divestiture excludes certain Freedom assets and [redacted]

[redacted].[56]

1. Failure to Include [redacted]

The proposed divestiture could stifle the development of and innovation for the Quattro MPK because it fails to transfer [redacted]

[56] Complaint Counsel allege that the proposed divestiture is inadequate because, in addition to the deficiencies we identify below, [redacted] *See* CCAB at 35-36, 39-40. The record does not support a finding that these additional omissions in the proposed divestiture would harm [redacted] ability to compete.

[redacted]

2. Failure to Transfer [redacted]

The divestiture also fails to transfer [redacted][57].

[redacted]

[57] [redacted]

[redacted]

3. Failure to Provide [redacted]

Another deficiency [redacted]

[redacted]

[58] *See* PX01392-013; PX01409 at -005, -007.

[59] The Commission is aware that Ottobock and [redacted] cannot compel employees to accept employment at [redacted]. Yet, like Commission divestiture orders, the APA should, at the very least, remove impediments and disincentives that would hinder or discourage employees from accepting employment with the buyer of the divested assets.

[redacted]

[redacted]

4. Failure to Include [redacted]

The divestiture is also deficient because it fails to include [redacted] After Otto Bock's launch of the C-Leg 4 in 2015, Freedom sought to regain lost sales by introducing the "Ideal Combo" promotion, under which a customer would get a free or discounted foot with the purchase of a Plié knee. IDF 612-16; PX01158-001.[61] The promotion was a success. Testerman, Tr. 1147. It helped drive Plié sales and converted multiple customer accounts to the Plié from other MPKs. IDF 617, 624; Testerman, Tr. 1147-48; PX01091-012.

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[60] [redacted]

[61] *See also, e.g.*, PX00833-007 (Freedom advertisement offering either a free Highlander, Agilix, or DynAdapt foot or $1000 off of a Kinterra prosthetic foot/ankle system with the purchase of a Plié 3); PX00787-001 (offering free graphite foot or 50% off a Kinterra). The combination of the Kinterra and the Plié 3 accounts for the majority of Freedom's Ideal Combo sales. IDF 620.

Both Freedom's and Otto Bock's executives recognized the promotion's effectiveness.[62] Respondent's own expert witness concluded based on the case record that bundling Freedom's feet with its Plié MPK positively impacted Plié sales. IDF 630 (citing Argue, Tr. 6387-88). In fact, the Ideal Combo promotion was so successful that Freedom continued to use it to sell Pliés through the time of the Acquisition and beyond. *See* [redacted]; PX05138 (Reissfelder Dep.) at 77-79; PX00787. The proposed divestiture, however, [redacted]

[redacted][63]

[62] *See* Testerman, Tr. 1147-48 (Ideal Combo promotions "are effective" at keeping Freedom "competitive" and "tak[ing] share from all microprocessor knees"); Carkhuff, Tr. 408-09 (Ideal Combo is an "effective marketing tool" that "incentivizes customers to buy more Freedom knees and more Freedom feet"); Ferris, Tr. 2395 (Ideal Combo promotion "drives value and utilization"); Swiggum, Tr. 3340 (Freedom's bundling the Plié 3 with prosthetic feet is "an effective marketing tool"); Solorio, Tr. 1648 (Freedom's promotions bundling feet and knees are "effective"); PX01091-012 [redacted]

[redacted]

[redacted]

In sum, although we draw no conclusions about the suitability of [redacted] as a potential buyer for a more complete divestiture of Freedom's assets, we find the proposed divestiture under the terms of [redacted] inadequate to replace the competitive intensity lost as a result of the Acquisition.

B. THE ALJ'S REMEDIAL ORDER IS APPROPRIATE AND NECESSARY TO FULLY RESTORE COMPETITION

We concur in the ALJ's ruling that divestiture of Freedom's entire business, with potential exceptions for certain lines of prosthetic foot products that may not be necessary for competition in the MPK market, is the appropriate remedy in this case. *See* ALJ Order, ID at

64 [redacted]

234, Sections I.I and I.J, II.A.1, and Appendix A and B.[65]

In cases involving an unlawful merger, such as those described at the beginning of Section IX, Respondent may still affirmatively show that a remedy other than full divestiture would adequately redress any violation found. *See, e.g.*, *Staples,* 190 F. Supp. 3d at 137 n.15 (*dicta*) ("Defendants bear the burden of showing that any proposed remedy would negate any anticompetitive effects of the merger. . . ."); *Fruehauf Corp.*, 90 F.T.C. 891, 1977 WL 189065, at *1 n.1 (F.T.C. Dec. 21, 1977); *Diamond Alkali Co.*, 72 F.T.C. 700, 1967 WL 94030, at *33 (F.T.C. Oct. 2, 1967) ("In the absence of proof to the contrary the assumption . . . must be that only divestiture can reasonably be expected to restore competition and make the affected markets whole again.") (internal quotation and citation omitted). In any event, as set forth in Section IX.A and discussed further below, we rely on affirmative record evidence to conclude that a complete divestiture of Freedom, less a potential exception for certain prosthetic foot product lines, is necessary to restore competition in the MPK market.

Respondent argues that a divestiture of Freedom's MPK assets would completely restore competition and that any divestiture beyond MPKs is "punitive." RAB at 42-43. We disagree. As discussed in Section IX.A above, a divestiture of only MPK assets would not suffice to restore competition. Freedom used its foot products to support the development and sale of its MPKs. *See* Section IX.A.1 (discussing the interrelationship between the [redacted]) and Section IX.A.4 (discussing Freedom's use of its foot products to stimulate sales of MPKs). To allow the divestiture buyer to compete as effectively as Freedom, the buyer must be offered the same competitive advantages that were available to Freedom. Consequently, a broader divestiture is necessary. *See Chicago Bridge,* 534 F.3d at 441-42 (finding that divestiture of multiple products was necessary for the divestiture buyer to replicate pre-merger competition "on an equal footing," and thus was "reasonably calculated to eliminate the anti-competitive effects" of the acquisition).

Contrary to Respondent's assertion, a divestiture that includes Freedom's foot products is not "punitive" but necessary to remedy the Acquisition's anticompetitive effects. Respondent's reliance on *Jim Walter Corp.*, 90 F.T.C. 671, 1977 FTC LEXIS 10 (1977), *vacated on other grounds,* 625 F.2d 676 (5th Cir. 1980) is misplaced. In that case, the Commission chose not to order the respondent to divest its entire construction products business. The *Jim Walter* respondent had a single operating division that participated in the relevant antitrust market of concern, which was limited to asphalt and tar roofing products; the division operated as a separate profit center from the rest of the firm and had a separate sales force and separate plants. 1977 FTC LEXIS 10 at *206-07. The respondent could divest the smaller entity without

[65] Our Final Order also adopts other aspects of the ALJ's Order, as to which Respondent has not stated a basis for objection (apart from issues pertaining to the scope of assets covered) and which we find necessary for a successful divestiture. These aspects include requirements for continuing to hold Freedom's assets separate pending divestiture, Final Order ¶ II.A.3; providing a potential acquirer full due diligence, Final Order ¶ II.A.4; ensuring full and effective divestiture of the relevant assets, Final Order ¶¶ II.A.5(a) and (b), 6-8, and 10-12; preserving Freedom's assets and business until divestiture is accomplished, Final Order ¶¶ III-IV; permitting appointment of a person to monitor Otto Bock's compliance with its obligations, Final Order ¶ VI; providing for appointment of a Divestiture Trustee if Otto Bock fails to divest within the time and in the manner required, Final Order ¶ VII; and requiring the filing of compliance reports, Final Order ¶ VIII.

impairing its viability as a standalone competitor.[66] Freedom's MPK business, however, is enmeshed with its prosthetic foot business. The Quattro and [redacted] *See* Section IX.A.1. Moreover, Freedom uses its foot products to stimulate sales of the MPKs. *See* Section IX.A.4. We consequently have reason to doubt that Freedom's interrelated product lines can be carved up without impairing the acquiring firm's competitive prospects.[67]

Other cases like *Chicago Bridge* and *Polypore* are more applicable. In *Chicago Bridge*, the Fifth Circuit Court of Appeals upheld our order requiring the divestiture of respondent's water tank business notwithstanding that Complaint Counsel proved a violation only in the sale of cryogenic tanks. 534 F.3d at 441. The sale of water tanks provided a steady source of revenue that complemented the revenue from the sale of cryogenic tanks, which was very sporadic; divesting both business lines was necessary to create a viable competitor. *Id.* Similarly, in *Polypore*, we ordered the respondent to divest its overseas plant in Feistritz, Austria, even though the relevant geographic market was limited to the United States. 2010 WL 9933413, at *32-35. Among other benefits, the Feistritz plant enabled a buyer of the divested U.S. facilities to overcome capacity constraints that would have limited the buyer's ability to compete. *Id.* at *33. Inclusion of the Feistritz plant also helped the divestiture buyer meet some customers' preferences to buy from a global supplier, making it a more attractive competitor. *Id.* at *34. The Court of Appeals upheld the order as an appropriate use of our broad discretion as to remedy. *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1218-19 (11th Cir. 2012); *see also Olin Corp.*, 1990 WL 10012633, at *159 (F.T.C. June 13, 1990) (requiring divestiture of assets outside the relevant market to "give [the] acquirer a real chance at competitive success"), *pet. for review denied*, 986 F.2d 1295 (9th Cir. 1993).

By including Freedom's foot products in the divestiture order, we aim to avoid placing the risk of a failed remedy on consumers. Our recent study of past Commission remedies suggests that divestiture of an ongoing business is "most likely to maintain or restore competition" as compared to divestiture of more limited asset packages, which may "increase[ ] the risk that a remedy will not succeed." Fed. Trade Comm'n, The FTC's Merger Remedies 2006-2012 at 5 (Jan. 2017). Consistent with that study, the evidence in this case indicates that a divestiture limited to MPK assets would deprive the divestiture buyer of tools Freedom used to compete effectively and would risk diminishing competition. Indeed, Otto Bock clearly believed that offering such a bundle would be important and useful: one of the first marketing initiatives that Otto Bock discussed after acquiring Freedom was to offer [redacted] PX01302 (Nov. 2017 presentation) at 085. Dividing Freedom's MPK business from its successful foot lines would force consumers to bear the risk that the divestiture buyer

[66] And even while the Commission declined to order the broader divestiture in *Jim Walter*, it simultaneously observed that it is "certainly within our power" to do so. *Id.* at *206-07.

[67] The fact that a divestiture buyer may have been willing to acquire only Freedom's MPK products does not assure that it will succeed, [redacted]. *See supra* Section IX.A.

would be unable to re-create Freedom's competitive impact in MPKs. At the same time, Otto Bock could entrench its MPK share further by offering the very Freedom foot bundle that it wishes to deny its competitor. This outcome would fall short of the public interest standard that the Supreme Court articulated in *du Pont*, 366 U.S. at 327-28, which not merely "authorize[s]" but "require[s]" us to provide relief effective to redress the Respondent's violations. *Id.* at 326.

Given the importance of Freedom's Ideal Combo, the [redacted] and the risk that a proffered divestiture buyer could not successfully replicate these competitive initiatives, we find that divestiture of only Freedom's MPKs would fail to "replac[e] the competitive intensity lost as a result of the merger." *Sysco*, 113 F. Supp. 3d at 72 (internal quotation marks and emphasis omitted). To render the greatest likelihood that competition will be restored to its pre-Acquisition state, we enter a Final Order requiring the divestiture of Freedom's entire business, with potential exceptions for certain lines of foot products as described below.

Under the first potential exception, Otto Bock *may retain* any or all of the prosthetic foot products of Freedom specified in "Divestiture Products Group A," unless the acquirer demonstrates to the Commission's satisfaction (i) that any such asset is necessary to achieve the purposes of our Final Order; and (ii) that the acquirer needs such asset to effectively operate the Freedom business in a manner consistent with the purpose of the Final Order, and the Commission approves the divestiture with the divestiture of such asset. Final Order, ¶ II.A. Divestiture Products Group A consists of prosthetic feet that, according to Complaint Counsel, [redacted] ID at 93; Final Order, Appendix A.

Under the second potential exception, Otto Bock *must divest* any or all of the products specified in "Divestiture Products Group B" unless the acquirer demonstrates to the Commission's satisfaction: (i) that any such asset is not necessary to achieve the purpose of our Final Order; and (ii) that the acquirer does not need such asset to effectively operate the Freedom business in a manner consistent with the purpose of the Final Order, and the Commission approves the divestiture without such asset. Final Order, ¶ II.A. Divestiture Products Group B consists of Freedom prosthetic foot products that Complaint Counsel assert [redacted] [68] ID at 93; Final Order, Appendix B.

The manner and scope of divestiture are subject to the Commission's broad discretion. *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946); *Chicago Bridge*, 534 F.3d at 440-42. The Final Order strikes an appropriate balance, providing adequate assurance that the divestiture buyer will have the assets that it needs to restore the competition lost from the Acquisition, while at the same time allowing Otto Bock potentially to retain certain non-MPK assets that are not necessary to this remedial purpose.

[68] On its appeal, Respondent does not object to Complaint Counsel's delineation of the Group B products as having been used by Freedom in the Ideal Combo promotion, or of the Group A products as not having been so used.

X. CHALLENGES TO THE LEGITIMACY OF THE COMMISSION'S ENFORCEMENT PROCEEDING

For the first time, on appeal, Respondent asserts that the Commission's Part 3 proceedings are unconstitutional. RAB at 43-45; RRB at 20-23. Respondent challenges the legitimacy of the appointment and removal processes for the ALJ; the division of antitrust enforcement workload between the FTC and the U.S. Department of Justice; and various procedural rules that govern the offering and admissibility of evidence at Part 3 trials.

Respondent failed to raise any of these objections in its pleadings or while the matter was pending before the ALJ, waiting instead until the ALJ had ruled against it.[69] Respondent has therefore waived its current claims. *See 1-800 Contacts, Inc.*, 2018 WL 6078349, at *53 (F.T.C. Nov. 7, 2018), *pet. for review pending*, No. 18-3848 (2d Cir.); *see also LabMD, Inc.*, 2015 WL 5608167, at *2 (F.T.C. Sept. 14, 2015).

Even if Respondent had timely raised its challenges, however, we would still reject them for the reasons discussed below.

A. THE ALJ'S APPOINTMENT AND PROTECTION FROM REMOVAL

Respondent raises two distinct Constitutional challenges to the ALJ's authority. First, citing *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018), Respondent argues that the ALJ's appointment violated Article II's Appointments Clause. *Lucia* held that ALJs are "officers of the United States" under the Constitution who must be appointed by the President, a court of law, or a "Head[ ] of Department[ ]," which in this case would be the Commission. *See generally Lucia*, 138 S. Ct. at 2050-52; U.S. CONST. art. II, § 2, cl. 2. According to Respondent, the ALJ was not originally appointed pursuant to the Appointments Clause, but only had his appointment ratified by the Commission. Consequently, Respondent argues, the ALJ's hearing, rulings, and Initial Decision are void. RAB at 44.

Second, Respondent contends that the ALJ's so-called "multilevel protection from removal" is unconstitutional. RAB at 44; RRB at 22. Congress in the Administrative Procedure Act directed that the ALJ be removable only "for good cause" found by the Merit Systems Protection Board ("MSPB"), 5 U.S.C. § 7521 (2018). The MSPB's members, in turn, may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d) (2018). Respondent urges us to extend the Supreme Court's holding in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010), which held unconstitutional what Respondent deems a "similar multilayered removal process[ ]" for members of the Public Company Accounting Oversight Board. RRB at 23. The Court in *Free Enterprise Fund* found that the unique removal protections afforded to members of that body,

[69] In fact, before the ALJ issued his Initial Decision, Respondent took precisely the opposite position, arguing that "due process dictate[d] that the ALJ, and not the Commission, should decide" a motion then pending before the Commission to strike one of Respondent's affirmative defenses. Respondent's Opposition to Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense at 3 (Feb. 28, 2018).

who themselves were appointed by the Securities and Exchange Commission, violated the separation of powers. 561 U.S. at 498.

We reject Respondent's challenges to the ALJ's authority. Regarding the Appointments Clause, Respondent acknowledges that the Commission ratified the ALJ's appointment in September 2015, more than two years before the Complaint in this case was issued. *See LabMD, Inc.*, 2015 WL 5608167, at *3, Exh. A. Respondent does not even attempt to explain why our ratification would not cure any Appointments Clause violation.

Respondent observes that the *Lucia* court declined to decide whether ratification of an official's appointment suffices to cure an Appointments Clause defect. RRB at 22 (citing *Lucia*, 138 S. Ct. at 2055 n.6). We note, however, that circuit courts have already answered a much more difficult question: whether improperly-appointed officials can subsequently ratify their own, formerly invalid actions after their appointment becomes proper. The courts have found that they can. *See, e.g., Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 370-71 (D.C. Cir. 2017); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 606 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708-09 (D.C. Cir. 1996). These cases presented the scenario of an official's (or agency's) *post hoc* ratification of his/her (or its) originally *ultra vires* decision to bring an enforcement action, while that action was still pending. Here, Respondent's challenge to ratification has even less merit than the challenges denied by those courts, because the Commission cured any Appointments Clause violation years before the ALJ took any action in Respondent's case.

We also deny Respondent's objection to what it terms the ALJ's "multilevel protection from removal." As we held in *1-800 Contacts*, the FTC's ALJ "occupies a different role" than the PCAOB members whom the Supreme Court found to be improperly insulated from presidential control in *Free Enterprise Fund*. *1-800 Contacts*, 2018 WL 6078349, at *54. The PCAOB had "expansive powers to govern an entire industry," including registering and routinely inspecting all accounting firms that audit public companies, promulgating auditing and ethics standards, initiating formal investigations, and issuing "severe sanctions" in disciplinary matters. *Free Enter. Fund*, 561 U.S. at 485. The FTC ALJ, by contrast, primarily, and for all purposes relevant, serves "adjudicative rather than enforcement or policymaking functions," *id.* at 507 n.10, and his adjudicative power is limited to initial factfinding and initial rulings that the Commission reviews *de novo*. *Id.*; 16 C.F.R. §§ 0.14, 3.54(a). The Court noted these differences when it declined to sweep agency ALJs within the scope of its ruling on the PCAOB. *Free Enter. Fund*, 561 U.S. at 507 n.10.

Our discretion to remove the ALJ, and hence oversight of his activities, is also greater than the SEC's authority over the PCAOB members in *Free Enterprise Fund*. In creating the PCAOB, Congress "enacted an unusually high standard that must be met" before Board members could be removed, enumerating a discrete set of bases for removal and requiring a formal Commission notice and opportunity for a hearing. 561 U.S. at 503. Here, by contrast, if the Administrative Procedure Act's "good cause" standard for removal is properly construed—*i.e.*, to allow us to remove an ALJ for failure to perform adequately or to follow agency policies, and to limit the Merit Systems Protection Board's role to determining whether a factual basis exists for the agency's proffered grounds for removal—the APA gives the President a

constitutionally adequate degree of control over ALJs. *See 1-800 Contacts*, 2018 WL 6078349, at *54; Brief for Respondent Supporting Petitioners at 48-53, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130).

B. CHALLENGE TO THE FTC/DOJ CLEARANCE AGREEMENT

Respondent further asserts that the unsigned FTC/DOJ Clearance Agreement is unlawful and violates Respondent's Constitutional right to Equal Protection. According to Respondent, the DOJ and FTC divide antitrust enforcement "arbitrarily and capriciously," and in a manner that Congress did not intend, thus violating the Administrative Procedure Act. RAB at 45 (citing 5 U.S.C. § 706(2)(A)); RRB at 21-22. Respondent also argues that the agencies lack a rational basis to apply different procedures—federal court litigation versus the administrative litigation process—based solely on the industry in which respondents participate, so that "similarly situated groups" are "subject to different procedures, and levels of due process leading to different substantive outcomes." RAB at 45; *see also* RRB at 21. Respondent does not explain in what respect the outcomes of the two processes differ or how it has been prejudiced by any differences in procedures.

Respondent has failed to make out an APA or Equal Protection violation. The Commission and the DOJ have shared concurrent enforcement of the Clayton Act for more than a century since the Act's inception. Clayton Act § 11, 15 U.S.C. § 21 (vesting authority in the FTC to enforce Section 7); *id*., § 15, 15 U.S.C. § 25 (granting district courts jurisdiction to hear Clayton Act injunction actions brought by the United States under direction of the Attorney General). Thus, either agency could have brought an action against Respondent. Indeed, in *FTC v. Cement Institute*, 333 U.S. 683, 694–95 (1948), the Supreme Court upheld the concurrent jurisdiction, finding that the Sherman Act and the FTC Act provided the Government with "cumulative remedies against activity detrimental to competition." To the extent that the agencies choose to divide their workload, such that one brings an action rather than both doing so, this hardly gives a basis for complaint. *See FTC v. AT&T Mobility LLC*, 883 F.3d 848, 862 (9th Cir. 2018) (noting that "two cops on the beat is not unusual," and favorably citing FTC and DOJ concurrent enforcement). In any event, Respondent has failed to explain how its treatment would materially differ by agency where, as here, both agencies enforce the Clayton Act pursuant to the same case law and a shared set of enforcement guidelines.

C. THE COMMISSION'S PROCEDURAL RULES FOR PART 3 PROCEEDINGS

Finally, Respondent argues that Part 3 provides "unequal treatment" to respondents and Complaint Counsel, thus failing to accord procedural due process. RAB at 44-45. Respondent cites Rule 3.43(d)(3), which provides a rebuttable presumption that a respondent's documents produced from its own files are authentic and kept in the ordinary course of business. Respondent also points to Rule 3.43(e)[70] which, according to Respondent, "allow[s Complaint

[70] Rule 3.43(e) reads, "Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by counsel representing the Commission in any such proceeding."

Counsel] to use as evidence anything obtained during its investigation." Respondent asserts that these provisions are one-sided because they do not provide the same benefits to Respondent as to Complaint Counsel. RAB at 44-45. Respondent also complains—in half of a sentence—about the admissibility of hearsay against respondents. RRB at 23.

Respondent's concerns about the fairness of the Part 3 rules appear to be based on misapprehension of those rules. For example, Part 3's hearsay rule, 16 C.F.R. § 3.43(b) (2019), providing that hearsay may be admitted if it is "relevant, material, and bears satisfactory indicia of reliability so that its use is fair," confers no special advantage on Complaint Counsel because it applies equally to both parties. Rule 3.43(d)(3), regarding authenticity of respondent's records, accurately notes that respondents "are in the best position to determine the nature of documents generated by [them] and which come from their own files," and accordingly gives respondents the burden to rebut a presumption of authenticity for their own records. *Id.* This rule is not inconsistent with federal court practice, which allows a court to infer a document's authenticity from the fact that an opposing party produced it. *See, e.g., Snyder v. Whittaker Corp.*, 839 F. 2d 1085, 1089 (5th Cir. 1988); *Orr v. Bank of America, NT & SA*, 285 F. 3d 764, 777 & n.20 (9th Cir. 2002). Rule 3.43(e) allows the Commission to disclose and offer evidence gathered "under any of its powers," notwithstanding that such powers normally come with confidentiality obligations attached. *See* 15 U.S.C. §§ 57b-2(b)(3)(C) (Commission's duty of confidentiality), 57b-2(d)(1)(C) (ability to disclose confidential materials in a proceeding). Rule 3.43(e) does not guarantee that Complaint Counsel's evidence will be admitted, nor does it prevent respondents from offering their own evidence.[71]

In any event, Respondent fails to articulate any harm to it from the Commission's purportedly unfair rules. Respondent does not identify a single piece of evidence that it wanted to admit but could not, nor any evidence that was admitted against it that should not have been. This lack of harm is fatal to Respondent's procedural due process claim. *See Perry v. Blum*, 629 F.3d 1, 17 (1st Cir. 2010).[72]

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[71] Respondent does not argue, nor can it, that respondents lack access to the investigative materials that Complaint Counsel gather during their investigation. *See, e.g.*, Rule 3.31(b) (mandating broad initial disclosure of "all documents and electronically stored information . . . relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent . . . .").

[72] Nor do we accept Respondent's arguments that its Constitutional rights were violated by our declining to grant Respondent's motions (i) to remove this case to the settlement process and (ii) to extend the briefing schedule for its appeal. It is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 544 (1978). Furthermore, agencies have discretion to manage the disposition of their caseloads. *See, e.g., Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (upholding such authority "in the strongest terms"). Within the time set forth in our rules, Respondent filed thorough briefs that set forth a comprehensive variety of arguments. Particularly in a consummated acquisition that threatens continuing harm to consumers, it is reasonable and appropriate for the Commission to manage its docket in a manner that keeps the case on track to a final disposition.