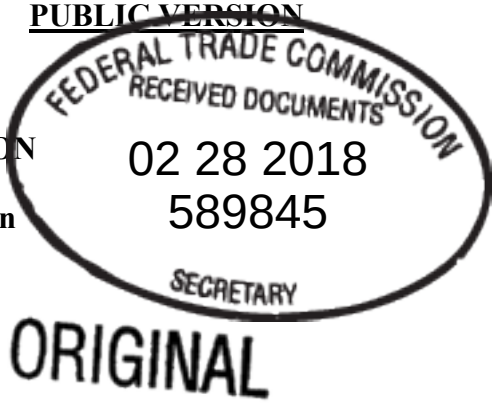
PUBLIC VERSION



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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

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

RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO STRIKE RESPONDENT'S SEVENTH AFFIRMATIVE DEFENSE

Wayne A. Mack
Edward G. Biester III
Sean S. Zabaneh
Sean P. McConnell
Erica Fruiterman
Sarah Kulik
William Shotzbarger
DUANE MORRIS LLP
30 S. 17th Street
Philadelphia, PA 19103
Telephone: (215) 979-1000
Fax: (215) 979-1020
WAMack@duanemorris.com
EGBiester@duanemorris.com
SSZabaneh@duanemorris.com
SPMcConnell@duanemorris.com
EFruiterman@duanemorris.com
SCKulik@duanemorris.com
WShotzbarger@duanemorris.com

Dated: February 28, 2018

Attorneys for Respondent Otto Bock HealthCare North America, Inc.

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INTRODUCTION & BACKGROUND

[redacted]

Respondent Otto Bock HealthCare North America, Inc. ("Ottobock") disputes the material factual statements in the Motion, including that the merger is likely to substantially lessen competition. [redacted]

Complaint Counsel cites no authority for the proposition that [redacted] is irrelevant to the issue the Commission must prove: likelihood of substantial lessening of competition. Such matters should be decided on full factual development, not on a motion to strike. Indeed, the Motion, labeled as a motion to strike an affirmative defense, in reality seeks partial summary decision on disputed issues of competitive effects on which the Commission bears the burden of proof and Ottobock is entitled to develop and present evidence. Due process requires that Ottobock be permitted to frame its

[1] All exhibits ("Exh.") are attached to the Declaration of William Shotzbarger.

own defense and present pertinent evidence. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) (the right to present a defense is a fundamental element of due process).

Ottobock disputes the allegations of relevant market, market shares, barriers to entry or expansion, contentions that Freedom was its closest competitor, [redacted], and disputes anticompetitive effects. *See* Amended Answer and Affirmative Defenses; Jan. 18, 2018 Tr. at 34-50.[2] Preclusion of disputed defenses is inappropriate at this early stage, with fact discovery proceeding and Ottobock's expert reports not due until May 1, 2018. *See Impax Labs., Inc.*, No. 9373 (F.T.C. Oct. 27, 2017) (denying premature motion seeking to limit defenses).

The evidence will establish that Ottobock's acquisition of Freedom does not violate the Clayton Act because the acquisition will not substantially lessen competition. That element of a violation depends on a forward-looking evaluation of overall effects. *See United States v. General Dynamics Corp.*, 415 U.S. 486, 504-05 (1974) (noting that "postacquisition evidence tending to diminish the probability or impact of anticompetitive effects might be considered in a

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[2] For example, Ottobock has asserted that:

"Efficiencies and other procompetitive benefits … outweigh any and all proffered anticompetitive effects." Am. Answer at 29.

"The Complaint fails to allege a proper relevant market in which to assess competitive effects …." *Id*.

"Any presumption of anticompetitive effects is rebutted by numerous factors, including, … the lack of substantial barriers to entry or expansion, the existence of numerous competing manufacturers each with its own research and development programs, the severe price constraints imposed by CMS and private insurers with superior bargaining power, the economic incentive and ability of large distributors and customers to promote products of Ottobock's competitors and new entrants, the severely diminished competitive profile of Freedom … in light of the financial difficulties it faced, and any anticompetitive effects are outweighed by procompetitive effects, efficiencies and synergies, including without limitation, cost savings, quality improvements, expanded consumer choice, and innovation." *Id*. at 29-30.

"At the time of the acquisition, Freedom … was a failing firm." *Id*. at 30.

§ 7 case" and that "the essential question remains whether the probability of such future impact [substantial lessening of competition] exists at the time of trial").

There has been no violation of the Clayton Act, and one of the reasons why is that the acquisition—[redacted]—is not likely to result in substantial lessening of competition. That disputed issue is part of the elements of a violation and a potentially dispositive defense.

THE ALJ SHOULD DECIDE THE MOTION

[redacted][3]

Pursuant to Rule 3.22(a), a motion to strike is referred to the Commission, unless the Commission refers it to the ALJ. The ALJ should address the Motion regarding issues that the ALJ identified as going to the heart of the case. In this context, due process dictates that the ALJ, and not the Commission, should decide the Motion. *See* ABA Antitrust Section Comments to FTC's Proposed Rulemaking, Nov. 6, 2008 (arguing that the Commission deciding motions to

[3] At the scheduling conference, the ALJ questioned counsel on the seventh affirmative defense. Jan. 18, 2018 Tr. at 6-9, Exh. B. The ALJ did not question its adequacy, or suggest that more detailed pleading was required, or that it was deficient as a matter of law. Instead, the ALJ suggested as a practical matter that [redacted]

strike "could reduce the quality of decision making, and may color the perception of the fairness and impartiality of Commission proceedings ….").

ARGUMENT

The Motion assumes, without any proof, that the merger was illegal. [redacted] [4] The evidence will show that the acquisition will not substantially lessen competition, inter alia, because Freedom [redacted] The Motion should be denied.

I. Disputed Factual Issues Preclude the Drastic Remedy of a Motion to Strike

Rule 3.22(a) permits motions to strike. *See In re 1-800 Contacts, Inc.*, 2017 WL 511541, *2 (F.T.C. Feb. 1, 2017). However, motions to strike are disfavored because striking a portion of a pleading is a drastic remedy. *In re Dynamic Health of Florida, LLC*, 2004 WL 3142823, *1 (F.T.C. Nov. 9, 2004); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001) (quoting 5A Wright & Miller Fed. Prac. & Procedure § 1380, 647 (2d ed.)). Many courts will grant such motions "only if the portions sought to be stricken are prejudicial or scandalous." *Makuch v. F.B.I.*, No. Civ.A. 99-1094, 2000 WL 915767, at *2 (D.D.C. Jan. 7, 2000). Absent a strong reason for so doing, courts will generally not tamper with pleadings. *Nwachukwu v. Karl*, 216 F.R.D. 176, 178 (D.D.C. 2003).

Complaint Counsel argues that it styled the Motion "as a motion to strike because it relies solely on the pleadings rather than any identified undisputed material fact." Mot. at 3 n.1. To

[4] *See* Am. Answer at 29 ("The inclusion of any ground within this section [on affirmative defenses] does not constitute an admission that Ottobock bears the burden of proof on each or any of the matters, nor does it excuse the FTC from establishing each element of its purported claim for relief.").

the contrary, the Motion relies not only on material facts disputed in the pleadings, as noted above, but also upon facts outside the pleadings. For example, the Motion asserts that Ottobock fired Freedom's CEO, began moving forward with integration plans, and then slowed those plans. *See* Mot. at 2. None of these facts—which are disputed—are in the Complaint.[5]

Complaint Counsel cites no case granting a motion to strike relating to [redacted] Complaint Counsel relies on *Impax Labs., Inc.*, No. 9373 (F.T.C. Oct. 27, 2017) and *In re 1-800 Contacts*, 2017 WL 511541, at *4. Both of these cases addressed motions for summary decision. Neither was a merger case. In *1-800 Contacts*, because the complaint challenged only private conduct not subject to *Noerr-Pennington* protection, certain defenses were stricken. In contrast, [redacted] go to the heart of factual analysis of whether the acquisition will substantially lessen competition, a disputed element of a violation.

In *Impax Laboratories*, the Commission refused to grant a motion for summary decision precluding defenses, which was prematurely brought before the parties had completed discovery and fully articulated their positions. *See Impax Labs., Inc.*, No. 9373 at 2. Similarly, there are many facts in dispute at the heart of this action, including whether the acquisition [redacted] is likely to substantially lessen competition. Furthermore, the discovery period runs until April 6, 2018, and Ottobock expert reports are not due until May 1, 2018.

The Motion argues that the defense fails the *Twombly/Iqbal* pleading standard. However, [redacted] is pertinent to issues on which the Commission bears the burden of proof, and the federal appellate courts have not addressed whether heightened pleading requirements apply

[5] Complaint Counsel made these arguments after it deposed Ottobock's designee on integration. [redacted]

to affirmative defenses, with federal district courts divided on that issue. *See* 5 Wright & Miller Fed. Prac. & Procedure: Civil 3d § 1274 (3d ed.). Moreover, as noted by the ALJ and the cases cited above, [redacted] goes to the heart of the Complaint. *See* pp. 1-3 above. On February 21, 2018, [redacted][6] To the extent more artful pleading or additional facts surrounding the [redacted] are required, Ottobock requests leave to amend.

II. [redacted] Is Pertinent to Analysis of Competitive Effects, Which the Commission Must Prove As Part of Its Case

The Motion should be denied because it is premised on, and assumes, material facts which are in dispute regarding whether Ottobock's acquisition will substantially lessen competition. *See, e.g.*, Am. Answer at 1-2, 29-30; ¶¶ 17, 31, 39, 59, 62. The acquisition will not substantially lessen competition, inter alia, because [redacted]

On September 22, 2017, Ottobock acquired Freedom. Within a week, Ottobock received inquiries from the FTC. In light of the FTC investigation, Ottobock [redacted]

[6] [redacted]

[7] [redacted]

[redacted]

The investigatory hearings conducted *ex parte* by Complaint Counsel confirm that [redacted]

The Motion contends that the effect of [redacted]

Complaint Counsel incorrectly argues it will "have to try two cases: [redacted]

[redacted]

[redacted]

The acquisition is not likely to substantially lessen competition because [redacted]

[redacted]

CONCLUSION

The Motion should be referred to the ALJ for decision and should be denied. If any more artful pleading or further details on [redacted] are required, Ottobock requests leave to amend.

Dated: February 28, 2018

Respectfully submitted,

/s/ William Shotzbarger
Wayne A. Mack
Edward G. Biester III
Sean S. Zabaneh
Sean P. McConnell
Erica Fruiterman
Sarah Kulik
William Shotzbarger
DUANE MORRIS LLP
30 S. 17th Street
Philadelphia, PA 19103
Telephone: (215) 979-1000
Fax: (215) 979-1020
WAMack@duanemorris.com
EGBiester@duanemorris.com
SSZabaneh@duanemorris.com
SPMcConnell@duanemorris.com
EFruiterman@duanemorris.com
SCKulik@duanemorris.com
WShotzbarger@duanemorris.com

Attorneys for Respondent Otto Bock HealthCare North America, Inc.

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Terrell McSweeny

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

DECLARATION OF WILLIAM SHOTZBARGER IN SUPPORT OF RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO STRIKE RESPONDENT'S SEVENTH AFFIRMATIVE DEFENSE

I, William Shotzbarger, pursuant to 28 U.S.C. § 1746, state and declare as follows:

1. I am an attorney at Duane Morris LLP. I am licensed to practice law in the Commonwealth of Pennsylvania. I am over the age of 18, am capable of making this Declaration, know all of the following facts of my own personal knowledge, and, if called and sworn as a witness, could and would testify competently thereto.

2. Attached as **Exhibit A** is a true and correct copy of [redacted]

3. Attached as **Exhibit B** is a true and correct copy of [redacted]

4. Attached as **Exhibit C** is a true and correct copy of [redacted]

5. Attached as **Exhibit D** is a true and correct copy of [redacted]

6. Attached as **Exhibit E** is a true and correct copy of [redacted]

7. Attached as **Exhibit F** is a true and correct copy of [redacted]

8. Attached as **Exhibit G** is a true and correct copy of [redacted]

9. Attached as **Exhibit H** is a true and correct copy of [redacted]

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 28th day of February 2018 in Philadelphia, Pennsylvania.

/s/ William Shotzbarger
William Shotzbarger

Public Version

EXHIBIT A

REDACTED IN ENTIRETY

Public Version

EXHIBIT B

REDACTED IN ENTIRETY

Public Version

EXHIBIT C

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EXHIBIT D

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EXHIBIT E

REDACTED IN ENTIRETY

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EXHIBIT F

REDACTED IN ENTIRETY

Public Version

EXHIBIT G

REDACTED IN ENTIRETY

Public Version

EXHIBIT H

REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 28, 2018, I caused a true and correct copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense to be served via the FTC E-Filing System and e-mail upon the following:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Rm. H-110
Washington, DC, 20580

Donald S. Clark
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Washington, DC 20580

Meghan Iorianni
Jonathan Ripa
Steven Lavender
William Cooke
Yan Gao
Lynda Lao
Stephen Mohr
Michael Moiseyev
James Weiss
Daniel Zach
Amy Posner
Lisa De Marchi Sleigh
Catherine Sanchez
Sarah Wohl
Joseph Neely
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC, 20580

/s/ William Shotzbarger
William Shotzbarger

Notice of Electronic Service

I hereby certify that on February 28, 2018, I filed an electronic copy of the foregoing Public - Respondent's Opposition to Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on February 28, 2018, I served via E-Service an electronic copy of the foregoing Public - Respondent's Opposition to Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense, upon:

Steven Lavender
Attorney
Federal Trade Commission
slavender@ftc.gov
Complaint

William Cooke
Attorney
Federal Trade Commission
wcooke@ftc.gov
Complaint

Yan Gao
Attorney
Federal Trade Commission
ygao@ftc.gov
Complaint

Lynda Lao
Attorney
Federal Trade Commission
llao1@ftc.gov
Complaint

Stephen Mohr
Attorney
Federal Trade Commission
smohr@ftc.gov
Complaint

Michael Moiseyev
Attorney
Federal Trade Commission
mmoiseyev@ftc.gov
Complaint

James Weiss
Attorney
Federal Trade Commission

jweiss@ftc.gov
Complaint

Daniel Zach
Attorney
Federal Trade Commission
dzach@ftc.gov
Complaint

Amy Posner
Attorney
Federal Trade Commission
aposner@ftc.gov
Complaint

Meghan Iorianni
Attorney
Federal Trade Commission
miorianni@ftc.gov
Complaint

Jonathan Ripa
Attorney
Federal Trade Commission
jripa@ftc.gov
Complaint

Wayne A. Mack
Duane Morris LLP
wamack@duanemorris.com
Respondent

Edward G. Biester III
Duane Morris LLP
egbiester@duanemorris.com
Respondent

Sean P. McConnell
Duane Morris LLP
spmcconnell@duanemorris.com
Respondent

Erica Fruiterman
Duane Morris LLP
efruiterman@duanemorris.com
Respondent

Sarah Kulik
Duane Morris LLP
sckulik@duanemorris.com
Respondent

William Shotzbarger
Duane Morris LLP
wshotzbarger@duanemorris.com
Respondent

Lisa De Marchi Sleigh
Attorney

Federal Trade Commission
ldemarchisleigh@ftc.gov
Complaint

Catherine Sanchez
Attorney
Federal Trade Commission
csanchez@ftc.gov
Complaint

Sarah Wohl
Attorney
Federal Trade Commission
swohl@ftc.gov
Complaint

Joseph Neely
Attorney
Federal Trade Commission
jneely@ftc.gov
Complaint

Sean Zabaneh
Duane Morris LLP
SSZabaneh@duanemorris.com
Respondent

Dylan Brown
Attorney
Federal Trade Commission
dbrown4@ftc.gov
Complaint

Betty McNeil
Attorney
Federal Trade Commission
bmcneil@ftc.gov
Complaint

Stephen Rodger
Attorney
Federal Trade Commission
srodger@ftc.gov
Complaint

William Shotzbarger
Attorney