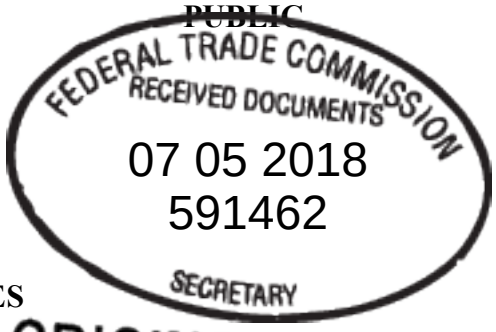

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

RESPONDENT'S PRE-TRIAL BRIEF

TABLE OF CONTENTS

INTRODUCTION 7

FACTUAL BACKGROUND 9

I. MPK Manufacturers in the United States 9

A. Ottobock 9

B. Össur 10

C. Freedom Innovations 11

D. Endolite 12

E. Nabtesco 12

F. DAW 13

II. The Challenged Acquisition 13

III. Competitive Landscape for Sales of MPKs 16

A. K-Level Mobility Coding System 17

B. L-Code Reimbursement System 17

C. Third Party Payors Pay for Function and Are Manufacturer Agnostic 18

ARGUMENT 19

IV. Complaint Counsel Has The Burden Of Establishing A Relevant Product Market. 20

A. Practical Indicia Support A Market Broader than Complaint Counsel's Alleged MPK-Only Market 22

B. The Hypothetical Monopolist Test Confirms That The Relevant Product Market Is Broader Than Only MPKs 28

V. The Merger Is Unlikely To Substantially Lessen Competition 33

A. Market shares do not fully reflect the competitive significance of the firms in the market or the impact of the merger. 33

B. At the time of the merger, Ottobock's closest MPK competitors were [redacted]. 35

1. Ottobock does not consider Plié 3 to be functionally equivalent to most other MPKs in the United States..... 35

2. From pricing, functionality, quality, and marketing perspective, Ottobock's C-Leg 4's closest rivals are [redacted] 37

3. Ottobock and Freedom's pricing and marketing strategies were significantly different and demonstrated that they were not closest competitors..... 43

C. Remaining MPK manufacturers will continue to constrain Ottobock and there are no barriers to expansion of the firms in the alleged market..... 44

1. [redacted]

D. The Merger will not substantially lessen MPK innovation 49

E. Freedom was a flailing firm at the time of Ottobock's acquisition 52

F. [redacted] is a powerful buyer that provides a significant competitive constraint on Ottobock/Freedom..... 56

VI. Cognizable, Merger-Specific Efficiencies Will Offset Any Potential Anticompetitive Harm From The Merger By A Wide Margin.....61

VII. Freedom Was a Failing Firm Under the Merger Guidelines. 62

A. [redacted]

C. [redacted]

[redacted]

CONCLUSION.....84

TABLE OF AUTHORITIES

Cases

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 21

California v. Sutter Health Sys., 84 F. Supp. 2d 1057 (N.D. Cal. 2000).....63, 65

California v. Sutter Health System, 130 F. Supp. 2d 1109 (N.D. Cal. Jan. 29, 2001) 29

FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) 20, 53

FTC v. Freeman Hospital, 911 F. Supp. 1213 (W.D. Mo. 1995).....32

FTC v. Great Lakes Chem. Corp., 528 F. Supp. 84 (N.D. Ill. 1981).....63

FTC v. National Tea Co., 603 F.2d 694 (8th Cir. 1979).....53

FTC v. RR Donnelley & Sons Co., No. 90-1619, 1990 U.S. Dist. LEXIS 11361 (D.D.C. Aug. 27, 1990).....57

[redacted]

FTC v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999) 61

[redacted]

New York v. Kraft General Foods, Inc., 926 F. Supp. 321 (S.D.N.Y. 1995) 19

In re Polypore Int'l, 149 F.T.C. 486 (F.T.C. March 1, 2010) (Chappell, A.L.J.).....*Passim*

Reilly v. Hearst Corp., 107 F. Supp. 2d 1192 (N.D. Cal. 2000).....63

Seven-Up Cos. v. FTC, 991 F.2d 859 (D.C. Cir. 1993) 63

In re SKF Indus., 94 F.T.C. 6, 1979 F.T.C. LEXIS 292 (F.T.C. 1976).....63

[redacted]

[redacted]

United States v. American Express Co., 838 F.3d 179 (2d Cir. 2017) 28

United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990).....34

United States v. Black & Decker Mfg. Co., 430 F. Supp. 729 (D. Md. 1976).....63

United States v. Country Lake Foods, 754 F. Supp. 669 (D. Minn. 1990).....57, 61

United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377 (1956) 21-22

[redacted]

United States v. General Dynamics Corp., 415 U.S. 486 (1974) ..... 21, 52, [redacted]

United States v. M.P.M. Inc., 397 F. Supp. 78 (D. Colo. 1975) 63

United States v. Maryland & Virginia Milk Producers Ass'n, 167 F. Supp. 799 (D.D.C. 1958) 63

[redacted]

United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N. D. Cal. 2004)..... 27-28, 44

[redacted]

United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172 (N.D. Ill. 2001)..... 21, 28

[redacted]

Statutes

Bankruptcy Act Chapter 11 ..... 62, 67-68

Bankruptcy Code 67

15 U.S.C. § 18..... 15

15 U.S.C. § 45..... 15, 20, 33

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Areeda, Phillip & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 954e (4th ed. 2016)..... 72-73

INTRODUCTION

The acquisition by Ottobock HealthCare North America, Inc. ("Ottobock") of FIH Group Holdings, LLC ("Freedom") (the "Merger") will not harm competition, even within the overly narrow alleged product market. The alleged microprocessor knee ("MPK") market contains strong, non-merging competitors with excess capacity for expansion, customers with significant buying power who are price sensitive and willing to switch among brands, and a highly-regulated reimbursement system that severely constrains prices.

Freedom was failing. It was in severe financial distress, [redacted] Through repeated delayed product launches and struggles with quality over the past 10 years, Freedom has proved unable to deliver a high-quality and high technology product. It simply lacked the financial health and stability to invest in updating its products to remain relevant in the market. The relative weakness of the Plié is underscored by the fact that Ottobock's acquisition of Freedom was principally driven by prosthetic feet, and not knees.

Through cherry-picked evidence, Complaint Counsel attempts to paint Freedom and Ottobock as close competitors. However, the reality is that in the MPK segment, and in the prosthetic industry generally, Ottobock's closest competitor is [redacted] With respect to MPKs, Ottobock and [redacted] are closest competitors on functionality, price, quality, performance, and reliability. [redacted] is Ottobock's next closest competitor. The evidence will show that Freedom's Plié, due to its limited functionality, poor quality, and value pricing strategy, is not a particularly close competitor of Ottobock. Freedom, like all prosthetic knee manufacturers (and all prosthetics makers, for that

matter) may consider Ottobock to be its number one competitor; however, from a functionality, price, quality, performance and reliability standpoint, Freedom's closest competitors on MPKs are [redacted]

Amputees with greater mobility, as discussed below, can and do use MPKs and non-MPKs. There are myriad types of prosthetic knees that comprise a full spectrum of functionality. To single out one feature – the presence of anything computer-controlled on the prosthetic – as definitional is contrary to the way prosthetists and amputees choose prosthetic components and the way industry participants view the market. Moreover, to the extent that Complaint Counsel seeks to argue that all MPKs are distinguished from all other products by safety, efficacy and reliability, then it cannot also credibly argue that the non-merging MPK manufacturers such as Össur, Endolite, Nabtesco, and DAW will not constrain the merged firm.

From a practical level, the evidence will show that competition and consumers are not injured by the Merger – particularly when considering that Freedom sold fewer than [redacted] MPKs annually in the United States. Clinics are not concerned about the Merger impacting the prices they pay for prosthetic knees, because they have negotiating power and sufficient alternative suppliers to meet demand. Ottobock is a financially stable company that has consistently invested in innovation, even when there is no obvious economic benefit in doing so. There is no evidence that the ultimate end users – amputees – are negatively impacted by the Merger either. On the contrary, the Merger is likely to benefit amputees because it will [redacted] and it will spur innovation and more reliable products.

[redacted]

[redacted] Therefore, there is no competitive harm in the alleged market.

FACTUAL BACKGROUND

I. MPK Manufacturers in the United States

It is undisputed that at least six firms sell MPKs in the United States: Ottobock, Össur, Freedom, Endolite, Nabtesco, and DAW. Prosthetic clinics in the United States can and do purchase MPKs from all six firms.[1] All six own intellectual property allowing them to sell, research, and develop MPKs in the United States.[2]

A. Ottobock

Since its founding in 1919, Ottobock has a long history of disruptive innovation in the areas of prosthetics, orthotics, mobility solutions, and medical care business throughout the world. [3] This disruptive innovation has allowed Ottobock to significantly improve the quality of life and socio-economic welfare of amputees in the United States. In particular, Ottobock, through partnership with the United States Departments of Defense and Veterans Affairs, has developed and introduced cutting-edge products designed to help active military personnel and veterans regain their freedom of movement.

Ottobock has been particularly innovative with respect to prosthetic knees. Ottobock introduced the C-Leg, the first microprocessor-controlled swing and stance phase knee to the

[1] *See, e.g.*, Complaint Counsel's Pre-trial Brief at 29. Other companies have engaged in MPK development efforts in the past, [redacted]
[2] According to Complaint Counsel's expert, 6,130 MPKs were sold in the U.S. in 2017. Morton Report at 83, Table 7.
[3] RX-0964 (https://www.ottobock.com/en/company/ottobock-today/).

United States market in 1999.[4] Since that time, Ottobock's C-Leg has become the "gold standard" MPK. In addition to the overwhelming success of the original C-Leg and its successors, Ottobock has continued to innovate with respect to MPKs. Ottobock has developed the Compact and Kenevo for lower-mobility amputees, and the Genium and X3 for more active amputees, including active and retired U.S. service men and women. Ottobock also sells highly sophisticated, non-MPKs such as the 3R80, 3R60, and 3R95 that are waterproof and provide greater flexion and are lighter weight than MPKs.[5] Despite Ottobock's successful transformation of prosthetic knees, Ottobock has struggled to develop similarly effective prosthetic feet.[6]

B. Össur

Össur's global prosthetics revenue in 2017 was between [redacted] and its prosthetics revenue in the United States was between [redacted][7] Össur sells a complete portfolio of prosthetics products, including the Rheo, Power Knee, Total Knee 2000, Total Knee 2100, Mauch, and Rheo Knee XC for K3 and K4 patients.[8] Össur uses a sales force of approximately [redacted] people to sell all of its prosthetics products in the United States, including its MPKs.[9] [redacted]

[4] A microprocessor swing and stance controlled knee was described by one prosthetist as follows: "generally speaking, they will utilize [fluid] to regulate the knee bending, so at what rate the knee will bend at any given time is controlled by changing resistance in the knee's [fluid] based on the input from the prosthesis as analyzed by the microprocessor." PX05003 [redacted]

[5] PX05162 (Ruhl (Ottobock) Dep Tr., 112:16-112:20); PX05165 [redacted]

[redacted][11]

C. Freedom Innovations

Freedom has developed lower-limb prosthetic components primarily for sale in the United States since 2002.[12] It has a wide portfolio of advanced lower limb prosthetic solutions and support services focusing mostly on prosthetic feet and ankles.[13] In particular, Freedom markets 23 brands of carbon fiber feet that can be customized to fit any lifestyle from everyday walking to extreme sports.[14] The majority of Freedom's sales are derived from prosthetic feet and ankles, which are outside the scope of the alleged relevant market of only MPKs.

Since 2007, Freedom has also sold a prosthetic knee called the Plié that utilizes a microprocessor to switch between the stance phase and swing of the knee. Despite some success with more active patients, Freedom expected [redacted][15] Freedom is [redacted] but projections regarding the commercial viability of [redacted] are speculative at best.

In 2017, Freedom was [redacted] Ottobock's acquisition of Freedom has [redacted][16]

[11] RX-0526
[12] RX-0947 (http://freedom-innovations.com/the-company/)
[13] *Id.*
[14] RX-0949 (http://freedom-innovations.com/)
[15] PX01014 at 041; PX01061 at 043; PX05010 (Schneider (Ottobock) IH Tr., 224:7-225:6).
[16] RX-0425.

D. Endolite

Like Freedom, Endolite sells lower-limb prosthetics in the United States.[17] Endolite's annual U.S. revenue is [redacted].[18] In addition to prosthetic feet, ankles, and liners, Endolite sells the Orion 3, Mercury, KX06, and ESK Variable Knee Control to U.S. clinics for K3 patients.[19] Endolite's Linx, an integrated prosthetic leg system that includes the Orion 3 MPK, won "Best Overall Winner" at the Medical Design Excellence Awards in 2017. Endolite utilizes a salesforce of [redacted] individuals to sell all of its prosthetics products, including MPKs, in the United States.[20]

E. Nabtesco

Wisconsin-based Proteor will become the exclusive seller of Nabtesco's prosthetic knees later this year.[21] Nabtesco's leading MPK, the Allux, was only recently fully launched in the United States, and [redacted].[22] The Allux is considered by many to be one of the best functioning MPKs sold in the United States because of its innovative four-bar technology.[23] Until now, Proteor has only used [redacted] sales representatives and [redacted] clinical specialist to sell the Allux, but Proteor has plans to increase to [redacted] sales representatives and [redacted] clinical specialists by [redacted].[24] Consistent with those plans, Proteor expects to be selling [redacted] Allux units per year by [redacted]. Proteor's plan for growth is further substantiated by its

[17] RX-0814.
[18] PX05144 [redacted]
[20] RX0791.
[21] PX05161 [redacted]
X05005 (Smith (Freedom) IH Tr. 31:6-31:7).
[24] PX05161 [redacted]

recent acquisition of Ability Dynamics, the manufacturer of the RUSH Foot line of prosthetic feet.[25]

F. DAW

DAW Industries provides additional alternative MPKs, which are manufactured by a Taiwanese company.[26] Its sales in the United States have included the Self-Learning Knee ("SLK"), the Microprocessor Programmable Knee ("MPPK"), and the Multi-Matrix Self-Learning Knee ("MTX"). These knees differ depending on how input from sensors is used to adjust the performance of the knee.[27] The SLK has been discontinued and [redacted].[28] Each of the models uses pneumatic technology.[29] DAW utilizes [redacted] individuals for sales of its MPKs, and DAW also sells prosthetic feet, ankles, liners, skins, foam, and titanium components.[30]

II. The Challenged Acquisition

Ottobock acquired Freedom on September 22, 2017 pursuant to an Agreement and Plan of Merger ("Merger Agreement").[31] Ottobock acquired Freedom for [redacted]

The primary strategic rationale for Ottobock's acquisition of Freedom was to [redacted].[32] Despite Freedom's pitch to Ottobock that [redacted] had the [redacted] to become a commercially viable MPK, [redacted].[33]

[25] *See* Press Release (http://pdf.pr.com/press-release/pr-755715.pdf)
[26] PX05147 [redacted]
[31] *See* RX-0820 at 001 ("FIH-Agreement and Plan of Merger")
[32] PX01003 at 003.
[33] PX01003 at 008.

More than a month after the acquisition, on November 7 and 8, 2017, [redacted].[36]

On December 8, 2017, with the assistance of a consultant, [redacted]}[41] Ottobock's [redacted] for Freedom was consistent with Ottobock's history of successfully [redacted] in other markets outside of the United States.[42]

[34] PX01061
[35] PX01061; PX05010 (Schneider IH Tr., 231:4-233:2).
[36] PX01061; PX05010 (Schneider IH Tr., 239:12-240:15).
[37] PX03290.
[38] PX03290 at 004-010.
[39] PX03290 at 004-010.
[40] PX03290 at 014, 022.
[41] PX03290 at 021.
[42] PX01061; PX05170 (Schneider June Dep. Tr., 144:15-24; 166:6-167:3); PX05163 (Stuch Dep. Tr., 95:15-96:12).

On December 20, 2017, Complaint Counsel filed a Complaint alleging that the acquisition violated Section 5 of the FTC Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18.

Prior to the filing of the Complaint, Ottobock [redacted]

[43] RX-1042; RX-1043.
[44] PX05156 [redacted]

[redacted]

III. Competitive Landscape for Sales of MPKs

The highly-regulated insurance reimbursement system for prosthetic products in the United States shapes the competitive landscape for sales of all prosthetic componentry, including MPKs. In most health care services markets, the Agencies focus antitrust enforcement on the private payor market, not government payor markets in which prices are determined by the government agencies. Pricing of prosthetic devices is disciplined not only by government-determined reimbursement rates for prosthetist services plus components as to government payors, but also by a private payor marketplace in which large health insurers exercise buying power over prosthetic clinics.

Adjusted for inflation, the industry has seen essentially no price increases from the government for the past ten years, while private payors clamp down and pay only a portion of what the government pays. The government periodically pushes audits which challenge clinics' use of MPKs instead of non-MPKs for amputees. Payors effectively preclude pricing power by manufacturers of components of prosthetic devices.

In addition, power buyers like [redacted] not only keep prices down, but also provide easy channels of distribution for lower priced products to counter any conceivable pricing power.

[47] RX-1042
[48] PX05106 at 098; RX-1044

A. K-Level Mobility Coding System

To understand the reimbursement system for lower-limb prosthetics, it is important first to understand how patients are categorized into mobility levels, as that affects the availability for clinics to obtain reimbursement for that patient. Amputees are classified by "K-Levels" which describes their mobility level. The K-Level classification system ranges from K-0 to K-4, with K-0 amputees having no ability to walk and no need for a prosthesis, to K-4 who are highly active.[49]

The following chart summarizes the K-Level classification system:

Level	Description
K0	No ability to walk and no need for a prosthetic.
K1	Household ambulator who may be able to use a prosthetic with an assistive device inside the home, likely would use wheelchair outside the home.
K2	Limited community ambulator who generally uses an assistive device along with a prosthetic to navigate low-level environmental barriers.
K3	Unlimited community ambulator who does not need an assistive device beyond the prosthetic and can walk at variable speeds, can negotiate ramps, stairs, and other environmental barriers.
K4	Highly active people including athletes and children.

B. L-Code Reimbursement System

Clinics seek reimbursement for providing prosthetic devices based on "L-Codes" which is a system developed by Medicare but used by private payers as well. L-Codes describe certain features or functions of components of a prosthetic device; each structural component of a

[49] As Ottobock's Managing Director of North America described it, "K0 would be a person who does not ambulate at all. K1 would be a very limited household ambulator, someone who uses a prosthesis to go to the bathroom at night, or just very minimally uses a prosthesis, not really outside the home. They'd probably be in a wheelchair outside the home. K2 patients make up the majority of lower-limb transfemoral amputees, and -- and they are the normal household ambulator, limited community ambulator. They oftentimes would use an assistive device, maybe a cane or a walker together with their prosthesis to ambulate. The K3 level is the unlimited community ambulator. This is, you know, individuals who – who don't use other assistive devices in order to ambulate. They're able to negotiate ramps and stairs and pretty much lead a -- what we would call a normal life in that sense. And then there's K4, and these are people who are into very high-level activities: Running, jumping, you know, just have zero restrictions." PX05162 (Ruhl (Ottobock) Dep. Tr. 38:7-39:3

prosthetic device will have one or more L-Codes corresponding to it based on the component's function. The Centers for Medicare and Medicaid Services ("CMS") establishes a reimbursement amount for each L-Code.[50] Public and private insurance payers use this established reimbursement amount to determine how much they will agree to reimburse for a particular L-Code, with the CMS-established rate representing the high-end of the possible reimbursement.[51] By way of example, [redacted] has reimbursed at as low as [redacted] of the CMS rate, and currently reimburses at [redacted] of CMS rates, depending on state and individual clinic contracts.[52] Clinics bill payers for the prosthetic device they deliver to a patient by listing and adding up all the L-Codes that correspond to the features of the prosthetic device.[53]

C. Third Party Payors Pay for Function and Are Manufacturer Agnostic

CMS determines whether it will reimburse a clinic for a particular L Code based on the patient's K-Level and deems whether that function is "medically necessary" for a patient of a particular mobility level. For example, the "base" L-Code for microprocessor knees is L5856 which establishes reimbursement level for the swing and stance microprocessor control function of the knee. Clinics can only be reimbursed through Medicare for L5856 if the patient receiving the device is classified as K3 or has the potential to become a K3.[54]

Medicare and private payers are manufacturer agnostic when it comes to reimbursement to clinics – the function is what is important. Though some manufacturers will seek certification that a certain device contains the function that corresponds to a particular L-Code, other manufacturers

[50] RX-0936 ("CMS January 2018 Fee Schedule.xlsx")
[51] PX05010, (Schneider (Ottobock) IH, at 64:15-65:7); PX05002, [redacted]
[52] PX05165 [redacted]
[53] PX05162 (Ruhl (Ottobock) Dep. Tr. 30:16-30:21)
[54] Medicare has sponsored RAC audits to ferret out clinics fitting more expensive MPKs on patients for whom cheaper non-MPKs might suffice, which has led to clinics curtailing use of MPKs in favor of non-MPKs for borderline patients.

develop their recommended coding for a particular product without external verification. The amount they reimburse a clinic is determined by that code, not by the particular brand of knee or the price the clinic pays for the knee.

Without an established L-Code for a particular function, clinics will not be able to obtain additional reimbursement for that function. Manufacturers are keenly aware of the reimbursement amount that particular components garner and price their products to clinics accordingly. However, in order for an L-Code to be established, the benefits of a particular function must be established and accepted. To seek additional coding requires significant investment of time and money by manufacturers without any guarantee of financial return. Once established, other manufacturers can take advantage of the additional coding obtained and create new products. Therefore, the presence of a market leader, like Ottobock, willing to invest in new products, prove their efficacy, and lobby for additional coding is critically important to improving the lives of amputees.

ARGUMENT

The "analytical approach to Section 7 cases . . . has traditionally consisted of a burden shifting exercise with three parts." *In re Polypore Int'l,* 149 F.T.C. 486, 798 (F.T.C. March 1, 2010) (Chappell, A.L.J.) (citing *United States v. Baker Hughes, Inc.,* 908 F.2d 981, 982-83 (D.C. Cir. 1990)). "First, the government must establish a prima facie case that an acquisition is unlawful." *Id.* (citing *Baker Hughes*, 908 F.2d at 982; *FTC v. H.J. Heinz Co.,* 246 F.3d 708, 715 (D.C. Cir. 2001)). It is not enough for Complaint Counsel to show some effect on competition. Instead, Complaint Counsel "has the burden of showing that the acquisition is reasonably likely to have 'demonstrable and substantial anticompetitive effects.'" *New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321, 358 (S.D.N.Y. 1995) (quoting *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1066 (S.D.N.Y. 1969)).

"Second, 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 statistical evidence as predictive of future anticompetitive effects." *Id.* (citing *Baker Hughes,* 908 F.2d at 982; *Chicago Bridge & Iron Co. N.V. v. Federal Trade Commission,* 534 F.3d 410, 423 (5th Cir. 2008)). "This second step of the analysis requires that the merger be 'functionally viewed, in the context of its particular industry.'" *Id.* (quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 321-22 (1962) and citing *In re Weyerhaeuser Co.,* 106 F.T.C 172, *215 (F.T.C. Sept. 26, 1985)). "Nonstatistical evidence which casts doubt on the persuasive quality of the statistics to predict future anticompetitive consequences may be offered to rebut the prima facie case made out by the statistics." *Id.* (quoting *Kaiser Aluminum & Chem. Corp.,* 652 F.2d 1324, 1341 (7th Cir. 1980)).

"Third, and 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 is incumbent on the government at all times." *Id.* at 801 (citing *Baker Hughes,* 908 F.2d at 983; *Chicago Bridge,* 534 F.3d at 423; *FTC v. University Health, Inc.,* 938 F.2d 1206, 1218-19 (11th Cir. 1991); *Kaiser Aluminum,* 652 F.2d at 1340); *see also FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004) ("[P]laintiffs have the burden on every element of their Section 7 challenge."). The legal standards for evaluating Complaint Counsel's claim under Section 5 of the FTC Act are the same. *See In re Polypore Int'l,* 149 F.T.C. 486, 798 (F.T.C. March 1, 2010) (Chappell, A.L.J.).

IV. Complaint Counsel Has The Burden Of Establishing A Relevant Product Market.

"The first step in analyzing a Section 7 case is to determine the 'line of commerce' and the 'section of the country.'" *Polypore*, 149 F.T.C. at 799 (quoting 15 U.S.C. § 18). "In other words, the first step is to determine the relevant product and geographic markets." *Id.* (citing *United States v. Oracle Corp.,* 331 F. Supp. 2d 1098, 1110 (N. D. Cal. 2004); *In re R.R. Donnelley &*

Sons, 120 F.T.C. 36, 1995 FTC LEXIS 450, at *37-38 (F.T.C. July 21, 1995); *United States v. General Dynamics Corp*., 415 U.S. 486, 510 (1974)). "Complaint Counsel bears 'the burden of proving a relevant market within which anticompetitive effects are likely as a result of the acquisition.'" *Id.* at 799-800 (quoting *In re R.R. Donnelley & Sons,* 1995 FTC LEXIS 450, at *38).

"A properly defined or relevant product market identifies the products with which the defendants' products compete and should include those producers that have the actual or potential ability to take significant business from each other." *Polypore*, 149 F.T.C. at 802-03 (citing *FTC v. CCC Holdings,* 605 F. Supp. 2d 26, 37 (D.D.C. 2009); *SmithKline Corp. v. Eli Lilly & Co.,* 575 F.2d 1056, 1063 (3d Cir. 1978)). "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 also United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956). Complaint Counsel bears the burden of establishing a product market by a preponderance of the evidence. *See United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 183, 190-91 (N.D. Ill. 2001) (finding that DOJ failed to carry its burden of establishing the relevant product market where customer testimony was found to be at best "equivocal").

Courts have "traditionally emphasized" two factors in defining a product market: "'the reasonable interchangeability of use and the cross-elasticity of demand between the product itself and substitutes for it.'" *Polypore*, 149 F.T.C. at 803 (quoting *Arch Coal,* 329 F. Supp. 2d at 119 and *Brown Shoe,* 370 U.S. at 325). "These factors address the question of 'whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other.'" *Id.* (quoting *FTC v. Staples, Inc.,* 970 F. Supp. 1066, 1074 (D.D.C. 1997)).

"If products can be used for the same purpose, the products are deemed 'functionally interchangeable.'" *Polypore*, 149 F.T.C. at 804 (quoting *United States v. Chas. Pfizer & Co.,* 246 F. Supp. 464, 468 (E.D.N.Y. 1965) and citing *Arch Coal,* 329 F. Supp. 2d at 119). "Courts generally place functionally interchangeable products in the same product market." *Id.* (citing *Arch Coal,* 329 F. Supp. 2d at 119). "However, products are only included in the same market if they are both functionally and reasonably interchangeable." *Id.* (citing *Pfizer*, 246 F. Supp. at 468 n.3); *see also United States v. E.I. Du Pont de Nemours & Co.,* 351 U.S. 377, 399, 404 (1956)). "Customer preferences for one product versus another do not negate reasonable interchangeability." *Id.* at 830 (quoting *Oracle,* 331 F. Supp. 2d at 1130-31) (brackets omitted). "[T]he issue is not what solutions the customers would like or prefer for their . . . needs; the issue is what they could do in the event of an anticompetitive price increase by [the merged entity]." *Id.* (quoting *Oracle,* 331 F. Supp. 2d at 1131) (substitutions and omission in original).

Complaint Counsel alleges that the relevant product market is no broader than the manufacture and sale of microprocessor prosthetic knees to prosthetic clinics in the United States.[55] The alleged market is both too broad and too narrow.[56]

A. Practical Indicia Support A Market Broader than Complaint Counsel's Alleged MPK-Only Market

A product market may "be determined by examining such practical indicia as industry or public recognition of the submarket 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." *Polypore*, 149 F.T.C. at 809 (quoting *Brown Shoe,* 370 U.S. at 325). "Proper market definition 'is a matter of business reality . . . of how the market

[55] Complaint at ¶ 17.
[56] Expert Report of David. A. Argue at pp. 20, 36.

is perceived by those who strive for profit in it.'" *Id.* at 810 (quoting *FTC v. Coca-Cola Co.,* 641 F. Supp. 1128, 1132 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987)).

In this case, there is significant evidence that the industry – in particular, prosthetists and manufacturers – recognize that MPKs and non-MPKs are less like discrete product markets and more like options on a continuum, either of which may be appropriate for certain patients.[57]

Clinicians typically fit most above-the-knee amputees initially with a non-MPK. After the amputee becomes comfortable using that knee, clinicians may then consider using an MPK for a patient with a K3 or K4 mobility rating (or a K2 patient with the potential for a K3 rating), but factors can cause the prosthetist to determine that a non-MPK is a more appropriate fit for a patient instead.[58] The prosthetist evaluates numerous factors related to the patient's ability such as the risk of falling, speed and variation in gait, sitting and standing routines of daily living, cognitive abilities, lifestyle, work and recreational environments, and financial resources, among other factors.[59] Most often, the prosthetist chooses the specific knee in consultation with the patient and the patient's physician who ultimately writes the order and documents the need for the knee.[60]

For instance, as [redacted]

[57] RX-0814 [redacted]
[58] PX05010 (Schneider IH Tr. 85:25-87:15); PX05129 [redacted]
[59] PX05132 [redacted]

[redacted] Ottobock views its demand from clinics for prosthetic knees as [redacted] As its Managing Director for North America testifies, MPKs compete with non-MPKs [redacted][64] Likewise, Freedom recognizes that both MPKs and non-MPKs are among the universe of [redacted] The documents of other MPK manufacturers align with this view, presenting knee solutions for groups of mobility levels, rather than whether or not the knee contains a microprocessor.[66]

Complaint Counsel points to the studies showing the additional benefits that MPKs provide over mechanical knees to show that they are in two different markets. This misunderstands the purpose of those studies. In order to compete effectively and convince clinicians that MPKs are worth fitting on patients, manufacturers point to clinical evidence regarding the benefits of an MPK rather than a non-MPK. The focus of these studies in differentiating MPKs from non-MPKs demonstrates that non-MPKs are competitive in the market. By differentiating between MPKs and non-MPKs of competitors, MPK manufacturers demonstrate that MPKs and non-MPKs are competing for the same end user.[67] Further to this point is the fact that manufacturers' sales reps sell both MPKs and non-MPKs to clinics.[68]

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[62] PX05166 [redacted]
[63] PX05010 (Schneider IH Tr.178:14-178:25); PX05123 (Solorio (Ottobock) Dep. 157:25-158:10).
[64] PX05162 (Ruhl (Ottobock) Dep. Tr. 58:11-58:21).
[65] PX05007 (Carkhuff (Freedom) IH Tr. 34:25-35:10).
[66] RX-0814 [redacted]
[67] PX05114 (Ferris (Freedom) Dep. Tr., 15:17-18 [redacted]
[68] PX05010 (Schneider (Ottobock) IH Tr. 38:14-21); PX05109 (Carkhuff (Freedom Innovations) Dep. Tr. 232:22-25); PX05124 [redacted]

Both non-MPKs and MPKs have attributes desired by patients, including safety, stability, and ease of use, and these can be provided in varying degrees by non-MPKs or MPKs. Safety and stability are often cited as benefits of MPKs, for example, but sophisticated non-MPKs can offer the same degree of safety as MPKs.[69] Clinicians have reported that non-MPKs have become increasingly safe, stable and functional.[70] Indeed, as [redacted] Moreover, Complaint Counsel argues broadly that all "MPKs provide amputees who wear them unique functionality compared to non-microprocessor knees";[73] however, Complaint Counsel cites only to clinical studies exclusively involving Ottobock MPKs.[74]

[69] PX05007 (Carkhuff (Freedom) IH Tr. 27:2-27:21); PX05001 [redacted]

[73] *See* Complaint Counsel's Pretrial Brief, at p. 1.

[74] PX08003 (Kannenberg et al., *Benefits of microprocessor-controlled prosthetic knees to limited community ambulators: Systematic review*, 51 JRRD 1469 (Nov. 10, 2014)) (systematic review of 6 publications that only studied the benefits of the C-Leg and/or the C-Leg Compact); PX08007 (Ottobock summary of a 2010 study of the C-Leg's benefits); PX08013 (Ottobock article referring only to benefits of the C-Leg); PX08018 (Kahle et al., *Comparison of nonmicroprocessor knee mechanism versus C-Leg on Prosthesis Evaluation Questionnaire, stumbles, falls, walking tests, stair descent, and knee preference*, 45 JRRD 1 (Nov. 1, 2008)) (study of mechanical knees versus the C-Leg); PX08059 (Hafner and Smith, *Differences in Function and Safety Between Medicare Functional Classification Level-2 and -3 Transfemoral Amputees and Influence of Prosthetic Knee Joint Control*, 46 J. of Rehab. R&D 417 (2009)) (only MPK involved in study was the C-Leg); PX08011 (Kaufman et al., *Energy Expenditure and Activity of Transfemoral Amputees Using Mechanical and Microprocessor-Controlled Prosthetic Knees*, 89 Arch Phys Med Rehabil. 1380 (July 2008)) (only MPK involved in study was the C-Leg); PX08010 (Kaufman et al., *Gait and Balance of Transfemoral Amputees Using Passive Mechanical and Microprocessor-Controlled Prosthetic Knees*, 26 Gait & Posture 489 (2007)) (only MPK involved in study was the C-Leg). *See also* PX08004 (Liu et al., Economic Value of Advanced Transfemoral Prosthetics, RAND Corp. (2017) -- "95 percent of the literature that was the basis for this report was on the C-Leg," but Össur was also involved. PX05150, Kannenberg Dep. 191:4-19.

The evidence will establish that, for some patients, non-MPKs are a preferred option notwithstanding any general benefits MPKs provide. For example, non-MPKs often offer greater reliability and predictability to patients and are lighter in weight than MPKs, which many patients prefer.[75] Non-MPKs are waterproof and do not have batteries that frequently need to be recharged.[76] Non-MPKs offer greater knee flexion allowing users to kneel on the floor, which is particularly important for parents of small children.[77] A non-MPK may also be necessary, for example, if a patient's weight is greater than the limit on an MPK.[78] Similarly, the patient's cognitive abilities may make an MPK too difficult to use and maintain, and the prosthetist could choose to use a non-MPK to keep the device as simple as possible.[79] Moisture from a patient's activities of daily living or incontinence may mean that an MPK is not a good option.[80] Even stumble recovery, which is often held up as an inherent advantage of an MPK, is offered by some non-MPKs.[81] For example, Ottobock's 3R60 non-MPK is very helpful in stumble recovery even though it is more passive than an MPK.[82]

Moreover, there are trade-offs among prosthetic knee features as basic as stability. As [redacted][83] Furthermore, both non-MPKs and MPKs have similar risks. Weight shifts, for example, create a risk of fall with either type of knee depending on settings and the sophistication of the knee.[84]

[75] PX05165 [redacted]

Respondent's ordinary course documents also do not support Complaint Counsel's narrow product market definition.[85] It also contradicts how Ottobock and other manufacturers conduct their business.

Freedom documents also highlight that non-MPKs compete in the same market as Freedom's Plié.[86] Freedom's marketing plans explain [redacted]

Complaint Counsel argues that "MPKs are used by a distinct subset of K-3 and K-4 amputees who prosthetists determine are healthy enough and regularly engage in activities that make wearing an MPK a medical necessity."[89] However, Complaint Counsel fails to define its proposed "distinct subset of K-3 and K-4 amputees."[90] To the contrary, Complaint Counsel claims only that "[f]or this distinct class of end-user, if a prosthetic clinic can obtain insurance reimbursement for an MPK, the patient will almost always receive one instead of a mechanical knee."[91] Complaint Counsel fails to define a relevant product market based on this distinct class of end-user.

Moreover, the preferences of some prosthetists for the functional features related to MPKs does not permit the exclusion of other fluid-controlled knees. *See, e.g.*, *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1102, 1131. (N.D. Cal. 2004). In *Oracle*, the court noted that "[t]he preferences of the[] customer witnesses for the functional features of PeopleSoft or Oracle

[85] RX-0111 at 5; RX-0031 at 67.
[86] RX-0277
[87] RX-0019 at 449
[88] RX-0277
[89] Complaint Counsel's Pre-Trial Br. at 10.
[90] Complaint Counsel's Pre-Trial Br. at 10.
[91] Complaint Counsel's Pre-Trial Br. at 10.

products was evident. But the issue is not what solutions the customers would *like* or *prefer* for their data processing needs; the issue is what they *could* do in the event of an anticompetitive price increase by a post-merger Oracle." *Id.* at 1131 (emphasis in original).

B. The Hypothetical Monopolist Test Confirms That The Relevant Product Market Is Broader Than Only MPKs

"To define the relevant market, [a] Court often applies a 'hypothetical monopolist test' . . . asking whether a hypothetical monopolist acting within the proposed market would be substantially constrained from increasing prices by the ability of customers to switch to other producers. Under the [hypothetical monopolist test], a market is any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level. If the sales of other producers substantially constrain the price-increasing ability of the hypothetical cartel, these others are part of the market." *United States v. American Express Co.*, 838 F.3d 179, 198-99 (2d Cir. 2017) (citations and some punctuation omitted); *see also United States v. Sungard Data Systems, Inc.*, 172 F. Supp. 2d 172, 182 (D.D.C. 2001). The Horizontal Merger Guidelines ("Merger Guidelines") endorse the hypothetical monopolist test. 2010 Merger Guidelines § 4.1.1.

A "critical loss analysis" may be considered "to assess the extent to which it corroborates inferences drawn from . . . evidence [relating to the hypothetical monopolist test]." 2010 Merger Guidelines § 4.1.3. "Critical loss analysis asks whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits . . . . A price increase raises profits on sales made at the higher price, but this will be offset to the extent customers substitute away from products in the candidate market. Critical loss analysis compares the magnitude of these two offsetting effects resulting from the price increase. The 'critical loss'

is defined as the number of lost unit sales that would leave profits unchanged." *Id.*; *see also, e.g., California v. Sutter Health System*, 130 F. Supp. 2d 1109, 1128 (N.D. Cal. Jan. 29, 2001).

Respondent's expert, Dr. Argue, calculates that the critical loss for a 5% increase in price above competitive levels is a loss of [redacted] of sales, and that the critical loss for a 10% increase in price above competitive levels is [redacted] of sales. This is based upon ordinary course of business documents supporting a finding that manufacturers of MPKs have high variable contribution margins for the production and sale of MPKs. The evidence further supports a finding that there would be a loss of sales equal to or above the critical loss level in response to a small but significant increase in the price of MPKs – supporting the conclusion that MPKs alone should not be treated as a separate product market.

For example, [redacted]

[92] PX05108 [redacted]

[redacted] Consistent with that testimony, other market participants have indicated that clinicians will use prosthetic knees that are "good enough" if the margin on the very best device is insufficient.[96] As one Freedom document indicates, [redacted][97]

[redacted]

There are other factors motivating clinicians to switch from MPKs to non-MPKs, despite the potentially greater margins that result from MPKs' higher reimbursement rates. In particular,

[95] [redacted]
[96] PX5007 (Carkhuff (Freedom) IH Tr. 49:2-49:15).
[97] RX-0019.
[98] PX05167 [redacted]
[101] RX-0277.
[102] RX-0019.

MPKs have higher non-billable costs and involve greater financial risk for clinicians – factors that will be exacerbated if the cost of MPKs rise. One reason that MPKs have higher reimbursement rates is that it is more time consuming to fit a patient with an MPK, and because MPKs require significantly more follow-up service. In addition, clinicians face the risk that they will not be fully reimbursed for the higher financial outlay that an MPK requires. MPKs are highly audited, and there is a risk that the clinician will not receive full reimbursement if use of an MPK is deemed inappropriate.

In addition, more patients have chosen health plans with high-deductibles or large co-payments, leading them often to delay replacement of prosthetic knees and thus contributing additional financial stress on clinics.[103] Many Medicare patients fail to pay the required 20% co-payment, further reducing clinic profitability.[104] The [redacted]

Dr. Argue's analysis shows that, at the very least, a [redacted] price increase would likely make MPKs unprofitable for private insurance patients, with a typical loss of [redacted] per patient for such patients. Indeed, one of the fatal flaws in the analysis of Complaint Counsel's expert is that it

[103] PX05153A [redacted]

ignores the distinctions among types of patients in considering whether prosthetic clinics might switch patients from MPKs to mechanical knees in the event that the hypothetical monopolist of MPKs raised prices 5%. In particular, Dr. Scott Morton considers average price and profitability across Medicare and private insurance payors even though the actual price and profitability of patients differs significantly depending on payor. *Cf. FTC v. Freeman Hospital*, 911 F. Supp. 1213, 1224 (W.D. Mo. 1995) ("Because reimbursement amounts for Medicare and Medicaid patients are dictated by the government, the exercise of monopoly power through higher prices has an adverse effect only on private-pay patients.").

The record evidence supports separately considering profitability for Medicare and private insurance patients. About [redacted] of the MPK purchases by clinics are covered by private insurance. Reimbursement rates for patients in the traditional Medicare program have increased "minimally" over the past ten years and this is confirmed by the Medicare rate schedule.[108] Reimbursements from private insurance companies are usually based on a discount off of Medicare, and those payments have also stagnated or declined. [redacted] unilaterally reduced its allowable to [redacted] by [redacted] in 2016 as part of a general decline in reimbursements to the clinic.[109] Reimbursements for prosthetic knees of five private insurers for [redacted] stood at [redacted] below Medicare in 2015 and remained unchanged for three years, thus falling even farther behind Medicare.[110] At least two Medicare Advantage plans (i.e., private insurance products that cover Medicare patients) that cover [redacted]

[108] [redacted] Medicare's actual allowable amount for L5856 increased an average of less than 0.9% per year between 2010 and 2018. (available at https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/DMEPOSFeeSched/DMEPOS-Fee-Schedule.html). The average reimbursement for L5856 was $21,642 in January 2010 and it increased to only $23, 198 in January 2018, or less than 1% per year on average.

[109] PX05134 [redacted]

[110] *See* RX-0893.

patients reimburse for MPKs at 45% below Medicare.[111] Adding to the rate pressure is the trend of patients moving from traditional Medicare to these much lower-reimbursing Medicare Advantage plans.[112]

V. The Merger Is Unlikely To Substantially Lessen Competition

"The second step in analyzing a Section 7 case is to determine whether the effect of the acquisition 'may be substantially to lessen competition, or to tend to create a monopoly.'" *Polypore*, 149 F.T.C. at 800 (quoting 15 U.S.C. § 18). "After determining the relevant product and geographic markets, an analysis of the likely competitive effects of an acquisition requires a determination of the transaction's probable effects on competition in those markets." *Id.* at 849 (citing *CCC Holdings,* 605 F. Supp. 2d at 37 (citing *United States v. Marine Bancorporation, Inc.,* 418 U.S. 602, 618-23 (1974); *Gen'l Dynamics,* 415 U.S. at 510-11)). "[T]o satisfy section 7, the government must show a reasonable probability that the proposed transaction would substantially lessen competition in the future." *Id.* (quoting *FTC v. University Health,* 938 F.2d 1206, 1218 (11th Cir. 1991); *FTC v. Warner Communs. Inc.,* 742 F.2d 1156, 1160 (9th Cir. 1984)).

A. Market shares do not fully reflect the competitive significance of the firms in the market or the impact of the merger.

According to the Horizontal Merger Guidelines, market concentration is just one indicator of likely competitive effects of a merger, and "shares may not fully reflect the competitive significance of firms in the market or the impact of a merger."[113] Beyond "market share and concentration," a court must consider the "structure, history and probable future" of the market to determine whether high market shares indicate there are likely to be anticompetitive effects from the transaction." *Gen'l Dynamics*, 415 U.S. at 498 (quoting *Brown Shoe*, 770 U.S. at 322 n.38);

[111] RX-0028.
[112] PX05153A [redacted]
[113] PX08040 (Merger Guidelines at § 5.3)

see also Baker Hughes, 908 F.2d at 992 ("The Herfindahl-Hirschman Index cannot guarantee litigation victories.") "[M]arket share and concentration data provide only the starting point for analyzing the competitive impact of a merger. . . . [The government] also will assess the other market factors that pertain to competitive effects." *Polypore*, 149 F.T.C. at 849 (quoting *Merger Guidelines* § 2.1 and citing *In re Weyerhauser Co.,* 1985 FTC LEXIS 26, at *215 (F.T.C. Sept. 26, 1985)) (substitutions and omission in original).

Given Ottobock's well-established history of producing innovative, high-quality prosthetic components to U.S. amputees, it is unremarkable that Ottobock has attained a significant share of the prosthetic knee market, regardless of how that market is precisely defined. Whether Ottobock post-merger share of the relevant market is now [redacted], as alleged by Complaint Counsel, or even close to 100%, as it would have been in Complaint Counsel's alleged market after Ottobock first launched the C-Leg, Ottobock has never had the incentive or ability to substantially lessen competition.[114] To the contrary, Ottobock has demonstrated a consistent track record of repeatedly delivering innovative, safe, reliable, durable, and effective MPKs at competitive prices regardless of its market share or the market share of its rivals.[115] Indeed, competitors have shown a willingness and capability to compete directly with Ottobock. As discussed below, Össur, Endolite, Nabtesco, and DAW have all introduced several new MPKs in the past five years, and all have [redacted] In light of the unique reimbursement structure in the United States, these four firms alone have the ability to constrain any incentive Ottobock may have to substantially lessen competition.

[114] PX05162 (Ruhl (Ottobock) Dep. Tr. 92:9-93:9).
[115] *Id*.

B. At the time of the merger, Ottobock's closest MPK competitors were [redacted]

The Horizontal Merger Guidelines state that "[t]he extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects. Unilateral price effects are greater, the more buyers of products sold by one merging firm consider products sold by the other merging firm to be their next choice."[116] Conversely, "[a] merger is ***unlikely to generate substantial unilateral price increases*** if non-merging parties offer very close substitutes for the products offered by the merging firms," and closeness of substitution is implied by the willingness of buyers to switch brands of a product. [117]

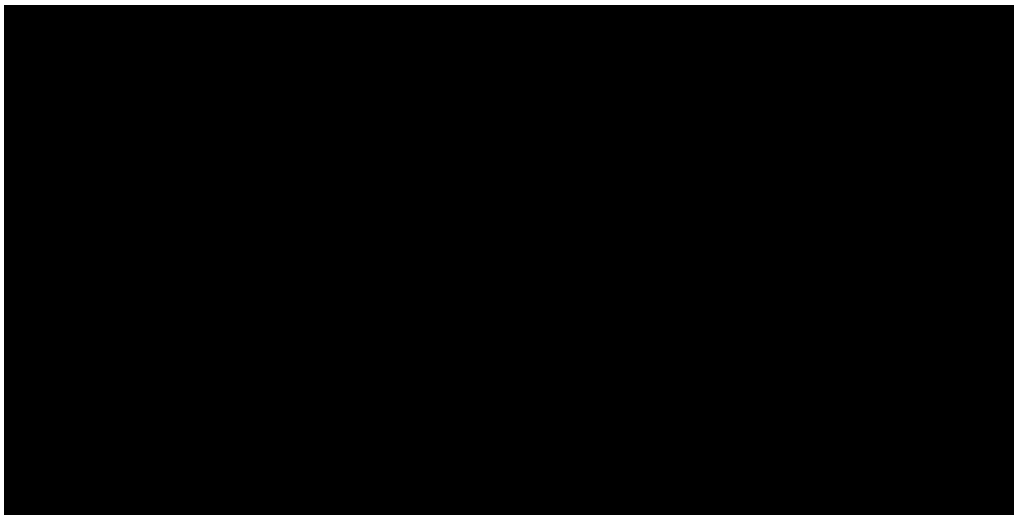
Here, the evidence indicates that Ottobock's C-Leg 4 and Freedom's Plié 3 are not the closest, or even particularly close, substitutes. The overwhelming evidence shows that [redacted] are Ottobock's closest competitors.

1. Ottobock does not consider Plié 3 to be functionally equivalent to most other MPKs in the United States.

Ottobock's ordinary course documents show that it does not consider the Plié 3 to be functionally equivalent to the C-Leg 4, Rheo 3, Orion 3, Allux, or SLK. Ottobock considers the Plié 3 to be microprocessor-controlled for the stance phase only.[118] This functionality is similar to Ottobock's less-sophisticated MPKs, the Compact and Kenevo, but significantly different from the functionality in C-Leg 4, Rheo 3, Orion 3, Allux, and SLK, which are all microprocessor-controlled in both the swing and stance phases of the knee.[119] During due diligence, Ottobock concluded that [redacted]

[116] PX0840 (Horizontal Merger Guidelines, § 6.1).
[117] PX0840 (Horizontal Merger Guidelines, § 6.1). (emphasis added).
[118] PX01057 at 050; PX01004 at 005.
[119] *See, e.g.*, RX-0419.

[redacted]



The Plié 3 is functionally dissimilar from the Ottobock C-Leg 4, Össur Rheo 3, Endolite Orion 3, Nabtesco Allux, and DAW SLK because it lacks a microprocessor control for the swing phase of knee. Accordingly, it is inaccurate to characterize Freedom's Plié 3 as a true MPK, and doing so overstates Freedom's closeness as a competitor to Ottobock.

In the Plié 3, the microprocessor controls the switch between the swing phase and stance phase, but flexion and extension resistance of the valves and springs in each phase are manually adjusted or pressure dependent.[121] For this reason, Ottobock has historically held that Plié 3 is not a true L5856 MPK. Ottobock documents and witnesses describe the Plié 3 as having microprocessor control of a switch between swing mode and stance mode. Other Ottobock documents identify the issue of [redacted] of the Plié 3.[122] As a stance-only MPK (or as a non-MPK with the microprocessor controlling only the switch between swing and stance), Plié 3 is not a close substitute for C-Leg 4.

[120] PX01004 at 005.
[121] RX-0072; RX-0523; RX-0599; RX-0095.
[122] RX-0871.

Other MPK manufacturers agree that Plié 3 does not have the functionality of microprocessor-controlled swing and stance control. [redacted] has a similar view, arguing that Plié 3 lacks the microprocessor-controlled swing mode that is included in C-Leg 4, Orion 3 and Rheo 3.[123] [redacted] also questioned the appropriateness of reimbursing Plié 3 for microprocessor swing and stance control and expressed concern about [redacted][124] It specified [redacted]

Clinicians further support this view. [redacted] describes Plié 3 as having a mechanical stance feature that is [redacted] explains that [redacted] making billing it with an L5856 code questionable.[127] A [redacted] explained that [redacted]

2. From pricing, functionality, quality, and marketing perspective, Ottobock's C-Leg 4's closest rivals are [redacted]

While all U.S. MPK manufacturers engage in aggressive competition, the evidence will establish that C-Leg 4's closest competitors are [redacted] is the second leading prosthetics maker in the United States, and the quality of Össur's Rheo MPK has improved over time, making it a close rival to the C-Leg 4.[129] Ottobock's Managing Director for North

123 RX-0049.
124 RX-0878.
125 RX-0878.
126 PX05140 [redacted]
128 RX-0709.
129 PX5134 [redacted] RX-0881.

America testified that Össur's products were showing "improved performance, less service-related issues, and . . . improv[ed] quality."[130] For example, when Ottobock launched the C-Leg 4, it positioned it against its primary rivals: Össur's Rheo 3, Endolite's Orion 2 (Endolite has since launched the Orion 3), and Össur's Power Knee.[131] Ottobock recognized the shortcomings of the Plié, and never considered it a serious competitor to the C-Leg.[132]

[redacted] considers Ottobock to be its [redacted] competitor in MPKs.[133] [redacted] described Ottobock and [redacted] as being alone in competing around [redacted] He characterized Rheo 3, along with C-Leg, as [redacted] He testified that [redacted]

[redacted] documents paint the same picture, describing [redacted] and Ottobock as competing on [redacted][137] In its marketing analyses, [redacted]

[130] PX05162 (Ruhl (Ottobock) Dep Tr., 93:10-93:16).
[131] PX01057 at 050.
[132] RX-0072, at –06 ("Plie was worst among MPKs tested" and "Plie claims have been clinically disproven"); RX-0047, at –02 (Ottobock email stating "Plie is NOT the competition . . . Plie is a fly").
[133] PX05124 [redacted]
[137] RX-0292.
[138] PX05124 [redacted]
[139] RX-0882.

[redacted]

[140] RX-0853
[141] RX-0088
[142] RX-0881.
[143] RX-0292.
[144] RX-0088.
[145] RX-0088.
[146] PX05124 [redacted]

[redacted]

In addition to [redacted] is another well-established prosthetics manufacturer that competes more closely with Ottobock than Freedom. MPK market participants have noted that [redacted] is making inroads with sales representatives and has increased its U.S. share in recent years.[151] Indeed, 2017 was [redacted] best year ever.[152] [redacted] noted in February 2018 that its [redacted] Clinicians have benefited from competition by [redacted] One clinic in particular noted how effective [redacted] sales representative was at offering aggressive price discounts in competition against other MPK manufacturers.[154] [redacted] testified that when clinics are trying to use the prices of competing MPKs to negotiate lower prices for [redacted] is one of the products mentioned as having lower prices, along with Nabtesco's Allux and Plié 3.[155] [redacted] recognized its opportunity to increase sales to clinics by "continu[ing] to work with SPS reps."[156] The [redacted] indicated that he thought [redacted] was in no way inferior to C-Leg 4 or Plié 3.[157] [redacted] product comparison across MPK features shows that [redacted] rates favorably compared to C-Leg 4 and [redacted], and is superior to Plié 3 on several features, including automatic microprocessor swing control.[158] [redacted] has continued

[149] PX05009 [redacted]

[153] RX-0082.

[154] PX05151 [redacted]

[156] RX-0607.

[157] PX05167 [redacted]

[158] RX-0672.

to advance its long reputation for innovation in prosthetics by developing [redacted] Clinics share that view and often favor [redacted] and C-Leg 4 because they are easier to fit on patients than Plié 3.[162] In addition, some clinicians have testified that it is easier to teach new amputee patients using C-Leg 4 and [redacted] than using Plié 3.[163] Similarly, [redacted]

Most clinic customers also do not consider Freedom and Ottobock to be particularly close competitors, and sworn testimony establishes that clinics would willingly switch among various MPKs to avoid a price increase as follows:

[159] PX05144 [redacted] PX05005 (Smith (Freedom) IH Tr. 31:15-32:3); PX05119 [redacted]

[161] **PX05144** [redacted]

[163] *See id.*

[164] PX05128 [redacted]

- [redacted]

Ottobock, by virtue of its large presence in prosthetic knees and MPKs, is likely to be picked out as a primary target competitor by all other MPK suppliers, and that could easily miscast Ottobock as being the closest competitor to any such supplier. As many industry participants have testified, Ottobock's C-Leg 4 is the "gold standard" because, among other reasons, Ottobock was early to the market and innovative and established software and safety standards.[172] Therefore, evidence that Freedom considered Ottobock its primary MPK competitor is not probative of whether any customers actually considered the Plié 3 to be C-Leg 4's closest competitor.

[167] PX05168 [redacted]

3. Ottobock and Freedom's pricing and marketing strategies were significantly different and demonstrated that they were not closest competitors.

In addition, Ottobock and Freedom have different marketing strategies. Numerous sources indicate that Freedom's marketing strategy [redacted] Freedom's documents discuss its [redacted] strategy with prices [redacted] Ottobock notes that Freedom's price policy was entirely a low-price strategy with prices below Ottobock, Össur and Endolite.[174] Freedom also had an additional price-discounting strategy by leveraging Plié 3 with Freedom's very popular line of prosthetic feet. This marketing tool was not developed in response to the launch of C-Leg 4, but had been in place prior to C-Leg 4's launch.[175]

In contrast to Freedom's price-proposition marketing strategy, Ottobock competes on the quality of its products. Often, Ottobock's products do not have the lowest prices.[176] [redacted] As one of Ottobock's competitors explains, Ottobock competes around [redacted] Ottobock's focus on ensuring high quality had led it to roll out new products more slowly due in part to testing them above standard levels.[178] In contrast, Freedom received a litany of complaints

173 RX-0361.
174 RX-0871; PX05162 (Ruhl (Ottobock) Dep Tr., 95:18-95:21)
175 PX05114 (Ferris (Freedom) Dep. Tr. 176:15-177:7).
176 PX05162 (Ruhl (Ottobock) Dep Tr., 96:13-96:14).
177 PX05162 (Ruhl (Ottobock) Dep Tr., 101:9-101:16).
178 PX05010 (Schneider (Ottobock) IH Tr. 133:21-134:12, 138:5-138:16).

about manufacturing, durability and service quality problems from clinicians regarding Plié 3.[179] Ottobock viewed the "very high return rates [of Plié 3] as indicator for poor product quality."[180]

[redacted]

C. Remaining MPK manufacturers will continue to constrain Ottobock and there are no barriers to expansion of the firms in the alleged market.

According to the Horizontal Merger Guidelines, "[a] merger is unlikely to generate substantial unilateral price increases if non-merging parties offer very close substitutes for the products offered by the merging firms."[182]

It is Complaint Counsel's burden to demonstrate that the non-merging firms are unlikely to reposition their MPK products to the products controlled by the merging firms to eliminate any significant market power created by the merger." *Oracle* at 1117-18 (citing Areeda & Hovenkamp, 4 Antitrust Law ¶ 914f).

"Repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency."[183] Repositioning must be

[179] RX-0285; RX-0386.
[180] RX-0871; PX05007 (Carkhuff IH Tr., 61:4-14; 167:20-168:7).
[181] OB0396870.
[182] Merger Guidelines at § 6.1.
[183] Merger Guidelines at § 6.1.

"sufficient to deter or counteract what otherwise would be significant anticompetitive unilateral effects from a differentiated merger."[184] To be timely, repositioning and/or expansion "must be rapid enough that customers are not significantly harmed by the merger."[185] Repositioning is likely if it would be profitable, accounting for the costs and risks of doing so.[186] Expansion by a single firm that will replicate at least the scale and strength of one of the merging firms is considered "sufficient" under the Merger Guidelines, and expansion by "one or more firms operating at a smaller scale may be sufficient if such firms are not at a competitive disadvantage."[187] Here, there is no evidence that repositioning by other competitors will not occur. In fact, the evidence is totally to the contrary.

1. [redacted]

For the reasons stated above, Ottobock's C-Leg 4 and [redacted] are closest competitors. [redacted] has the intellectual property, sales force, brand recognition, scale, and experience to reposition and expand production at the scale and strength of Freedom. Indeed, [redacted]

2. [redacted]

After [redacted] is Ottobock C-Leg's next closest competitor. [redacted] also has the intellectual property, sales force, brand recognition, scale, and experience to reposition and expand production at the scale and strength of Freedom. Presently, [redacted]

[184] Merger Guidelines at § 6.1.
[185] Merger Guidelines at § 9.1.
[186] Merger Guidelines at § 9.2.
[187] Merger Guidelines at § 9.3.
[188] [redacted]

[redacted]

3. [redacted]

[redacted] also has the ability to grow, expand, and reposition its MPK products. Freedom understood the threat posed by the expansion of [redacted] into the United States. Indeed, the [redacted] was identified under the topic of [redacted] in a memo from Freedom Vice President of National & Key Accounts.[191] According to Freedom's former CEO, [redacted] Freedom's Vice President for Marketing and Product Development describes **{Allux}** as having [redacted] was described as a [redacted] according to a Freedom marketing plan.[194] Other market participants, both competing manufacturers and clinics, also had favorable views of [redacted]

189 [redacted]
190 *See* Merger Guidelines
191 RX-0277.
192 PX05005 (Smith (Freedom) IH Tr. 31:6-31:7).
193 PX05114 (Ferris (Freedom) Dep. 132:17-132:20).
194 RX-0104.
195 PX05144 [redacted]

[redacted]

4. [redacted]

[redacted] provides additional alternative MPK's, which are manufactured [redacted] Its sales in the United States have included [redacted]

198 PX05161 [redacted]
199 RX-0670.
200 RX-0673, RX-0670, RX-0666; RX-0601.
201 PX05161 [redacted]
206 *See* Press Release (http://pdf.pr.com/press-release/pr-755715.pdf)
207 PX05147 [redacted]

[redacted]

[redacted] These knees differ depending on how input from sensors is used to adjust the performance of the knee.[208] The [redacted] also sells prosthetic feet, ankles, liners, skins, foam, and titanium components along with prosthetic knees.[211]

5. [redacted]

[redacted]

208 RX-0735 [redacted]

D. The Merger will not substantially lessen MPK innovation

Complaint Counsel also alleges that Freedom was a strong innovator in the field of MPKs, pointing in particular to its introduction of the "waterproof" feature of Plié 3. Complaint Counsel further asserts that competition between Ottobock and Freedom was "poised to increase in the near future" with Freedom's [redacted][214] However, the evidence shows that the prosthetic knee industry remains highly motivated for innovation, regardless of whether Freedom is independent or part of Ottobock.

Substantial market forces drive innovation in the prosthetics industry. As Hanger's Form 10-K report explains, "[t]he medical device industry is characterized by rapid and significant technological change."[215] [redacted] As Freedom's former CEO characterizes it, demand for MPKs changes from the time the original investment is made in developing a product because customers want to pick [redacted] This makes the process of developing products highly competitive.[217] Consistent with that mentality among consumers, product upgrades have become more frequent in recent years, enhancing the competitiveness of the market.[218]

An industry analysis explains that "[t]he leading players [in the prosthetics market] have shown their ability to catch up and close the gap in their product portfolios whenever they are behind in the innovation cycle," citing Ottobock's and Össur's developments, in particular.[219] Freedom's Chairman explains that [redacted]

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214 FTC Complaint, ¶ 6.
215 RX-0341.
216 PX05165 [redacted]
217 PX05005 (Smith (Freedom) IH Tr. 245:10-245:18).
218 PX05124 [redacted]
219 SEB Equity Research, Ossur, Nov. 29, 2017, p. 4.

[redacted]

Ottobock, Freedom, Össur and Endolite are all considered to be innovative companies. Each manufacturer, not just Ottobock and Freedom, responds to new features in competitors' products.[221] Each of the manufacturers has responded back-and-forth on product developments from the others.[222] Clinicians have observed that competition from both Össur and Endolite has compelled Ottobock and Freedom to improve their products.[223]

For Ottobock, product development is [redacted] Ottobock has a track record of continuing and expanding its product development and innovation after acquiring a company. After acquiring TEC Interface Systems, for example, Ottobock improved the product and rolled it out to the market.[226] Clinics have testified that they expect Ottobock to continue innovation in MPKs after acquiring Freedom.[227]

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220 PX05109 (Carkhuff (Freedom) Dep. 51:8-51:13).

221 PX5002 [redacted]

Össur views itself as among the most innovative companies in the prosthetic knee industry,

[redacted]

Endolite also has a long history of innovation in mechatronics, including development of the first commercially available microprocessor-controlled prosthetic knee.[234] Endolite's innovative successes in prosthetics include the first-ever microprocessor-controlled foot/ankle (the Elan) and [redacted]

[redacted]

228 RX-0555.
229 PX05124 [redacted]
231 RX-0881.
232 RX-0088.
233 PX05124 [redacted]

[redacted]

E. Freedom was a flailing firm at the time of Ottobock's acquisition

A merger does not reduce competition where the acquired entity's weakened position makes it of little competitive significance. In *General Dynamics*, the Supreme Court explained that the acquired firm, a coal company, "had no coal reserves and was unable to obtain additional ones. Thus, . . . the acquired company was an insignificant factor as a competitor and the merger

[236] RX-1027 [redacted]

did not have an anticompetitive impact on the market." *FTC v. National Tea Co.*, 603 F.2d 694, 699-700 (8th Cir. 1979) (citing *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) and affirming district court's consideration of acquired firm's probable exit from the market).

The "weakened competitor" defense may be satisfied even where the elements of the "failing firm" defense, *see infra* § IV, are technically not. In *Arch Coal*, the court found that the failing firm defense was not satisfied, but held that the financially weakened condition of the target was a defense to the government's case of anticompetitive effects. In that case, the target, a mining company, was showing positive financial measures, but the court held that this ignored that the mine's reserves were depleted. The court noted that:

> Although not a failing firm in the technical sense, [the target] is plainly a relatively weak competitor . . . with no convincing prospects for improvement. The evidence establishes that it faces high costs, has low reserves, has at best uncertain prospects for loans or new reserves, is in a wakened financial condition, and has no realistic prospects for other buyers. . . . Although defendants cannot avail themselves of a failing firm defense to defeat Complaint Counsel's antitrust challenge, [the target's] weak competitive status remains relevant to an examination of whether substantial anticompetitive effects are likely from the transactions. The Court concludes that based on the evidence before it, plaintiffs' claims of [the target's] past and future competitive significance in the [product] market has been far overstated.

329 F. Supp. 2d at 157.

In this case, Complaint Counsel asserts that Freedom was "a maverick firm . . . [that] offer[ed] low prices and attractive promotions."[242] Complaint Counsel's assertions imply that Freedom has been a disruptive presence in the market in the past, leading to stronger competition, and that it would continue to play that role in the future. The reality is that at the time of the merger, [redacted]

[242] FTC Complaint, ¶ 57.
[243] *See infra* § IV

[redacted] Serious problems with Freedom's Plié 3 contributed to Freedom's [redacted]

As described above, Freedom has pursued a strategy of marketing its MPKs as the low-price competitor in the market. The aggressiveness of Freedom's discounting ramped up in late 2016, including its [redacted] Freedom not only gave significant discounts, but often included a free or discounted foot, ice chest, or GoPro camera with the sale of an MPK, which amounted to an even more aggressive discount.[249]

Complaint Counsel characterizes these discounting and promotional efforts by Freedom, including those beginning in late 2016, as a basis for the firm being a "maverick."[250] In the context of a *Horizontal Merger Guidelines* analysis, however, a maverick competitor must be able to sustain its marketing strategy into the future for that pricing to be competitively significant. As the Expert Report of James R. Peterson ("Peterson Report") explains, Freedom's [redacted]

[244] *Id.*

[245] RX-0263, at –02-03 [redacted]

[250] **FTC Complaint, ¶ 56.**

[redacted]

Freedom's prospects for further innovation were not material at the time of the transaction. Freedom's former CEO testified that market demands were changing and Plié was [redacted]

Freedom's former CEO explained that the company had [redacted] on innovation and new products in its feet and ankles product lines.[255] The [redacted] Ottobock believed that Freedom was [redacted][257] One market participant noted that [redacted][258] In its due diligence of Freedom, Ottobock found that [redacted][259] Ottobock described Freedom's Kinnex microprocessor foot as of [redacted]

[251] Peterson Report, ¶ 24.
[252] PX05005 (Smith (Freedom) IH Tr. 70:5-70:21).
[253] PX05005 (Smith (Freedom) IH Tr. 48:8-48:10).
[254] PX0510 (Schneider (Ottobock) IH Tr. 173:10-173:21, 224:7-225:6).
[255] PX05005 (Smith (Freedom) IH Tr. 75:11-75:19).
[256] PX0510 (Schneider (Ottobock) IH Tr. 158:18-159:4).
[257] PX0510 (Schneider (Ottobock) IH Tr. 229:18-229:21).
[258] [redacted]
[259] RX-0479.
[260] RX-0871.

Ottobock also recognized the serious shortcomings of the Plié, and did not consider it a serious competitor to the C-Leg.[261] Moreover, clinics have experienced the many issues with the Plié, causing them to switch patients to non-MPKs or other MPKs.[262]

[redacted]

F. [redacted] is a powerful buyer that provides a significant competitive constraint on Ottobock/Freedom.

The existence of a powerful buyer may mitigate the anticompetitive effects of a merger.

[261] RX-0072, at –06 [redacted]

[redacted]

[264] RX-0849.

[265] PX05167 [redacted]

[266] RX-0878.

> The 'power buyer' defense is grounded in the theory that large, sophisticated buyers may have the bargaining power to resist anticompetitive price increases and, thereby, counter anticompetitive effects of a merger. In *Baker Hughes* . . . the Court of Appeals for the D.C. Circuit relied upon the findings of the district court regarding the buyers' sophistication and large order sizes, coupled with their ability to 'closely examine available options' while 'typically insisting on multiple, confidential bids for each order,' as convincing evidence of bargaining power, which would allow customers to resist anticompetitive price increases that might result from the merger.

Polypore, 149 F.T.C. at 899 (citing *Baker Hughes,* 908 F.2d at 986-87) (brackets omitted); *see also Archer-Daniels-Midland*, 781 F. Supp. at 1416 ("The existence of large, powerful buyers of a product mitigates against the ability of sellers to raise prices."); *FTC v. RR Donnelley & Sons Co.*, No. 90-1619, 1990 U.S. Dist. LEXIS 11361, at *10-11 (D.D.C. Aug. 27, 1990) (holding that powerful customers exerted economic power that "make any anti-competitive consequences very unlikely."); *United States v. Country Lake Foods*, 754 F. Supp. 669, 679 (D. Minn. 1990) ("The market power of buyers is demonstrated in the declarations of fluid milk purchasers . . . in which they described their swift and aggressive response to a price increase unrelated to normal market conditions as well as their willingness to seek out suppliers who would sell fluid milk at lower prices."); 2010 Merger Guidelines § 8.

In this case, as discussed above, the presence of government payors and private insurers prevent supracompetitive pricing. Moreover, [redacted] are powerful buyers that negotiate discounted prices and are well-positioned to implement strategies to force Ottobock/Freedom to provide competitive price and quality. [redacted]

[267] PX05002, [redacted]

[redacted]

[268] PX05153A, [redacted] *See supra* Section VI.C for other clinics' willingness to switch MPKs.

[271] [redacted]

[redacted]

[272] PX05162 (Ruhl (Ottobock) Dep Tr., 135:20-136:8).
[273] PX01546; PX05162 (Ruhl (Ottobock) Dep Tr., 135:6-135:15).
[274] RX-0782. One clinic testified that patients are actually open to different makes of MPK when they replace their MPK, evidently because "technology changes so fast in three to five years." PX05151 [redacted]

[276] Ferris (Freedom) Dep. 144:4-144:13.

[redacted]

277 PX05162 (Ruhl (Ottobock) Dep Tr., 127:24-128:15, 183:2-183:17).
278 OB0108029.
279 PX05162 (Ruhl (Ottobock) Dep Tr., 138:16-138:22, 183:2-183:17).
280 PX05162 (Ruhl (Ottobock) Dep Tr., 128:20-128:22, 184:18-185:5).
281 [redacted]
282 Ferris (Freedom) Dep. 178:11-178:13, 178:20-179:2.
283 RX-0782.

[redacted]

VI. Cognizable, Merger-Specific Efficiencies Will Offset Any Potential Anticompetitive Harm From The Merger By A Wide Margin

"In addition, courts and the Commission typically consider 'efficiencies, including quality improvements, after the government has shown that the transaction is likely to reduce competition.'" *Polypore*, 149 F.T.C. at 801 (quoting *In re Evanston Northwestern Healthcare Corp.,* No. 9315, 2007 FTC LEXIS 210, at *191 (F.T.C. Aug. 6, 2007) and citing *Heinz,* 246 F.3d at 715, 720). "The defendant has the burden of production to show that efficiencies offset any likely anticompetitive effects of the increase in market power produced by the merger." *Id.* (quoting *In re Evanston Northwestern Healthcare Corp.,* 2007 FTC LEXIS 210, at *191 and citing *Heinz,* 246 F.3d at 715, 720; *FTC v. Staples, Inc.,* 970 F. Supp. 1066, 1088-89 (D.D.C. 1997)); *see also FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054 (8th Cir. 1999) (enhanced efficiencies should be considered "in the context of the competitive effects of the merger."); *Country Lake Foods*, 754 F. Supp. at 674, 680 (efficiencies involving "lower plant and transportation costs and other savings" found as "further evidence that the proposed acquisition will enhance competition.").

[redacted]

[284] *See* Peterson Report, at ¶¶ 14-109.

[redacted] Clinics that prefer to use Plié 3 would have it available in the market because Ottobock's acquisition allowed it to be there. Absent that acquisition, this low-price option and the benefits consumers receive from its availability, would cease to exist.

In addition, the Peterson Report explains in greater detail, that the Merger was expected to and would have resulted in quantifiable, cognizable efficiencies, as set forth in the Merger Guidelines.

VII. Freedom Was a Failing Firm Under the Merger Guidelines.

Prior to the Merger, Freedom was [redacted] As a consequence, Freedom's CEO and Board worked extremely hard to find strategic buyers and financing partners. Ultimately, Freedom was left with a basic choice: [redacted] This is precisely the factual scenario that the failing firm defense covers.

The elements of a failing firm defense are that "(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

[285] *See* RX-0656.
[286] PX05010 (Schneider (Ottobock) IH Tr. 225:15-226:24); RX-0654.
[287] *See* RX-1048 (Peterson Expert Report pp. 6-27).

the relevant market and pose a less severe danger to competition than does the proposed merger." 2010 Horizontal Merger Guidelines § 11; *see also Dr. Pepper / Seven-Up Cos. v. FTC*, 991 F.2d 859, 864-65 (D.C. Cir. 1993). Courts have held that acquired firms were "failing" in a number of cases. *See FTC v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 96-98 (N.D. Ill. 1981); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 778-81 (D. Md. 1976); *United States v. M.P.M. Inc.*, 397 F. Supp. 78, 98-101 (D. Colo. 1975); *United States v. Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 799, 808 (D.D.C. 1958); *In re SKF Indus.*, 94 F.T.C. 6, 1979 F.T.C. LEXIS 292, at *77-85 (F.T.C. 1976); *California v. Sutter Health Sys.*, 84 F. Supp. 2d 1057, 1081-83 (N.D. Cal. 2000); *Reilly v. Hearst Corp.*, 107 F. Supp. 2d 1192, 1203-05 (N.D. Cal. 2000). Freedom meets each and every one of the elements of this defense.

A. [redacted]

[288] *See* PX05126 (Lee Kim (Freedom) Dep. Tr. 76:24-77:10)
[289] *See* RX-0815 ("Equity Commitment Letter" between Health Evolution Partners and Freedom Acquisition Holdings LLC, dated Jan. 26, 2012).

[redacted]

[290] *See* RX-0826 ("Credit Facility" dated Feb. 16, 2012).
[291] *See id*.
[292] *See* RX-0827; RX-0828; RX-0830 (Fourth, Fifth, and Sixth Amendments to Credit Facility)
[293] *See* RX-0372-003 [redacted]
[294] *See* RX-0817 ("Freedom Innovations Schedule of Unitholders," dated Apr. 25, 2017).

[redacted]

[296] RX-0823 at 007-008 ("Freedom Innovations Holdings, LLC, and Subsidiaries, Consolidated Financial Statements for the Years Ending December 31, 2016, and 2015," Squire & Company, PC, dated Apr. 6, 2017).
[297] *See id.*

[redacted] In an effort to turn around the company, in 2016, the HEP-controlled Board of Directors replaced then Freedom CEO Maynard Carkhuff, with new CEO David Smith. While the new CEO implemented an aggressive cost-cutting strategy, fueled by [redacted]

[298] RX-0823
[299] PX05122 (D. Smith (HEP) Dep. Tr. 137:16-139:7).
[300] *See* RX-0543 ("Eighth Amendment to Credit Facility," dated Sept. 15, 2017)
[301] *See id.*; PX05125 [redacted]

[redacted]

Despite increasing sales to some degree, David Smith was not able to change Freedom's fundamental financial issues. Indeed, into mid-year 2017, Freedom's [redacted]

[redacted]

[302] RX-0529.
[303] RX-0479.
[304] RX-0464 ("Freedom Innovations LLC and Subsidiaries Consolidated Income Statements for the Month Ending June 30, 2017," dated July 12, 2017, , at p. 2); RX-0823 ("Freedom Innovations Holdings, LLC, and Subsidiaries, Consolidated Financial Statements for the Years Ending December 31, 2016, and 2015," Squire & Company, PC, dated Apr. 6, 2017, at p. 4.)
[305] RX-0823 ("Freedom Innovations Holdings, LLC, and Subsidiaries, Consolidated Financial Statements for the Years Ending December 31, 2016, and 2015," Squire & Company, PC, dated Apr. 6, 2017, , at p. 7).

[redacted]

[306] RX-0451.

[redacted]

a global investment bank, has advised on more than $2.3 trillion of transactions across a wide variety of industries.[310] [redacted]

[redacted]

[307] PX05122 [redacted]

[redacted] relied upon its professional judgment and experience to identify those parties most likely to be serious bidders in the sale process, [redacted]

Throughout late April 2017 and May 2017, Moelis reached out to multiple refinancing partners and strategic buyers. By July 2017, all potential financial buyers that were contacted by Moelis and / or Freedom declined to submit offers to purchase Freedom and / or to refinance Freedom's debt obligations.[317] By July 26, 2017, only two strategic organizations submitted non-

[313] PX05110 [redacted]

binding offers to purchase Freedom: [redacted] submitted a non-binding offer in the amount of [redacted] Ottobock submitted a non-binding offer in the amount of [redacted]

This process is more than adequate to satisfy the requirement to solicit reasonable alternative offers under the failing firm defense. Contrary to Complaint Counsel's suggestion, the Merger Guidelines do not impose an obligation to contact every possible financing partner or strategic alternative. Rather, they suggest that the acquired company must have made good faith efforts to solicit reasonable alternative offers. Here, the sales process was standard, thorough, and exhaustive.

2. [redacted]

In August 2017, Freedom engaged in negotiations with Ottobock and [redacted] As a result of the negotiations, Ottobock raised its final offer to acquire Freedom to [redacted] Despite the negotiations, [redacted]

[redacted]

[318] **PX05110** [redacted]

[redacted]

"A 'preferred purchaser' is an acquirer (1) who would remain in the market; and (2) whose acquisition would be lawful a) even if the acquired firm were not failing, or b) simply on proof that [failure was impending]." "A 'preferred purchaser' should be significantly more attractive from a competitive standpoint than the proposed acquirer. Slight differences would not justify intervention even if the offers seemed comparable and private interests are equally well served; determining comparability would raise difficult judgmental questions that should be avoided if at all possible." Areeda & Hovenkamp, *supra*, ¶ 954c. "As a basic premise, [an] alternative acquirer should be deemed preferable only when its market share is substantially less than that of other acquirers, including the proposed acquirer." *Id.* ¶ 954c3.

[321] **RX-0417** [redacted]

[322] *See* Areeda, Phillip & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 954e (4th ed. 2016); *see also* Peterson Report ¶ 85.

At the time of sale, [redacted] was the only other firm that expressed interest in purchasing Freedom.[323] Ms. Hammer argues that she has seen no evidence that [redacted] bid to acquire Freedom would not qualify as a reasonable offer.[324] However, the issue is not simply that there is another bid, but that the other bidder should be "significantly more desirable in competitive terms than the proposed acquirer."[325] The analytical framework of the Morton Report demonstrates an [redacted]/Freedom transaction would raise competitive concerns in the MPK market. That same methodology, as well as relevant evidence from documents and testimony, indicates that a competitive problem also would arise in the market for K3 prosthetic feet.

An HHI analysis indicates that a merger between Freedom and [redacted] is presumptively anticompetitive in a market for MPKs. Under the Merger Guidelines, a merger is presumptively anticompetitive if it increases the HHI by more than 200 points and results in a post-merger HHI exceeding 2,500.[326] Using the share calculations of the Morton Report, in each of the past three years a merger between Freedom and [redacted] would result in a post-merger HHI of over [redacted] and a change in the HHI of over [redacted] for MPKs.[327] In the MPK/K3/K4 market, an [redacted]/Freedom transaction would also exceed the levels and changes in concentration to be presumptively anticompetitive under the Merger Guidelines. It is noteworthy that in the MPK/K3/K4 market, an [redacted]/Freedom transaction would create a change in concentration of [redacted] that is comparable to the change of [redacted] created by the Ottobock/Freedom transaction shown in Table 3.

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323 Hammer Report, ¶ 97.
324 Hammer Report, ¶¶ 9, 79, 119-122.
325 Areeda, Phillip & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 954c2 (4th ed. 2016).
326 Horizontal Merger Guidelines §5.3
327 If the analysis is limited to the narrower market used in the Morton Report's Tables A1 and A2, a merger of Freedom and Össur is still presumptively anticompetitive, with the post-merger HIHI over [redacted] and the change in HHI over [redacted].

In addition, as explained by Dr. Argue in his expert report, an [redacted]/Freedom merger would be presumptively anticompetitive in a market for in K3 feet. [redacted] and Freedom are the top two firms in prosthetic feet and Freedom is [redacted] closest competitor. Table 6 shows each firm's 2016 share of K3 feet.[328] Since the post-merger HHI for a market with an [redacted]/Freedom transaction exceeds [redacted] and the change in the HHI exceeds [redacted], a market for K3 feet would be identified as "Highly Concentrated" according to the Merger Guidelines and there is a presumption that the merger would likely enhance market power.

Evidence from testimony and documents of market participants regarding prosthetic feet indicate that [redacted] and Freedom are the largest and closest competitors among prosthetic feet suppliers. [redacted] considers Freedom to be its closest competitor in prosthetic feet.[329] [redacted] described its intent in purchasing Freedom [redacted]

Freedom viewed its competitors in feet as [redacted]

[328] Medicare utilization data are being used to estimate the total number of K3 feet since data for all manufacturers are not available. Medicare utilization data for 2016 are the most recent available.
[329] PX05124[redacted]
[330] RX-0878.
[331] PX05124[redacted]
[332] PX05122 (Smith (Freedom) Dep. 236:5-236:11).

[redacted]

The closeness of competition between [redacted] and Freedom in K3 prosthetic feet is driven in large part because Freedom's co-founder and current Chairman, Maynard Carkhuff, [redacted]

[redacted]

Given the pedigree of Freedom, it is not unexpected that some Freedom feet are one-to-one comparable products with [redacted] feet.[335] Regarding the comparability of feet, [redacted]

By contrast, an Otttobock/Freedom transaction in K3/K4 prosthetic feet would result in a post-transaction HHI below 2,500, *i.e.*, below the "highly concentrated" level defined in the Merger Guidelines. Therefore, the Merger Guidelines would not characterize an Ottobock/Freedom transaction in K3/K4 feet as being "presumed to be likely to enhance market power," whereas an [redacted]/Freedom transaction would have that presumption. Thus, while the

[333] PX05122 (Smith (Freedom) Dep. 181:18-181:21).
[334] PX05124 [redacted]

competitive impact of an [redacted]/Freedom transaction in the MPK/K3/K4 prosthetic knees market is likely to be comparable to an Ottobock/Freedom transaction in that market, in a K3/K4 prosthetic feet market, the *Guidelines* thresholds indicate that an [redacted]/Freedom transaction would be more competitively harmful.

VIII. [redacted]

[redacted]

[redacted]

[339] PX05156 [redacted]

[redacted]

[342] [redacted]

[343] PX05106; PX05156; PX05152.

[344] PX05106 at 27-28, 77-78, 139-40; PX05156 p. 209-17.

[345] PX05016 at pp. 27; PX05156 pp. 88-94 [redacted] p. 210-12 [redacted]

[redacted]

[346] PX05016 pp. 30-35, 122-29; PX05159 pp. 113-38, 143-47; PX05152 pp. 145-50, 168-70.
[347] PX05152 pp. 168-170.
[348] RX-1042.
[349] PX-5106, p. 98; RX-1044.

[redacted]

[350] RX-1044; PX5159 pp. 192-95.
[351] PX5159. pp. 167-86.
[352] *Id.* 186-201.
[353] Morton Report, ¶ 227.

[redacted]

[354] Morton Report, ¶ 227.

[355] [redacted]

[redacted]

[360] PX05145 [redacted]

[redacted]

CONCLUSION

Complaint Counsel bear the burden of proving each and every element of their Clayton Act Section 7 and FTC Act Section 5 case. They fail to do so in this case. Therefore, after the conclusion of the hearing on the merits in this matter, the Court should dismiss the Complaint against Respondent.

Dated: July 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 5, 2018, I caused a true and correct copy of the foregoing Respondent's Pre-Trial Brief to be served via the FTC E-Filing System and e-mail upon the following:

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Notice of Electronic Service

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