Complaint Counsel has already sought to preclude evidence of by moving to strike Ottobock's Seventh Affirmative Defense before the Commission. In rejecting Complaint Counsel's prior attempt the Commission held on April 18, 2018:

Indeed, the Commission held that evidence of was admissible both as to the question of competitive harm in the alleged relevant market and *Id*. at 3, 6. The Commission further rejected Complaint Counsel's attempts as speculative or uncertain. *Id*. at 3-4, 6. Ottobock is entitled to develop and present evidence of

Complaint Counsel should not be allowed to relitigate this issue, or attempt to prejudice Ottobock by s

ARGUMENT

The Motion should be denied. Motions *in limine* are strongly disfavored. The Commission has already held that the evidence is relevant, Complaint Counsel will not be prejudiced, and any evidence will not disrupt the orderly and efficient trial of the case.

I. The Motion *in Limine* Standard Compels Denial of the Motion

The Court's Scheduling Order states that "Motions *in limine* are strongly discouraged." Scheduling Order at ¶ 9 (Jan. 18, 2018). "Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (April 20, 2009) (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *SEC v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002))." *Id.*; *see also In re Pom Wonderful LLC*, Dkt. No. 9344, 2011 WL 2160775, *2 (F.T.C. 2011) (Chappell, J.). Motions *in limine* are appropriate *only in extreme circumstances* where they will "eliminate plainly irrelevant evidence" or "needlessly cumulative evidence." *In re Rambus Inc.*, No. 9302, 2003 WL 21223850, *1 (F.T.C. Apr. 21, 2003). The Scheduling Order also informs the parties that "the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence." Scheduling Order at ¶ 9.

In assessing whether to exclude trial testimony, courts have considered:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified (2) the ability of that party to cure the prejudice, (3) the extent to which *waiver of the rule against calling unlisted witnesses* would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the district court's [scheduling] order.

In re Basic Research, LLC, Dkt. No. 9318, 2005 FTC LEXIS 167, *5 (2005) (quoting *In re Kreta Shipping, S.A.*, 181 F.R.D. 273, 277 (S.D.N.Y. 1998) (alteration in original)).[2]

"Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context." *In re McWane, Inc.*, Dkt. No. 9351, 2012 WL 3597375, *2 (F.T.C. 2012) (Chappell, J.).[3] Finally, it is well settled that the right to present a defense is a fundamental element of due process. *See Washington v. Texas*, 388 U.S. 14, 19 (1967).

II. Complaint Counsel Will Not Be Prejudiced by Evidence of [redacted]

Complaint Counsel's discomfort about [redacted] comes nowhere near the high threshold for excluding relevant testimony at trial. Complaint Counsel has no valid basis to suggest surprise. They had notice about [redacted]

[2] In the Motion, Complaint Counsel misconstrues the third factor as applying more broadly to "the introduction of new evidence," instead of "waiver of the rule against calling unlisted witnesses" as the court in *Basic Research* held. *Compare* Mot. at 3 *with Basic Research*, 2005 FTC LEXIS 167 at *5.

[3] Complaint Counsel cites cases deciding evidentiary issues regarding late identified expert witnesses, but the expert report cited in Complaint Counsel's motion was timely, and Complaint Counsel had the opportunity to present rebuttal reports. Regarding alleged undisclosed expert opinions, this Court has held that "[w]hether or not an expert opinion amounts to an impermissible, undisclosed, 'new' opinion *cannot, and should not, be decided outside the context of trial*. Rather . . . the proper procedure is to object at trial." *In re Pom Wonderful LLC*, 2011 WL 2160775 at*2 (emphasis added). Moreover, the cases cited by Complaint Counsel are irrelevant because Dr. Argue's report was timely. In *Perkasie Indus. Corp. v. Advance Transformer, Inc.*, 143 F.R.D. 73, 77 (E.D. Pa. 1992), the plaintiff served two expert reports *and* identified three new expert witnesses after the deadline for doing so. *In re Basic Research* concerned eight rebuttal expert witnesses and one piece of evidence created two months after discovery and produced shortly before trial. *In re Basic Research*, 2005 FTC LEXIS 167 at *1, *9. In *Praxair, Inc. v. ATML Inc.*, 231 F.R.D. 463-64 (D. Del. 2005), the defendants served a supplemental expert report when supplemental expert reports were not even permitted by the scheduling order. That supplemental expert report "was filed ten days before the summary judgment motions were due, so plaintiffs had no opportunity to conduct rebuttal discovery *for the summary judgment motions.*" *Id*. at 463. The court noted "the prejudice [of an impermissible supplemental expert report served before summary judgment briefing was due] may be cured by allowing plaintiffs additional expert discovery," but did note that "this would undoubtedly disrupt the trial process, as trial is set to begin in less than a month." *Id*.

[redacted]

[redacted] Moreover, Complaint Counsel's own delay [redacted] cannot be used to prejudice Ottobock.

Complaint Counsel does not need to amend its expert reports. Dr. Argue's report was timely, and Complaint Counsel had the opportunity to present rebuttal expert reports. *See* Exh. C, Rebuttal Expert Report of Fiona Scott Morton at ¶ 62 (June 1, 2018) [redacted]

Moreover, there has already been ample discovery from [redacted]

Complaint Counsel (and their experts) have more than enough information [redacted]

[redacted]

III. The Evidence Will Not Disrupt the Orderly and Efficient Trial of the Case

Any evidence relating to [redacted] will not disrupt the orderly and efficient trial of this case. The Commission has already held that the evidence of [redacted] is relevant and admissible both as to competitive harm [redacted] The ultimate goal of this proceeding is to determine whether there has been a violation of the Clayton Act based on competitive effect in an alleged market for MPKs, and if so, what remedy is appropriate. In seeking a second time to limit evidence of [redacted] Complaint Counsel has fundamentally lost sight of the interests of justice and the goal of consumer welfare.

The Commission rebuffed Complaint Counsel's prior attempt to tell Respondent what it could and could not present in its defense. Dr. Argue has concisely explained that [redacted] The Commission has

denied Complaint Counsel's request to preclude [redacted] both as to competitive harm [redacted] *See* Exh. B (Slip Op. at 3, 6). To the extent [redacted]

[redacted]

IV. Ottobock Is Not Offering Evidence on [redacted]

Ottobock is not seeking to admit evidence of

CONCLUSION

Ottobock is The Commission already ruled that this evidence is admissible. This evidence is highly relevant and admissible regardless whether

The Motion should be denied.

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EXHIBIT C

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EXHIBIT D

REDACTED IN ENTIRETY

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EXHIBIT E

REDACTED IN ENTIRETY

Public Version

EXHIBIT F

REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 13, 2018, I caused a true and correct copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion *in Limine* to Exclude All Evidence Related to to be served via the FTC E-Filing System and e-mail upon the following:

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

Donald S. Clark
Federal Trade Commission
Office of the Secretary
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Meghan Iorianni
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Yan Gaocervave 1BDC 1(l)8/P €ID 18 24.<2C 1(lnlnlnllnlnlnllnlnlnllndTJEMC /14- 0TaEMC /P 0ah48)

Notice of Electronic Service

I hereby certify that on June 13, 2018, I filed an electronic copy of the foregoing Public - Respondent's Opposition to Complaint Counsel's Motion in Limine to Exclude Evidence, with:

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

Donald Clark
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I hereby certify that on June 13, 2018, I served via E-Service an electronic copy of the foregoing Public - Respondent's Opposition to Complaint Counsel's Motion in Limine to Exclude Evidence, upon:

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