PUBLIC

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

06 27 2018
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In the Matter of

Otto Bock HealthCare North America, Inc.,
a corporation,

Respondent.

Docket No. 9378

COMPLAINT COUNSEL'S PRETRIAL BRIEF

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INTRODUCTION

[redacted] [redacted] [redacted]

Important aspects of this case are not in serious dispute. Respondent's economic expert does not contest that the geographic market is the United States.[2] Even under Respondent's overly broad relevant market definition, which improperly includes non-MPKs in his relevant market definition, Respondent's expert concedes that the Merger is presumptively anticompetitive, resulting in shares and concentration levels that far exceed thresholds in the case law and Horizontal Merger Guidelines.[3] Finally, there is no serious dispute that Respondent's testimony and documents chronicle years of vigorous head-to-head competition between Otto Bock and Freedom, marked by repeated MPK innovation and aggressive price competition.

Although such pre-Merger evidence is sufficient to establish that the Merger violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, *see* *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001), additional post-Merger documents and testimony from Respondent's executives confirm that the Merger has led and will continue to lead to anticompetitive harm. Approximately a month and a half after consummating the Merger, top executives from Otto Bock and Freedom met in November 2017 to discuss the future of Freedom's MPK products. With Freedom's MPK (the Plié 3) and Otto Bock's MPK (the C-Leg 4) under common ownership, it did not make sense to have these two products competing against each other as they had before the Merger.[4] Otto Bock management recommended that, going

[redacted]

[redacted]

[redacted]

ARGUMENT

Section 7 of the Clayton Act bars mergers "effect of [which] substantially to lessen competition, or to tend to create a monopoly" in "any line of or . . . activity affecting commerce in any section of the country." 15 U.S.C. § 18 (2012); Congress used the words 'may be substantially to lessen competition' to indicate that its co with probabilities, not certainties[.]" FTC v. Penn State Hershey Med. C 838 F.3 Cir. 2016) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962)). rger violates Section 7 if it "create[s] [a] Heinz Statestl,

[redacted]

sufficient to prevent or outweigh the Merger's harm. Further, Freedom does not satisfy the elements of a failing firm defense [redacted]

I. Respondent's Consummated Merger is Presumptively Unlawful

The Merger is presumptively unlawful by a wide margin. It has substantially increased concentration in the already highly concentrated market of the manufacture and sale of MPKs to U.S. prosthetic clinics, causing a substantial lessening of competition in that market.

A. The Relevant Product Market is Microprocessor Prosthetic Knees

The relevant product market is the "line of commerce" affected by a proposed merger. *Brown Shoe*, 370 U.S. at 324. "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. In other words, "courts look at 'whether two products can be used for the same purposes, and if so, whether and to what extent purchasers are willing to substitute one for the other.'" *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 51 (D.D.C. 2011) (citation omitted). Determination of the relevant market "is a matter of business reality—a matter of how the market is perceived by those who strive for profit in it." *FTC v. Staples*, 970 F. Supp. 1066, 1079 (D.D.C. 1997) (internal quotation marks and citation omitted); *see also FTC v. Coca Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C. 1986). Courts frequently define relevant product markets using two analyses—the *Brown Shoe* practical indicia and the hypothetical monopolist test. *See, e.g.*, *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 27-34 (D.D.C. 2015).

In Brown Shoe, the Supreme Court identified a series of "practical indicia" courts should consider in determining the relevant product market. The indicia outlined in Brown Shoe include, "industry or public recognition of the [market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Brown Shoe, 370 U.S. at 325; see also Sysco, 113 F. Supp. 3d at 27; U.S. v. Aetna, 240 F. Supp. 3d 1, 21 (D.D.C. 2017); H&R Block, 833 F. Supp. 2d at 51.

Another approach to defining the relevant product market that courts often rely on—and the approach prescribed by the Merger Guidelines—is the hypothetical monopolist test. See FTC v. Advocate Health Care Network, 841 F.3d 460, 468-69 (7th Cir. 2016) (applying the hypothetical monopolist test to define a relevant geographic market); In the Matter of ProMedica Health Sys., Inc., 2012 WL 1155392, *14 (F.T.C. Mar. 28, 2012) (citations omitted); see also Sysco, 113 F. Supp. 3d at 33; Merger Guidelines § 4. Under the hypothetical monopolist test, a candidate market constitutes a relevant antitrust market if a hypothetical monopolist could profitably impose a "small but significant and non-transitory increase in price" (referred to by antitrust practitioners as a "SSNIP")[17] on at least one product of the merging parties in the candidate market. The Merger Guidelines instruct that in determining the bounds of the relevant product market, it is appropriate to apply first the hypothetical monopolist test on a candidate market comprised of at least one product of each merging firm. Merger Guidelines §§ 4.1.1-4.1.3. The hypothetical monopolist test "is iterative, meaning it should be repeated with ever-larger candidates until it defines a [relevant market]." Advocate, 841 F.3d at 468 (citation omitted). If enough customers would switch to products outside the candidate market in the

[17] In applying the hypothetical monopolist test, a SSNIP is typically five percent. Merger Guidelines § 4.1.2; Sysco, 113 F. Supp. 3d at 34.

face of a SSNIP to render their price increase unprofitable, the candidate market is too narrow. Merger Guidelines §§ 4.1.1-4.1.3. Additional products should be added to the candidate market until a hypothetical monopolist could profitably impose a SSNIP—at which point, a relevant antitrust product market has been defined. Merger Guidelines §§ 4.1.1-4.1.3. A relevant market defined using the hypothetical monopolist test "does not need to include all of the firm's competitors; it needs to include the competitors that would 'substantially constrain [the firm's] price-increasing ability.'" *Advocate*, 841 F.3d at 469 (citations omitted).

Both *Brown Shoe*'s "practical indicia" and the hypothetical monopolist test clearly demonstrate that MPKs sold to U.S. clinics constitute a distinct relevant product market in which to assess the competitive effects of the Merger.

i. Practical Indicia Demonstrate MPKs Are a Relevant Product Market

The "practical indicia" identified in

Six of the practical indicia discussed in Brown Shoe clearly indicate that a relevant product market of MPKs exists—substantial evidence, described later in this section, supports the presence of each of these indicia in this case. First, MPKs have "peculiar characteristics and uses" that clearly distinguish them from other types of prosthetic knees, which market participants refer to as "mechanical" or "non-microprocessor" knees.[20] The microprocessors in MPKs provide unique functionality for amputees who wear them, resulting in significant safety, health, and quality of life benefits mechanical knees cannot match, as demonstrated by a large body of clf0 T Td t11.7och. SeconcsMCI3t2(ees caif59 (echani)]o f)3.rc 03n2 0 Td [usted by adso

[redacted]

[redacted]

Distinct Customers. Prosthetists have an ethical and reputational obligation to fit patients with a prosthetic knee device that will be best suited to a patient's medical needs.[43] MPKs are the only products that meet the medical needs of a distinct set of K-3 and K-4 patients who have mobility and activity levels that allow them to take advantage of the benefits MPKs provide over mechanical knees and allow prosthetists to justify reimbursement for MPKs from insurance providers.

Prosthetists determine the medical necessity of fitting an MPK by evaluating a number of factors about a patient, including his or her health and ability to engage in a number of different activities, and their need to regularly:

- x walk on slopes, hills, or uneven terrain;
- x climb or descend stairs;
- x navigate obstacles; or
- x walk significant distances.[44]

[41] [redacted]; see also [redacted]

[42] [redacted]

[43] See, e.g. [redacted]

[44] See, e.g. PX01489 (Otto Bock) at 03[redacted]; PX01543 (Otto Bock) at 002 (providing a summary of patient needs or deficits that can be used to justify the medical necessity of the C-Leg.); PX05150 (Kannenberg

Prosthetists also evaluate whether patients frequently stumble or fall using their current prosthetic knee or avoid activities due to safety concerns, lack of balance, or lack of

[redacted]

[redacted]

[redacted]

[redacted]

with them to establish MPK prices.[54] According to the testimony of MPK manufacturers, in these negotiations with customer clinics, manufacturers alter the MPK prices they offer based on the prices of competing MPK providers, and the ability of clinics to switch to other MPKs, but not based on mechanical knees.[55] Thus, MPK prices are sensitive to the prices of other MPKs, but not mechanical knees.[56] Consistent with this testimony, countless Otto Bock and Freedom documents reference competition from other MPKs, but few, if any, documents that discuss pricing for MPKs make even a reference to mechanical knee pricing.[57] Respondent's exclusive focus on other MPK competitors in documents discussing pricing and promotion strategy decisions is "strong evidence" of a distinct relevant market. *See H&R Block*, 833 F. Supp. 2d at 53. [redacted]

[54] PX05007 (Carkhuff (Freedom) IH 101:9-13); PX01890 (Otto Bock) at 001 [redacted];

[55] *See* PX05008 (Carkhuff (Freedom) IH 60:13-2 [redacted]

[56] [redacted]

[57] For example, when Otto Bock's Market Manager for Microprocessor Knees so [redacted] from the sales organization, her request was limited to competitor MPKs. PX01257 (Otto Bock) at 001-002. In addition, when Otto Bock conduc [redacted] for its [redacted] Otto Bock compares the

Distributors agree that a lower-priced mechanical knee would have no impact on a clinic's MPK negotiations because [redacted]

Specialized Vendors. Manufacturers sell MPKs using highly specialized sales forces that assist prosthetists with fitting, possess deep knowledge about the products they sell, and provide a variety of educational and other services that clinics find valuable.[60] To sell MPKs successfully, manufacturers provide extensive training to sales personnel and employ certified prosthetists to assist in the sales process.[61] MPK sales representatives visit clinics regularly: Otto Bock's CEO of North America estimated that its sales representatives visited the clinics of its largest customer more than [redacted] times each year.[62] As Otto Bock's EVP of Global Sales explained, a direct sales force is critical because [redacted] Clinic customers also require other specialized non-sales services from MPK vendors such as assistance with reimbursement[63] and technical support to assist with troubleshooting of MPKs, which customers describe as [redacted] MPK vendors also must have sufficient resources to provide repairs of MPKs[64] and offer loaners to patients.[65] This is in stark contrast to other

[59] PX05116 [redacted]; see also PX05004 [redacted]

[60] See PX05118 (Testerman (Freedom) Dep. 42:20 [redacted]; PX05148 (Swiggum (Otto Bock) Dep. 142:20-143:20).

[61] PX05148 (Swiggum (Otto Bock) Dep. 58:11-59:21).

[62] PX05163 (Stuch (Otto Bock) Dep. 45:23-48:19); see also PX05148 (Swiggum (Otto Bock) Dep. 38:7-39:23) [redacted]

[63] PX05148 (Swiggum (Otto Bock) Dep. 34:9-36 [redacted]

[64] [redacted]; see also [redacted]

[65] [redacted]

prosthetic products, including mechanical knees, which do not require the same level of technical and reimbursement-related support, and are sold indirectly through distributors.[67]

Industry Recognition of MPKs as a Separate Market. Respondent, other MPK manufacturers, mechanical knee manufacturers, and prosthetic clinics all view MPKs as a distinct market from mechanical knees. In the ordinary course of business, Otto Bock and Freedom regularly evaluate a separate U.S. MPK market, in which they calculate shares for themselves and their MPK competitors.[68] For example, Freedom includes market share charts such as the one below in documents used for major strategic decisions [redacted] where Freedom assesses the identities and estimated shares of its competitors.[69]

[redacted]

[66] PX05007 (Carkhuff (Freedom) IH Tr. 132:21-134 [redacted]

[67] See, e.g. [redacted]

[68] See, e.g. PX01002 (Otto Bock) at 00 [redacted]; PX01057 at 02 [redacted]; PX01463 (Otto Bock) at 02 [redacted]; see also PX05148 (Swiggum (Otto Bock) Dep. 40:10-41:12); id. 43:21-44: [redacted]

[69] PX01155 (Freedom) at 091; PX05109 (Carkhuff (Freedom) Dep. 195:23- [redacted]

[redacted]

Similarly, Otto Bock regularly analyzes the U[redacted] market,

[redacted][70]

[70] PX01302 (Otto Bock) at 07[redacted].

[redacted]

Otto Bock's CEO of North Amer[illegible]ica, Matthew Swiggum, testified th

[redacted]

[redacted]

[redacted]

Other MPK manufacturer [redacted] also view MPKs as a distinct market.[72] [redacted]

MPK manufacturers that also use or have evaluated selling [redacted]

ii. The Hypothetical Monopolist Test Confirms MPKs Are a Relevant Product Market

The hypothetical monopolist test asks if a hypothetical profit-maximizing firm were the only seller of a set of products in the proposed market, would that firm likely impose a SSNIP on at least one product sold by the merging firms. Merger Guidelines §§ 4.1.1-4.1.3. To answer this question, the hypothetical monopolist test focuses on "customers' ability and willingness to substitute away from one product to another in response to a price increase." Merger Guidelines § 4. Here, the applicable question is whether a hypothetical monopolist, owning all of the MPKs in the marketplace, could profitably impose a SSNIP on either Freedom's Plié or one of Otto Bock's MPKs, because if it could, MPKs would constitute a relevant product market. Complaint Counsel will demonstrate at trial that a hypothetical monopolist of MPKs would clearly be able to impose a SSNIP profitably.

Respondent argues that mechanical knees should be included in the relevant product market.[80] But for the K3/K4 patients for whom MPK3 are medically necessary, mechanical knees are not substitutes. Testimony from prosthetists and clinic owners shows that they would not deny these patients a product they deem a medical necessity and switch them to mechanical knees as long as the clinic could fit the patient with an MPK without losing money.[81] Therefore, if a hypothetical monopolist tried to increase the price of one of Respondent's MPKs by a SSNIP, clinics would not switch to mechanical knees for patients that would benefit from MPKs.[82] Many clinics would choose to pay the higher price for their preferred MPK product.[83]

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[80] Respondent's economic expert alleges that non-high-end MPKs and K3 and K4 mechanical knees compete in the same relevant market. RX-1049 (Argue Report) at ¶ 34.

[81] See

;

[82] Many customers testified that if the price of MPKs increased by five to ten percent, they would not switch to mechanical knees. See [redacted]

For those that switched products, most would likely choose another MPK rather than a mechanical knee.[84] This is because the margins that clinics earn when they fit patients with MPKs are high enough to allow the clinic to earn a profit if it fit an MPK even after a SSNIP.[85] Thus, overwhelming evidence shows that mechanical knees are not significant substitutes for MPKs because they could not prevent a hypothetical monopolist of MPKs from profitably imposing a SSNIP.[86] Finally, it is important to note that even under an overly broad and unsupportable market definition that included mechanical knees, Respondent's own expert admits that the Merger is still presumptively illegal by a wide margin.[87]

B. The Relevant Geographic Market is the United States

The relevant geographic market is the area "where the effect of the merger on competition will be direct and immediate." FTC v. Advocate Health Care Network, 841 F.3d 460, 476 (7th Cir. 2016) (citing U.S. v. Philadelphia Nat'l Bank, 374 U.S. 321, 357) (internal quotations omitted). The United States is where "the defendants compete in marketing their products or services." H&R Block, 833 F. Supp. 2d at 50 n.7 (quoting CCC Holdings, 605 F. Supp. 2d at 37). Respondent's economic expert agrees that the United States is the relevant

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Because this is a much stricter test than the hypothetical monopolist test, it further illuminates the lack of substitutability of mechanical knees.

[83] See [redacted]

[84] [redacted]

[85] The clinic receives a higher reimbursement if an MPK is used than it would receive if the patient receives a mechanical knee, but the clinic receives the same fee if, say, a Freedom KNEE is used or an Otto Bock MPK is used, regardless of the price that the clinic pays for the knee. The patient may pay a co-payment that is a percentage of the flat fee amount the insurance company pays the clinic. This fee structure ensures that clinics do not have a financial disincentive to use the product best suited for the patient. Indeed, the contribution margins—the difference between the price of the component and the reimbursement—is considerably higher for MPKs, and would remain so even if MPKs increased by a SSNIP. See

geographic market, explainin [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

marketing plans specific to the United State[93] [redacted]

MPK firms that only operate outside of the United States are not viable options for U.S. prosthetic clinics. Customers place a premium on their MPK suppliers' sales, technical

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

C. The Merger Resulted in High Market Shares and Concentration Levels, Triggering a Strong Presumption of Illegality

The Merger presumptively violates Section 7 of the Clayton Act and Section 5 of the FTC Act because it significantly increased concentration in the already highly concentrated U.S. MPK market. A merger is presumed to violate the Clayton Act and FTC Act if it produces a firm controlling an "undue concentration in the relevant market." ProMedica, 2012 WL 1155392 at *12 (citing Philadelphia Nat'l Bank, 374 U.S. at 363; Baker Hughes, 908 F.2d at 982-83). "Sufficiently large [Herfendahl-Hirschman Index ("HHI")[103] figures" establish "[a] prima facie case that a merger is anticompetitive." H.J. Heinz, 246 F.3d at 716; Polypore, 150 F.T.C. at *23 (concentration data was sufficient to create a presumption of illegality). Under the Merger Guidelines, mergers "that involve an increase in the HHI of more than 200 points" in a highly concentrated market (i.e., with HHI over 2500), are presumptively anticompetitive. Merger Guidelines § 5.3; Sysco, 113 F. Supp. 3d at 52-53; Heinz, 246 F.3d at 716-17. Here, the Merger results in an HHI of 5,245 and an increase in HHI of 1,522, far exceeding the established thresholds to establish a strong presumption that the Merger is likely to enhance market power.[104]

Otto Bock is the dominant supplier of MPKs in the United States. At the time of the Merger, Otto Bock's market share, by revenue, exceeded [redacted] and Freedom had an approximate [redacted] giving the combined firm more than [redacted] of the U.S. MPK market.[105] Moreover, Freedom's market share underestimates [C8 (ct and F1)8.1 (a)-5.9 (

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Haresdcmrpshälderpfesp Katedslby the Otto Bock executives in July 2017 for Otto Bock's owner,

After consummating the Merger, Dr.

obal Executive Vice Pres[redacted]

[redacted]

[redacted] [109] These

[redacted]

[redacted]

Finally, c

[110] Respondent's rt, Dr. Argue, contends p

[redacted] the Me[redacted] results in a post-merger H

[112] he

units sold (rather than revenue),

[113] he still agrees that this Merger is presumptively illegal by a

wide margin.

[112] RX-1049 (David Argue Report) at 37, Table 3.
[113] See

[redacted]

Freedom's innovation has stagnat

A. Otto Bock and Freedom Engaged in Aggressive Head-to-Head Competition to the Benefit of MPK Customers

A series of product launches over the last several years, including the introduction of the Plié 3 by Freedom in 2014, the subsequent launch of Otto Bock's C-Leg 4 in 2015, and the competitive responses to those launches show that customers have benefited from the historic rivalry between the two companies. This competition, which the Merger eliminated, was poised to intensify

i. Freedom's 2014 Launch of Plié 3

Beginning with its launch of the original C-Leg in 1999, Otto Bock has long been the MPK market leader in the United States, commanding a market share in excess for nearly a decade.[115] Freedom launched the Plié and Plié 2 in 2007 and 2010, respectively, but as a new MPK entrant with no track record and unproven technology, the Plié and Plié 2 initially had limited impact on Otto Bock's C-leg dominance, although Freedom gradually built its market share over time.[116] In September 2014, Freedom launched its third-generation MPK: the Plié 3.[117] Freedom touted the Plié 3's rapid microprocessor time, interchangeable batteries, rugged internal components, intuitive software, improved stance flexion resistance, customized stumble recovery, and seamless variable speeds.[118] In particular, the claim that Plié 3 was differentiated it from the C-Leg 3, Otto Bock's MPK at that

[115] PX01054 (Otto Bock) at 005; *see also* PX05162 (Ruhl (Otto Bock) Dep. 92:9-93
[116] PX05007 (Carkhuff (Freedom) Dep. 155:19-156:2); *infra* Section III.B.
[117] PX05112 (Ammouri (Freedom) Dep. 107:18-20).
[118] PX01513 (Freedom) at 003-004; PX08014 (Freedom) at 002-003; PX01181 (Freedom) at 003-004.
[119] PX01071 (Freedom) at 024; PX01181 (Freedom) at 003.

time, and contributed to its immediate success.[120] Despite being more innovative than other MPKs on the market, Freedom adopted [redacted] strategy for the Plié 3, pricing it lower than the C-Leg 3.[121]

The launch of Freedom's Plié 3 along with its aggressive marketing and pricing strategy had a direct and significant impact on Otto Bock's MPK sales.[122] Otto Bock executives observed that Freedom had made [redacted][123] and its improvements to the Plié allowed it to [redacted]

Dr. Pfuhl, Otto Bock's executive vice president, wrote to a colleague at the time that, [redacted][125] Similarly, Otto Bock's Executive Medical Director for North America testified that [redacted][126]

Otto Bock swiftly responded with new discounts and promotions on the C-Leg 3, and developed marketing strategies specifically aimed at dissuading clinicians from using the Plié 3

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[120] See PX05162 (Ruhl (Otto Bock) Dep. 93:17-94:3) ; PX05112 (Ammouri (Freedom) Dep. 96:10-97:10);

[121] PX01023 (Freedom) at 003 (presentation stating that Plié 3 has); id. at 004 (presentation stating,); PX01024 (Freedom) at 004 (Plié 3's).

[122]

on their patients. Customers who Freedom had pitched to purchase more Plié 3's because of the attractive price point began observing [redacted][127] Otto Bock armed its sales and marketing staff with [redacted] In an aggressive move to undercut the Plié's competitive impact, Otto Bock sent letters to insurers specifically contrasting the Plié 3 and the C-Leg in an effort to convince insurers to give the C-Leg preferential status over the Plié from a reimbursement perspective.[129]

Prosthetists, and the amputees they fit with MPKs, benefitted from the advancements in the Plié 3 and the subsequent price competition between Otto Bock and Freedom. For example, [redacted]

[127] [redacted]

[128] PX05150 (Kannenberg (Otto Bock) Dep. 128:12-129:13); see generally PX01499 (Otto Bock) (presentation titled [redacted]

[129] PX01548 (Otto Bock) and PX01491 (Otto Bo[redacted]

[130] [redacted]

[131] See [redacted]

ii. Otto Bock's 2015 Launch of the C-Leg 4

Within a year of Freedom's launch of the Plié 3 in April 2015,[132] Otto Bock introduced its next-generation C-Leg 4 that included features aimed at some of the most popular aspects of the Plié 3. A detailed approximately 40-page launch plan ("C-Leg 4 Launch Plan"), which contained [redacted], was circulated among top U.S. and global Otto Bock executives, including Brad Ruhl, then President of Otto Bock Healthcare North America, who led the C-Leg 4 launch in the United States.[133] The C-Leg 4 Launch Plan touted innovative new features, including a lower system height, new carbon frame construction, integration of all sensors, Bluetooth compatibility, knee-bending angle of 130 degrees, and weatherproofing.[134] It also claimed the C-Leg 4 was [redacted][135] The C-Leg 4 Launch Plan contrasted the C-Leg 4's features against the Plié 3's features, noting several advances over the Plié 3, including a [redacted][136] The plan contained market share estimates for a market described as [redacted], estimating that Otto Bock had a [redacted] share and identifying Freedom as the next-largest competitor with an [redacted] share.[137] A stated goal of the C-Leg 4 was [redacted]

In preparation for the release of the C-Leg 4, the launch team worked to determine the pricing for the C-Leg 4. The team took into account reimbursement rates and the prices of only

[132] PX08077 (Otto Bock) at 001 (Press release announcing the C-Leg 4 launch in North America).
[133] PX01518 (Otto Bock) at 002; PX05162 (Ruhl (Otto Bock) Dep. 51:12-52:6).
[134] PX01518 (Otto Bock) at 023; see also PX05162 (Ruhl (Otto Bock) Dep. 41:17-42:16).
[135] PX01518 (Otto Bock) at 024.
[136] PX01518 (Otto Bock) at 003.
[137] PX01518 (Otto Bock) at 009, 050.
[138] PX01057 (Otto Bock) at 023.

three knee products—Freedom's Pli[redacted]—and settled on an initial price of approximately [redacted].[139] Otto Bock also developed [redacted] explicitly comparing the C-Leg 4's features to the Pli[redacted][140]

The introduction of the C-Leg 4 had an immediate impact on the Plié's sales with such a substantial effect that Freedom's execut[redacted][141] For example, in August 2015, four months after the C-Leg 4 launch, Freedom's CFO reported to the Freedom Board of Dire[redacted][142] The impact of the C-Leg 4 on Freedom's business continued to be highlighte[redacted][145] Freedom's top executives viewed the impact of the C-Leg 4 launch as so important tha[redacted], Freedom specifically claimed that, [redacted][146] According to internal documents fr[redacted]

[redacted][147]

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[139] PX01524(Otto Bock) at 004, 007.
[140] PX01526 (Otto Bock) at 002.
[141] See e.g.PX01162 (Freedom) at 0[redacted]
[142] PX01158 (Freedom) at 001.
[143] PX01654 (Freedom) at 006; see also PX01162 (Freedom) [redacted]
[144] PX01655 (Freedom) at 006.
[145] PX01658 (Freedom) at 006.
[146] [redacted]; see also [redacted].
[147] PX03008 at 005.

[redacted]

[redacted][165]

Feeling the pressure of Freedom's aggressive promotions, Otto Bock's marketing group provided the sales team with guidance [redacted][166] Otto Bock also ran various sales promotions, including a [redacted]

[redacted]

[redacted]

[redacted] As development continued, Freedom repeatedly compared the features and functionality of [redacted][183] When discussions turned to pricing, Freedom planned to pri[redacted][184]

By the time of the Merge[redacted]

[181] PX05111 (Prince (Freedom) Dep. at 108:12-19).
[182] See, e.g., PX01024 (Freedom) at 0[redacted]
[183] PX01024 (Freedom) at 0[redacted]
[184] PX01024 (Freedom) at 0[redacted]
[185] PX05006 (Robertson (Freedom) IH 67:10-68:1).
[186] PX01223 (Freedom) at 030.
[187]
[188]

[redacted]

[redacted][209] In his deposition, Mr. Swiggum confirmed that he was [redacted][210]

C. Post-Merger Evidence Confirms the Likelihood of Unilateral Effects

Unilateral effects analysis typically requires a forward-looking assessment based on analysis of the extent of direct competition between the merging parties' products, as well as the incentives and abilities of Respondent to elicit competitive harm. Although the evidence described above amply demonstrates the likelihood of anticompetitive effects, this Court need not look any further than Respondent's own post-merger plans for the [redacted] to conclude this Merger will result in substantial unilateral anticompetitive effects.

More than a month and a half after Otto Bock acquired Freedom, and shortly before the Complaint in this case was filed [redacted]

[209] PX01462 (Otto Bock) at 001.
[210] PX05148 (Swiggum (Otto Bock) Dep. 104:4-8).
[211] See

[redacted][213]

In the month leading up to the November Meeting, the consolidation of Otto Bock and Freedom under common ownership was alread[redacted]. For instance, Otto Bock's Head of Prosthetics Lower Limb Mechatronic Systems Business Uni[redacted][214] Mr. Swiggum replied [redacted][215] Eliminating any uncertainty as to what this mea[redacted][216]

Around the same time, on October 5, 2017, Hans Georg Näder, the owner of Otto Bock, outlined a[redacted] that contemplated increasing the price of Freedom's Plié and replacing[redacted][217] Mr. Swiggum confirmed that at this time there had b[redacted][218] With respect to the termination of Otto Boc[redacted]

[212] PX01304 (Otto Bock) at 00[redacted].
[213] Id.
[214] PX01264 (Otto Bock) at 002; PX05148 (Swiggum (Otto Bock) Dep. 152:5-155:25).
[215] PX01264 (Otto Bock) at 001.
[216] PX05148 (Swiggum (Otto Bock) Dep. 152:5-155:25).
[217] PX01301 (Otto Bock) at 003, 005; PX05148 (Swiggum (Otto Bock) Dep. 158:15-161:21).
[218] PX05148 (Swiggum (Otto Bock) Dep. 159:17-21).

[redacted] Mr. Swiggum agreed th[redacted]

[redacted][219]

[redacted]

[redacted]

[redacted][233] More than a month and a half after consummating the Merger, Otto Bock executives determined th[redacted] [redacted][235] In a move that would deprive customers of a strong competitor to Otto Bock's dominant C-Leg franchise, the combined firm's top executives discuss[redacted] [redacted][236]

Although not privy to Otto Bock's internal plans for the Plié [redacted], prosthetic clinic customers have voiced concerns that the transaction will deprive them of the benefits of the fierce competition between Otto Bock and Freed[redacted]

[233] See PX01306 at 00[redacted]
[234] PX01302 (Otto Bock) at 083.
[235] PX05157 (Pfuhl (Otto Bock) at Dep. 172:11-17).
[236] PX01306 (Otto Bock) at 004.
[237] [redacted]
[238] [redacted]
[239] [redacted]

[redacted][240]

D. The Merger Has Already Harmed Competition

Before the Merger, Freedom and Otto Bock had the incentive to compete aggressively in an effort to win sales from one another.[241] After the Merger, however, these former rivals [redacted] and Freedom executives presented strategic and pricing information to Otto Bock's high-level executives.[242] As Professor Scott Morton explains, this exchange of previously confidential and competitively sensitive information "may have impacted pricing and investment decisions, and diminished the degree to which Otto Bock's and Freedom's microprocessor knee products competed with each other."[243]

Beyond the initial exchange of information, evidence indicates that Otto Bock's and Freedom's competitive interactions were likely altered after the Merger. For example, soon after the Merger, Otto Bock's CEO of North America, Matthew Swiggum, communicated to Freedom's Chairman, Mr. Carkhuff, that there [redacted][244] In response to these concerns, [redacted][245] This close coordination on pricing undoubtedly diminished the intensity of competition that existed between Otto Bock and Freedom pre-Merger to the detriment of clinics who had previously played the two companies off each other in negotiations.

[redacted]

[241] PX06001 (Scott Morton Report) at ¶179.
[242] PX05109 (Carkhuff (Freedom) Dep. 15:1-16:2).
[243] PX06001(Scott Morton Report) at ¶179.
[244] PX05109 (Carkhuff (Freedom) Dep. 146:1-148:20);

[redacted]

[redacted]

strategy and pricing documents.[266] In fact, Freedom's CEO at the time of the Merger, David Smith, testified tha [redacted] [267] Many customers testified that they were unaware [redacted] [268] had never fit [redacted] MPK,[269] or found that their produ[redacted]s and related servi[redacted] [270] [redacted]

[redacted]

266 gMC /STf 0.0001 Tc -0.0026 Tw 10.02 03.07re <</7.004 Tc 0 Tw 7.98 0 0 7.98 225.7804 713.3998 Tm (266)Tj EMC /P <</MCID .00s8 0 Tc.Tm c 0 Tw 6.48 0 0 6. EMC /T k .98 225

[redacted][271]

The inability of other market participants to constrain the merged firm is evidenced by the modeling that Otto Bock officials performed in anticipation of, and after, the transaction. [redacted][272] This ordinary course diversion analysis demonstrates that Otto Bock believes its VMP, particularly the C-Leg 4, are the closest competitors to Freedom's Plié 3 and products so [redacted] are more distant substitutes.

B. Respondent Cannot Demonstrate Entry is Timely, Likely, or Sufficient

New entry would not avert the anticompetitive consequences of the Merger. "For entry to constrain the likely harm from a merger that enhances market power, the scale must be large enough to constrain prices post-acquisition." Polypore, 150 F.T.C. at *29 (citing Chicago Bridge, 534 F.3d at 429). "Respondent's burden is to produce evidence sufficient to show that the likelihood of entry 'reaches a threshold ranging from reasonable probability to certainty.'" Polypore, 150 F.T.C. at *29 (quoting Chicago Bridge, 534 F.3d at 430 n.10). Respondent is

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[271] [redacted]

[272] PX05148 (Swiggum (Otto Bock) Dep. 120:20-123:19); PX01003 (Otto Bock) at [redacted]; see also PX01473 (Otto Bock) at 023. Otto Bock also calculated diversion from the Plié 3 to C-Leg 4 of approximately [redacted]. See PX01003 (Otto Bock) at 009; PX01473 (Otto Bock) at 010.

unable to make such a showing because the most likely entrants testified that they have no plans to do so in a timely manner and there are high barriers to entry.

First, [redacted]:

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

[redacted]

[redacted]

community.[285] Clinics are reluctant to fit patients with an unproven product because of the risk of inferior clinical outcomes.[286] Respondent's officials recognize the importance of a proven track record and leverage the one Otto Bock has developed over its many years in the industry.[287] Otto Bock's Chief Future Development Officer and President of Medical Care, testified that [redacted] [288] Given the lack of companies currently poised to enter and the extremely high barriers faced by any firm that seeks to enter in the future, the U.S. MPK market is insulated from new entry for the foreseeable future.

C. Respondent Cannot Demonstrate That Its Purported Efficiencies Outweigh Competitive Harm

No court has permitted an otherwise unlawful transaction to proceed based on claimed efficiencies. *See Heinz*, 246 F.3d at 720-21; *Sysco*, 113 F. Supp. 3d at 82; *CCC Holdings*, 605 F. Supp. at 72. This case does not merit exception as Respondent has failed to demonstrate any cognizable efficiencies.

While courts consider efficiencies claims to rebut evidence of an anticompetitive merger, courts apply strict standards in their review. *H&R Block*, 833 F. Supp. 2d at 89; *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-21 (D.C. Cir. 2001); Merger Guidelines § 10 ("[e]fficiencies almost never justify a merger to monopoly or near-monopoly"). Respondent bears the heavy burden to show that its efficiencies claims are cognizable, meaning that they are "merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or

[285] [redacted]

[286] [redacted]

[287] *See* PX05010 (Schneider (Otto Bock) IH 58:10-16); 59:19-23 [redacted]; PX05007 (Carkhuff (Freedom) IH 296:9-25).

[288] PX05010 (Schneider (Otto Bock) IH 58:10-16).

service." Merger Guidelines § 10; *see also Heinz*, 246 F.3d at 720; *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 72-73 (D.D.C. 2009). When the relevant market is highly concentrated, as it is here, courts have expressly required "proof of extraordinary efficiencies." *Heinz*, 246 F.3d at 720; *CCC Holdings*, 605 F. Supp. 2d at 72; Merger Guidelines § 4.

Respondent's efficiencies expert

[redacted]

[redacted]

Additionally, neither Respondent's expert, nor its corporate designee regarding its efficiencies calculations, could describe the methodology for many of the estimates or inputs into the synergies estimates.[298] It is Respondent's burden to substantiate its efficiencies claims, but here, Respondent has failed to substantiate any claimed efficiencies to allow for their verification.[299]

ii. Respondent's Claimed Efficiencies are Not Merger Specific

Respondent's efficiencies defense also fails because its purported efficiencies are not merger-specific. *See Sysco*, 113 F. Supp. 3d at 84 (holding that, despite the "rigor and scale of the analysis," defendants' efficiencies claims are inadequate because they are not merger specific); FTC v. Cardinal Health, 12 F. Supp. 2d 34, 62 (D.D.C. 1998) ("In light of the anti-competitive concerns that mergers raise, efficiencies, no matter how great, should not be considered if they could also be accomplished without a merger."); Merger Guidelines § 10. As courts have explained, "a 'cognizable' efficiency claim must represent the type of cost saving that could not be achieved without the merger." *H&R Block*, 833 F. Supp. 2d at 89; *Sysco*, 113 F. Supp. 3d at 82. If a company can achieve its purported cost savings alone or via a less anticompetitive alternative, such as a licensing agreement, then the efficiencies are not merger-specific. *H&R Block*, 833 F. Supp. 2d at 90; *Cardinal Health*, 12 F. Supp. 2d 34 at 62; Merger Guidelines § 10, n. 13.

"Defendants bear the burden of demonstrating that their claimed efficiencies are merger specific," *Sysco*, 113 F. Supp. 3d at 82 (citing *H&R Block*, 833 F. Supp. 2d at 89), so it is instructive to look to Respondent's own assessment when evaluating merger specificity. Respondent's expert, Mr. Peterson, acknowledges [redacted]

[redacted]

[298] *See* PX05170 (Schneider (Otto Bock) Dep. (June 1, 2018) 149:1-150:20); PX05174 (Peterson (Respondent) Dep. 279:20-280:20).
[299] PX05174 (Peterson (Respondent) Dep. 269:2–278:1, 279:20–280:20).

[redacted]

without the Merger. Because Mr. Peterson fails to take into consideration whether Respondent can achieve any, if not all, of these supposed synergies absent the Merger, Respondent fails to meet its burden to establish merger specificity.

iii. There is No Evidence that the Purported Efficiencies will Benefit Customers

Even if Respondent's claimed efficiencies were verifiable and merger-specific, they fail because there is no evidence its expected cost savings are likely to be passed on to customers. See, e.g., FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 351 (3d Cir. 2016); Univ.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.

Merger Guidelines §11. Respondent cannot meet any of these criteria, much less all of them.

i. Freedom Was Able to Meet Its Near Term Financial Obligations

At the time of the Merger, Freedom was not at risk of imminent failure. The company had emerged from a period of decreasing sales and earnings with a new management team, a concrete strategic plan to increase sales, and a renewed effort to replenish its research and

[redacted]

[redacted][325] In the end, Freedom's independent auditor gave Fre[redacted]

[redacted]—just six months prior to the Merger.[326] [redacted]

On September 16, 2017, Freedom's loans [redacted] were due. Freedom's positive operating results, along with its relationship with one of its two primary creditors [redacted], make it highly unlikely that Freedom would have been unable to extend its existing credit arrangement or secure additional funding to satisfy the loan. As Freedom's CFO explained in an internal me617 6[redacted] an interA1 [(Freedo

[redacted]

[redacted]

ii. Had It Been Unable to Meet Its Current Financial Obligations, Freedom Could Have Successfully Reorganized Under Chapter 11

Even if Freedom could not meet its financial obligations at the time of the Merger, Respondent's failing firm defense fails because it cannot show that Freedom would have been unable "to reorganize successfully under Chapter 11 of the Bankruptcy Act." *See* Merger Guidelines § 11; *Citizen Pub. Co.*, 394 U.S. at 138 ("The prospects of reorganization . . . would have had to be dim or nonexistent to make the failing company doctrine applicable to this case."). Freedom did not initiate Chapter 11 reorganization and there is no evidence to suggest the company ever seriously explored the possibility of doing so.[332] Nevertheless, there is no reason to believe Freedom could not have reorganized under Chapter 11 if necessary.[333] As Complaint Counsel's expert, Ms. Hammer concludes in her report, "[g]iven that Freedom's reorganization efforts were proving to be successful outside of Chapter 11, there is no reason to believe . . . that Freedom could not have reorganized successfully in Chapter 11 or implemented a successful reorganization plan."[334]

iii. Freedom Did Not Make Good Faith Effort to Find Alternative Purchasers

Even if Freedom's financials had not improved, and its failure and subsequent exit from the market were a reality, Respondent must show that Freedom had made unsuccessful "good-faith efforts to elicit reasonable alternative offers." *See* Merger Guidelines § 11. As the Supreme

[redacted]

[333] PX06002 (Hammer Report) at ¶ 75. There are several variables considered when determining whether a company can reorganize successfully under Chapter 11, which include an increase in sales, reduction of costs, reduction of personnel, change in CAPEX spending, reduction of leverage, issuance of equity, change in top

[redacted]

Court clearly stated, "The failing company doctrine plainly cannot be applied in a merger . . . unless it is established that the company that

and potential benefits of a merger.[338] These discussions continued over the next seven months, with Freedom's focus remaining singularly on completing a transaction with Otto Bock.[339] It was not until the end of April, after th

[redacted]

company.[346] [redacted] all have testified that they were never contacted about a potential acquisition of

[redacted]

[redacted]

E. [redacted]

In the face of overwhelming evidence demonstrating that it consummated an anticompetitive transaction, Respondent, since filing its Answer, has argued that it plans to [redacted]

The current Commission has made it a top priority to ensure success in the Commission's [redacted] As FTC Chairman Joseph Simons testified to the

[359] The Commission recently ruled that, in a consummated merger, evidence [redacted] See Opinion and Order of the Commission, [redacted]

Senate Commerce Committee, "[o]ne of the things I want to do at the Commission . . . [is to] look self-critically at whether our merger enforcement has been as effective as it should be and if it hasn't, why hasn't it and see if we can fix it."[360] Chairman Simons informed the Senate Committee that one of the top challenges facing the Commission is the [redacted]

[redacted]

The Commission has explained that [redacted]

[redacted]

[360] U.S. Senate Committee on Commerce, Science, & Transportation, Nomination Hearing, Feb. 14, 2018, at https://www.commerce.senate.gov/public/index.cfm/hearings?ID=EECF6964-F8DC-469E-AEB2-D7C16182A0E8.

[361] [redacted]

[362] [redacted]

[363] [redacted]

[redacted]

[redacted]

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364 [redacted]

365 [redacted]

366 PX05111 (Prince (Freedom) Dep. 21:19-22:15); PX05115 (Robertson (Freedom) Dep. 42:18-44:3); PX05109 (Carkuff (Freedom) Dep. 61:25-62:17[redacted]

[redacted]

[redacted]

[367] PX05109 (Carkhuff (Freedom) Dep. 209:7-21 [redacted] PX05138 (Reissfelder (Freedom) Dep. 40:22-4 [redacted]

[368] PX05138 (Reissfelder (Freedom) Dep. 47:23-48:8) (explaining that Freedom's MPK sale [redacted]); PX05109 (Carkhuff (Freedom) Dep. 232:22- [redacted]

[369] PX05111e .6 ((Freeo1)-re fm) Dp.e .6 321 -25.8 (11)-re f:191)

[redacted]

[redacted]

[redacted]

[redacted]

378 [redacted]

379 [redacted]

380 [redacted]

[redacted]

i. [redacted]

As early as March 6, 2018, less than one month [redacted]

[redacted]

381 [redacted]

382 [redacted]

383 [redacted]

384 [redacted]

385 [redacted]

386 [redacted]

387 [redacted]

[redacted]

396 [redacted]

397 [redacted]

398 [redacted]

399 [redacted]

400 [redacted]

[redacted]

[redacted]

[401] [redacted]

[402] [redacted]

[403] [redacted]

[404] PX05148 (Swiggum (Otto Bock) Dep. 142:20-143[redacted] id. at 144:15-146:1[redacted]

[redacted]

ii. [redacted]

As of today, Respondent represents [redacted]

[redacted]

[redacted] Because the MPK market is already highly concentrated, such an increase in the HHI "plainly raise[s] significant competitive concerns and often warrant[s] scrutiny." United States v. Bazaarvoice, Inc., 2014 U.S. Dist. LEXIS 3284, 238 (N.D. Cal. 2014) (quoting Merger Guidelines at §5.3)); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 124 (D.D.C. 2004) [redacted]

iii. [redacted]

[redacted]

[409] RX-1049 (Argue Report) at ¶ 222.

[410] [redacted]

[411] [redacted]

[redacted]

CONCLUSION

For the foregoing reasons, which will be supported by evidence at trial, Otto Bock's acquisition of Freedom violated Section 7 of the Clayton Act and Section 5 of the FTC Act, as alleged in the Complaint. Therefore, after the conclusion of the trial on the merits, the Court should order necessary and appropriate relief to prevent further consumer harm from the Merger.

[redacted]

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

June 2 , 2018 By: /s/ Daniel Zach