

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



In the Matter of

Otto Bock HealthCare North
America, Inc.,

a corporation,

Respondent.

Docket No. 9378

PUBLIC

**RESPONDENT'S RESPONSE TO FOURROUX PROSTHETICS, INC.'S AMENDED
MOTION TO QUASH SUBPOENAS DUCES TECUM AND MOTION TO QUASH
SUBPOENAS AD TESTIFICANDUM**

On February 26, 2018, Complaint Counsel served a subpoena *ad testificandum* (“deposition subpoena”) on Keith Watson, the owner of Fourroux Prosthetics, Inc. (“Fourroux” or the “Company”). On March 2, 2018, Respondent Counsel served a deposition subpoena on Keith Watson, a Rule 3.31(c)(1) deposition subpoena on Fourroux, and a subpoena *duces tecum* (“document subpoena”) on Fourroux.

Respondent opposes the motion of Fourroux to quash these subpoenas because Mr. Watson’s deposition, the deposition of Fourroux, and the related production of documents by Fourroux are necessary for the litigation. Unlike Complaint Counsel, Respondent finds no distinction between the need for the deposition of Keith Watson and the need for the deposition of and collection of documents from Fourroux, and therefore opposes Fourroux’s motion to quash Watson deposition subpoena, the Fourroux deposition subpoena, and the document subpoena served on the company.

FACTS**A. Keith Watson and Fourroux Possess Information Critical to the Claims and Defenses in This Case.**

Fourroux operates a chain of prosthetic clinics. The Company purchases prosthetic knee joints, including microprocessor-controlled knee joints and works closely with patients, their families and their healthcare professionals to design a customized approach for its patients. Mr. Watson, Fourroux's owner, is a certified practitioner in orthotics and prosthetics and has been with Fourroux for over twenty years. In particular, he is certified in the newest microprocessor-controlled prosthetic knee systems. Although Respondent possesses knowledge of the industry from the perspective of a manufacturer, evidence regarding how clinics make their purchasing decisions is critical to the claims and defenses in this case. That information is uniquely in the possession of clinics, like Fourroux. Fourroux is a significant participant in the markets at issue in this case, and Mr. Watson has personal knowledge of facts that bear on the key issues in this matter, including market definition and the competitive interaction between market participants. His testimony in his individual capacity and on behalf of Fourroux, therefore, is relevant to Respondent's defenses.

B. Respondent Has Met and Conferred with Fourroux and Has Significantly Narrowed the Fourroux Corporate Designee Topics and Document Requests.

On February 26, 2018, the Federal Trade Commission ("FTC") issued a deposition subpoena to Keith Watson, owner of Fourroux, to testify in his individual capacity. On March 2, 2018, Respondent issued three subpoenas: 1) a deposition subpoena to Keith Watson, to testify in his individual capacity, attached as Exhibit A; 2) a Rule 3.31(c)(1) deposition subpoena to Fourroux for testimony on behalf of the corporation, attached as Exhibit B; and 3) a document subpoena to Fourroux, attached as Exhibit C.

On Wednesday, March 7, 2018, Mr. Lockwood sent an email requesting an opportunity to meet and confer with counsel for Respondent and the FTC. *See* Email from Robert Lockwood to Erica Fruiterman, dated March 7, 2018, attached as Exhibit D. On March 9, 2018, two days later, Mr. Lockwood filed a Motion to Extend Deadline to File a Motion to Quash and/or Limit Subpoenas Duces Tecum and Subpoena ad Testificandum served on it by Respondent and the Subpoena Duces Tecum served by the FTC. Notably, the motion to extend did not address the FTC's subpoena to Mr. Watson in his individual capacity. On March 9, 2018, after returning from travel for depositions, Respondent's counsel, Erica Fruiterman, called Mr. Lockwood to discuss the subpoenas served on Fourroux. *See* Email from E. Fruiterman to R. Lockwood, dated March, 12, 2018, attached as Exhibit E; Affidavit of Erica Fruiterman, at ¶ 1, attached as Exhibit F. Mr. Lockwood did not return her message. Fruiterman Aff. ¶ 2.

On March 12, 2018, ten days after receiving the subpoena and four days before the scheduled deposition of Fourroux, Mr. Lockwood sent an email stating that neither he nor his client were available to appear on March 16th for the deposition and that he planned to file motions to quash the subpoenas issued by Respondent. *See* Email from R. Lockwood to Wayne A. Mack, Edward G. Biester, Sean P. McConnell, Erica Fruiterman, Sarah O'Laughlin Kulik, William Shotzbarger, and Sean S. Zabaneh, dated March 12, 2018, attached as Exhibit G. In that email, Mr. Lockwood stated he left a voice mail message with Erica Fruiterman, and sent emails to both Wayne Mack and Erica Fruiterman, to discuss his client's objections to the subpoena. *Id.* Ms. Fruiterman promptly returned his phone call that day and left messages for Mr. Lockwood. Fruiterman Aff. ¶ 4. Mr. Lockwood filed Fourroux's motion to quash the same day without returning Ms. Fruiterman's messages. *Id.* ¶ 5.

On March 13, 2018, Mr. Lockwood and Ms. Fruiterman spoke to discuss Fourroux's Motion to Quash. *See* Fruiterman Aff. ¶ 6; Email chain between R. Lockwood and E. Fruiterman, dated March 13, 2018, attached as Exhibit H. Ms. Fruiterman explained that despite the two deposition subpoenas, Respondent was willing to agree to a single day of testimony from Mr. Watson limited to seven hours. Fruiterman Aff. ¶ 7. In addition, Ms. Fruiterman explained that Respondent was willing to significantly narrow the number and the scope of the document requests to the greatest extent possible. *Id.* ¶ 8. Mr. Lockwood indicated that he planned to reach out to the FTC to inquire as to whether the FTC would be willing to withdraw the FTC's deposition subpoena to Mr. Watson. *Id.* ¶ 9. On that call, Respondent made no commitments to withdraw its subpoenas. *Id.* ¶ 10.

Later that day, Mr. Lockwood wrote an email to Ms. Fruiterman informing her that he had spoken with Joe Neely at the FTC. *See* Email from R. Lockwood to E. Fruiterman, dated March 13, 2018, attached as Exhibit I. According to Mr. Lockwood, Mr. Neely stated that the FTC might be willing to release Fourroux from the document subpoena, but was unlikely to be willing to release Mr. Watson from the deposition subpoena. *Id.* In response to Mr. Neely, and as reported by Mr. Lockwood, Mr. Lockwood stated that his "instructions [were] to vigorously contest any subpoena because [his] client has no desire to be involved in these proceedings." *Id.*

On March 14, 2018, Mr. Lockwood filed on behalf of Fourroux an amended motion to quash, which corrected the previous motion to add 1) the FTC's deposition subpoena directed at Mr. Watson, and 2) Respondent's deposition subpoena directed at Mr. Watson. (Am. Mot. to Quash Subpoenas Duces Tecum and Motion to Quash Subpoenas ad Testificandum, at 1.) The amended motion requested relief "for the reasons set forth in the original motion," despite the

fact that by then Respondent and counsel for Fourroux had met and conferred, and Respondent had indicated a willingness to narrow the subpoenas. *Id.*

On Friday, March 16, 2018, Ms. Fruiterman received a message from Richard J.R. Raleigh, Jr., who represented that Fourroux was Mr. Raleigh's client, calling to discuss the subpoenas filed by Respondent. Fruiterman Aff. ¶ 11. Ms. Fruiterman returned Mr. Raleigh's message that same evening. *Id.* ¶ 12. During that call, Mr. Raleigh explained that he was tied up in another matter in court, and that, in the meantime, Mr. Lockwood was assisting him with his client Fourroux Prosthetics. *Id.* ¶ 13. Mr. Raleigh also stated that his client would in fact be willing to sit for a deposition and produce documents, if necessary, provided the parties could agree upon a reasonable scope for the documents requests. *See* Fruiterman Aff. ¶ 14; Email from E. Fruiterman to Richard J.R. Raleigh, J.R., dated March 19, 2018, attached as Exhibit J. Respondent counsel explained that Respondent was not seeking two days of testimony, but rather sought only one day of testimony to be split between Respondent and the FTC. Fruiterman Aff. ¶ 15. Respondent counsel confirmed Respondent's willingness to provide narrowed document requests and to continue to meet and confer to reach a resolution concerning Respondent's three subpoenas to Fourroux. *Id.*

On the following Monday, Ms. Fruiterman sent Mr. Raleigh an email memorializing the content of their conversation and included in that email a set of revised and significantly narrowed document requests. *See* Ex. J. Specifically, Respondent reduced the number of document requests from twelve to seven, narrowed those seven requests even further by date range and content requested, and stated that information requested in **six of the seven document requests** could be provided through Mr. Watson's testimony on behalf of Fourroux Prosthetics. *Id.*

After the call, Respondent received an email from Mr. Raleigh thanking Ms. Fruiterman for her call and the message she left on Monday, March 19, 2018. *See* Email from R. Raleigh, Jr. to E. Fruiterman, dated March 20, 2018, attached as Exhibit K. In that email, Mr. Raleigh directed Ms. Fruiterman to continue to meet and confer with Mr. Lockwood and expressed his hope that both parties could reach an agreement. On the same day, March 20, 2018, this Court issued an order to Respondent directing Respondent to “meet and confer with Fourroux, in a good faith effort to resolve by agreement the issues raised by this Motion, and that such conference shall occur before filing any opposition to the Motion.” *See* Order dated March 20, 2018.

On March 21, Mr. Lockwood and Ms. Fruiterman continued to meet and confer. *See* Fruiterman Aff. ¶ 18; Email from E. Fruiterman to R. Lockwood, dated March 21, 2018, attached as Exhibit L. Mr. Lockwood did not address the narrowed requests provided by Respondent or provide Respondent with Mr. Watson’s availability, but instead reiterated his hope that the subpoenas be withdrawn entirely. *See* Email from R. Lockwood to E. Fruiterman, dated March 21, 2018, attached as Exhibit M. Mr. Lockwood also stated that if Respondent was unwilling to withdraw its subpoenas, then his “work becomes more complex, because he will also be forced to negotiate with the FTC on the scope of its subpoenas.” *Id.* Two days earlier, Respondent had provided Fourroux with fewer and substantially narrowed requests, and agreed, in order to further reduce Fourroux’s burden, to **obtain all of the information, with the exception of revised request no. 1, through Mr. Watson’s testimony.** Mr. Lockwood then, for the first time in his exchanges with Respondent over the scope of the subpoenas, raised the issue of the number of deposition topics contained in the corporate designee deposition subpoena and asked if Respondent was willing to narrow the scope of those topics. *See* Email from R.

Lockwood to E. Fruiterman, dated March 21, 2018, attached as Exhibit N. In reply, Respondent offered to “narrow the scope of our corporate designee topics to match, as closely as possible, the previously narrowed scope of the documents requests directed towards Fourroux,” and included the narrowed requests in Respondent’s reply email. *See* Email from E. Fruiterman to R.

Lockwood, dated March 22, 2018, attached as Exhibit O.

On Thursday, March 22, 2018, Mr. Lockwood responded that he had reviewed Respondent’s proposal with his client and declined to withdraw its motion to quash. *See* Email from R. Lockwood to E. Fruiterman, dated March 22, 2018, attached as Exhibit P. The only reason provided by Mr. Lockwood for this position was the fact that Fourroux still found Respondent’s requests “objectionable”. *Id.* Ms. Fruiterman replied that Respondent planned to respond to Fourroux’s motions to quash, but noted that she was available for “further discussion” if it “might lead to a resolution.” *See* Email from E. Fruiterman to R. Lockwood, dated March 22, 2018, attached as Exhibit Q.

ARGUMENT

Respondent opposes Fourroux’s amended motion to quash respondent’s deposition subpoenas issued to Keith Watson and to Fourroux Prosthetics, Inc., and Fourroux’s motion to quash Respondent’s document subpoena. Parties to an FTC proceeding are entitled to discovery that “may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” FTC Rule of Practice 3.31(c)(1). Further, as Fourroux itself points out, Administrative Law Judges are reluctant to grant motions to quash based upon burden, “where the party initiating the subpoena has expressed a willingness to mitigate whatever burden may exist by negotiation and compromise.” *See* Mot. to Quash, at 3-4 (citing *In re General Motors Corp.*, No. 9077, 1977 FTC LEXIS 18, at*1 (Nov. 25, 1977)). Fourroux’s Motions to Quash should be denied because Respondent’s subpoenas

seek information relevant to its defenses and because Respondent has significantly narrowed its requests for documents and testimony. Specifically, Respondent has essentially narrowed seven documents requests down to one by agreeing to accept testimony in lieu of documents for six of the requests. Respondent has also limited its corporate designee topics from twenty-two requests to eight. Because Fourroux is in possession of information relevant to this action and because Fourroux has not stated why it believes Respondent's narrowed requests are overbroad or excessively burdensome, Respondent respectfully requests that this Court deny Fourroux's motions to quash.

C. Respondent Opposes Fourroux's Motion to Quash the Deposition Subpoenas Issued to Keith Watson in his Personal Capacity and to the Corporation Fourroux Prosthetics, Inc.

1. Individual Capacity

Fourroux, in its amended motion, makes no argument, and provides no evidence, as to why the deposition subpoenas issued by Respondent and Complaint Counsel to Mr. Watson seeking testimony in his personal capacity should be quashed. All of the arguments and objections pertain to the topics Respondent identified in its subpoena to Fourroux for a corporate deposition. Those arguments, however, are simply incorrect.

Respondent opposes Fourroux's assertion that none of Fourroux's employees should be deposed. Mr. Watson, as a CPO and owner of Fourroux, has personal knowledge about many topics that are relevant to this case, including, among other topics, the types of prosthetic knees Fourroux fits on particular patients, the degree to which different types of prosthetic knees are considered are substitutes for one another, Fourroux's margin on non-microprocessor-controlled and microprocessor-controlled prosthetic knees, respectively, and the absence of any anticompetitive effects experienced by Fourroux as a result of the merger between Ottobock and

Freedom in September 2017. None of the testimony sought by Respondent in its deposition of Mr. Watson and Fourroux seeks expert testimony.

Fourroux operates a chain of prosthetic clinics. The company purchases, *inter alia*, microprocessor-controlled prosthetic knee joints and works closely with patients, their families and their healthcare professionals to design a customized approach for its patients. Mr. Watson, Fourroux's owner, is a certified practitioner in orthotics and prosthetics and has been with Fourroux for over twenty years. In particular, he is certified in the newest microprocessor-controlled prosthetic knee systems. Although Respondent possesses knowledge of the industry from the perspective of a manufacturer, Respondent needs evidence regarding how clinics make their purchasing decisions and why certain prosthetic knees are preferred by clinicians and patients over others. That information is uniquely in the possession of clinics, like Fourroux. Fourroux is a significant participant in the market at issue, and Mr. Watson has personal knowledge of facts that bear on the key issues in this matter, including market definition and the competitive interaction between market participants. His testimony in his individual capacity and on behalf of Fourroux, therefore, is relevant to both Respondent and Complaint Counsel's case.

Fourroux's unwillingness to participate in this litigation is irrelevant to whether its motion to quash should be granted. *See generally Kirschner v. Klemons*, 2005 WL 1214330 (S.D.N.Y. May 19, 2005) (stating that "inconvenience alone will not justify an order to quash a subpoena that seeks potentially relevant testimony.") (internal citation omitted); *Plant Genetic Systems, N.V. v. Northrup King Co., Inc.*, 6 F. Supp. 2d 859, 862 (E.D. Mo. 1998) (stating that a motion to quash should be denied where third party "has done little more than make the bare

assertion that it is burdensome for it to comply”); *Ispat Inland, Inc. v. Kemper Environmental, Ltd.*, 2007 WL 737786 at *2 (D. Minn. March 8, 2007) (same).

Fourroux argues that the deposition subpoenas should be quashed because “Otto Bock and the FTC would be better-served by obtaining their desired information from a different third-party,” and because certain information requested by Respondent is already in Respondent’s possession. (Am. Mot. to Quash at 4-5.) As noted by Complaint Counsel, “there is no basis in the law for the contention that, because information may potentially be available from one third party, it is not proper for a litigant to seek that information from a different third party, or that information may not be sought from Fourroux if similar information may be in the possession of Respondent.” (Complaint Counsel’s Opposition at 4.) The Commission’s decision in *In the matter of subpoena Duces Tecum issued to Humana, Inc.*, F.T.C. File No. 161-0026 (Jun. 5, 2017) (attached as Exhibit R), cited by Fourroux, explains the importance of obtaining information from a variety of third-party sources. The Commission in that decision explained that, “an important and effective tool in investigations involves comparing, contrasting, and supplementing information and materials obtained from targets with that obtained from third parties.” *Id.* at 6. In a subsequent ruling, the Commission held that “even if such information were available from other sources, it is still appropriate to adduce testimony from Humana to, *inter alia*, verify that information. Indeed, by its very nature, the discovery process entails asking witnesses questions about matters that have been the subject of other discovery.” *In the matter of subpoena Duces Tecum issued to Humana, Inc.*, F.T.C. File No. 161-0026 (Jun. 15, 2017) at 5 (attached as Exhibit S) (internal punctuation and quotations omitted).

Fourroux also contends that information is better sought from one of “several trade organizations that can provide exactly the information that these parties desire.” (Mot. to Quash

at 4.) There is no evidence on the record that any of these trade associations does, in fact, possess any or all of the relevant information sought by the deposition subpoenas directed to Mr. Watson and Fourroux, or that any organization thus represents the “single source likely to have all of the necessary information,” referenced by the Commission in its *Humana* Order. *In the matter of subpoena Duces Tecum issued to Humana, Inc.*, F.T.C. File No. 161-0026 (Jun. 5, 2017) at 5. Indeed, the source most likely to have all of the necessary information about Fourroux’s purchasing practices and views of the market and its participants is Mr. Watson in his individual capacity and on behalf of Fourroux.

2. Corporate Designee

In an effort to further reduce Fourroux’s burden, Respondent has agreed to limit the original 22 corporate designee topics to eight topics, but that offer has been rejected by Fourroux. Because Fourroux has never articulated its objections to Respondent’s proposed narrowing of the topics, Respondent has had no opportunity to incorporate Fourroux’s feedback into its decisions about how to narrow and limit the requests. Rather than having a substantive objection to the proposal, it appears that Fourroux simply does not want to be deposed on any topic, no matter how minimal a burden. However, because the entity, Fourroux, possesses information that is directly relevant to Respondent’s defenses in this case and because Respondent has made every effort to reasonably narrow the deposition topics, Fourroux’s motion to quash Respondent’s 3.31(c)(1) deposition subpoena should be denied.

D. Respondent Opposes Fourroux’s Motion to Quash the Document Subpoena Issued by Respondent to Fourroux.

Like the corporate designee topics, Fourroux has also refused to negotiate the scope of Respondent’s document requests. Respondent indicated from the beginning of its communication with counsel for Fourroux a willingness to work with Fourroux to limit the

document requests directed at Fourroux as much as possible. *See* Fruiterman Aff. As part of that effort, Respondent offered to limit the document subpoena directed at Fourroux to seven document requests. *See* Exhibit J. In the interest of further reducing Fourroux's burden, Respondent offered to receive information responsive to six of the seven requests via the testimony of Fourroux's corporate designee. *Id.* Despite these efforts by Respondent, Fourroux has never addressed the substance of Respondent's proposal, and its arguments as to burden in its motion to quash do not respond to Respondent's significant narrowing of the requests. *See* Fruiterman Aff. ¶ 19. Fourroux has offered no explanation of how the physical production of documents responsive to a **single request** presents a burden. Without an understanding of why Respondent's proposal remains "objectionable," Respondent cannot offer a counterproposal to address Fourroux's concerns. Respondent is left to draw the conclusion that no proposal, other than the complete withdrawal of the subpoena for documents, would satisfy Fourroux. However, such a position is unsupported by the law and the facts. Respondent is entitled to discover information relevant to its defenses from third parties, provided it makes efforts to mitigate whatever burden exists through negotiation and compromise. Fourroux possesses documents relevant to Respondent's defenses and Fourroux has refused to respond to Respondent's effort to negotiate the scope of the document requests. For these reasons, Fourroux's motion to quash Respondent's document subpoena should be denied.

CONCLUSION

For the foregoing reasons, this Court should reject Fourroux's motion to quash the Respondent's and Complaint Counsel's deposition subpoenas issued to Keith Watson in his personal capacity, Fourroux's motion to quash the deposition subpoena seeking testimony from a corporate representative, and Fourroux's motion to quash the document subpoenas issued to Fourroux by Respondent and by Complaint Counsel. In the event this Court denies Fourroux's

motions to quash, Respondent respectfully requests that Fourroux be granted two weeks from the entry of the order denying the motion to quash to comply with the document subpoena, and that the deposition of Keith Watson in his individual capacity and as a corporate representative be ordered for one week after the deadline for Fourroux's document production.

Dated: March 26, 2018

Respectfully submitted,

/s/ William Shotzbarger

Wayne A. Mack

Edward G. Biester III

J. Manly Parks

Christopher H. Casey

Sean S. Zabaneh

Sean P. McConnell

Erica Fruiterman

Sarah Kulik

William Shotzbarger

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*Attorneys for Respondent Otto Bock HealthCare
North America, Inc.*

PUBLIC

EXHIBIT A



SUBPOENA AD TESTIFICANDUM PUBLIC DEPOSITION

Provided by the Secretary of the Federal Trade Commission, and Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

<p>1. TO</p> <p>Keith Watson, Fourroux Prosthetics 2743 Bob Wallace Avenue, SW Huntsville, AL 35805</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

<p>3. PLACE OF DEPOSITION</p> <p>Wilmer & Lee, P.A. 100 Washington Street Northeast Huntsville, AL 35801</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Erica Fruiterman</p> <hr/> <p>5. DATE AND TIME OF DEPOSITION</p> <p>March 16, 2018 at 9:00 am</p>
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6. SUBJECT OF PROCEEDING

In the Matter of Otto Bock Healthcare North America, Inc., Docket No. 9378

<p>7. ADMINISTRATIVE LAW JUDGE</p> <p>The Honorable D. Michael Chappell Federal Trade Commission Washington, D.C. 20580</p>	<p>8. COUNSEL AND PARTY ISSUING SUBPOENA</p> <p>Otto Bock Healthcare North America, Inc. Duane Morris LLP 30 S. 17th St. Philadelphia, PA 19103 (215) 979-1000</p>
---	--

<p>DATE SIGNED</p> <p>3/2/2018</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
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GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was personally delivered to:

Keith Watson, Fourroux Prosthetics
2743 Bob Wallace Avenue, SW
Huntsville, AL 35805

I hereby certify that I delivered via electronic mail a copy of the foregoing document to:

William Cooke
Jonathan Ripa
Federal Trade Commission
Bureau of Competition
400 7th Street SW
Washington, DC 20024
wcooke@ftc.gov
jripa@ftc.gov

Counsel Supporting the Complaint

March 2, 2018

By: /s/ Erica Fruiterman
Erica Fruiterman
Duane Morris LLP
30 S. 17th Street
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efruiterman@duanemorris.com

*Counsel for Respondent Otto Bock
HealthCare North America, Inc.*

PUBLIC

EXHIBIT B



SUBPOENA AD TESTIFICANDUM PUBLIC DEPOSITION

Provided by the Secretary of the Federal Trade Commission, and Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

<p>1. TO</p> <p>Fourroux Prosthetics c/o Keith Watson (Registered Agent) 2743 Bob Wallace Avenue SW Huntsville, AL 35805</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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<p>DATE SIGNED</p> <p>3/2/2018</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

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

Docket No. 9378

**RESPONDENT COUNSEL'S SUBPOENA *AD TESTIFICANDUM* ATTACHMENT TO
FOURROUX PROSTHETICS**

Pursuant to the Federal Trade Commission's Rules of Practice 16 C.F.R. §§ 3.33(a) and 3.33(c)(1), and the Definitions set forth below, Respondent Counsel will take the deposition of the Company or its designee(s), who shall testify on behalf of the Company about matters known or reasonably available to the Company.

DEPOSITION TOPICS

The Company is advised that it must designate one or more officer, director, managing agent, or other person who consents to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. The persons so designated shall testify as to matters known or reasonably available to the Company relating to the following deposition topics:

1. The current orthotic and prosthetic industry and market, including, but not limited to, the market and any submarkets or market segments of prosthetic knee joints.
2. The various microprocessor prosthetic knees and mechanical knees the Company currently purchases, sells or distributes in the United States and/or has purchased, sold or distributed in the past five years.
3. Facts and circumstances related to the Company's decision to purchase, sell or distribute each manufacturer's models of microprocessor prosthetic knees.
4. The orthotic and prosthetic industry and market over the past five years, including, but not limited to, the market and submarkets of prosthetic knee joints.
5. Freedom's position in the prosthetic industry and market in the United States over the past five years.

6. Any communications between the Company and Freedom regarding potential acquisition of any of Freedom's assets or business(es) by the Company.
7. Available microprocessor prosthetic knee and mechanical knee choices by K-Level patients.
8. Strengths and weaknesses of each manufacturer's (i) microprocessor prosthetic knees and (ii) mechanical knees.
9. The competition in the manufacture, sale and distribution of (i) microprocessor prosthetic knees and (ii) mechanical knees in the United States.
10. The impact that Otto Bock's acquisition of Freedom had on the microprocessor prosthetic knee market, including, but not limited to, cost savings, quality improvements, expanded consumer choice, and innovation.
11. The microprocessor prosthetic knees that the Company currently fits on patients in the United States or has fitted in the past five years, including, but not limited to, number of units fitted and revenue received by source and gross margin by manufacturer and model.
12. The competition and/or differences between microprocessor prosthetic knees and mechanical knees.
13. The impact that a price change of one manufacturer's microprocessor prosthetic knee has on the willingness of (i) patients or (ii) clinicians to substitute to another manufacturer's microprocessor prosthetic knee.
14. The functional interchangeability and differences among microprocessor prosthetic knees of different manufacturers.
15. The functional interchangeability and differences between microprocessor prosthetic knees and mechanical knees.
16. Information surrounding the (i) Company's, (ii) patients', or (iii) clinicians' views of microprocessor prosthetic knees of different manufacturers.
17. Patients' reasons for (i) initially choosing or (ii) subsequently switching at the time of replacing the prosthesis, between microprocessor prosthetic knees sold by different manufacturers.
18. The factors affecting prosthetists' decisions concerning which type of prosthetic knee to fit on a particular patient.
19. The Company's decision-making process in fitting patients with prosthetic knee joints, including, but not limited to the revenue received per patient and the acquisition cost per prosthetic knee.

20. The limitations and/or ceiling on prices for microprocessor prosthetic knees imposed by Medicare and private insurers.
21. The sales, gross margin, and profits for microprocessor prosthetic knees fitted and sold by the Company.
22. Recovery Audit Contractor (RAC) audits, their impact on clinics and any impact on clinical assessments regarding prosthetic devices containing microprocessor controlled knees or mechanical knees.

DEFINITIONS

The following definitions and instructions apply without regard to whether the defined terms used herein are capitalized or lowercase and without regard to whether they are used in the plural or singular form:

1. The term “Company” means Fourroux Prosthetics, including without limitation, any of its predecessors, successors, subsidiaries, departments, divisions and/or affiliates, or any organization or entity which the Company manages or controls, together with all present and former directors, officers, employees, agents, representatives, independent contractors, or any person acting or purporting to act on the Company’s behalf. The terms “subsidiaries,” and “affiliates” refer to any person in which there is partial (25 percent or more) or total ownership or control between the Company and any other person.
2. The term “Otto Bock” means Otto Bock HealthCare North America, Inc., including without limitation, any of its predecessors, successors, subsidiaries, departments, divisions and/or affiliates, or any organization or entity which Otto Bock HealthCare North America, Inc. manages or controls, together with all present and former directors, officers, employees, agents, representatives, independent contractors, or any person acting or purporting to act on Otto Bock’s behalf. The terms “subsidiaries,” and “affiliates” refer to any person in which there is partial (25 percent or more) or total ownership or control between Otto Bock and any other person.
3. The term “Freedom” means FIH Group Holdings, LLC, including without limitation, any of its predecessors, successors, subsidiaries, departments, divisions and/or affiliates, or any organization or entity which FIH Group Holdings, LLC manages or controls, together with all present and former directors, officers, employees, agents, representatives, independent contractors, or any person acting or purporting to act on Freedom’s behalf. The terms “subsidiaries,” and “affiliates” refer to any person in which there is partial (25 percent or more) or total ownership or control between Freedom and any other person.

4. The terms “And” and “Or” are interchangeable. “And” is understood to include and encompass “or,” and vice versa.
5. The terms “Communication” or “Communications” means, without limitation, oral or written communication of any kind, all electronic communications, emails, facsimiles, telephone communications, correspondence, exchange of written or recorded information, face-to-face meetings, or one-way communication.
6. “Relating to,” “related to,” “concerning,” “regarding,” and “surrounding” mean, without limitation, the following concepts: concerning, discussing, describing, reflecting, dealing with, pertaining to, analyzing, evaluating, estimating, constituting, or otherwise involving, in whole or in part.

PROOF OF SERVICE

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____.

I served the subpoena by delivering a copy to the named person as follows:

_____ on *(date)* _____; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of \$_____.

My fees are \$_____ for travel and \$_____ for services for a total of \$_____

I declare under penalty of perjury that this information is true.

Date: _____

Server's Signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was personally delivered to:

Fourroux Prosthetics
c/o Keith Watson (Registered Agent)
2743 Bob Wallace Ave. SW
Huntsville, AL 35805

I hereby certify that I delivered via electronic mail a copy of the foregoing document to:

William Cooke
Jonathan Ripa
Federal Trade Commission
Bureau of Competition
400 7th Street SW
Washington, DC 20024
wcooke@ftc.gov
jripa@ftc.gov

Counsel Supporting the Complaint

March 2, 2018

By: /s/ Erica Fruiterman
Erica Fruiterman
Duane Morris LLP
30 S. 17th Street
Philadelphia, PA 19103
efruiterman@duanemorris.com

*Counsel for Respondent Otto Bock
HealthCare North America, Inc.*

PUBLIC

EXHIBIT C



SUBPOENA DUCES TECUM

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

<p>1. TO</p> <p>Fourroux Prosthetics c/o Keith Watson (Registered Agent) 2743 Bob Wallace Avenue SW Huntsville, AL 35805</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
--	---

This subpoena requires you to produce and permit inspection and copying designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

<p>3. PLACE OF PRODUCTION</p> <p>Duane Morris LLP 30 S. 17th St. Philadelphia, PA 19103 (215) 979-1000</p>	<p>4. MATERIAL WILL BE PRODUCED TO</p> <p>Erica Fruiterman</p> <hr/> <p>5. DATE AND TIME OF PRODUCTION</p> <p>March 9, 2018 at 9:00 am</p>
--	--


6. SUBJECT OF PROCEEDING

In the Matter of Otto Bock Healthcare North America, Docket No. 9378

7. MATERIAL TO BE PRODUCED

Documents & materials responsive to the attached Subpoena Duces Tecum Requests for Production

<p>8. ADMINISTRATIVE LAW JUDGE</p> <p>The Honorable D. Michael Chappell Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL AND PARTY ISSUING SUBPOENA</p> <p>Otto Bock Healthcare North America, Inc. Duane Morris LLP 30 S. 17th St. Philadelphia, PA 19103 (215) 979-1000</p>
---	--

<p>DATE SIGNED</p> <p>3/2/2018</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
------------------------------------	--

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

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

In the Matter of

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

Docket No. 9378

**RESPONDENT COUNSEL'S SUBPOENA *DUCES TECUM* ATTACHMENT TO
FOURROUX PROSTHETICS**

Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.34, and the Definitions and Instructions set forth below, Respondent Counsel hereby requests that the Company produce all Documents, electronically stored information, and other things in its possession, custody, or control responsive to the following requests:

1. Any and all documents regarding the qualifications for use of a microprocessor controlled knee or reimbursement policy or terms of any public or private payor, including contracts with payors covering microprocessor controlled knees.
2. Any and all documents regarding the terms offered or applied for the Company's purchase of microprocessor controlled knees by any manufacturer, supplier, distributor or seller, including any proposed or agreed terms.
3. Any and all documents evidencing the number of the Company's clinic locations in the United States and each U.S. State, District, or Territory and the number of clinicians at any of the Company's clinic locations who fitted patients with any type of prosthetic knee.
4. Documents sufficient to show all microprocessor knees the Company currently fits on patients in the United States and each U.S. State, District, or Territory or has fitted for the past five years, indicating for each: (a) manufacturer and model of each microprocessor knee; (b) the number of units fitted and the revenue received by source (e.g., third party payor, patient, etc.) and by K Level for microprocessor knees with HCPCS Codes L5856 or L5858; (c) cost to acquire microprocessor knees with HCPCS Codes L5856 or L5858 by manufacturer and model in units and dollars by channel of purchase (e.g., distributor, direct sale from manufacturers); (d) the cost to service, repair or maintain microprocessor knees over the duration of the Company's warranty to the patient; and (e) the gross margin for each microprocessor knee by manufacturer and model.

5. Any and all documents, including, but not limited to, market studies, forecasts, surveys marketing plans, business plans, presentations to the Board of Directors, discussing: (a) any available (i) microprocessor knee and (ii) non-microprocessor (i.e., “mechanical”) knee choices by K level; (b) strengths and weaknesses of each manufacturer’s (i) microprocessor knees and (ii) mechanical knees; (c) competition in the manufacture, sale and distribution of (i) microprocessor knees and (ii) mechanical knees in the United States and each U.S. State, District, or Territory.
6. Any and all documents that discuss the Company’s or patients’ views of microprocessor knees of different manufacturers, particularly, but without exclusion, those discussing: (a) functional interchangeability among microprocessor knees of different manufacturers as well as between microprocessor knees and mechanical knees; (b) information on (i) the general willingness of patients to substitute and (ii) actual incidence of patients substituting, among microprocessor knees of different manufacturers; (c) information evidencing patients’ reasons for (i) initially choosing or (ii) subsequently switching at the time of replacing the prosthesis, between microprocessor knees sold by different manufacturers; (d) views of (i) the company, (ii) patients, or (iii) clinicians’ views of microprocessor knees of different manufacturers; and (e) factors affecting or which may affect prosthetists’ decisions concerning which type of prosthetic knee to fit to a particular patient.
7. Any and all documents discussing (a) any impact of small but significant increases in price (e.g., 5% - 10%) of one manufacturer’s microprocessor knee (with no accompanying change in quality or product features) on the willingness of (i) patients or (ii) clinicians to substitute to another manufacturer’s microprocessor knee; (b) specifically, any impact of a small but significant increases in price (e.g., 5% - 10%) of Otto Bock’s or Freedom Innovation’s microprocessor knees (with no accompanying change in quality or product features) on the willingness of (i) patients or (ii) clinicians to substitute to another manufacturer’s microprocessor knee; (c) the impact of a manufacturer’s small, incremental quality improvement or small, incremental design change in its microprocessor knees on patients’ willingness to choose that microprocessor knee over that of another manufacturer, including specifically Otto Bock and Freedom Innovation as the other manufacturer (where “incremental” specifically excludes major product changes); and (d) any recommendations of alternative microprocessor knees the Company’s clinicians make to patients who wished to switch among manufacturers’ microprocessor knees.
8. Any and all documents that discuss the Company’s margin between revenue received per patient and acquisition cost per prosthetic knee, specifically with respect to: (a) the minimum acceptable margin in dollars and as a percent of revenue; and (b) any effect of differences in margins among prosthetic knees on clinicians’ choices of (i) microprocessor knees or (ii) mechanical knees.
9. Any and all documents pertaining to the current orthotic and prosthetic industry and market, including, but not limited to, the market and any submarkets or market segments of prosthetic knee joints.

10. Any and all documents discussing, describing, or analyzing Freedom Innovations or Otto Bock's position in prosthetic industry and market in the United States over the past five years.
11. Any and all documents evidencing the limitations imposed or ceiling on the prices of microprocessor prosthetic knees imposed by Medicare and private insurers.
12. Any and all documents regarding Recovery Audit Contractor (RAC) audits with respect to: (i) their impact on the Company or other clinics; (ii) their impact on the clinical analysis of prosthetic devices containing microprocessor controlled knees or mechanical knees; and (iii) their impact on prosthetists' recommendations of microprocessor controlled knees or mechanical knees.

DEFINITIONS

The following definitions and instructions apply without regard to whether the defined terms used herein are capitalized or lowercase and without regard to whether they are used in the plural or singular form:

1. The term "Company" or "You" means Fourroux Prosthetics, including without limitation, any of its predecessors, successors, subsidiaries, departments, divisions and/or affiliates, or any organization or entity which Company manages or controls, together with all present and former directors, officers, employees, agents, representatives, independent contractors, or any person acting or purporting to act on the Company's behalf. The terms "subsidiaries," and "affiliates" refer to any person in which there is partial (25 percent or more) or total ownership or control between the Company and any other person.
2. The term "Otto Bock" means Otto Bock HealthCare North America, Inc., including without limitation, any of its predecessors, successors, subsidiaries, departments, divisions and/or affiliates, or any organization or entity which Otto Bock HealthCare North America, Inc. manages or controls, together with all present and former directors, officers, employees, agents, representatives, independent contractors, or any person acting or purporting to act on Otto Bock's behalf. The terms "subsidiaries," and "affiliates" refer to any person in which there is partial (25 percent or more) or total ownership or control between Otto Bock and any other person.
3. The term "Freedom" means FIH Group Holdings, LLC, including without limitation, any of its predecessors, successors, subsidiaries, departments, divisions and/or affiliates, or any organization or entity which FIH Group Holdings, LLC manages or controls, together with all present and former directors, officers, employees, agents, representatives, independent contractors, or any person acting or purporting to act on Freedom's behalf. The terms "subsidiaries," and "affiliates" refer to any person in which there is partial (25 percent or more) or total ownership or control between Freedom and any other person.

4. The terms “And” and “Or” are interchangeable. “And” is understood to include and encompass “or,” and vice versa.
5. The terms “Communication” or “Communications” means, without limitation, oral or written communication of any kind, all electronic communications, emails, facsimiles, telephone communications, correspondence, exchange of written or recorded information, face-to-face meetings, or one-way communication.
6. The term “Merger” means the Agreement and Plan of Merger, dated as of September 22, 2017, by and among Otto Bock HealthCare North America, Inc., OB Roosevelt Acquisition, LLC, FIH Group Holdings, LLC and Health Evolution Partners Fund I (AIV I), LP.
7. The term “Documents” means all written, recorded, and graphic materials of every kind in the possession, custody, or control of the Company. The term “Documents” includes, without limitation: electronic correspondence and drafts of Documents; electronic mail messages; metadata; copies of Documents that are not identical duplicates of the originals in that Person’s files; and copies of the Documents the originals of which are not in the possession, custody, or control of the Company.
8. The terms “each,” “any,” and “all” mean “each and every.”
9. “Relating to,” “related to,” “concerning,” “regarding,” and “surrounding” mean, without limitation, the following concepts: concerning, discussing, describing, reflecting, dealing with, pertaining to, analyzing, evaluating, estimating, constituting, or otherwise involving, in whole or in part.

INSTRUCTIONS

1. Unless the request specifically, or in context, indicates otherwise, the timeframe applicable to these requests shall be January 1, 2016, through the present.
2. This request for documents shall be deemed continuing in nature so as to require production of all documents responsive to any specification included in this request produced or obtained by the Company up to fifteen (15) calendar days prior to the date of the Company’s full compliance with this request.

3. If You claim any form of privilege, whether based on statute or otherwise, as a ground for not answering any Request, state the nature of the privilege claimed (*e.g.*, attorney-client, work product, or other) and set forth all facts upon which the claim of privilege is based.

4. Except for privileged material, You shall produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. You should submit any appendix, table, or other attachment by either attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, You will not redact, mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.

5. Wherever a Request calls for documents and/or communications which are not available to You in the form requested, but is available in another form or can be obtained at least in part from other sources in Your possession, You should so state and either supply the information requested in the form in which it is available or supply the sources from which the information can be obtained.

6. To the extent that You possess any requested documents or information in electronic form, the electronic data, and all underlying metadata, should be produced in a manner that does not modify the metadata.

7. The following instructions apply to electronically stored information:

- a. Provide single-page black and white Group IV TIFF images with metadata contained in a separate file.
- b. All electronic documents attached to an e-mail are to be produced contemporaneously and sequentially immediately after the parent e-mail.
- c. Each production must include a standard Concordance delimited ASCII data (.dat) file as well as an Ipro (.lfp) image load file.
- d. Microsoft Excel files should be produced in native file format with a TIFF placeholder stating "This Document Produced in Native File Format Only."

- e. Microsoft Project Plans and Microsoft PowerPoint should be produced in both native file format and as TIFF images.
- f. All available metadata, including but not limited to the following fields, should be produced:

- BegDoc
- EndDoc
- BegAttach
- EndAttach
- NumAttach
- Custodian
- SourceApp
- SourceFile
- From
- To
- CC
- BCC
- Author
- Title
- Subject
- EMailSubject
- ConversationIndex
- InReplyToID
- DateCreated (Combined Date & Time Field)
- DateLastMod (Combined Date & Time Field)
- DateLastPrnt (Combined Date & Time Field)
- DateRcvd (Combined Date & Time Field)
- DateSent (Combined Date & Time Field)
- PgCount
- RecordType
- DocExt
- FileDescription
- Filename
- Filesize
- Headers
- EntryID
- IntMsgID
- MD5Hash
- Sha1Hash
- NativeFile
- OCRPath

If You are unable to produce responsive documents in this format, You or, if You are represented by counsel, Your counsel, shall discuss the format in which documents are to be produced with counsel issuing this subpoena and agree upon a format before the date for response.

8. This subpoena does not request patient health records or HIPAA protected-information, and no request should be construed to request them. If contained in a responsive document, such information should be redacted in a manner to conform with HIPAA and expectations of patient privacy.

9. If any Documents are withheld from production based on a claim of privilege, You shall provide, pursuant to 16 C.F.R. § 3.38A, a schedule which describes the nature of Documents, communications, or tangible things not produced or disclosed, in a manner that will enable Respondent Counsel to assess the claim of privilege.

10. You must provide Respondent Counsel with a statement identifying the procedures used to collect and search for electronically stored Documents and Documents stored in paper format. The Company must also provide a statement identifying any electronic production tools or software packages utilized by the Company in responding to this subpoena for: keyword searching, Technology Assisted Review, email threading, de-duplication, global de-duplication or near-de-duplication.

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena *Duces Tecum* is complete and correct to the best of my knowledge and belief.

(Signature of Official)

(Title/Company)

(Typed Name of Above Official)

(Office Telephone)

PROOF OF SERVICE

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____.

I served the subpoena by delivering a copy to the named person as follows:

_____ on *(date)* _____; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of \$_____.

My fees are \$_____ for travel and \$_____ for services for a total of \$_____

I declare under penalty of perjury that this information is true.

Date: _____

Server's Signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was personally delivered to:

Fourroux Prosthetics
c/o Keith Watson (Registered Agent)
2743 Bob Wallace Ave. SW
Huntsville, AL 35805

I hereby certify that I delivered via electronic mail a copy of the foregoing document to:

William Cooke
Jonathan Ripa
Federal Trade Commission
Bureau of Competition
400 7th Street SW
Washington, DC 20024
wcooke@ftc.gov
jripa@ftc.gov

Counsel Supporting the Complaint

March 2, 2018

By: /s/ Erica Fruiterman
Erica Fruiterman
Duane Morris LLP
30 S. 17th Street
Philadelphia, PA 19103
efruiterman@duanemorris.com

*Counsel for Respondent Otto Bock
HealthCare North America, Inc.*

PUBLIC

EXHIBIT D

Shotzbarger, William

From: Robert Lockwood <rlockwood@wilmerlee.com>
Sent: Wednesday, March 7, 2018 12:07 PM
To: Fruiterman, Erica
Cc: Cathy Silva; Richard Raleigh; jneely@ftc.gov
Subject: In the matter of Otto Bock Healthcare North America, Inc.

Ms. Fruiterman:

I represent Forroux Prosthetics in Huntsville, Alabama. I am in receipt of subpoenas that you issued on or about March 2, 2018 relating to the Otto Bock / FTC matter. Yesterday, I left you a voice mail to discuss the subpoenas, but I have not heard back from you.

As you know, my client has a very short period of time to object to the subpoenas. Prior to making a formal objection, I would like to work with you and counsel for the FTC to limit the subpoenas. To that end, would you be willing to agree to an extension of time for my client to respond and/or object to the subpoenas? I suggest that we agree to a deadline of March 26, 2018.

I spoke briefly with Joe Neely yesterday, but he and I did not discuss a potential extension of time. Therefore, by copy of this e-mail, I am making the same request to him.

Thank you for your time and attention. I look forward to working with you.

Robert

Robert C. Lockwood



Wilmer & Lee, P.A.
100 Washington Street, Suite 100
Huntsville, Alabama 35801
(256) 533-0202 - telephone
(256) 533-0302 – facsimile
rlockwood@wilmerlee.com

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PUBLIC

EXHIBIT E

Shotzbarger, William

From: Fruiterman, Erica
Sent: Monday, March 12, 2018 8:31 PM
To: rlockwood@wilmerlee.com
Cc: Zabaneh, Sean S.; McConnell, Sean P.
Subject: Fourroux Prosthetics

Dear Mr. Lockwood,

In response to your March 7, 2018 email, I called you on Friday, March 9, 2018, after receipt of the notice of your filing, and today, Monday, March 12, 2018, and left voice messages and have not yet received a return call. We were thus surprised to see the representation in Fourroux's papers that Respondent counsel has not responded to your requests to speak. That said, we would very much like to discuss the scope of Respondent's subpoenas with you as soon as possible. Please let us know some times that work for you tomorrow.

Erica Fruiterman

Associate

Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103-4196
P: +1 215 979 1815
EFruiterman@duanemorris.com
www.duanemorris.com

PUBLIC

EXHIBIT F

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

In the Matter of

**Otto Bock HealthCare North
America, Inc.,**

a corporation,

Respondent.

Docket No. 9378

PUBLIC

**AFFIDAVIT OF ERICA FRUITERMAN IN SUPPORT OF RESPONDENT'S
RESPONSE TO FOURROUX PROSTHETICS, INC.'S AMENDED MOTION TO
QUASH SUBPOENAS DUCES TECUM AND MOTION TO QUASH SUBPOENAS AD
TESTIFICANDUM**

I, Erica Fruiterman, pursuant to the provisions of 28 U.S.C. § 1746, hereby declare as follows:

1. On March 9, 2018, after returning from travel for depositions, I called Mr. Lockwood to discuss the subpoenas served on Fourroux.
2. Mr. Lockwood did not return my message.
3. On March 12, 2018, ten days after receiving the subpoena and four days before the scheduled deposition of Fourroux Prosthetics, Mr. Lockwood sent an email stating that neither he nor his client were available to appear on March 16th for the deposition and that he planned to file motions to quash the subpoenas issued by Respondent.
4. I promptly returned his phone call that day and left messages for Mr. Lockwood.
5. Mr. Lockwood filed Fourroux's motion to quash the same day without returning my messages.
6. On March 13, 2018, Mr. Lockwood and I spoke to discuss Fourroux's Motion to Quash.

7. I explained that despite the two deposition subpoenas, Respondent was willing to agree to a single day of testimony from Mr. Watson limited to seven hours.

8. In addition, I explained that Respondent was willing to significantly narrow the number and the scope of the document requests to the greatest extent possible.

9. Mr. Lockwood indicated that he planned to reach out to the FTC to inquire as to whether the FTC would be willing to withdraw the FTC's deposition subpoena to Mr. Watson.

10. On that call, Respondent made no commitment to withdraw its subpoenas.

11. On Friday, March 16, 2018, I received a message from Richard J.R. Raleigh, Jr., who represented that Fourroux was Mr. Raleigh's client, calling to discuss the subpoenas filed by Respondent.

12. I returned Mr. Raleigh's message that same evening.

13. Mr. Raleigh explained that he was tied up in another matter in court, and that, in the meantime, Mr. Lockwood was assisting him with his client Fourroux Prosthetics.

14. During that call, Mr. Raleigh stated that his client would in fact be willing to sit for a deposition and produce documents, if necessary, provided the parties could agree upon a reasonable scope for the documents requests.

15. Respondent counsel explained to Mr. Raleigh that Respondent was not seeking two days of testimony, but rather sought only one day of testimony to be split between Respondent and the FTC.

16. Respondent counsel confirmed to Mr. Raleigh Respondent's willingness to provide narrowed document requests and to continue to meet and confer to reach a resolution concerning Respondent's three subpoenas to Fourroux.

17. On the following Monday, I sent Mr. Raleigh an email memorializing the content of our conversation and included in that email a set of revised and significantly narrowed document requests.

18. On March 21, Mr. Lockwood and I continued to meet-and-confer.

19. Despite these efforts by Respondent, Fourroux has never addressed the substance of Respondent's proposal, and its arguments as to burden in its motion to quash do not respond to Respondent's significant narrowing of the requests.

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

Executed on the 26th day of March, 2018, at Philadelphia, Pennsylvania.

/s/ Erica Fruiterman

Erica Fruiterman
Duane Morris LLP

PUBLIC

EXHIBIT G

Shotzbarger, William

From: Robert Lockwood <rlockwood@wilmerlee.com>
Sent: Monday, March 12, 2018 12:10 PM
To: Mack, Wayne A.; Biester, Edward G.; McConnell, Sean P.; Fruiterman, Erica; Kulik, Sarah O'Laughlin; Shotzbarger, William; Zabaneh, Sean S.
Cc: jneely@ftc.gov
Subject: FTC/Otto Bock Healthcare North America, Inc.

Counsel:

Otto Bock has scheduled the deposition of Fourroux Prosthetics, Inc. for this Friday, March 16. Please be advised that neither I nor my client are available this Friday, and we will not go forward with the deposition. Please cancel any plans you may have made for this deposition.

I plan to file a motion to quash the subpoenas. Section 3.22(g) of the FTC's Rules of Practice requires me to confer in good faith with counsel for Otto Bock prior to filing the motion to quash. I have left a voice mail with Ms. Fruiterman, and sent e-mails to Mr. Mack and Ms. Fruiterman to discuss my client's objections to the subpoenas. I have not heard back from either of them. I would be appreciative if you would contact me about these subpoenas.

Thank you for your time and attention to this matter.

Robert Lockwood

Robert C. Lockwood



Wilmer & Lee, P.A.
100 Washington Street, Suite 100
Huntsville, Alabama 35801
(256) 533-0202 - telephone
(256) 533-0302 – facsimile
rlockwood@wilmerlee.com

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PUBLIC

EXHIBIT H

Shotzbarger, William

From: Fruiterman, Erica
Sent: Tuesday, March 13, 2018 11:16 AM
To: 'Robert Lockwood'
Cc: Zabaneh, Sean S.; McConnell, Sean P.
Subject: RE: Fourroux Prosthetics

Robert,

I am available at 2:00 EST/1:00 CST. I will call you then.

Erica

From: Robert Lockwood [mailto:rlockwood@wilmerlee.com]
Sent: Tuesday, March 13, 2018 11:15 AM
To: Fruiterman, Erica
Cc: Zabaneh, Sean S. ; McConnell, Sean P.
Subject: RE: Fourroux Prosthetics

Erica:

I have a conference call starting at 12:00 EST that may not be done by 1:00. Are you available at 2:00 EST/1:00 CST?

The number on my signature block is the best number.

Robert

Robert C. Lockwood



Wilmer & Lee, P.A.
100 Washington Street, Suite 100
Huntsville, Alabama 35801
(256) 533-0202 - telephone
(256) 533-0302 – facsimile
rlockwood@wilmerlee.com

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From: Fruiterman, Erica [mailto:EFruiterman@duanemorris.com]
Sent: Tuesday, March 13, 2018 10:06 AM
To: Robert Lockwood <rlockwood@wilmerlee.com>
Cc: Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; McConnell, Sean P. <SPMcConnell@duanemorris.com>
Subject: RE: Fourroux Prosthetics

Robert,

Thank you for your email. I am out of the office at a deposition today. Would it be possible for me to give you a call at 1pm EST?

If so, please confirm that I should use the number listed in your signature block below.

Thanks,

Erica

From: Robert Lockwood [<mailto:rlockwood@wilmerlee.com>]
Sent: Tuesday, March 13, 2018 10:23 AM
To: Fruiterman, Erica <EFruiterman@duanemorris.com>
Cc: Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; McConnell, Sean P. <SPMcConnell@duanemorris.com>
Subject: RE: Fourroux Prosthetics

Ms. Fruiterman:

Thanks for your e-mail. For some reason, I did not receive your voice mails. I appreciate your willingness to talk on the issue of the subpoenas. My afternoon is completely clear. Name a time and I'll give you a call.

Thanks,

Robert

Robert C. Lockwood



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100 Washington Street, Suite 100
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From: Fruiterman, Erica [<mailto:EFruiterman@duanemorris.com>]
Sent: Monday, March 12, 2018 7:31 PM
To: Robert Lockwood <rlockwood@wilmerlee.com>
Cc: Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; McConnell, Sean P. <SPMcConnell@duanemorris.com>
Subject: Fourroux Prosthetics

Dear Mr. Lockwood,

In response to your March 7, 2018 email, I called you on Friday, March 9, 2018, after receipt of the notice of your filing, and today, Monday, March 12, 2018, and left voice messages and have not yet received a return call. We were thus surprised to see the representation in Fourroux's papers that Respondent counsel has not responded to your requests to speak. That said, we would very much like to discuss the scope of Respondent's subpoenas with you as soon as possible. Please let us know some times that work for you tomorrow.

Erica Fruiterman

Associate

Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103-4196
P: +1 215 979 1815
EFruiterman@duanemorris.com
www.duanemorris.com

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PUBLIC

EXHIBIT I

Shotzbarger, William

From: Robert Lockwood <rlockwood@wilmerlee.com>
Sent: Tuesday, March 13, 2018 5:36 PM
To: Fruiterman, Erica
Cc: Cathy Silva
Subject: Otto Bock / Fourroux Prosthetics

Follow Up Flag: Follow up
Flag Status: Flagged

Erica:

I spoke with Joe Neely at FTC earlier this afternoon. He has no authority to commit to any course of action yet. Nevertheless, he said, at most, the FTC might be willing to release Fourroux Prosthetics from the subpoena duces tecum, but not a subpoena ad testificatum. I told him that my instructions are to vigorously contest any subpoena because my client has no desire to be involved in these proceedings. He is supposed to call me to let me know FTC's final position, and I will certainly relay to you when I hear.

The University of Alabama is on Spring Break, so my college-aged son and I are going on a fishing trip to the Smokies tomorrow. I'll be available by cell phone until about 12:00 EST: (256) 658-8861

Robert

Robert C. Lockwood



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EXHIBIT J

Shotzbarger, William

From: Fruiterman, Erica
Sent: Monday, March 19, 2018 12:09 PM
To: 'rraleigh@wilmerlee.com'
Cc: Zabaneh, Sean S.; McConnell, Sean P.; Rudowitz, Andrew J.; Poles, Simeon S.
Subject: Otto Bock / Fourroux Prosthetics

Mr. Raleigh,

Thank you very much for speaking with me this past Friday. I was pleased to hear that your client would like to reach a mutually agreeable and efficient resolution to this matter.

During our call, you represented that although your client does not understand why his testimony might be important to Respondent's defenses, he would be willing to sit for a deposition. You also stated that your client would consider producing documents in response to a revised and significantly narrowed set of document requests. I have provided those requests below. With the exception of revised request number 1, Respondent agrees that your client may provide this information through his testimony on behalf of Fourroux Prosthetics.

Given your client's willingness to meet and confer in order to reach an agreed-upon scope for the document production and dates certain for the production of documents and testimony, we request that you withdraw the motions to quash Respondent's subpoenas *ad testificandum* and *duces tecum*.

I am traveling today, but I am available to speak after 5pm EST. Please feel free to call my cell – 215-971-5952. I look forward to speaking with you soon.

Best,

Erica

1. Reimbursement rate schedules from private insurance plans to Wright & Filippis for the L codes associated with microprocessor knees and non-microprocessor knees for the years 2015, 2016, and 2017.
2. Documents sufficient to show the prices Wright & Filippis paid for microprocessor knees by manufacturer for the years 2015, 2016, and 2017.
3. Documents sufficient to show the prices Wright & Filippis paid for non-microprocessor knees for the K3 and K4 populations of patients for the years 2015, 2016, and 2017.
4. Documents sufficient to show the number of microprocessor knees Wright & Filippis purchased by manufacturer for the years 2015, 2016, and 2017.
5. Documents sufficient to show the number of non-microprocessor knees Wright & Filippis purchased for the K3 and K4 population of patients for the years 2015, 2016, and 2017,
6. The percentage of reimbursement for microprocessor knees by Medicare, private insurance, or patient payment (including any private or Medicare co-payments) for the years 2015, 2016, and 2017.
7. The percentage of reimbursement for non-microprocessor knees by Medicare, private insurance, or patient payment (including any private or Medicare co-payments) for the years 2015, 2016, and 2017.

From: Robert Lockwood [<mailto:rlockwood@wilmerlee.com>]

Sent: Tuesday, March 13, 2018 5:36 PM

To: Fruiterman, Erica <EFruiterman@duanemorris.com>

Cc: Cathy Silva <csilva@wilmerlee.com>

Subject: Otto Bock / Fourroux Prosthetics

Erica:

I spoke with Joe Neely at FTC earlier this afternoon. He has no authority to commit to any course of action yet. Nevertheless, he said, at most, the FTC might be willing to release Fourroux Prosthetics from the subpoena duces tecum, but not a subpoena ad testificatum. I told him that my instructions are to vigorously contest any subpoena because my client has no desire to be involved in these proceedings. He is supposed to call me to let me know FTC's final position, and I will certainly relay to you when I hear.

The University of Alabama is on Spring Break, so my college-aged son and I are going on a fishing trip to the Smokies tomorrow. I'll be available by cell phone until about 12:00 EST: (256) 658-8861

Robert

Robert C. Lockwood



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rlockwood@wilmerlee.com

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EXHIBIT K

Shotzbarger, William

From: Richard Raleigh <rraleigh@wilmerlee.com>
Sent: Tuesday, March 20, 2018 3:06 PM
To: Fruiterman, Erica
Cc: Zabaneh, Sean S.; McConnell, Sean P.; Rudowitz, Andrew J.; Poles, Simeon S.; Robert Lockwood
Subject: Re: Otto Bock / Fourroux Prosthetics

Erica,

Thanks for your call and your message. I'm covered up with another matter at the moment, so Robert Lockwood is going to continue to work this for us. I am hopeful for both of our parties that we can work all this out.

Thanks,

Rich

Richard J.R. Raleigh, Jr.
Wilmer & Lee, P.A.
100 Washington Street
Suite 200
Huntsville, Alabama 35801
256-533-0202 Telephone
256-533-0302 Facsimile
256-509-7743 Mobile
rraleigh@wilmerlee.com

From: Fruiterman, Erica
Sent: Monday, March 19, 2018 11:08:43 AM
To: Richard Raleigh
Cc: Zabaneh, Sean S.; McConnell, Sean P.; Rudowitz, Andrew J.; Poles, Simeon S.
Subject: Otto Bock / Fourroux Prosthetics

Mr. Raleigh,

Thank you very much for speaking with me this past Friday. I was pleased to hear that your client would like to reach a mutually agreeable and efficient resolution to this matter.

During our call, you represented that although your client does not understand why his testimony might be important to Respondent's defenses, he would be willing to sit for a deposition. You also stated that your client would consider producing documents in response to a revised and significantly narrowed set of document requests. I have provided those requests below. With the exception of revised request number 1, Respondent agrees that your client may provide this information through his testimony on behalf of Fourroux Prosthetics.

Given your client's willingness to meet and confer in order to reach an agreed-upon scope for the document production and dates certain for the production of documents and testimony, we request that you withdraw the motions to quash Respondent's subpoenas *ad testificandum* and *duces tecum*.

I am traveling today, but I am available to speak after 5pm EST. Please feel free to call my cell – 215-971-5952. I look forward to speaking with you soon.

Best,
Erica

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6. The percentage of reimbursement for microprocessor knees by Medicare, private insurance, or patient payment (including any private or Medicare co-payments) for the years 2015, 2016, and 2017.
7. The percentage of reimbursement for non-microprocessor knees by Medicare, private insurance, or patient payment (including any private or Medicare co-payments) for the years 2015, 2016, and 2017.

From: Robert Lockwood [<mailto:rlockwood@wilmerlee.com>]

Sent: Tuesday, March 13, 2018 5:36 PM

To: Fruiterman, Erica <EFruiterman@duanemorris.com>

Cc: Cathy Silva <csilva@wilmerlee.com>

Subject: Otto Bock / Fourroux Prosthetics

Erica:

I spoke with Joe Neely at FTC earlier this afternoon. He has no authority to commit to any course of action yet. Nevertheless, he said, at most, the FTC might be willing to release Fourroux Prosthetics from the subpoena duces tecum, but not a subpoena ad testificatum. I told him that my instructions are to vigorously contest any subpoena because my client has no desire to be involved in these proceedings. He is supposed to call me to let me know FTC's final position, and I will certainly relay to you when I hear.

The University of Alabama is on Spring Break, so my college-aged son and I are going on a fishing trip to the Smokies tomorrow. I'll be available by cell phone until about 12:00 EST: (256) 658-8861

Robert



Robert C. Lockwood

Wilmer & Lee, P.A.

100 Washington Street, Suite 100

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rlockwood@wilmerlee.com

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EXHIBIT L

Shotzbarger, William

From: Fruiterman, Erica
Sent: Wednesday, March 21, 2018 9:01 AM
To: Robert Lockwood
Cc: Zabaneh, Sean S.; McConnell, Sean P.; Rudowitz, Andrew J.; Poles, Simeon S.; 'Richard Raleigh'
Subject: RE: Otto Bock / Fourroux Prosthetics

Robert,

Thank you for speaking with me this morning. I understand from our call that you are going to contact Joe Neely at the FTC and your client regarding Respondent's narrowed proposal below, and make every effort to provide Respondent with an answer today as to whether Fourroux will withdraw its motions to quash Respondent's subpoenas.

Thanks,

Erica

From: Richard Raleigh [mailto:rraleigh@wilmerlee.com]
Sent: Tuesday, March 20, 2018 3:06 PM
To: Fruiterman, Erica
Cc: Zabaneh, Sean S. ; McConnell, Sean P. ; Rudowitz, Andrew J. ; Poles, Simeon S. ; Robert Lockwood
Subject: Re: Otto Bock / Fourroux Prosthetics

Erica,

Thanks for your call and your message. I'm covered up with another matter at the moment, so Robert Lockwood is going to continue to work this for us. I am hopeful for both of our parties that we can work all this out.

Thanks,

Rich

Richard J.R. Raleigh, Jr.
Wilmer & Lee, P.A.
100 Washington Street
Suite 200
Huntsville, Alabama 35801
256-533-0202 Telephone
256-533-0302 Facsimile
256-509-7743 Mobile
rraleigh@wilmerlee.com

From: Fruiterman, Erica <EFruiterman@duanemorris.com>
Sent: Monday, March 19, 2018 11:08:43 AM

To: Richard Raleigh
Cc: Zabaneh, Sean S.; McConnell, Sean P.; Rudowitz, Andrew J.; Poles, Simeon S.
Subject: Otto Bock / Fourroux Prosthetics

Mr. Raleigh,

Thank you very much for speaking with me this past Friday. I was pleased to hear that your client would like to reach a mutually agreeable and efficient resolution to this matter.

During our call, you represented that although your client does not understand why his testimony might be important to Respondent's defenses, he would be willing to sit for a deposition. You also stated that your client would consider producing documents in response to a revised and significantly narrowed set of document requests. I have provided those requests below. With the exception of revised request number 1, Respondent agrees that your client may provide this information through his testimony on behalf of Fourroux Prosthetics.

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Best,

Erica

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7. The percentage of reimbursement for non-microprocessor knees by Medicare, private insurance, or patient payment (including any private or Medicare co-payments) for the years 2015, 2016, and 2017.

From: Robert Lockwood [<mailto:rlockwood@wilmerlee.com>]

Sent: Tuesday, March 13, 2018 5:36 PM

To: Fruiterman, Erica <EFruiterman@duanemorris.com>

Cc: Cathy Silva <csilva@wilmerlee.com>

Subject: Otto Bock / Fourroux Prosthetics

Erica:

I spoke with Joe Neely at FTC earlier this afternoon. He has no authority to commit to any course of action yet. Nevertheless, he said, at most, the FTC might be willing to release Fourroux Prosthetics from the subpoena duces tecum, but not a subpoena ad testificatum. I told him that my instructions are to vigorously contest any subpoena because my client has no desire to be involved in these proceedings. He is supposed to call me to let me know FTC's final position, and I will certainly relay to you when I hear.

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Robert



Robert C. Lockwood

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EXHIBIT M

Shotzbarger, William

From: Robert Lockwood <rlockwood@wilmerlee.com>
Sent: Wednesday, March 21, 2018 1:58 PM
To: Fruiterman, Erica
Cc: Richard Raleigh
Subject: RE: Otto Bock / Fourroux Prosthetics

Erica:

Thank you for your phone call this morning. When we spoke, you told me that Fourroux was not one of the third-parties that the FTC and Otto Bock were discussing as possibilities for dropping from the witness list.

I just spoke with Joe Neely at the FTC. He informs me that between Friday and today the FTC offered to drop Fourroux from its witness list if Otto Bock would also drop Fourroux. According to Mr. Neely, Otto Bock rejected that proposal.

Before responding to your narrowed request, I need to know if my client continues to be part of this dispute solely because of Otto Bock's insistence. My client does not want to be involved in any manner in this dispute. If Otto Bock is willing to drop Fourroux, my client's goal will be achieved. If Otto Bock will not drop Fourroux from its witness list, then my work becomes more complex, because I will also be forced to negotiate with the FTC on the scope of its subpoenas. If there is any confusion between the FTC and Otto Bock about dropping Fourroux, I suggest that we try to schedule a conference call between you, me and Mr. Neely.

Also, I note that your narrowed requests were directed to "Wright & Filippis." I assume that you intended those requests to be directed to Fourroux.

I look forward to hearing from you.

Robert

Robert C. Lockwood



Wilmer & Lee, P.A.
100 Washington Street, Suite 100
Huntsville, Alabama 35801
(256) 533-0202 - telephone
(256) 533-0302 - facsimile
rlockwood@wilmerlee.com

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From: Fruiterman, Erica [mailto:EFruiterman@duanemorris.com]
Sent: Wednesday, March 21, 2018 8:01 AM

To: Robert Lockwood
Cc: Zabaneh, Sean S. ; McConnell, Sean P. ; Rudowitz, Andrew J. ; Poles, Simeon S. ; Richard Raleigh
Subject: RE: Otto Bock / Fourroux Prosthetics

Robert,

Thank you for speaking with me this morning. I understand from our call that you are going to contact Joe Neely at the FTC and your client regarding Respondent's narrowed proposal below, and make every effort to provide Respondent with an answer **today** as to whether Fourroux will withdraw its motions to quash Respondent's subpoenas.

Thanks,

Erica

From: Richard Raleigh [<mailto:rraleigh@wilmerlee.com>]
Sent: Tuesday, March 20, 2018 3:06 PM
To: Fruiterman, Erica <EFruiterman@duanemorris.com>
Cc: Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; McConnell, Sean P. <SPMcConnell@duanemorris.com>; Rudowitz, Andrew J. <AJRudowitz@duanemorris.com>; Poles, Simeon S. <SSPoles@duanemorris.com>; Robert Lockwood <rlockwood@wilmerlee.com>
Subject: Re: Otto Bock / Fourroux Prosthetics

Erica,

Thanks for your call and your message. I'm covered up with another matter at the moment, so Robert Lockwood is going to continue to work this for us. I am hopeful for both of our parties that we can work all this out.

Thanks,

Rich

Richard J.R. Raleigh, Jr.
Wilmer & Lee, P.A.
100 Washington Street
Suite 200
Huntsville, Alabama 35801
256-533-0202 Telephone
256-533-0302 Facsimile
256-509-7743 Mobile
rraleigh@wilmerlee.com

From: Fruiterman, Erica <EFruiterman@duanemorris.com>
Sent: Monday, March 19, 2018 11:08:43 AM
To: Richard Raleigh
Cc: Zabaneh, Sean S.; McConnell, Sean P.; Rudowitz, Andrew J.; Poles, Simeon S.
Subject: Otto Bock / Fourroux Prosthetics

Mr. Raleigh,

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During our call, you represented that although your client does not understand why his testimony might be important to Respondent's defenses, he would be willing to sit for a deposition. You also stated that your client would consider producing documents in response to a revised and significantly narrowed set of document requests. I have provided those requests below. With the exception of revised request number 1, Respondent agrees that your client may provide this information through his testimony on behalf of Fourroux Prosthetics.

Given your client's willingness to meet and confer in order to reach an agreed-upon scope for the document production and dates certain for the production of documents and testimony, we request that you withdraw the motions to quash Respondent's subpoenas *ad testificandum* and *duces tecum*.

I am traveling today, but I am available to speak after 5pm EST. Please feel free to call my cell – 215-971-5952. I look forward to speaking with you soon.

Best,

Erica

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4. Documents sufficient to show the number of microprocessor knees Wright & Filippis purchased by manufacturer for the years 2015, 2016, and 2017.
5. Documents sufficient to show the number of non-microprocessor knees Wright & Filippis purchased for the K3 and K4 population of patients for the years 2015, 2016, and 2017,
6. The percentage of reimbursement for microprocessor knees by Medicare, private insurance, or patient payment (including any private or Medicare co-payments) for the years 2015, 2016, and 2017.
7. The percentage of reimbursement for non-microprocessor knees by Medicare, private insurance, or patient payment (including any private or Medicare co-payments) for the years 2015, 2016, and 2017.

From: Robert Lockwood [<mailto:rlockwood@wilmerlee.com>]

Sent: Tuesday, March 13, 2018 5:36 PM

To: Fruiterman, Erica <EFruiterman@duanemorris.com>

Cc: Cathy Silva <csilva@wilmerlee.com>

Subject: Otto Bock / Fourroux Prosthetics

Erica:

I spoke with Joe Neely at FTC earlier this afternoon. He has no authority to commit to any course of action yet. Nevertheless, he said, at most, the FTC might be willing to release Fourroux Prosthetics from the subpoena *duces tecum*, but not a subpoena *ad testificatum*. I told him that my instructions are to vigorously contest any subpoena because my

client has no desire to be involved in these proceedings. He is supposed to call me to let me know FTC's final position, and I will certainly relay to you when I hear.

The University of Alabama is on Spring Break, so my college-aged son and I are going on a fishing trip to the Smokies tomorrow. I'll be available by cell phone until about 12:00 EST: (256) 658-8861

Robert



Robert C. Lockwood

Wilmer & Lee, P.A.

100 Washington Street, Suite 100

Huntsville, Alabama 35801

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rlockwood@wilmerlee.com

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EXHIBIT N

Shotzbarger, William

From: Robert Lockwood <rlockwood@wilmerlee.com>
Sent: Wednesday, March 21, 2018 5:18 PM
To: Fruiterman, Erica
Cc: Richard Raleigh; Zabaneh, Sean S.; Cathy Silva
Subject: RE: Otto Bock / Fourroux Prosthetics

Erica:

I need some clarity. Otto Bock sent a subpoena ad testificandum with 22 deposition topics. Otto Bock also sent a subpoena duces tecum with 12 requests for documents. Your e-mail below suggests that Otto Bock is narrowing the scope of its document requests to 7 areas. Is Otto Bock also narrowing the 22 deposition topics to the same 7 areas. Or, is Otto Bock insisting on the full scope of its original deposition subpoena?

Thanks,

Robert

Robert C. Lockwood



Wilmer & Lee, P.A.
100 Washington Street, Suite 100
Huntsville, Alabama 35801
(256) 533-0202 - telephone
(256) 533-0302 - facsimile
rlockwood@wilmerlee.com

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From: Fruiterman, Erica [mailto:EFruiterman@duanemorris.com]
Sent: Wednesday, March 21, 2018 2:09 PM
To: Robert Lockwood
Cc: Richard Raleigh ; Zabaneh, Sean S.
Subject: RE: Otto Bock / Fourroux Prosthetics

Robert,

I apologize for the misunderstanding on this morning's call. Initially, it was the FTC's position that they were not going to drop Fourroux from the witness list. You are correct that they then informed us recently that they would be willing to drop Fourroux. Respondent remains unwilling to drop Fourroux. I do not believe a phone call with the FTC would assist us in resolving this matter.

I am confused by the inconsistent representations your firm is making on behalf of Fourroux Prosthetics. When I spoke to your colleague Richard Raleigh, he represented that your client would be willing to sit for a deposition, if necessary, and would be willing to produce documents in response to substantially narrowed requests. Not only have we provided you with fewer and substantially narrowed requests, we have also agreed, in order to further reduce your client's burden, to **obtain all of the information, with the exception of revised request no. 1, through your client's testimony.** We would appreciate clarity with regard to your position as soon as possible so that we may reach an efficient resolution of this matter.

To that end, please tell us whether Fourroux intends to withdraw the motions to quash Respondent's subpoenas by close of business tomorrow, March 22, 2018. If Fourroux intends to withdraw its motions to quash, please also reply with your client's availability for the weeks of March 26th and April 2nd, 2018.

Best,

Erica

(Robert: I do apologize for the error in my previous email regarding the name of your client. You are correct – Respondent's revised requests are directed at Fourroux Prosthetics. I have included a revised version of the requests below.)

Respondent's Revised Document Requests Directed at Fourroux Prosthetics

1. Reimbursement rate schedules from private insurance plans to Fourroux Prosthetics for the L codes associated with microprocessor knees and non-microprocessor knees for the years 2015, 2016, and 2017.
2. Documents sufficient to show the prices Fourroux Prosthetics paid for microprocessor knees by manufacturer for the years 2015, 2016, and 2017.
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7. The percentage of reimbursement for non-microprocessor knees by Medicare, private insurance, or patient payment (including any private or Medicare co-payments) for the years 2015, 2016, and 2017.

From: Robert Lockwood [<mailto:rlockwood@wilmerlee.com>]

Sent: Wednesday, March 21, 2018 1:58 PM

To: Fruiterman, Erica <EFruiterman@duanemorris.com>

Cc: Richard Raleigh <rraleigh@wilmerlee.com>

Subject: RE: Otto Bock / Fourroux Prosthetics

Erica:

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Before responding to your narrowed request, I need to know if my client continues to be part of this dispute solely because of Otto Bock's insistence. My client does not want to be involved in any manner in this dispute. If Otto Bock is willing to drop Fourroux, my client's goal will be achieved. If Otto Bock will not drop Fourroux from its witness list, then my work becomes more complex, because I will also be forced to negotiate with the FTC on the scope of its subpoenas. If there is any confusion between the FTC and Otto Bock about dropping Fourroux, I suggest that we try to schedule a conference call between you, me and Mr. Neely.

Also, I note that your narrowed requests were directed to "Wright & Filippis." I assume that you intended those requests to be directed to Fourroux.

I look forward to hearing from you.

Robert

Robert C. Lockwood



Wilmer & Lee, P.A.
100 Washington Street, Suite 100
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(256) 533-0302 – facsimile
rlockwood@wilmerlee.com

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From: Fruiterman, Erica [<mailto:EFruiterman@duanemorris.com>]
Sent: Wednesday, March 21, 2018 8:01 AM
To: Robert Lockwood <rlockwood@wilmerlee.com>
Cc: Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; McConnell, Sean P. <SPMcConnell@duanemorris.com>; Rudowitz, Andrew J. <AJRudowitz@duanemorris.com>; Poles, Simeon S. <SSPoles@duanemorris.com>; Richard Raleigh <rraleigh@wilmerlee.com>
Subject: RE: Otto Bock / Fourroux Prosthetics

Robert,

Thank you for speaking with me this morning. I understand from our call that you are going to contact Joe Neely at the FTC and your client regarding Respondent's narrowed proposal below, and make every effort to provide Respondent with an answer **today** as to whether Fourroux will withdraw its motions to quash Respondent's subpoenas.

Thanks,

Erica

From: Richard Raleigh [<mailto:rraleigh@wilmerlee.com>]
Sent: Tuesday, March 20, 2018 3:06 PM
To: Fruiterman, Erica <EFruiterman@duanemorris.com>
Cc: Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; McConnell, Sean P. <SPMcConnell@duanemorris.com>; Rudowitz, Andrew J. <AJRudowitz@duanemorris.com>; Poles, Simeon S. <SSPoles@duanemorris.com>; Robert Lockwood <rlockwood@wilmerlee.com>
Subject: Re: Otto Bock / Fourroux Prosthetics

Erica,

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Thanks,

Rich

Richard J.R. Raleigh, Jr.
Wilmer & Lee, P.A.
100 Washington Street
Suite 200
Huntsville, Alabama 35801
256-533-0202 Telephone
256-533-0302 Facsimile
256-509-7743 Mobile
rraleigh@wilmerlee.com

From: Fruiterman, Erica <EFruiterman@duanemorris.com>
Sent: Monday, March 19, 2018 11:08:43 AM
To: Richard Raleigh
Cc: Zabaneh, Sean S.; McConnell, Sean P.; Rudowitz, Andrew J.; Poles, Simeon S.
Subject: Otto Bock / Fourroux Prosthetics

Mr. Raleigh,

Thank you very much for speaking with me this past Friday. I was pleased to hear that your client would like to reach a mutually agreeable and efficient resolution to this matter.

During our call, you represented that although your client does not understand why his testimony might be important to Respondent's defenses, he would be willing to sit for a deposition. You also stated that your client would consider producing documents in response to a revised and significantly narrowed set of document requests. I have provided those requests below. With the exception of revised request number 1, Respondent agrees that your client may provide this information through his testimony on behalf of Fourroux Prosthetics.

Given your client's willingness to meet and confer in order to reach an agreed-upon scope for the document production and dates certain for the production of documents and testimony, we request that you withdraw the motions to quash Respondent's subpoenas *ad testificandum* and *duces tecum*.

I am traveling today, but I am available to speak after 5pm EST. Please feel free to call my cell – 215-971-5952. I look forward to speaking with you soon.

Best,

Erica

1. Reimbursement rate schedules from private insurance plans to Wright & Filippis for the L codes associated with microprocessor knees and non-microprocessor knees for the years 2015, 2016, and 2017.
2. Documents sufficient to show the prices Wright & Filippis paid for microprocessor knees by manufacturer for the years 2015, 2016, and 2017.
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4. Documents sufficient to show the number of microprocessor knees Wright & Filippis purchased by manufacturer for the years 2015, 2016, and 2017.
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From: Robert Lockwood [<mailto:rlockwood@wilmerlee.com>]

Sent: Tuesday, March 13, 2018 5:36 PM

To: Fruiterman, Erica <EFruiterman@duanemorris.com>

Cc: Cathy Silva <csilva@wilmerlee.com>

Subject: Otto Bock / Fourroux Prosthetics

Erica:

I spoke with Joe Neely at FTC earlier this afternoon. He has no authority to commit to any course of action yet. Nevertheless, he said, at most, the FTC might be willing to release Fourroux Prosthetics from the subpoena *duces tecum*, but not a subpoena *ad testificatum*. I told him that my instructions are to vigorously contest any subpoena because my client has no desire to be involved in these proceedings. He is supposed to call me to let me know FTC's final position, and I will certainly relay to you when I hear.

The University of Alabama is on Spring Break, so my college-aged son and I are going on a fishing trip to the Smokies tomorrow. I'll be available by cell phone until about 12:00 EST: (256) 658-8861

Robert



Robert C. Lockwood

Wilmer & Lee, P.A.
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(256) 533-0202 - telephone
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rlockwood@wilmerlee.com

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PUBLIC

EXHIBIT O

Shotzbarger, William

From: Fruiterman, Erica
Sent: Thursday, March 22, 2018 10:52 AM
To: 'Robert Lockwood'
Cc: Richard Raleigh; Zabaneh, Sean S.; Cathy Silva; Rudowitz, Andrew J.
Subject: RE: Otto Bock / Fourroux Prosthetics

Robert,

I apologize for any delay in my response. I am currently on the west coast traveling for depositions.

We are willing to narrow the scope of our corporate designee topics to match, as closely as possible, the previously narrowed scope of document requests directed towards Fourroux. You will find below a list of our narrowed corporate designee topics; however, Otto Bock reserves the right to ask the witness questions beyond those topics in his individual capacity, to the extent that he has personal knowledge of the answers.

In light of our substantially narrowed document requests and corporate designee topics, we would appreciate some clarity as to whether Fourroux intends to withdraw the motions to quash Respondent's subpoenas by close of business today, March 22, 2018. Again, if Fourroux intends to withdraw its motions to quash, please also reply with your client's availability for the weeks of March 26th and April 2nd, 2018.

Best,

Erica

Respondent's Revised Corporate Designee Topics Directed at Fourroux Prosthetics

1. Facts and circumstances related to the Company's decision to purchase, sell or distribute each manufacturer's models of microprocessor prosthetic knees, including, but not limited to, the prices Fourroux Prosthetics paid for each manufacturer's microprocessor knees.
2. Facts and circumstances related to the Company's decision to purchase, sell or distribute each manufacturer's models of non-microprocessor prosthetic knees, including, but not limited to, the prices Fourroux Prosthetics paid for each manufacturer's non-microprocessor knees.
3. The impact that a price change of one manufacturer's microprocessor prosthetic knee has on the willingness of (i) patients or (ii) clinicians to substitute to another manufacturer's microprocessor prosthetic knee.
4. The limitations and/or ceiling on prices for microprocessor prosthetic knees imposed by Medicare and private insurers.
5. Recovery Audit Contractor (RAC) audits, their impact on clinics and any impact on clinical assessments regarding prosthetic devices containing microprocessor controlled knees or mechanical knees.
6. The factors affecting (i) the Company's and (ii) prosthetists' decisions concerning which type of prosthetic knee to fit on a particular patient, including, but not limited to, the revenue received per patient and the acquisition cost per prosthetic knee.
7. The microprocessor prosthetic knees that the Company currently fits on patients in the United States or has fitted in the past five years, including, but not limited to, number of units fitted and revenue received by source and gross margin by manufacturer and model.
8. The reimbursement rate schedules from private insurance plans to Fourroux Prosthetics for the L codes associated with microprocessor knees and non-microprocessor knees for the years 2015, 2016, and 2017.

From: Robert Lockwood [mailto:rlockwood@wilmerlee.com]

Sent: Thursday, March 22, 2018 10:40 AM

To: Fruiterman, Erica

Cc: Richard Raleigh ; Zabaneh, Sean S. ; Cathy Silva

Subject: RE: Otto Bock / Fourroux Prosthetics

Erica:

During our phone call yesterday, you told me that Otto Bock needed a quick resolution to the motion to quash because of its limited resources in this matter. Given that urgency, I want to make sure that you saw my e-mail below regarding the scope of Otto Bock's deposition subpoena. I look forward to hearing from you.

Robert

Robert C. Lockwood



Wilmer & Lee, P.A.
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rlockwood@wilmerlee.com

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From: Robert Lockwood

Sent: Wednesday, March 21, 2018 4:18 PM

To: 'Fruiterman, Erica' <EFruiterman@duanemorris.com>

Cc: Richard Raleigh <rraleigh@wilmerlee.com>; Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; Cathy Silva <csilva@wilmerlee.com>

Subject: RE: Otto Bock / Fourroux Prosthetics

Erica:

I need some clarity. Otto Bock sent a subpoena ad testificandum with 22 deposition topics. Otto Bock also sent a subpoena duces tecum with 12 requests for documents. Your e-mail below suggests that Otto Bock is narrowing the scope of its document requests to 7 areas. Is Otto Bock also narrowing the 22 deposition topics to the same 7 areas. Or, is Otto Bock insisting on the full scope of its original deposition subpoena?

Thanks,

Robert

Robert C. Lockwood



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From: Fruiterman, Erica [<mailto:EFruiterman@duanemorris.com>]
Sent: Wednesday, March 21, 2018 2:09 PM
To: Robert Lockwood <rlockwood@wilmerlee.com>
Cc: Richard Raleigh <rraleigh@wilmerlee.com>; Zabaneh, Sean S. <SSZabaneh@duanemorris.com>
Subject: RE: Otto Bock / Fourroux Prosthetics

Robert,

I apologize for the misunderstanding on this morning's call. Initially, it was the FTC's position that they were not going to drop Fourroux from the witness list. You are correct that they then informed us recently that they would be willing to drop Fourroux. Respondent remains unwilling to drop Fourroux. I do not believe a phone call with the FTC would assist us in resolving this matter.

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From: Robert Lockwood [<mailto:rlockwood@wilmerlee.com>]

Sent: Wednesday, March 21, 2018 1:58 PM

To: Fruiterman, Erica <EFruiterman@duanemorris.com>

Cc: Richard Raleigh <rraleigh@wilmerlee.com>

Subject: RE: Otto Bock / Fourroux Prosthetics

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Sent: Wednesday, March 21, 2018 8:01 AM

To: Robert Lockwood <rlockwood@wilmerlee.com>

Cc: Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; McConnell, Sean P. <SPMcConnell@duanemorris.com>; Rudowitz, Andrew J. <AJRudowitz@duanemorris.com>; Poles, Simeon S. <SSPoles@duanemorris.com>; Richard Raleigh <rraleigh@wilmerlee.com>

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Sent: Tuesday, March 20, 2018 3:06 PM

To: Fruiterman, Erica <EFruiterman@duanemorris.com>

Cc: Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; McConnell, Sean P. <SPMcConnell@duanemorris.com>; Rudowitz, Andrew J. <AJRudowitz@duanemorris.com>; Poles, Simeon S. <SSPoles@duanemorris.com>; Robert Lockwood <rlockwood@wilmerlee.com>

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Cc: Zabaneh, Sean S.; McConnell, Sean P.; Rudowitz, Andrew J.; Poles, Simeon S.
Subject: Otto Bock / Fourroux Prosthetics

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From: Robert Lockwood [<mailto:rlockwood@wilmerlee.com>]
Sent: Tuesday, March 13, 2018 5:36 PM
To: Fruiterman, Erica <EFruiterman@duanemorris.com>
Cc: Cathy Silva <csilva@wilmerlee.com>
Subject: Otto Bock / Fourroux Prosthetics

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Robert



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PUBLIC

EXHIBIT P

Shotzbarger, William

From: Robert Lockwood <rlockwood@wilmerlee.com>
Sent: Thursday, March 22, 2018 4:36 PM
To: Fruiterman, Erica
Cc: Richard Raleigh; Zabaneh, Sean S.; Cathy Silva; Rudowitz, Andrew J.
Subject: RE: Otto Bock / Fourroux Prosthetics

Erica:

Thank you very much for your proposals to narrow the scope of Otto Bock's subpoenas. I have carefully reviewed your proposals with my client. Fourroux believes that Otto Bock's requests are still objectionable, and declines to withdraw its motion to quash. I greatly appreciate your efforts to resolve this dispute, and I look forward to working with you as this matter progresses.

Robert

Robert C. Lockwood



Wilmer & Lee, P.A.
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Huntsville, Alabama 35801
(256) 533-0202 - telephone
(256) 533-0302 – facsimile
rlockwood@wilmerlee.com

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From: Fruiterman, Erica [mailto:EFruiterman@duanemorris.com]
Sent: Thursday, March 22, 2018 9:52 AM
To: Robert Lockwood
Cc: Richard Raleigh ; Zabaneh, Sean S. ; Cathy Silva ; Rudowitz, Andrew J.
Subject: RE: Otto Bock / Fourroux Prosthetics

Robert,

I apologize for any delay in my response. I am currently on the west coast traveling for depositions.

We are willing to narrow the scope of our corporate designee topics to match, as closely as possible, the previously narrowed scope of document requests directed towards Fourroux. You will find below a list of our narrowed corporate designee topics; however, Otto Bock reserves the right to ask the witness questions beyond those topics in his individual capacity, to the extent that he has personal knowledge of the answers.

In light of our substantially narrowed document requests and corporate designee topics, we would appreciate some clarity as to whether Fourroux intends to withdraw the motions to quash Respondent's subpoenas by close

of business today, March 22, 2018. Again, if Fourroux intends to withdraw its motions to quash, please also reply with your client's availability for the weeks of March 26th and April 2nd, 2018.

Best,

Erica

Respondent's Revised Corporate Designee Topics Directed at Fourroux Prosthetics

1. Facts and circumstances related to the Company's decision to purchase, sell or distribute each manufacturer's models of microprocessor prosthetic knees, including, but not limited to, the prices Fourroux Prosthetics paid for each manufacturer's microprocessor knees.
2. Facts and circumstances related to the Company's decision to purchase, sell or distribute each manufacturer's models of non-microprocessor prosthetic knees, including, but not limited to, the prices Fourroux Prosthetics paid for each manufacturer's non-microprocessor knees.
3. The impact that a price change of one manufacturer's microprocessor prosthetic knee has on the willingness of (i) patients or (ii) clinicians to substitute to another manufacturer's microprocessor prosthetic knee.
4. The limitations and/or ceiling on prices for microprocessor prosthetic knees imposed by Medicare and private insurers.
5. Recovery Audit Contractor (RAC) audits, their impact on clinics and any impact on clinical assessments regarding prosthetic devices containing microprocessor controlled knees or mechanical knees.
6. The factors affecting (i) the Company's and (ii) prosthetists' decisions concerning which type of prosthetic knee to fit on a particular patient, including, but not limited to, the revenue received per patient and the acquisition cost per prosthetic knee.
7. The microprocessor prosthetic knees that the Company currently fits on patients in the United States or has fitted in the past five years, including, but not limited to, number of units fitted and revenue received by source and gross margin by manufacturer and model.
8. The reimbursement rate schedules from private insurance plans to Fourroux Prosthetics for the L codes associated with microprocessor knees and non-microprocessor knees for the years 2015, 2016, and 2017.

From: Robert Lockwood [<mailto:rlockwood@wilmerlee.com>]

Sent: Thursday, March 22, 2018 10:40 AM

To: Fruiterman, Erica <EFruiterman@duanemorris.com>

Cc: Richard Raleigh <rraleigh@wilmerlee.com>; Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; Cathy Silva <csilva@wilmerlee.com>

Subject: RE: Otto Bock / Fourroux Prosthetics

Erica:

During our phone call yesterday, you told me that Otto Bock needed a quick resolution to the motion to quash because of its limited resources in this matter. Given that urgency, I want to make sure that you saw my e-mail below regarding the scope of Otto Bock's deposition subpoena. I look forward to hearing from you.

Robert

Robert C. Lockwood



Wilmer & Lee, P.A.
100 Washington Street, Suite 100
Huntsville, Alabama 35801
(256) 533-0202 - telephone
(256) 533-0302 – facsimile
rlockwood@wilmerlee.com

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From: Robert Lockwood

Sent: Wednesday, March 21, 2018 4:18 PM

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Cc: Richard Raleigh <rraleigh@wilmerlee.com>; Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; Cathy Silva <csilva@wilmerlee.com>

Subject: RE: Otto Bock / Fourroux Prosthetics

Erica:

I need some clarity. Otto Bock sent a subpoena ad testificandum with 22 deposition topics. Otto Bock also sent a subpoena duces tecum with 12 requests for documents. Your e-mail below suggests that Otto Bock is narrowing the scope of its document requests to 7 areas. Is Otto Bock also narrowing the 22 deposition topics to the same 7 areas. Or, is Otto Bock insisting on the full scope of its original deposition subpoena?

Thanks,

Robert

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Cc: Richard Raleigh <rraleigh@wilmerlee.com>; Zabaneh, Sean S. <SSZabaneh@duanemorris.com>

Subject: RE: Otto Bock / Fourroux Prosthetics

Robert,

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I am confused by the inconsistent representations your firm is making on behalf of Fourroux Prosthetics. When I spoke to your colleague Richard Raleigh, he represented that your client would be willing to sit for a deposition, if necessary, and would be willing to produce documents in response to substantially narrowed requests. Not only have we provided you with fewer and substantially narrowed requests, we have also agreed, in order to further reduce your client's burden, to **obtain all of the information, with the exception of revised request no. 1, through your client's testimony.** We would appreciate clarity with regard to your position as soon as possible so that we may reach an efficient resolution of this matter.

To that end, please tell us whether Fourroux intends to withdraw the motions to quash Respondent's subpoenas by close of business tomorrow, March 22, 2018. If Fourroux intends to withdraw its motions to quash, please also reply with your client's availability for the weeks of March 26th and April 2nd, 2018.

Best,

Erica

(Robert: I do apologize for the error in my previous email regarding the name of your client. You are correct – Respondent's revised requests are directed at Fourroux Prosthetics. I have included a revised version of the requests below.)

Respondent's Revised Document Requests Directed at Fourroux Prosthetics

1. Reimbursement rate schedules from private insurance plans to Fourroux Prosthetics for the L codes associated with microprocessor knees and non-microprocessor knees for the years 2015, 2016, and 2017.
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From: Robert Lockwood [<mailto:rlockwood@wilmerlee.com>]
Sent: Wednesday, March 21, 2018 1:58 PM
To: Fruiterman, Erica <EFruiterman@duanemorris.com>
Cc: Richard Raleigh <rraleigh@wilmerlee.com>
Subject: RE: Otto Bock / Fourroux Prosthetics

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Thank you for your phone call this morning. When we spoke, you told me that Fourroux was not one of the third-parties that the FTC and Otto Bock were discussing as possibilities for dropping from the witness list.

I just spoke with Joe Neely at the FTC. He informs me that between Friday and today the FTC offered to drop Fourroux from its witness list if Otto Bock would also drop Fourroux. According to Mr. Neely, Otto Bock rejected that proposal.

Before responding to your narrowed request, I need to know if my client continues to be part of this dispute solely because of Otto Bock's insistence. My client does not want to be involved in any manner in this dispute. If Otto Bock is willing to drop Fourroux, my client's goal will be achieved. If Otto Bock will not drop Fourroux from its witness list, then my work becomes more complex, because I will also be forced to negotiate with the FTC on the scope of its subpoenas. If there is any confusion between the FTC and Otto Bock about dropping Fourroux, I suggest that we try to schedule a conference call between you, me and Mr. Neely.

Also, I note that your narrowed requests were directed to "Wright & Filippis." I assume that you intended those requests to be directed to Fourroux.

I look forward to hearing from you.

Robert

Robert C. Lockwood



Wilmer & Lee, P.A.
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From: Fruiterman, Erica [<mailto:EFruiterman@duanemorris.com>]
Sent: Wednesday, March 21, 2018 8:01 AM
To: Robert Lockwood <rlockwood@wilmerlee.com>
Cc: Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; McConnell, Sean P. <SPMcConnell@duanemorris.com>; Rudowitz, Andrew J. <AJRudowitz@duanemorris.com>; Poles, Simeon

S. <SSPoles@duanemorris.com>; Richard Raleigh <rraleigh@wilmerlee.com>

Subject: RE: Otto Bock / Fourroux Prosthetics

Robert,

Thank you for speaking with me this morning. I understand from our call that you are going to contact Joe Neely at the FTC and your client regarding Respondent's narrowed proposal below, and make every effort to provide Respondent with an answer **today** as to whether Fourroux will withdraw its motions to quash Respondent's subpoenas.

Thanks,

Erica

From: Richard Raleigh [<mailto:rraleigh@wilmerlee.com>]

Sent: Tuesday, March 20, 2018 3:06 PM

To: Fruiterman, Erica <EFruiterman@duanemorris.com>

Cc: Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; McConnell, Sean P. <SPMcConnell@duanemorris.com>; Rudowitz, Andrew J. <AJRudowitz@duanemorris.com>; Poles, Simeon S. <SSPoles@duanemorris.com>; Robert Lockwood <rlockwood@wilmerlee.com>

Subject: Re: Otto Bock / Fourroux Prosthetics

Erica,

Thanks for your call and your message. I'm covered up with another matter at the moment, so Robert Lockwood is going to continue to work this for us. I am hopeful for both of our parties that we can work all this out.

Thanks,

Rich

Richard J.R. Raleigh, Jr.
Wilmer & Lee, P.A.
100 Washington Street
Suite 200
Huntsville, Alabama 35801
256-533-0202 Telephone
256-533-0302 Facsimile
256-509-7743 Mobile
rraleigh@wilmerlee.com

From: Fruiterman, Erica <EFruiterman@duanemorris.com>

Sent: Monday, March 19, 2018 11:08:43 AM

To: Richard Raleigh

Cc: Zabaneh, Sean S.; McConnell, Sean P.; Rudowitz, Andrew J.; Poles, Simeon S.

Subject: Otto Bock / Fourroux Prosthetics

Mr. Raleigh,

Thank you very much for speaking with me this past Friday. I was pleased to hear that your client would like to reach a mutually agreeable and efficient resolution to this matter.

During our call, you represented that although your client does not understand why his testimony might be important to Respondent's defenses, he would be willing to sit for a deposition. You also stated that your client would consider producing documents in response to a revised and significantly narrowed set of document requests. I have provided those requests below. With the exception of revised request number 1, Respondent agrees that your client may provide this information through his testimony on behalf of Fourroux Prosthetics.

Given your client's willingness to meet and confer in order to reach an agreed-upon scope for the document production and dates certain for the production of documents and testimony, we request that you withdraw the motions to quash Respondent's subpoenas *ad testificandum* and *duces tecum*.

I am traveling today, but I am available to speak after 5pm EST. Please feel free to call my cell – 215-971-5952. I look forward to speaking with you soon.

Best,

Erica

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7. The percentage of reimbursement for non-microprocessor knees by Medicare, private insurance, or patient payment (including any private or Medicare co-payments) for the years 2015, 2016, and 2017.

From: Robert Lockwood [<mailto:rlockwood@wilmerlee.com>]

Sent: Tuesday, March 13, 2018 5:36 PM

To: Fruiterman, Erica <EFruiterman@duanemorris.com>

Cc: Cathy Silva <csilva@wilmerlee.com>

Subject: Otto Bock / Fourroux Prosthetics

Erica:

I spoke with Joe Neely at FTC earlier this afternoon. He has no authority to commit to any course of action yet. Nevertheless, he said, at most, the FTC might be willing to release Fourroux Prosthetics from the subpoena *duces tecum*, but not a subpoena *ad testificandum*. I told him that my instructions are to vigorously contest any subpoena because my client has no desire to be involved in these proceedings. He is supposed to call me to let me know FTC's final position, and I will certainly relay to you when I hear.

The University of Alabama is on Spring Break, so my college-aged son and I are going on a fishing trip to the Smokies tomorrow. I'll be available by cell phone until about 12:00 EST: (256) 658-8861

Robert



Robert C. Lockwood

Wilmer & Lee, P.A.

100 Washington Street, Suite 100

Huntsville, Alabama 35801

(256) 533-0202 - telephone

(256) 533-0302 – facsimile

rlockwood@wilmerlee.com

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PUBLIC

EXHIBIT Q

Shotzbarger, William

From: Fruiterman, Erica
Sent: Thursday, March 22, 2018 9:03 PM
To: 'Robert Lockwood'
Cc: Richard Raleigh; Zabaneh, Sean S.; Cathy Silva; Rudowitz, Andrew J.; McConnell, Sean P.
Subject: RE: Otto Bock / Fourroux Prosthetics

Robert:

We are very disappointed that Fourroux has declined to accept any of our proposals to narrow the subpoenas. As you are aware, we have significantly reduced the burden on Fourroux, but your email suggests there is no further room for negotiation on your part. We will respond to your motion accordingly. Please let us know if further discussion might lead to a resolution, and we would be happy to engage with you.

Erica

From: Robert Lockwood [mailto:rlockwood@wilmerlee.com]
Sent: Thursday, March 22, 2018 4:36 PM
To: Fruiterman, Erica
Cc: Richard Raleigh ; Zabaneh, Sean S. ; Cathy Silva ; Rudowitz, Andrew J.
Subject: RE: Otto Bock / Fourroux Prosthetics

Erica:

Thank you very much for your proposals to narrow the scope of Otto Bock's subpoenas. I have carefully reviewed your proposals with my client. Fourroux believes that Otto Bock's requests are still objectionable, and declines to withdraw its motion to quash. I greatly appreciate your efforts to resolve this dispute, and I look forward to working with you as this matter progresses.

Robert

Robert C. Lockwood



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From: Fruiterman, Erica [mailto:EFruiterman@duanemorris.com]
Sent: Thursday, March 22, 2018 9:52 AM
To: Robert Lockwood <rlockwood@wilmerlee.com>

Cc: Richard Raleigh <rraleigh@wilmerlee.com>; Zabaneh, Sean S. <SSZabaneh@duanemorris.com>; Cathy Silva <csilva@wilmerlee.com>; Rudowitz, Andrew J. <AJRudowitz@duanemorris.com>

Subject: RE: Otto Bock / Fourroux Prosthetics

Robert,

I apologize for any delay in my response. I am currently on the west coast traveling for depositions.

We are willing to narrow the scope of our corporate designee topics to match, as closely as possible, the previously narrowed scope of document requests directed towards Fourroux. You will find below a list of our narrowed corporate designee topics; however, Otto Bock reserves the right to ask the witness questions beyond those topics in his individual capacity, to the extent that he has personal knowledge of the answers.

In light of our substantially narrowed document requests and corporate designee topics, we would appreciate some clarity as to whether Fourroux intends to withdraw the motions to quash Respondent's subpoenas by close of business today, March 22, 2018. Again, if Fourroux intends to withdraw its motions to quash, please also reply with your client's availability for the weeks of March 26th and April 2nd, 2018.

Best,

Erica

Respondent's Revised Corporate Designee Topics Directed at Fourroux Prosthetics

1. Facts and circumstances related to the Company's decision to purchase, sell or distribute each manufacturer's models of microprocessor prosthetic knees, including, but not limited to, the prices Fourroux Prosthetics paid for each manufacturer's microprocessor knees.
2. Facts and circumstances related to the Company's decision to purchase, sell or distribute each manufacturer's models of non-microprocessor prosthetic knees, including, but not limited to, the prices Fourroux Prosthetics paid for each manufacturer's non-microprocessor knees.
3. The impact that a price change of one manufacturer's microprocessor prosthetic knee has on the willingness of (i) patients or (ii) clinicians to substitute to another manufacturer's microprocessor prosthetic knee.
4. The limitations and/or ceiling on prices for microprocessor prosthetic knees imposed by Medicare and private insurers.
5. Recovery Audit Contractor (RAC) audits, their impact on clinics and any impact on clinical assessments regarding prosthetic devices containing microprocessor controlled knees or mechanical knees.
6. The factors affecting (i) the Company's and (ii) prosthetists' decisions concerning which type of prosthetic knee to fit on a particular patient, including, but not limited to, the revenue received per patient and the acquisition cost per prosthetic knee.
7. The microprocessor prosthetic knees that the Company currently fits on patients in the United States or has fitted in the past five years, including, but not limited to, number of units fitted and revenue received by source and gross margin by manufacturer and model.
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Sent: Thursday, March 22, 2018 10:40 AM

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[<csilva@wilmerlee.com>](mailto:csilva@wilmerlee.com)

Subject: RE: Otto Bock / Fourroux Prosthetics

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Robert

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Sent: Wednesday, March 21, 2018 1:58 PM

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Also, I note that your narrowed requests were directed to "Wright & Filippis." I assume that you intended those requests to be directed to Fourroux.

I look forward to hearing from you.

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Thanks,

Rich

Richard J.R. Raleigh, Jr.
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256-533-0202 Telephone
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From: Fruiterman, Erica <EFruiterman@duanemorris.com>
Sent: Monday, March 19, 2018 11:08:43 AM
To: Richard Raleigh
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Subject: Otto Bock / Fourroux Prosthetics

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3. Documents sufficient to show the prices Wright & Filippis paid for non-microprocessor knees for the K3 and K4 populations of patients for the years 2015, 2016, and 2017.
4. Documents sufficient to show the number of microprocessor knees Wright & Filippis purchased by manufacturer for the years 2015, 2016, and 2017.
5. Documents sufficient to show the number of non-microprocessor knees Wright & Filippis purchased for the K3 and K4 population of patients for the years 2015, 2016, and 2017,
6. The percentage of reimbursement for microprocessor knees by Medicare, private insurance, or patient payment (including any private or Medicare co-payments) for the years 2015, 2016, and 2017.
7. The percentage of reimbursement for non-microprocessor knees by Medicare, private insurance, or patient payment (including any private or Medicare co-payments) for the years 2015, 2016, and 2017.

From: Robert Lockwood [<mailto:rlockwood@wilmerlee.com>]
Sent: Tuesday, March 13, 2018 5:36 PM
To: Fruiterman, Erica <EFruiterman@duanemorris.com>
Cc: Cathy Silva <csilva@wilmerlee.com>
Subject: Otto Bock / Fourroux Prosthetics

Erica:

I spoke with Joe Neely at FTC earlier this afternoon. He has no authority to commit to any course of action yet. Nevertheless, he said, at most, the FTC might be willing to release Fourroux Prosthetics from the subpoena duces tecum, but not a subpoena ad testificatum. I told him that my instructions are to vigorously contest any subpoena because my client has no desire to be involved in these proceedings. He is supposed to call me to let me know FTC's final position, and I will certainly relay to you when I hear.

The University of Alabama is on Spring Break, so my college-aged son and I are going on a fishing trip to the Smokies tomorrow. I'll be available by cell phone until about 12:00 EST: (256) 658-8861

Robert



Robert C. Lockwood

Wilmer & Lee, P.A.
100 Washington Street, Suite 100
Huntsville, Alabama 35801
(256) 533-0202 - telephone
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PUBLIC

EXHIBIT R

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

In the Matter of

**SUBPOENA *DUCES TECUM* ISSUED TO HUMANA,
INC. DATED APRIL 10, 2017**

)
)
) **File No. 161-0026**
) **June 5, 2017**
)
)

ORDER DENYING PETITION TO LIMIT SUBPOENA *DUCES TECUM*

By McSWEENEY, Commissioner:

Humana, Inc. (“Humana” or “Petitioner”) has filed a petition to limit a subpoena *duces tecum* issued by the Commission on April 17, 2017. For the reasons stated below, the petition to limit (“Petition”) is denied.

I. BACKGROUND

On October 27, 2015, Walgreens Boots Alliance (“Walgreens”) announced its intent to acquire Rite Aid Corporation, one of Walgreens’ major retail pharmacy competitors. As a result, the FTC opened an investigation to determine whether there is reason to believe that the proposed acquisition violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or Section 7 of the Clayton Act, 15 U.S.C. § 18, and whether that proposal meets the requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a.

At their most basic, most retail pharmacy purchases involve three types of actors: (1) consumers, who buy pharmaceuticals; (2) pharmacies, who sell pharmaceuticals; and (3) payers, usually insurance providers, who receive premiums from consumers and develop plans to provide discounts on the costs of certain drugs. In order to develop insurance plans attractive to consumers and thereby build their customer base, insurers often seek to recruit pharmacies that consumers perceive as desirable (*i.e.*, lower-cost or more conveniently located) by providing them with increased reimbursements for the costs of the pharmaceuticals. The more desirable a retail pharmacy chain is to consumers, the greater the amount of reimbursement from payers it can demand, creating the risk that payers will pass these costs on to their customers in the form of higher premiums. Some insurers’ plans use a “preferred” model, in which a “preferred” pharmacy agrees to accept lower reimbursements in exchange for the plan steering customers to the pharmacy by offering greater discounts. The Centers for Medicare & Medicaid Services (“CMS”) approves these plans offered to consumers, part of which involves ensuring that the plans (1) provide consumers with sufficient access to participating pharmacies in each geographic area and (2) do not misrepresent the benefits or coverage offered to consumers.

As part of this investigation, on April 10, 2017, the FTC issued a subpoena *duces tecum* and accompanying subpoena *ad testificandum* to Humana, Inc., a payer that is one of the nation’s largest providers of Medicare Part D prescription drug plans.¹ Humana offers the Humana Walmart Rx Plan, in which Walmart is the designated “preferred” provider. The Humana Walmart Rx Plan is nearly unique, in that it is one of the only Medicare Part D prescription drug plans in which neither Walgreens, Rite Aid, nor CVS is a “preferred” provider. As such, FTC staff seeks to determine whether a retail pharmacy network that features Walmart as the sole “preferred” provider is a viable and attractive option for Medicare Part D plans seeking to attract beneficiaries in any geographic areas, and if so, which geographic areas. If evidence indicated that beneficiaries in certain geographic areas do not view the Humana Walmart Rx Plan as attractive (for example, because Walmart lacks a significant presence in those areas), this would be useful to assess whether—from the perspective of Medicare Part D plan sponsors in different areas of the country—Walmart-only preferred networks are meaningful substitutes for networks that designate Walgreens, Rite Aid, and/or CVS as preferred.

The subpoena *duces tecum* (“subpoena”) seeks documents concerning Humana’s analysis of the proposed merger and any potential divestitures of assets by either Walgreens or Rite Aid (specifications 1 and 2); Humana’s Walmart Rx Plan (specification 3); and Humana’s communications with CMS concerning whether its Medicare plans, including the Walmart Rx Plan, offer sufficiently meaningful access to pharmacies across geographic areas (specification 4). This information enables staff to assess the attractiveness of Humana’s Walmart Rx Plan to beneficiaries in different geographic areas, based on Humana’s own documents and documents related to CMS’s oversight of the plan.

The FTC served the subpoena on Humana on April 12, 2017. In response, counsel for Humana claimed that the subpoena was “overly broad, unduly burdensome, and irrelevant” to the investigation, although counsel did not provide specific or detailed reasons supporting these objections. Nonetheless, Humana counsel and FTC staff met and conferred regarding potential narrowing of the scope of the subpoena. Staff agreed that Humana could initially confine its search for documents responsive to Specifications 1 and 2 to two key custodians, and that the FTC would request documents from additional custodians only if it became necessary. FTC staff twice agreed to extend the deadline for production of documents, first on May 1, 2017 and then again on May 8, 2017, for a final return date of May 16, 2017. On May 9, Humana produced five documents totaling 13 pages responsive to Specifications 1 and 2.

On May 16, 2017, the deadline for production, Humana requested additional time to produce documents or file a petition to limit or quash the subpoena. In response, staff declined to extend the return dates absent a definitive schedule for production. Humana also requested modifications to Specification 3, concerning the Walmart Rx Plan, and Specification 4, concerning Humana’s communications with CMS. In response, staff offered to further limit the subpoena by allowing Humana to confine its production for those specifications to the two key custodians whose files Humana was already reviewing for Specifications 1 and 2. Staff also offered to relieve Humana of Specification 3’s requirement to produce “all documents” regarding the Humana Walmart Rx Plan. Instead, Humana would be required to answer only the itemized

¹ Humana filed a petition to quash the subpoena *ad testificandum* on May 23, 2017.

subparts of Specification 3, each of which concerns the plan’s ability to compete effectively. Humana rejected these offers and filed the instant petition to limit.

Humana’s petition asks the Commission to quash Specifications 3 and 4 in their entirety. Humana claims that the information sought is not relevant to the present merger investigation and, in any event, that it is publicly available from other sources, including other government agencies. Humana also contends that these specifications are overly broad and unduly burdensome, particularly given Humana’s status as a non-party.² Finally, Humana raises several general objections to the subpoena as a whole.

II. ANALYSIS

Agency compulsory process is proper if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to the inquiry, as defined by the Commission’s investigatory resolution.³ Agencies have wide latitude to determine what information is relevant to their law enforcement investigations.⁴ As the D.C. Circuit has explained, “[t]he standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one The requested material, therefore, need only be relevant to the *investigation* – the boundary of which may be defined quite generally.”⁵

The documents requested by the subpoena are directly relevant to the FTC’s investigation into Walgreens’ proposed acquisition of Rite Aid. These documents enable FTC staff to assess the degree to which Humana’s Walmart Rx Plan—which features Walmart as its sole preferred provider—is attractive to consumers in different geographic areas. This information is largely unavailable from sources other than Humana and only in part through its regulator, CMS. Humana also fails to support its claim that complying with the subpoena would cause undue burden.

² In addition, Humana objects to Specifications 1 and 2 “out of an abundance of caution and solely to preserve its objections pursuant to the Commission’s rules.” It “intends to produce additional non-privileged documents in response to” those specifications once they “are fully processed and reviewed.” Pet., at 4.

³ *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089-90 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 872-74 (D.C. Cir. 1977).

⁴ *See, e.g., Morton Salt*, 338 U.S. at 642-43 (“[Administrative agencies have] a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.”).

⁵ *Invention Submission*, 965 F.2d at 1090 (emphasis in original, internal citations omitted) (citing *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980), and *Texaco*, 555 F.3d at 874 & n.26).

A. The Subpoena is Narrowly Tailored and Seeks Information Directly Relevant to the Investigation.

There is no merit to Humana’s claims that the subpoena is overly broad and requests irrelevant information. In the context of administrative subpoenas, “relevance” is defined broadly and with deference to an agency’s determination.⁶ An administrative agency is accorded “extreme breadth” in conducting an investigation.⁷ As the D.C. Circuit has stated, the standard for judging relevance in an administrative investigation is “more relaxed” than in an adjudicatory proceeding.⁸ As a result, a CID recipient must demonstrate that the agency’s determination is “obviously wrong,” or the documents are “plainly irrelevant” to the investigation’s purpose as defined by the investigational resolution.⁹ Thus, a subpoena request is overbroad only where it is “out of proportion to the ends sought,” and “of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.”¹⁰

In this case, the Commission’s resolution authorizes an investigation “[t]o determine whether the proposed acquisition of Rite Aid . . . by Walgreens” would violate the FTC Act because it would amount to an unfair method of competition or would violate the Clayton Act because the acquisition would “substantially . . . lessen competition, or . . . tend to create a monopoly.” *See* 15 U.S.C. §§ 18, 45. Humana fails to support its claim that the subpoena requests—two of which relate directly to the proposed acquisition and two of which relate to the competitive landscape for retail pharmacy services—have no bearing on the competitive significance of the proposed merger. To the contrary, the two specifications at issue, Specifications 3 and 4, are directly relevant to assessing the impact of the merger on competition. As discussed above, FTC staff seeks to determine the degree to which Humana’s Walmart Rx Plan is attractive to consumers in need of Medicare Part D coverage in different geographic areas, which, in turn, will facilitate the FTC staff’s analysis of the importance of competition between the merging parties in different geographic areas. Specification 3 seeks to obtain Humana’s own documents regarding its experiences in developing and administering the Humana Walmart Rx Plan, while Specification 4 seeks documents relating to CMS’s oversight of the Humana Walmart Rx Plan, and similar plans. As such, this information is highly relevant to staff’s investigation. Moreover, the fact that staff has tailored the subpoena to this plan, and to those types of documents mostly likely to shed light on its competitiveness, confirms that the subpoena is not overly broad.

⁶ *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1315-16 (D.C. Cir. 2011); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

⁷ *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. RTC*, 5 F.3d 1508, 1517 (D.C. Cir. 1993).

⁸ *Invention Submission*, 965 F.2d at 1090.

⁹ *Id.* at 1089; *Carter*, 636 F.2d at 788.

¹⁰ *U.S. v. Wyatt*, 637 F.2d 293, 302 (5th Cir. 1981) (quoting, *inter alia*, *Morton Salt*, 338 U.S. at 652).

B. The Information Sought is Not Readily Available to the FTC from Other Sources.

Humana claims that Specifications 3 and 4 are improper because they “seek[] documents that are publicly available to the FTC or readily available to the FTC through another government agency.” Pet., 11-12.

There is no basis for this assertion. Humana asserts generally that the documents are “publicly available,” ignoring the fact that many of the documents sought are by their nature not public, including internal documents for which Humana is the best—and only—source. For example, Specification 3 expressly calls for (1) Humana’s analysis of “the Humana Walmart Rx Plan retail pharmacy network’s ability to satisfy geographic access requirements of CMS”; (2) Humana’s “consideration or plans to alter the composition or benefit structure of the Humana Walmart Rx Plan retail pharmacy network”; and (3) Humana’s “actual or considered development or promotion of a Preferred Network with a benefit structure including more pharmacies as preferred cost-sharing pharmacies than the Humana Walmart Rx Plan.” While Specification 4 seeks documents relating to Humana’s communications with CMS, that request is not limited to direct communications with CMS. It also covers Humana’s communications with other third parties as well as Humana’s *internal* analyses of its interactions with CMS, including its responses to any concerns CMS raised about Humana’s plans related to pharmacy access. Again, only Humana would have access to these internal analyses.

The subpoena seeks certain non-internal documents, including communications between Humana and CMS. Humana provides no support for its suggestion that these documents are “publicly available.” Humana also speculates that these documents are “readily available to the FTC” through other sources. Even if Humana were somehow correct that all or some documents were available from other sources, the Commission is not obliged to seek records from multiple sources that are readily available from a single source. Instead, the Commission may issue process to a single source likely to have all of the necessary information, as it did here.¹¹

C. The Subpoena is Not Unduly Burdensome

Humana also claims that Specifications 3 and 4 (and more generally, the subpoena as a whole) are unreasonable and unduly burdensome, particularly given its status as a non-party. Pet., 5-6. Humana does not offer any support for this contention other than the conclusory and

¹¹ In *In re Exxon Valdez*, the district court approved just such an approach, allowing a plaintiff to obtain from a nonparty trade association documents that were also available from each of the association’s members because this was “more convenient, less burdensome [and] less expensive.” 142 F.R.D. 380, 382-83 (D.D.C. 1992); *cf. Software Rights Archive, LLC v. Google Inc.*, No. 2:07-CV-511, 2009 WL 1438249, at *2 (D. Del. May 21, 2009) (“[T]here is no absolute rule prohibiting a party from seeking to obtain the same documents from a non-party as can be obtained from a party, nor is there an absolute rule providing that the party must first seek those documents from an opposing party before seeking them from a non-party.”)(quotation omitted); *Viacom Int’l, Inc. v. YouTube, Inc.*, No. C 08–80129 SI, 2008 WL 3876142, at *2-*3 (N.D. Cal. Aug.18, 2008) (same).

unattributed statements that compliance would require it to review and produce “thousands” or possibly “hundreds of thousands” of documents. *Id.*, 6, 8.

Where possible, FTC staff routinely work with subpoena recipients to limit the burdens imposed on them. Nonetheless, the standard for enforcement of administrative compulsory process is the same whether the subpoenaed entity is a target of the investigation or a third party. The statute authorizing the Commission to issue subpoenas specifically empowers the Commission to obtain from third-party “witnesses” “*all such documentary evidence relating to any matter under investigation.*”¹² Indeed, an important and effective tool in investigations involves comparing, contrasting, and supplementing information and materials obtained from targets with that obtained from third parties. Thus, whether an administrative subpoena is issued to a target or a third party, it is not unduly burdensome unless the recipient shows that “compliance threatens to unduly disrupt or seriously hinder normal operations of a business.”¹³ This test is “not easily met.”¹⁴

Nothing in *Humana*’s cited cases supports its assertion that these standards are more relaxed for third parties. *Pet.*, 5-6. The first, *Dow Chemical Co. v. Allen*, involved an administrative *trial* subpoena, not an *investigative* subpoena, and the court specifically acknowledged that investigative subpoenas may be broader in scope.¹⁵ In addition, the type of burden at issue was completely different: the requests infringed nonparties’ First Amendment academic freedoms by seeking unpublished data from ongoing and incomplete university research studies.¹⁶ Indeed, the *Dow* court quoted from *FTC v. Dresser Industries, Inc.*, a case in which the court held that “one who opposes an agency’s subpoena necessarily must bear a heavy burden. That burden is essentially the same *even if the subpoena is directed to a third party.*”¹⁷ Similarly, in *FTC v. Bowman*, the district court affirmed the Commission’s authority to issue subpoenas to nonparties and enforced the subpoena, subject only to minor limitations on the

¹² 15 U.S.C. § 49 (emphasis added).

¹³ See, e.g., *Invention Submission*, 965 F.2d at 1090 (citing *Texaco*, 555 F.2d at 882). See also *FTC v. Dresser Indus., Inc.*, 1977-1 Trade Cas. ¶ 61,400, 1977 WL 461238 (D.D.C. 1977) (holding that this test applies to a subpoena issued to a nonparty). *Accord Commission Order Affirming June 18, 2012 Ruling Denying Petition of Samsung Telecommunications America, LLC to Limit Subpoena Duces Tecum*, File No. 111-0163 (September 7, 2012), <https://www.ftc.gov/enforcement/cases-proceedings/petitions-quash/google-inc> (investigative subpoena issued on nonparty) (citing *FTC v. Rockefeller*, 441 F. Supp. 234, 240-42 (S.D.N.Y. 1977)); *In the Matter of Evanston Northwestern Healthcare Corp.*, No. 9315, 2004 WL 2380507, at *2 (Sept. 28, 2004) (citation omitted) (process issued to nonparties in administrative adjudicative proceeding); *FTC v. Ernstthal*, Misc. No. 78-0064, 1978 WL 1375 (D.D.C. May 30, 1978, *aff’d*, 607 F.2d 488, 489 n.1 (D.C. Cir. 1979) (rejecting burden, definiteness, and relevance challenges to administrative subpoena issued to nonparty in adjudicative hearing).

¹⁴ *Texaco*, 555 F.2d at 882.

¹⁵ *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1267-68 (7th Cir. 1982).

¹⁶ See *id.* at 1266, 1273-77.

¹⁷ See *id.* at 1277 (quoting *Dresser Indus.*, 1977 WL 461238) (emphasis added).

scope of documents sought.¹⁸ Indeed, *Dresser* cited *Bowman* for its holding that nonparties bear the same burden as targets of an investigation.¹⁹

Further, Humana offers nothing to support its assertion that compliance with the subpoena would require it to review and produce “thousands,” or even “hundreds of thousands,” of documents. A recipient of agency process must demonstrate that the burden of compliance is undue.²⁰ “Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.”²¹ Thus, Humana must show the “measure of [its] grievance rather than [asking the court] to assume it.”²²

But even assuming that responsive documents number in the thousands or hundreds of thousands, that fact alone would not be sufficient to demonstrate undue burden given Humana’s size, resources, and the availability of advanced search techniques. Indeed, Humana’s most recent annual report notes that its current and past business practices are subject to ongoing review by various state and federal authorities, who regularly scrutinize numerous facets of Humana’s business, including its pharmacy benefits.²³ Humana cannot claim that responding to the FTC’s subpoena “seriously disrupts or unduly hinders” its normal business operations when those operations expressly involve government oversight and reporting.

In short, there is no basis for Humana’s claim that the burden imposed by the subpoena is undue. Staff’s offer to allow Humana to produce documents from only two custodians (which we adopt herein) will further temper any burden Humana must bear.

D. Humana’s General Objections Provide No Basis for Limiting or Quashing the Subpoena

Humana also lists a number of general objections, most of which merely restate its objections to particular subpoena specifications, lack accompanying argument or support, or have no bearing on disposition of the present petition. We address the remaining objections below.

¹⁸ *FTC v. Bowman*, 149 F. Supp. 624, 629-30 (N.D. Ill. 1957), *aff’d*, 248 F.2d 456 (7th Cir. 1957).

¹⁹ *Dresser Indus.*, 1977 WL 461238.

²⁰ *In the Matter of January 16, 2014 Civil Investigative Demand Issued to the College Network, Inc.*, File No. 1323236, 2014 FTC LEXIS 90, at *5 (April 21, 2014) (citing, *inter alia*, *Texaco*, 555 F.2d at 882).

²¹ *Texaco*, 555 F.2d at 882.

²² *Morton Salt*, 338 U.S. at 654.

²³ *See Humana, Inc.*, Annual Report (Form 10-K) at 129. This report further indicates that the company has substantial financial resources, having received over \$54 billion in revenue and paid over \$52 billion in operating expenses in fiscal year 2016. *See id.* at 38.

General Objection 1: Duplicative to earlier information requests. Humana objects that the requests in the subpoena are duplicative of three other requests issued to the company by the Commission: a Civil Investigative Demand (“CID”) and subpoena *duces tecum* on January 14, 2016, and a CID issued on March 7, 2017. Pet., 1-2, 7-8.²⁴ This objection is baseless.

Although FTC staff *requested* some of the same documents in 2016, Humana did not produce those documents. The Commission issued compulsory process to Humana and the CID and subpoena issued on January 14, 2016 sought information that overlaps with the current subpoena at issue, including requests for Humana’s analysis of the Walgreens-Rite Aid merger, and information regarding Humana’s retail pharmacy networks. Humana produced one Excel file and a single PowerPoint slide in response.

Nor is there any duplication to the CID issued on March 3, 2017. That CID contained only one specification that sought Humana’s annual purchases of retail pharmacy services by line of business and by pharmacy chain. This specification does not overlap with the current subpoena, but even if it did, this would also not be duplicative for the same reasons as above: Humana did not produce documents or data in response to this CID but rather provided only a brief factual proffer in lieu of a full production of information.

General Objection 4: Privileged information. Humana objects to the subpoena to the extent it seeks privileged information. The Commission does not seek privileged material. The Commission’s Rules of Practice instruct a subpoena recipient how to assert claims of privilege, *see* Rule 2.11, 16 C.F.R. § 2.11, and that Rule is restated in the subpoena’s instructions. This objection is therefore without merit.

General Objection 5: Confidential information. Humana also objects to the subpoena to the extent it seeks confidential commercial information. That is not a proper basis for objecting to a subpoena. The Commission’s Rules of Practice and relevant statutory provisions provide ample protection for documents and information—including proprietary business and sensitive customer information—obtained by the Commission through compulsory process.²⁵ Courts have consistently held that these provisions provide adequate protection and that the Commission has a full right to access even the most highly sensitive information including trade secrets.²⁶ This objection is therefore without merit.

²⁴ Humana also claims that the current subpoena includes requests for information that the FTC “previously conceded it did not need.” Pet., 7. Again, Humana offers no support for this claim. Even if *arguendo* this assertion were accurate, over the course of a years-long investigation, staff may learn that particular facts have greater importance than was ascertainable at an initial stage.

²⁵ *See* 15 U.S.C. §§ 46(f), 57b-2; 16 C.F.R. § 4.10(a).

²⁶ *See, e.g., FTC v. Invention Submission Corp.*, No. 89-272, 1991 WL 47104, at *4 (D.D.C. 1991), *aff’d*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *In re Subpoena Duces Tecum*, 228 F.3d 341, 351 (4th Cir. 2000) (enforcing subpoena requesting sensitive health care information in light of statutory protections).

IV. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Humana, Inc.'s Petition to Limit Subpoena *Duces Tecum* be, and it hereby is, **DENIED**.

We understand, however, that FTC staff consents to modifications to the subpoena. Accordingly, **IT IS FURTHER ORDERED THAT** the subpoena *duces tecum* be **MODIFIED** as follows:

a. Specifications 1, 2, 3, and 4 are modified to require Petitioner Humana to search for and produce responsive documents in the possession, custody, or control of custodians Jay Ecleberry and Laura White; and

b. Specification 3 is revised to replace the text "Submit all documents relating to the Humana Walmart Rx Plan retail pharmacy network, including, but not limited to," with "Submit the following documents:".

IT IS FURTHER ORDERED THAT Petitioner Humana, Inc. shall comply with the Commission's modified subpoena *duces tecum* on or before June 15, 2017.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: June 5, 2017

PUBLIC

EXHIBIT S

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

In the Matter of

**SUBPOENA *AD TESTIFICANDUM* ISSUED TO
HUMANA, INC. DATED APRIL 10, 2017**

)
)
) **File No. 161-0026**

) **June 15, 2017**
)
)

ORDER DENYING PETITION TO QUASH SUBPOENA *AD TESTIFICANDUM*

By McSWEENEY, Commissioner:

Humana, Inc. (“Humana” or “Petitioner”) has filed a petition to quash a subpoena *ad testificandum* issued by the Commission on April 10, 2017. For the reasons stated below, Humana’s Petition to Quash (“Petition”) is denied.

I. BACKGROUND

On October 27, 2015, Walgreens Boots Alliance (“Walgreens”) announced its intent to acquire Rite Aid Corporation, one of Walgreens’ major retail pharmacy competitors. As a result, the FTC opened an investigation to determine whether there is reason to believe that the proposed acquisition violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or Section 7 of the Clayton Act, 15 U.S.C. § 18, and whether that proposal meets the requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a.

At their most basic, most retail pharmacy purchases involve three types of actors: (1) consumers, who buy pharmaceuticals; (2) pharmacies, who sell pharmaceuticals; and (3) payers, usually insurance providers, who receive premiums from consumers and develop plans to provide discounts on the costs of certain drugs. In order to develop insurance plans attractive to consumers and thereby build their customer base, insurers often seek to recruit pharmacies that consumers perceive as desirable (*i.e.*, lower-cost or more conveniently located) by providing them with increased reimbursements for the costs of the pharmaceuticals. The more desirable a retail pharmacy chain is to consumers, the greater the amount of reimbursement from payers it can demand, creating the risk that payers will pass these costs on to their customers in the form of higher premiums. Some insurers’ plans use a “preferred” model, in which a “preferred” pharmacy agrees to accept lower reimbursements in exchange for the plan steering customers to the pharmacy by offering greater discounts.

As part of this investigation, on April 10, 2017, the FTC issued a subpoena *duces tecum* and an accompanying subpoena *ad testificandum* to Humana, Inc., a payer that is one of the nation’s largest providers of Medicare Part D prescription drug plans.¹ The subpoenas seek to understand how Humana constructs its retail pharmacy plans and determines which pharmacies to include in those plans. Humana offers several different plans, including the Humana Walmart Rx Plan, in which Walmart is the designated “preferred” provider. The Humana Walmart Rx plan is nearly unique, in that it is one of the only Medicare Part D prescription drug plans in which neither Walgreens, Rite Aid, nor CVS is a “preferred” provider. As such, FTC staff seeks to determine, *inter alia*, whether a retail pharmacy network that features Walmart as the sole “preferred” provider is a viable and attractive option for Medicare Part D plans seeking to attract beneficiaries in any geographic areas, and if so, which geographic areas. If evidence indicated that beneficiaries in certain geographic areas do not view the Humana Walmart Rx Plan as attractive (for example, because Walmart lacks a significant presence in those areas), this would be useful to assess whether—from the perspective of Medicare Part D plan sponsors in different areas of the country—Walmart-only preferred networks are meaningful substitutes for networks that designate Walgreens, Rite Aid, and/or CVS as preferred.

The subpoena *ad testificandum* (“subpoena”) seeks testimony from one or more Humana corporate representatives regarding the proposed merger and its impact on Medicare Part D plans. Under Section 2.7(h) of the FTC Rules of Practice and Procedure, 16 C.F.R. § 2.7(h), the Commission may obtain the testimony of a corporate entity by describing with “reasonable particularity the matters for examination.” The corporate entity then “must designate one or more officers, directors, or managing agents, or designate others who consent, to testify on its behalf.” *Id.* Rule 2.7(n) provides a process for taking oral testimony from corporate entities that parallels the process in Fed. R. Civ. P. 30(b)(6). The testimony of the designated witness conveys the collective knowledge of the corporation, not merely that of the individual witness.

The subpoena required Humana’s designated witness or witnesses to testify on May 8, 2017, on eight topics: (1) the design and composition of Humana’s drug plans; (2) differences among those plans; (3) the plans’ usage of mail-order pharmacy services; (4) Humana’s negotiations with Walgreens, Rite Aid, and pharmacy benefit managers; (5) Walgreens’ proposed acquisition of Rite Aid; (6) proposed divestitures of assets from either Walgreens or Rite Aid; (7) the Humana Walmart Rx Plan; and (8) communications between Humana and the Centers for Medicare & Medicaid Services (“CMS”) on the subject of pharmacy access under Humana’s Medicare Part D plans.² This information will help FTC staff to assess how prescription drug plans built around Walmart or other competitors compare to those built around Walgreens, Rite Aid, or CVS.

¹ On June 5, 2017, the Commission denied Humana’s separate petition to limit the subpoena *duces tecum*.

² In approving prescription drug plans offered to consumers, CMS considers whether the plans (1) provide consumers with sufficient access to participating pharmacies in each geographic area and (2) accurately describe their benefits and coverage.

The FTC served the subpoena on Humana on April 12, 2017. On April 26, Humana asked staff to allow Humana to provide a “written response to a targeted set of questions” in lieu of oral testimony. In response, staff stated that it would consider allowing Humana to provide a sworn declaration in lieu of oral testimony provided that Humana promptly produced the documents required by the accompanying subpoena *duces tecum*. Staff also agreed to reschedule the investigational hearing to May 30. Throughout the meet-and-confer period, Humana did not offer any proposals to limit or clarify the subpoena’s topics for examination.

On May 16, Humana told FTC staff that it would not produce certain categories of documents required by the subpoena *duces tecum*. At that time, staff informed Humana that the corporate investigational hearing, as rescheduled on April 26 at Humana’s request, would proceed on May 30, or soon thereafter based on the availability of the witness. Staff confirmed that without relevant documents a declaration would not be sufficient. By letter dated May 18, 2017, Humana’s counsel stated that the company “do[es] not intend to expend the resources necessary to educate a witness for a deposition scheduled in a compressed timeframe.”

On May 23, 2017, Humana filed the petition to quash the subpoena *ad testificandum*, asking the Commission to quash the subpoena in its entirety. Humana argues that many of the topics for examination “have nothing to do with the Proposed Acquisition,” Pet., 1, or seek information that either overlaps with prior document requests or is available from another source. Humana further states that several of the topics for examination are vague and call for information that is easier to convey in written submissions than oral testimony. Finally, Humana states that preparing a corporate witness or witnesses to testify on the specified topics would impose undue burden.

II. ANALYSIS

As explained in our ruling on Humana’s petition to limit the subpoena *duces tecum*, the Commission has broad authority to compel the production of information relevant to an investigation. FTC compulsory process is proper if the inquiry is within the Commission’s authority, the demand is not too indefinite, and the information sought is reasonably relevant to the inquiry, as defined by the investigatory resolution.³ Agencies have wide latitude to determine what information is relevant to their law enforcement investigations.⁴ As the D.C. Circuit has explained, “[t]he standard for judging relevancy in an investigatory proceeding is more relaxed

³ See *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089-90 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 872-74 (D.C. Cir. 1977).

⁴ See, e.g., *Morton Salt*, 338 U.S. at 642-43 (“[Administrative agencies have] a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.”).

than in an adjudicatory one The requested material, therefore, need only be relevant to the *investigation* – the boundary of which may be defined quite generally.”⁵

Here, the subpoena seeks testimony on subjects that are directly relevant to the FTC’s investigation into Walgreens’ proposed acquisition of Rite Aid. The testimony will enable FTC staff to assess the degree to which Humana’s Walmart Rx Plan—which features Walmart as the sole preferred provider—is attractive to consumers in different geographic areas. The subpoena will also enable FTC staff to learn about Humana’s assessment of the potential competitive impact of the proposed merger. This information is largely unavailable from sources other than Humana. Moreover, written responses often do not provide an adequate substitute for live testimony because there is no opportunity to ask follow-up questions or otherwise probe the responses. Humana also has not demonstrated that preparing a corporate witness or witnesses to testify would impose undue burden. For these reasons, we deny Humana’s Petition to Quash the subpoena.

A. The Testimony is Relevant to the Investigation and is Unavailable from Other Sources

Humana’s contention that several of the subpoena’s topics for examination are overly broad or irrelevant to the investigation is counter to established precedent on relevance. In the context of administrative subpoenas, “relevance” is defined broadly and with deference to the agency’s determination.⁶ In this case, the subpoena’s eight topics for testimony, further defined by subtopics, are directly relevant to the Commission’s investigation.

The Commission’s resolution authorizes an investigation “[t]o determine whether the proposed acquisition of Rite Aid . . . by Walgreens” would violate the FTC Act because it would amount to an unfair method of competition or would violate the Clayton Act because the acquisition would “substantially . . . lessen competition, or . . . tend to create a monopoly.” *See* 15 U.S.C. §§ 18, 45. According to Humana, exploring topics such as the Humana Walmart Rx Plan or Humana’s communications with CMS would not benefit the Commission in making this determination. *Pet.*, 7.⁷ We disagree. As previously explained, the information will help FTC staff learn the degree to which Humana’s Walmart Rx plan is attractive to consumers in need of Medicare Part D coverage in different geographic areas. Humana’s communications with CMS

⁵ *Invention Submission*, 965 F.2d at 1090 (emphasis in original, internal citations omitted) (citing *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980), and *Texaco*, 555 F.3d at 874 & n.26).

⁶ *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1315-16 (D.C. Cir. 2011); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

⁷ Humana also makes boilerplate objections to all eight of the subpoena’s topics for examination as either “overly broad” or “not relevant to the subject matter of the FTC’s investigation.” *See Pet.*, 10-15. Humana does not support any of these objections or make any specific proposals to narrow the topics for examination.

are central to the same inquiry, given CMS’s role in overseeing the Humana Walmart Rx Plan and ensuring consumers sufficient access to pharmacies.

Humana provides no support or detail for its claim that any relevant information about the Walmart Rx Plan or Humana’s communications with CMS is “publicly available, or . . . available through CMS.” Pet., 8; *see also id.* 10-11, 14-15. The subpoena seeks testimony for which Humana is the best—and only—source. For example, Topic 7 calls for (1) Humana’s analysis of “the Humana Walmart Rx Plan retail pharmacy network’s ability to satisfy geographic access requirements of CMS”; (2) Humana’s “consideration or plans to alter the composition or benefit structure of the Humana Walmart Rx Plan retail pharmacy network”; and (3) Humana’s “consideration or plans to develop or promote” a network that includes “more pharmacies as preferred . . . than the Humana Walmart Rx Plan.” Similarly, while Topic 8 seeks Humana’s testimony about its communications with CMS, it also asks for Humana’s *internal* analyses of those interactions, including responses to concerns CMS may have raised about the geographic access afforded by Humana’s plans.

Moreover, even if such information were available from other sources, it is still appropriate to adduce testimony from Humana to, *inter alia*, verify that information. Indeed, “[b]y its very nature, the discovery process entails asking witnesses questions about matters that have been the subject of other discovery. . . . Thus, the fact that information has been provided . . . concerning a particular category does not, in itself, make that information an impermissible subject of a 30(b)(6) deposition.”⁸ *See also* Part E, *infra* (explaining why written submissions are no substitute for live testimony in an FTC investigation).

B. The Testimony is Not Duplicative of Prior FTC Document Requests

Humana argues next that it should be excused from testifying because the subject matter would be “duplicative” of document requests “cover[ing] many of the same topics.” Pet., 2-3, 7-8. This argument is baseless.

First, as Humana acknowledges, it produced only a handful of the requested documents. *See id.* at 3. Humana’s testimony cannot be “duplicative” of information that it has not produced.⁹

⁸ *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 126 (D.D.C. 2005).

⁹ On January 14, 2016, the Commission issued a CID and subpoena *duces tecum* to Humana seeking, *inter alia*, Humana’s analysis of the Walgreens-Rite Aid merger and information regarding Humana’s retail pharmacy networks. In response, Humana produced one Excel file and a single PowerPoint slide. Humana claims that the FTC “conceded it did not need” the documents that it failed to produce (Pet., 8), but offers no support for this claim. Even if *arguendo* this assertion were accurate, over the course of an investigation staff may learn that particular facts have greater importance than was ascertainable at an initial stage.

Second, even if Humana had produced all relevant documents, it would still be appropriate to seek testimony on the same subjects. Courts consistently reject the proposition that producing documents exempts a corporation from the obligation to provide testimony in response to a Rule 30(b)(6) subpoena.¹⁰ Oral testimony conventionally follows document productions because it enables FTC staff to probe the details, explanations, and limitations of the productions. “[A] party who has received written production is entitled to explanations of the information produced, including how the information was gathered, by whom, whether or not the party adopts that information, where the information came from, [and] whether there is some additional information.”¹¹

C. The Subpoena Describes the Areas for Testimony in Sufficient Detail

Humana states that particular matters for examination in the subpoena¹² “are vague and confusing.” Pet., 10. Humana similarly states that the descriptions of three topics¹³ do not adequately “inform Humana of the specific areas of inquiry to be addressed in the” investigational hearing. *Id.* As an initial matter, we note that Humana did not raise these contentions during the required meet and confer process. *See* Pet. 3-5; 16 C.F.R. § 2.10(a)(2) (Commission rule requiring petitioner to confer with Commission staff “in an effort in good faith to resolve by agreement the issues raised by the petition”). If Humana had done so, it could have resolved any uncertainties by conferring with Commission staff. To the extent that Humana did not raise these issues with Commission staff, Humana’s complaint is not properly before us. 16 C.F.R. § 2.7(k) (“[A]bsent extraordinary circumstances, [Commission] will consider only issues raised during the meet and confer process.”). Nonetheless, we address Humana’s arguments in the exercise of our discretion.

¹⁰ *See, e.g., QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 689 (S.D. Fla. 2012) (“In responding to a Rule 30(b)(6) notice or subpoena, a corporation may not take the position that the documents state the company’s position and that a corporate deposition is therefore unnecessary.”) (citing *Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D. 534, 540 (D. Nev. 2008)).

¹¹ *United States v. Educ. Mgmt. LLC*, No. 2:07-CV-00461, 2014 WL 1391105, at *4 (W.D. Pa. Feb. 24, 2014) (quoting *State Farm Mut. Auto Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 207 (E.D. Pa. 2008)).

¹² Humana’s Petition challenges the descriptions of Topic 2 (seeking information about Humana’s retail pharmacy networks), Topic 3 (asking about Humana’s use of mail-order pharmacy services), Topic 4 (seeking information about negotiations between Humana and Walgreens, Rite Aid, and PBMs regarding retail pharmacy networks), and Topic 8 (asking about communications with CMS regarding benefit designs and preferred cost sharing in particular Humana plans, including the Humana Walmart Rx Plan).

¹³ Humana identifies Topic 4 (addressing negotiations between Humana and Walgreens, Rite Aid, and PBMs regarding retail pharmacy networks), Topic 5 (seeking information regarding the proposed acquisition of Rite Aid by Walgreens), and Topic 7 (asking for information about the Humana Walmart Rx Plan).

Under Section 2.7(h) of the FTC Rules of Practice and Procedure, a subpoena must “describe with reasonable particularity the matters for examination.” 16 C.F.R. § 2.7(h). We find that the subpoena satisfies that standard. Four of the six topics that Humana claims are vague include subparts that provide more detailed information about the expected areas of testimony, better enabling Humana to prepare its witnesses. The remaining topics provide Humana with sufficient notice to prepare a corporate designee. For instance, Topic 5 seeks Humana’s position on the proposed merger between Walgreens and Rite Aid. In the context of this investigation, it is clear that the inquiry will address how the proposed merger may affect Humana’s negotiations with a combined firm comprised of two of its important partners to create networks to provide prescription drug coverage.

D. The Subpoena’s Topics are Not Overbroad and Do Not Impose Undue Burden

Humana asserts that preparing its designated witness (or witnesses) to testify at an FTC investigational hearing would impose an undue burden “in terms of time, expense, and resources.” Pet., 8. Humana’s arguments lack foundation.

Generally, “[b]roadness alone is not sufficient justification to refuse enforcement of a subpoena.”¹⁴ A subpoena request is overbroad only where it is “out of proportion to the ends sought,” and “of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.”¹⁵ “Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.”¹⁶ Humana’s most recent annual report notes that its current and past business practices are subject to ongoing review by various state and federal authorities, who regularly scrutinize numerous facets of Humana’s business, including its pharmacy benefits.¹⁷ Given that Humana’s business operations involve ongoing review of its pharmacy benefits program by other state and federal authorities, responding to an FTC inquiry about key aspects of its business does not appear overly burdensome

Humana also contends that the subpoena is unduly burdensome because it must prepare its witness in a compressed timeframe. Pet., 2, 7. Courts acknowledge that “[p]reparing a . . . designee [to provide a corporation’s testimony] may be an onerous and burdensome task, but this consequence is merely an obligation that flows from the privilege of using the corporate form to do business.”¹⁸ Despite the burden, courts require the corporation make a conscientious good-

¹⁴ *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

¹⁵ *United States v. Wyatt*, 637 F.2d 293, 302 (5th Cir. 1981) (quoting, *inter alia*, *Morton Salt*, 338 U.S. at 652).

¹⁶ *Texaco*, 555 F.2d at 882.

¹⁷ *See* Humana, Inc., Annual Report (Form 10-K) at 129. This report further indicates that the company has substantial resources, having received over \$54 billion in revenue and paid over \$52 billion in operating expenses in fiscal year 2016. *See id.* at 38.

¹⁸ *QBE*, 277 F.R.D. at 689 (citations omitted).

faith effort to prepare its designated witnesses so that they can answer fully the questions posed.¹⁹ Thus, the obligation to prepare corporate designees to testify ordinarily provides no basis to excuse the testimony.

Here, the short time frame appears to be a direct result of Humana's actions. In its petition, Humana states that it has not yet started to prepare a corporate designee because it assumed that FTC staff would be willing to accept either a declaration or informal interviews of individual employees in lieu of the investigational hearing. Humana had no basis to make this assumption. Humana was served with the subpoena on April 12, 2017, and at Humana's request on April 26, the date for the investigational hearing of a corporate witness was moved back to May 30, 2017. Throughout the ensuing meet and confer process, FTC staff repeatedly told Humana that any alternative to a corporate investigational hearing was dependent on Humana's timely production of documents pursuant to the subpoena *duces tecum* that issued concurrently with the subpoena. When Humana informed staff that it did not intend to produce documents in response to two Specifications in the subpoena *duces tecum*, FTC staff confirmed that the alternatives proposed by Humana would not satisfy staff's investigation needs. The short period to prepare a corporate witness arises because Humana failed to begin the preparation in a reasonable time period after it received the subpoena on April 12 and further decided not to produce documents. We find that the short time to prepare the corporate designee cannot be considered an undue burden when the truncated period of time for witness preparation is the direct result of Humana's own decisions and actions. The time from the initial issuance of the subpoena on April 12 to the date this Order sets for compliance, June 26, provides ample time for the preparation of a corporate witness or witnesses.

E. Written Responses Are Not Substitutes for a Corporate Designee

Humana contends that, as a third party, it should not be required to produce anything more than a written declaration or the testimony of two knowledgeable individuals who would not testify as corporate representatives. Pet., 8.

Written responses are no substitute for live testimony. When a company offers a prepared response, an investigational hearing allows the investigator to probe the underlying facts and circumstances, often aided by the company's own documents.²⁰ By contrast, written discovery may include ambiguities and qualifications.²¹ This means that the party's responses

¹⁹ See *Sprint Commc'ns Co, L.P. v. Theglobe.com, Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006) (quoting *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000)).

²⁰ Humana contends that some topics would require Humana to sort data, run reports, and prepare spreadsheets. See Pet., 8. An investigational hearing would provide an opportunity to obtain an explanation of the reports and data. See *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

²¹ See, e.g., *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 174 (D.D.C. 2003) (rejecting argument that a Rule 30(b)(6) deposition is unnecessary or duplicative by distinguishing between depositions and document production and stating that "the two forms of discovery are not equivalent"); *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989)

are subject to interpretation. In such a situation, the investigator “should be permitted to depose [the party] regarding these qualifications and attempt to clarify these ambiguities.”²² For these reasons, courts have not allowed written responses to excuse the appearance of a properly prepared corporate witness.²³

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Humana, Inc.’s Petition to Quash subpoena *ad testificandum* be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Humana, Inc. shall appear to testify on the topics in the subpoena on June 26, 2017, or at such mutually agreeable later date as FTC staff and Humana may designate.

By the Commission.

Donald S. Clark
Secretary

SEAL:

ISSUED: June 15, 2017

(“Because of its nature, the deposition process provides a means to obtain more complete information [than a written response to an interrogatory] and is, therefore, favored.”).

²² *Educ. Mgmt.*, 2014 WL 1391105, at *5.

²³ *See In re Vitamins Antitrust Litig.*, 216 F.R.D. at 172 (finding that submission of prepared timeline based on interviews of former employees and review of company documents did not excuse Rule 30(b)(6) deposition).

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I also certify that I delivered via electronic mail a copy of the foregoing document to:

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Notice of Electronic Service

I hereby certify that on March 26, 2018, I filed an electronic copy of the foregoing Respondent's Response to Fourroux Prosthetics, Inc.'s Motion to Quash, with:

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I hereby certify that on March 26, 2018, I served via E-Service an electronic copy of the foregoing Respondent's Response to Fourroux Prosthetics, Inc.'s Motion to Quash, upon:

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