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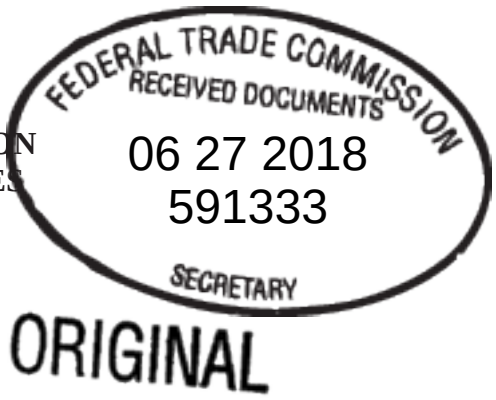

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

COMPLAINT COUNSEL'S PRETRIAL BRIEF

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INTRODUCTION

For years, Otto Bock HealthCare North America, Inc., together with its parent company, Otto Bock HealthCare GmbH (collectively, "Otto Bock"), has been the dominant supplier of microprocessor prosthetic knees ("MPKs") in the United States. On September 22, 2017, it acquired its closest competitor, FIH Group Holdings, LLC ("Freedom"), for approximately [redacted] (the "Merger"), giving the combined firm [redacted] of the market and leaving it with only one substantial competitor. As Respondent's own documents and website trumpet, and as clinical studies that it has sponsored explain, MPKs are technologically advanced prosthetic knees that provide transfemoral (or "above-the-knee") amputees with significant health, safety, and quality of life benefits over other types of prosthetic knees.[1] The microprocessor and sensors in MPKs make thousands of adjustments per second to regulate the stiffness and positioning of the joint, providing amputees the ability to walk more naturally, maneuver through obstacles and over uneven terrain, and reduce falls, in ways that mechanical knees cannot match. By eliminating close and substantial competition that has led to better pricing, higher-quality products, and rapid innovation, the Merger has harmed the amputees who benefit from using MPKs and the prosthetic clinics that serve amputees. The Merger will continue to harm customers unless this Court restores Freedom's business as an independent competitive force. Significant harm to amputees is occurring and will continue to occur until Otto Bock unwinds its unlawful acquisition of Freedom.

[1] PX08003 (Kannenberg et al., Benefits of microprocessor-controlled prosthetic knees to limited community ambulators: Systematic review, 51 JRRD 1469 (Nov. 10, 2014)) at 001; PX08007 (Otto Bock); PX08013 (Otto Bock); PX08018 (Kahle et al., Comparison of nonmicroprocessor knee mechanism versus C-Leg on Prosthesis Evaluation Questionnaire, stumbles, falls, walking tests, stair descent, and knee preference, 45 JRRD 1 (Nov. 1, 2008)) at 001.

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

Although such pre-Merger evidence is sufficient to establish that the Merger violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, *see FTC v. H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001), additional *post-Merger* documents and testimony from Respondent's executives confirm that the Merger has led and will continue to lead to anticompetitive harm. Approximately a month and a half after consummating the Merger, top executives from Otto Bock and Freedom met in November 2017 to discuss the future of Freedom's MPK products. With Freedom's MPK (the Plié 3) and Otto Bock's MPK (the C-Leg 4) under common ownership, it did not make sense to have these two products competing against each other as they had before the Merger.[4] Otto Bock management recommended that, going forward, the Plié 3 and C-Leg 4 should be [redacted][5] and the combined firm should [redacted][6] A high-ranking Otto Bock executive presented a strategy that involved [redacted]

[2] PX05173 (Argue (Respondent) Dep. 69:5-20, 91:5-13); RX-1049 (Argue Report) at ¶ 36.
[3] PX05173 (Argue (Respondent) Dep. 91:14-92:7); RX-1049 (David Argue Report) ¶ 60, Table 3.
[4] PX05148 (Swiggum (Otto Bock) Dep. 193:5-11).
[5] PX01302 (Otto Bock) at 081); PX05148 {(Swiggum (Otto Bock) Dep. 192:9-23).
[6] PX05148 (Swiggum (Otto Bock) Dep. 192:1-8).

[redacted] Respondent's executives also discussed the future of [redacted]—which, before the Merger, Freedom's Chairman described as the [redacted] to the owner of Otto Bock[9]—and concluded they could not allow [redacted] on its original path, as Freedom planned, [redacted]

None of Respondent's defenses rebut Complaint Counsel's strong *prima facie* case, much less the overwhelming additional evidence of anticompetitive effects that Complaint Counsel will present at trial. Respondent fails to demonstrate any cognizable efficiencies.[11] Nor can Respondent meet its burden of establishing a failing firm defense, particularly in light of clear evidence showing Respondent did not make good-faith efforts to elicit reasonable alternative offers, as the law requires. In fact, Freedom disregarded expressed interest from at least one prosthetics manufacturer and failed to include other interested prosthetics companies in the sales process.[12] Remaining MPK manufacturers are distant competitors that cannot constrain the merged firm, and no company is positioned to enter and timely launch a new MPK. Indeed, Respondent's own expert could not identify a single likely entrant.[13]

In the face of the enormous body of evidence showing that the Merger was anticompetitive, Respondent has manufactured a defense that it will [redacted]

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[7] PX05148 (Swiggum (Otto Bock) Dep. 193:15-194:11).
[8] PX01302 (Otto Bock) at 081.
[9] PX05109 (Carkhuff (Freedom) Dep. 50:18-51:3) [redacted]; *see also* PX01068 (Freedom) at 031.
[10] *See* PX01306 (Otto Bock) at 004 [redacted]
[11] PX05173 (Argue (Respondent) Dep. 35:19-36:3); PX05174 (Peterson (Respondent) Dep. 48:22-49:9, 162:10-22).
[12] [redacted]; PX01288 (Otto Bock) at 001-002.
[13] PX05173 (Argue (Respondent) Dep. 29:18-23).

[redacted] It is therefore not surprising that Otto Bock's CEO of North America admitted that the [redacted]

[14] PX05148 (Swiggum (Otto Bock) Dep. 148:13-149:11).

ARGUMENT

Section 7 of the Clayton Act bars mergers "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or . . . activity affecting commerce in any section of the country." 15 U.S.C. § 18 (2012). "Congress used the words '*may be* substantially to lessen competition' to indicate that its concern was with probabilities, not certainties[.]" *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). A merger violates Section 7 if it "create[s] an appreciable danger of [anticompetitive consequences] in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for." *Heinz*, 246 F.3d at 719. "Even in a consummated merger, the ultimate issue under Section 7 is whether anticompetitive effects are reasonably probable in the future, not whether such effects have occurred as of the time of trial." *In the Matter of Polypore Int'l, Inc.*, 150 F.T.C. 586, *8 (Nov. 5, 2010) (citing *United States v. General Dynamics Corp.*, 415 U.S. 486, 505-06 (1974)). Courts typically assess whether a merger violates Section 7 by determining the relevant product market, the relevant geographic market, and the merger's probable effect on competition in those relevant markets. *See United States v. Marine Bancorp.*, 418 U.S. 602, 618-23 (1974); *see also U.S. Steel Corp. v. FTC*, 426 F.2d 592, 595-96 (6th Cir. 1970).[15]

Courts analyze Section 7 cases using a burden-shifting framework consisting traditionally of three steps. *In the Matter of Polypore, Int'l, Inc.*, 149 F.T.C. 486, 800 (Mar. 1, 2010). "First, the government must establish a prima facie case that an acquisition is unlawful." *Polypore*, 149

[15] Courts often rely on the Merger Guidelines framework to assess how acquisitions may harm competition. PX08040 (U.S. Dep't of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010)) [hereinafter *Merger Guidelines*]; *see, e.g.*, *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565 (6th Cir. 2014); *FTC v. Bass Bros. Enter., Inc.*, 1984 WL 355, *24 (N.D. Ohio 1985).

F.T.C. at 800; *see also FTC v. ProMedica Health Sys., Inc.*, 2011 WL 1219281, *53 (N.D. Ohio 2011); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990); *Heinz*, 246 F.3d at 715. If the government can show "that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition." *Polypore*, 149 F.T.C. at 850 (quoting *Baker Hughes*, 908 F.2d at 982).

Respondent can then rebut the presumption "by producing evidence to cast doubt on the accuracy of the government's" evidence. *Polypore*, 149 F.T.C at 800; *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *Baker Hughes*, 908 F.2d at 982. The stronger the *prima facie* case, however, "the greater Respondent['s] burden of production on rebuttal." *In the Matter of OSF Healthcare Sys.*, 2012 FTC LEXIS 76, *46 (Apr. 4, 2012); *see also Heinz*, 246 F.3d at 725. If Respondent successfully rebuts the *prima facie* case, the burden shifts again to the government, which has the ultimate burden of persuasion. *ProMedica*, 2011 WL 1219281 at *53; *Chicago Bridge*, 534 F.3d at 423; *Baker Hughes*, 908 F.2d at 983.

Ordinary course documents from Respondent and third parties, sworn deposition testimony, market share and concentration estimates, and other empirical evidence from Complaint Counsel's economic expert, establish a strong *prima facie* case that the Merger is unlawful. In fact, Respondent's own economic expert concludes that this Merger is presumptively illegal by a wide margin.[16] Respondent is unable to rebut this presumption. The evidence will show that the Merger is likely to lead to unilateral competitive harm; entry or expansion is unlikely to be timely, likely or sufficient; and there are not cognizable efficiencies

[16] [redacted]

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

I. Respondent's Consummated Merger is Presumptively Unlawful

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

A. The Relevant Product Market is Microprocessor Prosthetic Knees

The relevant product market is the "line of commerce" affected by a proposed merger. *Brown Shoe*, 370 U.S. at 324. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. In other words, "courts look at 'whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other." *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 51 (D.D.C. 2011) (citation omitted). Determination of the relevant market "is a matter of business reality—a matter of how the market is perceived by those who strive for profit in it." *FTC v. Staples*, 970 F. Supp. 1066, 1079 (D.D.C. 1997) (internal quotation marks and citation omitted); *see also FTC v. Coca Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C. 1986). Courts frequently define relevant product markets using two analyses—the *Brown Shoe* practical indicia and the hypothetical monopolist test. *See, e.g., FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 27-34 (D.D.C. 2015).

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

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

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

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

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

i. Practical Indicia Demonstrate MPKs Are a Relevant Product Market

The "practical indicia" identified in *Brown Shoe* establish MPKs as a distinct relevant product market. 370 U.S. at 325. "When determining the relevant product market, courts often pay close attention to the defendants' ordinary course of business documents." *Sysco*, 113 F. Supp. 3d at 41 (quoting *H&R Block*, 833 F. Supp. 2d at 52). Here, Respondent's own documents unambiguously reveal that MPKs constitute a separate relevant product market. According to Respondent's website, MPKs use an "internal computer" that "monitors each phase of your walking pattern (your 'gait cycle') using a series of sensors" which "help you walk with a much more stable and efficient gait that more closely resembles a natural walking pattern."[18] These sophisticated products enable patients to "easily navigate ramps, stairs, and nearly every type of challenging surface – even walking backwards."[19]

[18] PX08013 at 001 (https://www.ottobockus.com/prosthetics/info-for-new-amputees/prosthetics-101/computer-controlled-knees/).
[19] *See* PX08012 at 003 (Otto Bock, *C-Leg above the knee prosthetic leg*, https://www. Ottobockus.com/c-leg.html (last visited June 14, 2018).

Six of the practical indicia discussed in *Brown Shoe* clearly indicate that a relevant product market of MPKs exists—substantial evidence, described later in this section, supports the presence of each of these indicia in this case. First, MPKs have "peculiar characteristics and uses" that clearly distinguish them from other types of prosthetic knees, which market participants refer to as "mechanical" or "non-microprocessor" knees.[20] The microprocessors in MPKs provide unique functionality for amputees who wear them, resulting in significant safety, health, and quality of life benefits mechanical knees cannot match, as demonstrated by a large body of clinical research. Second, MPKs are used by a distinct subset of K-3 and K-4[21] amputees who prosthetists determine are healthy enough and regularly engage in activities that make wearing an MPK a medical necessity. For this distinct class of end-user, if a prosthetic clinic can obtain insurance reimbursement for an MPK the patient will almost always receive one instead of a mechanical knee.[22] Third, manufacturers sell MPKs to clinics at prices that are much higher than mechanical knees, and insurance companies reimburse clinics at rates that are orders of magnitude higher than mechanical knees.[23] Fourth, in one-on-one negotiations

[20] There are three broad categories of mechanical knees—friction brake, pneumatic cylinder and hydraulic cylinder, which increase in sophistication and expense in that order. Different types of mechanical knees are designed to target different populations, including K1, K2, K3, and K4 amputees. Evidence indicates that there likely is not a single market for mechanical knees, but rather several separate markets for different types of mechanical knees. *See* PX01302 (Otto Bock) at 076; PX05148 (Swiggum (Otto Bock) Dep. 181:18-182:6); PX01164 (Freedom) at 016.

[21] The "K-Level" rating system classifies patients into one of five ascending mobility levels, K-0 to K-4. These levels range from patients who will not likely be able to walk (K-0) to patients likely able to engage in activities requiring high levels of impact, such as running. Specifically, a K-3 amputee is a limited community ambulator who "[h]as the ability or potential for ambulation with variable cadence. Typical of the community ambulator who has the ability to traverse most environmental barriers and may have vocational, therapeutic, or exercise activity that demands prosthetic utilization beyond simple locomotion." A K-4 amputee "[h]as the ability or potential for prosthetic ambulation that exceeds the basic ambulation skills, exhibiting high impact, stress, or energy levels, typical of the prosthetic demands of the child, active adult, or athlete." PX08003 (Otto Bock) at 002.

[22] *See e.g.*, [redacted]

[23] For the purpose of efficient claims processing, Medicare and other payers use the Healthcare Common Procedure Coding System ("HCPCS") Level II codes to classify similar products together and to assign reimbursement amounts. There are 17 HCPCS Level II code sections. Section L ("L-Codes") refers to Orthotic and Prosthetic Procedures and Devices. *See, e.g.*, HCPCS codes webpage, HCPCS Code Sections, https://hcpcs.codes/section/ (last visited June 19, 2018). Mechanical and microprocessor knees may qualify for different sets of L-Codes (though some L-Codes are used for both), such that the aggregate reimbursement amounts from Medicare are significantly

between MPK manufacturers and their clinic customers, MPK prices are sensitive to prices of other MPKs but not mechanical knees. [24] Fifth, MPKs are sold by specialized vendors that use highly trained and knowledgeable sales and clinical staff to meet regularly with clinic customers, assist prosthetists with patient fittings, and educate prosthetists on the functionality of these complex products. [25] Finally, industry participants, including Respondent, other MPK manufacturers, mechanical knee manufacturers, prosthetic clinics, and others recognize MPKs as a separate market from those in which mechanical knees are sold (i.e., in the language of *Brown Shoe*, MPKs are an economic entity that is distinct from mechanical knees).[26] Collectively, these practical indicia establish MPKs as a separate relevant product market for purposes of assessing the Merger's impact on competition.

Peculiar Characteristics and Uses. MPKs provide amputees who wear them unique functionality compared to non-microprocessor knees. As Otto Bock explains "there are two kinds of prosthetic knees: non-microprocessor (or "mechanical") and microprocessor," with MPKs providing a "more sophisticated method of control to a prosthetic knee."[27]

A large body of clinical research demonstrates that amputees who wear MPKs experience significant safety, health, and quality of life benefits over those who wear mechanical knees. Recent peer-reviewed articles show that, relative to amputees who wear mechanical knees, MPK wearers:

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different. *See, e.g.*, PX05150 (Kannenberg (Otto Bock) 77:14-24); [redacted]

[24] *See,* [redacted]

[25] *See, e.g.*, PX05148 (Swiggum (Otto Bock) Dep. 142:20-143:20); PX01169 (Freedom) at 001-003.

[26] *See, e.g.*, PX01022 (Freedom) at 006 [redacted] PX00871 (Otto Bock) at 006-007 (showing distinct market shares for mechanical and MPK knee markets); PX00829 (Otto Bock) (tracking sales separately for MPKs, mechanical knees, and micro-processor feet); [redacted];

[27] PX08013 (Otto Bock) at 001.

- experience fewer falls,[28]
- have increased ability to walk on difficult terrain,[29]
- engage in more physical activity,[30]
- improve their gait mechanics,[31]
- have greater satisfaction in their prosthetic knee,[32] and
- experience overall improvement in quality of life.[33]

Prosthetists consider these clinical studies when deciding whether to fit a patient with an MPK or a mechanical knee, [34] and in practice, prosthetists testify that they observe the clinical benefits of MPKs in the patients they fit with them. [35]

In its ordinary course documents, Respondent recognizes that MPKs provide important clinical benefits for patients that mechanical knees do not offer.[36] For example, in a document

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[28] PX08004 at 007 (Liu et al., *Economic Value of Advanced Transfemoral Prosthetics*, RAND Corporation (2017)) ("We found that compared with NMPKs, MPKs are associated with substantial improvement in physical function and reductions in incidences of falls and osteoarthritis.").

[29] PX08059 at 001(Hafner and Smith, D*ifferences in Function and Safety Between Medicare Functional Classification Level-2 and -3 Transfemoral Amputees and Influence of Prosthetic Knee Joint Control*, 46 J. of Rehab. R&D 417) (2009)) ("Active knee control [*i.e.,* microprocessor knee] was associated with significant improvements ($p < 0.05$) in hill and stair gait, speed (hills, obstacle course, and attentional demand task), and ability to multitask while walking for both cohorts.").

[30] PX08011 at 001 (Kaufman et al., *Energy Expenditure and Activity of Transfemoral Amputees Using Mechanical and Microprocessor-Controlled Prosthetic Knees*, 89 Arch Phys Med Rehabil. 1380 (July 2008)) ("People ambulating with a microprocessor-controlled knee significantly increased their physical activity during daily life, outside the laboratory setting, and expressed an increased quality of life.").

[31] PX08010 at 001 (Kaufman et al., *Gait and Balance of Transfemoral Amputees Using Passive Mechanical and Microprocessor-Controlled Prosthetic Knees*, 26 Gait & Posture 489 (2007)) ("Transfemoral amputees using a microprocessor-controlled knee have significant improvements in gait and balance.").

[32] PX08018 at 001 (Kahle et al., *Comparison of Nonmicroprocessor Knee Mechanism versus C-Leg on Prosthesis Evaluation Questionnaire, Stumbles, Falls, Walking Tests, Stair Descent, and Knee Preference*, 45 J. of Rehab. R&D 1 (2008)) ("C-Leg improved function in all outcomes: (1) Prosthesis Evaluation Questionnaire scores increased 20%, . . . (9) the C-Leg was preferred over the NMKM by 14 subjects [out of 19].").

[33] PX08011 at 001 (Kaufman et al., *Energy Expenditure and Activity of Transfemoral Amputees Using Mechanical and Microprocessor-Controlled Prosthetic Knees*, 89 Arch Phys Med Rehabil. 1380 (July 2008)) ("People ambulating with a microprocessor-controlled knee significantly increased their physical activity during daily life, outside the laboratory setting, and expressed an increased quality of life.").

[34] [redacted]; PX05173 (Argue (Respondent) Dep. 145:16-25). Prosthetists also rely on the same studies in seeking insurance reimbursement for MPKs. *See, e.g.*, PX05150 (Kannenberg (Otto Bock) Dep. 94:21-95:1).

[35] *See, e.g.*, [redacted]

titled [redacted] Otto Bock's Executive Medical Director for North America, Dr. Andreas Kannenberg, described a number of [redacted] of MPKs over [redacted] Among others, he highlighted that MPKs provide [redacted] [37] Otto Bock's MPK marketing materials also regularly highlights the clinical benefits of MPKs over mechanical knees.[38] For example, Otto Bock in its materials notes that the C-Leg is associated with [redacted] [39]

Similarly, in its marketing materials Freedom identified eleven distinct benefits of the Plié 3 over non-microprocessor controlled prosthetic knee systems, including [redacted] Other MPK manufacturers also highlight the benefits of MPKs over mechanical knees. [redacted]

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[36] *See e.g.*, PX01484 (Otto Bock); PX01619 (Otto Bock); PX01194 (Freedom); PX08009 (Freedom); PX01164 (Freedom) at 024 [redacted]
[37] PX01868 (Otto Bock) at 001, 005 (summarizing results from various clinical studies).
[38] *See, e.g.*, PX1741 (Otto Bock) at -001-02 (Otto Bock marketing material summarizing clinical findings showing the benefits of MPKs over mechanical knees); PX08013 (Otto Bock) at 003 (Otto Bock website: "Compared with mechanical knees, you'll find that computerized knees may be more expensive, but they take less energy to operate, which can be a huge benefit. High stability/fewer falls can also be demonstrated as an important contributor to maintaining good health.").
[39] PX08007 (Otto Bock) at 001 ("Safety, Energy Efficiency, and Cost Efficacy of the C-Leg for Transfemoral Amputees").
[40] PX01195 (Freedom) at 003-004.

[redacted]

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

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

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

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

[42] [redacted]

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

[44] *See, e.g.*, PX01489 (Otto Bock) at 034 [redacted]; PX01543 (Otto Bock) at 002 (providing a summary of patient needs or deficits that can be used to justify the medical necessity of the C-Leg.); PX05150 (Kannenberg

Prosthetists also evaluate whether patients frequently stumble or fall using their current prosthetic knee or avoid activities due to safety concerns, lack of balance, or lack of confidence.[45] When a prosthetist determines that an MPK can improve the safety, health, or quality of life of an amputee, the clinic will seek reimbursement from an insurance provider to ensure the amputee receives the knee he or she needs from a medical perspective.[46]

Insurance providers such as Medicare and private payers like [redacted] typically only reimburse for MPKs when the individualized patient assessment, conducted by a qualified medical provider, indicates that an MPK is medically necessary for a K3 or K4 amputee.[47] As Otto Bock's Executive Medical Director of North America explained, clinics [redacted] [48] Because MPKs are expensive relative to mechanical knees, payers often require prior authorization or provide pre-determination of coverage based on a medical provider's written clinical assessment for the patient.[49] To meet insurance requirements, clinics have internal procedures to ensure that their prosthetists fit MPKs only on amputees that meet coverage eligibility criteria.[50] Thus, not every K3 or K4 amputee receives an MPK. Once an individual is deemed to medically need an MPK and the clinic believes the patient's insurance will reimburse for the MPK, however,

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(Otto Bock) Dep. 83:21-84:17); [redacted]

[45] *See, e.g.*, [redacted] PX05173 (Argue (Respondent) Dep. 135:15-136:19).

[46] [redacted]

[47] PX05109 (Carkhuff (Freedom) Dep. 49:9-13) (testifying that prosthetists must show medical necessity to receive reimbursement for an MPK); [redacted]

[48] PX05150 (Kannenberg (Otto Bock) Dep. 83:21-84:17).

[49] *See* [redacted]

[50] *See e.g.*, [redacted]

mechanical knees are no longer a substitute because they do not provide the tremendous health, safety, and quality of life benefits of MPKs.

Distinct Prices. MPKs are significantly more expensive than mechanical knees, indicating MPKs constitute a separate market. *See FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 119-120 (D.D.C. 2016) (discussing distinct pricing and negotiating practices as evidence of relevant product market); *Aetna*, 240 F. Supp. 3d 1, 21 (D.D.C. 2017), ("distinct prices" may be considered in assessing the boundaries of a market) (citing *Brown Shoe*, 370 U.S. at 325). For example, the average sales price of MPKs in 2017 was approximately [redacted], while the average sales price of mechanical knees was only approximately [redacted].[51]

Similarly, reimbursement rates paid to clinics by insurance providers are much higher for MPKs than for mechanical knees.[52] For example, the typical reimbursement rate for an MPK in 2017 was [redacted], while the average reimbursement rate for a mechanical knee was only approximately between [redacted].[53]

Sensitivity to Price Changes. Otto Bock and Freedom, as well as other MPK suppliers, "make pricing and marketing decisions based primarily on comparisons with rival [MPKs], with little if any concern about possible competition" from mechanical knees. *Coca Cola Co.*, 641 F. Supp. at 1133. Prosthetic clinics purchase MPKs from manufacturers that negotiate one-on-one

[51] PX06001 (Scott Morton Report) at ¶¶ 50-51; *see also* PX05173 (Argue (Respondent) Dep.134:12-19); RX-1049 (Argue Report) at ¶¶ 25, 44 [redacted]

[52] *See, e.g.*, PX05150 (Kannenberg (Otto Bock) 77:14-24); PX05173 (Argue (Respondent)) Dep. 134:2-135:9). Reimbursement for prosthetic knees is based on the L-codes for the particular device. The set of L-Codes commonly used for the C-Leg 4, Orion, Rheo 3, and Plié are L5856, L5828, L5845, and L5848. *See, e.g.*, PX01062 (Otto Bock) at 004. Mechanical knees do not qualify for all the same L-codes as MPKs and thus are reimbursed at much lower rates than MPKs. PX06001 (Scott Morton Report) at ¶¶ 41-44.

[53] PX06001 (Scott Morton Report) at ¶ 44; *see also* RX-1049 (Argue Report) at ¶¶18-19 [redacted]

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

[54] PX05007 (Carkhuff (Freedom) IH 101:9-13); PX01890 (Otto Bock) at 001-002 [redacted]

[55] *See* PX05008 (Carkhuff (Freedom) IH 60:13-20); [redacted]

[56] [redacted]

[57] For example, when Otto Bock's Market Manager for Microprocessor Knees solicited [redacted] from the sales organization, her request was limited to competitor MPKs. PX01257 (Otto Bock) at 001-002. In addition, when Otto Bock conducts [redacted] for its [redacted] Otto Bock compares the [redacted] and prices of its MPK products only with other manufacturers' MPKs. PX01002 (Otto Bock) at 006. Freedom also developed its pricing and promotion strategies to target only competing MPKs. *See* PX05112 (Ammouri (Freedom) Dep. 54:2-55:5, 102:15-103:3) [redacted]

[58] [redacted] ; *see also* [redacted]

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

Specialized Vendors. Manufacturers sell MPKs using highly specialized sales forces that assist prosthetists with fittings, possess deep knowledge about the products they sell, and provide a variety of educational and other services that clinics find valuable. To sell MPKs successfully, manufacturers provide extensive training to sales personnel and employ certified prosthetists to assist in the sales process.[60] MPK sales representatives visit clinics regularly: Otto Bock's CEO of North America estimated that its sales representatives visited the clinics of its largest customer more than [redacted] times each year.[61] As Otto Bock's EVP of Global Sales explained, a direct sales force is critical because [redacted] Clinic customers also require other specialized non-sales services from MPK vendors such as assistance with reimbursement[63] and technical support to assist with troubleshooting of MPKs, which customers describe as [redacted] MPK vendors also must have sufficient resources to provide repairs of MPKs[65] and offer loaners to patients.[66] This is in stark contrast to other

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

[60] *See* PX05118 (Testerman (Freedom) Dep. 42:20-25) [redacted]; PX05148 (Swiggum (Otto Bock) Dep. 142:20-143:20).

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

[62] PX05163 (Stuch (Otto Bock) Dep. 45:23-48:10); *see also* PX05148 (Swiggum (Otto Bock) Dep. 38:7-39:23) [redacted]

[63] PX05148 (Swiggum (Otto Bock) Dep. 34:9-36:2); [redacted]

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

[65] [redacted]

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

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

[redacted];

[66] PX05007 (Carkhuff (Freedom) IH Tr. 132:21-134:5) [redacted]

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

[68] *See, e.g.*, PX01002 (Otto Bock) at 005 [redacted]; PX01057 at 024 [redacted]; PX01463 (Otto Bock) at 022 [redacted]; *see also* PX05148 (Swiggum (Otto Bock) Dep. 40:10-41:12); *id.* 43:21-44: [redacted]

[69] PX01155 (Freedom) at 091; PX05109 (Carkhuff (Freedom) Dep. 195:23-196:1) [redacted]

[redacted]

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

[redacted][70]

[70] PX01302 (Otto Bock) at 076 [redacted].

Otto Bock's CEO of North America, Matthew Swiggum, testified that Freedom's Plié is shown

because those are all separate markets for mechanical knees in which Freedom's Plié does not compete.[71] As these documents and related testimony show, Otto Bock and Freedom do not view mechanical knees as significant competitors to their MPK products.

[71] PX05148 (Swiggum (Otto Bock) Dep. 189:4-191:6; 183:21-189:3) Unlike Freedom, which only sold MPKs, Otto Bock manufactures and sells a variety of different mechanical knees that compete in each of these mechanical knee markets and therefore has market share in each of them. *See* PX01302 (Otto Bock) at 076 (Otto Bock Freedom Innovation Portfolio Workshop, November 2017); PX05148 (Swiggum (Otto Bock) Dep. 189:4-191:6; 183:21-189:3).

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

MPK manufacturers that also sell, or have evaluated selling, mechanical knees confirm that these two types of products are not substitutes for each other. [redacted] Firms that produce mechanical knees, but not MPKs, confirm that their products do not compete against MPKs.[78] Clinics also testify that MPKs and mechanical knees are in separate markets.[79]

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[72] [redacted]

[73] [redacted]

[74] [redacted]

[75] [redacted]

[76] PX05118 (Testerman (Freedom) Dep. 87:21-88:6) [redacted]

[77] [redacted]

[78] *See, e.g.*, [redacted]

[79] *See* [redacted]

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

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

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

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

[81] *See* [redacted]

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

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

B. The Relevant Geographic Market is the United States

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

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

[83] *See* [redacted]

[84] [redacted]

[85] The clinic receives a higher reimbursement if an MPK is used than it would receive if the patient receives a mechanical knee, but the clinic receives the same fee if, say, a Freedom MPK is used or an Otto Bock MPK is used, regardless of the price that the clinic pays for the knee. The patient may pay a co-payment that is a percentage of the flat fee amount the insurance company pays the clinic. This fee structure ensures that clinics do not have a financial disincentive to use the product best suited for the patient. Indeed, the contribution margins—the difference between the price of the component and the reimbursement—is considerably higher for MPKs, and would remain so even if MPKs increased by a SSNIP. *See* PX06001 (Scott Morton Report) at ¶¶ 46-53.

[86] *See* [redacted]

[87] *See* PX05173 (Argue (Respondent) Dep. 91:14-92:7); RX-1049 (Argue Report) at ¶ 60, Table 3.

geographic market, explaining,

i. Commercial Realities Show the United States is a Relevant Geographic Market

The Supreme Court explained that the relevant geographic market must "correspond to the commercial realities of the industry," as determined through a "pragmatic, factual approach." *Brown Shoe*, 370 U.S. at 336 (internal quotations omitted). Here, the commercial realities of the MPK business, as reflected in documents and testimony of Respondent, customers, and competitors, shows that the United States is a distinct geographic market.

First, as Otto Bock's Senior Prosthetics Marketing Manager explained, Otto Bock considers the U.S. market to have characteristics that are Internal Otto Bock and Freedom documents consistently assess their MPK businesses in [90] Similarly, board presentations, strategic planning documents and routine business discussions, segregate decisions for the United States from the rest of the world.[91] For example, although Otto Bock and Freedom sell their MPKs outside of the United States, they both use distinct U.S.-specific pricing for their MPKs, based upon U.S. pricing of their competitors.[92] Freedom and Otto Bock also develop strategic

[88] PX05173 (Argue (Respondent) Dep. 91:5-13); *see also id.* 69:5-20 RX-1049 (Argue Report) at ¶ 36

[89] PX05123 (Solorio (Otto Bock) Dep. 94:16-95:19). For example, MPKs are Class I medical devices that require FDA approval to be sold in the United States. ; *see also* PX05112 (Ammouri (Freedom) Dep. 121:16-22).

[90] *See e.g.*, PX01022 (Freedom) at 007-015 ; PX01061 (Otto Bock) at 023, 048-057

[91] *See e.g.*, PX01072 (Freedom) at 017, 019 ; PX00870 (Otto Bock) at 002-003 .

[92] PX01710 (Otto Bock) at 005-008 .

marketing plans specific to the United States.[93]

MPK firms that only operate outside of the United States are not viable options for U.S. prosthetic clinics. Customers place a premium on their MPK suppliers' sales, technical assistance, and clinical support capabilities. Clinics and prosthetists rely on their MPK manufacturers' sales and clinical employees to fit, program, and maintain their patients' MPKs, and consider it essential that an MPK supplier be able to provide those services on site in clinics.[96] To meet those needs, each of the three largest MPK manufacturers, Otto Bock, Freedom, and Össur, has an extensive and highly trained sales force and clinical staff that frequently visit clinics to promote their MPKs and assist clinicians.[97] According to Freedom's Chairman and former CEO, Maynard Carkhuff, field sales personnel are critical to maintaining MPK sales, because In contrast, a foreign

[93] *See, e.g.*, PX01022 (Freedom) at 031; PX00867 (Otto Bock) at 002, 006, 018-023 (Marketing and Sales plan for North America).

[94]

[95] *See* PX05123 (Solorio (Otto Bock) Dep. 94:16-95:19)

[96] PX05118 (Testerman (Otto Bock) Dep. at 51:7-53:7).

[97] *See* PX05148 (Swiggum (Otto Bock) Dep. 58:11-59:21) PX05109 (Carkhuff (Freedom) Dep. 130:7-131:2) PX05163 (Stuch (Otto Bock) Dep. 45:23-47:1) *see also*

[98] PX05109 (Carkhuff (Freedom) Dep. 130:7-131:2).

MPK manufacturer, with little or no sales force presence in the United States, could not meet the needs of U.S. clinic customers.[99]

ii. The Hypothetical Monopolist Test Confirms the Relevant Geographic Market is the United States

A common tool used to assess the commercial reality of a relevant geographic market is the hypothetical monopolist test. *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016). "Under the Horizontal Merger Guidelines, a relevant geographic market is the smallest region in which a hypothetical monopolist that was the only seller of the relevant product located within that region could profitably implement a 'small but significant non transitory' increase in price." *Polypore*, 150 F.T.C. at *16 (citing *Merger Guidelines* § 4.2). Clinics in the United States indicate that they could not, and would not, turn to firms without a substantial U.S. presence for MPKs in the face of a price increase.[100] Because a hypothetical monopolist of MPKs currently sold in the United States could profitably raise prices to U.S. customers (without losing substantial sales to firms with no significant U.S. presence), the United States is a relevant geographic market. As such, Professor Scott Morton concludes, "the options of clinics in the United States are limited to the microprocessor knee manufacturers that currently have a presence in the United States."[101] Respondent's expert agrees, having testified that, [redacted]

[99] *See* [redacted]

[100] [redacted]

[101] PX06001 (Scott Morton Report) at ¶ 90.

[102] PX05173 (Argue (Respondent)) Dep. 69:5-20). *See also* RX-1049 (Argue Report) at ¶ 36 [redacted]

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

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

Otto Bock is the dominant supplier of MPKs in the United States. At the time of the Merger, Otto Bock's market share, by revenue, exceeded [redacted] and Freedom had an approximate [redacted] giving the combined firm more than an [redacted] of the U.S. MPK market.[105] Moreover, Freedom's market share underestimates its competitive significance as an independent competitor because [redacted]

[103] The Herfindahl-Hirschman Index (the "HHI") is the typical measure for determining market concentration. *ProMedica*, 2012 WL 1155392, at *12 (citing *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009)); *see also Polypore*, 150 F.T.C. at *23 (citing *Heinz*, 246 F.3d at 716). HHI is the sum of the squares of the market shares. In other words, in a market with four competitors, each of whom has 25% market share, the HHI would be 2500 ($25^2 + 25^2 + 25^2 + 25^2$).

[104] PX06001 (Scott Morton Report) at ¶ 112, Table 6.

[105] *Id.* (market shares and concentration levels based on revenue). Dr. Scott Morton calculated market shares based on both revenue and units sold. *See id.* at ¶ 112, Table 7.

[redacted]

[redacted] Because MPKs and other prosthetic knee products are differentiated products with a variety of features and price points, revenue-based shares, as opposed to unit-based shares, are the most appropriate metric for calculating market shares and evaluating the competitive significance of firms.[107] As the table below shows, post-Merger, Respondent is now more than

[redacted]

[redacted]

[redacted]

The market shares calculated by Complaint Counsel's economic expert are highly consistent with shares that Respondent regularly estimated in its ordinary course of business.

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[106] *See* PX01318 (Freedom) at -060 [redacted]

[107] [redacted] *See* RX-1049 (Argue Report) at ¶ 60. Calculating market shares based on revenue rather than units is usually more appropriate for differentiated products rather than homogenous products, *see* PX06003 (Scott Morton Rebuttal Report) at ¶ 37 (citing Gregory J. Werden, "Assigning Market Shares," 70 Antitrust Law Journal 1 (2002) (discussing various principles of assigning market shares)), and Dr. Scott Morton and Dr. Argue agree that MPKs are differentiated. *See* PX06003 (Scott Morton Rebuttal Report) at ¶¶ 5, 38; [redacted] Ultimately, however, it does not matter whether revenue or units are used because the HHI and increase in HHI using units also results in a highly concentrated market. *See* PX06001 (Scott Morton Report) at ¶ 112, Table 7 (HHIs calculated using units); [redacted]

For example, a memo prepared by top Otto Bock executives in July 2017 for Otto Bock's owner, Hans Georg Näder, estimated Otto Bock's and Freedom's shares of MPK sales in the United States to be [redacted] After consummating the Merger, Dr. Helmut Pfuhl, Otto Bock's Global Executive Vice President for Prosthetics, estimated the combined firm had a [redacted] in the United States.[109] These shares are also consistent with the perception of other market participants, such as [redacted]

Finally, Respondent's economic expert concedes that the Merger triggers the presumption of anticompetitive harm.[111] Respondent's economic expert, Dr. Argue, contends the Merger results in a post-merger HHI of [redacted] and an increase in HHI of [redacted] in a market he defines as "MPK/K3/K4 Prosthetic Knees."[112] Although Dr. Argue incorrectly includes sales of mechanical knees in his market definition, and improperly calculates market shares based on units sold (rather than revenue),[113] he still agrees that this Merger is presumptively illegal by a wide margin.

[108] PX01623 (Otto Bock) at 010.
[109] *See* PX01302 (Otto Bock) at 074, 076.
[110] [redacted]
[111] PX05173 (Argue (Respondent) 91:14-92:7) [redacted] RX-1049 (Argue Report) at 37, Table 3.
[112] RX-1049 (David Argue Report) at 37, Table 3.
[113] *See supra* n. 107.

II. Strong Evidence of Unilateral Effects Buttresses the Presumption of Competitive Harm from the Merger

Documents, data, and testimony from Respondent, customers, and competitors demonstrate that in the years prior to the Merger, Otto Bock and Freedom vigorously competed for sales of MPKs, resulting in lower prices and better products and services for clinics and amputees. Mergers that eliminate significant head-to-head competition are likely to result in anticompetitive unilateral effects.[114] *See*, *e.g.*, *ProMedica*, 749 F.3d 559, at 569 ("The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral effects."); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000) ("[A] unilateral price increase . . . is likely after the acquisition because it will eliminate one of Swedish Match's primary direct competitors."); *Staples*, 970 F. Supp. at 1083 (finding unilateral anticompetitive effects when the transaction "would eliminate significant head-to-head competition" between the merging parties).

Concerns about unilateral anticompetitive effects resulting from the Merger are not merely theoretical. Over the course of two days in November 2017, the top executives from Otto Bock and Freedom gathered in Irvine, California to discuss the integration of Freedom's MPKs into Otto Bock. They planned to either raise prices for, or discontinue the availability of, the Plié 3 in the United States and re-position Freedom's [redacted] to no longer compete head-to-head with Otto Bock's C-Leg business. Absent this litigation, Otto Bock's anticompetitive plans would have already raised costs for prosthetic clinics and removed or limited valuable MPK choices for amputees. Even with this litigation, Plié 3/C-Leg 4-competition has lessened and

[114] Even though they are here, merging parties need not be each other's *closest* competitors for a merger to result in significant unilateral anticompetitive effects. *H&R Block*, 833 F. Supp. 2d at 83-84 (finding unilateral effects where the merging firms were "each other's *second* closest rivals" and the closest competitor to both firms remained independent) (emphasis added); *see also ProMedica*, 749 F.3d at 569 ("For a merger to raise concerns about unilateral effects, however, not every consumer in the relevant market must regard the products of the merging firms as her top two choices.").

Freedom's innovation has stagnated, [redacted]

[redacted]

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

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

i. Freedom's 2014 Launch of Plié 3

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

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

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

The launch of Freedom's Plié 3 along with its aggressive marketing and pricing strategy had a direct and significant impact on Otto Bock's MPK sales.[122] Otto Bock executives observed that Freedom had made [redacted][123] and its improvements to the Plié allowed it to [redacted][124]

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

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

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

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

[122] PX01023 (Freedom) at 003; PX05010 (Schneider (Otto Bock) IH 121:13-22) [redacted]

[123] PX01506 (Otto Bock) at 002 ([redacted]); *see also* PX05162 (Ruhl (Otto Bock) Dep. 92:9-93:9) [redacted]

[124] *See* PX05162 (Ruhl (Otto Bock) Dep. 92:9-93:9) [redacted]

[125] PX01506 (Otto Bock) at 001.

[126] PX05150 (Kannenberg (Otto Bock) Dep. 127:9-15).

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

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

[127] [redacted]

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

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

[130] [redacted]

[131] *See* [redacted]

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

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

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

[132] PX08077 (Otto Bock) at 001 (Press release announcing the C-Leg 4 launch in North America).
[133] PX01518 (Otto Bock) at 002; PX05162 (Ruhl (Otto Bock) Dep. 51:12-52:6).
[134] PX01518 (Otto Bock) at 027; *see also* PX05162 (Ruhl (Otto Bock) Dep. 41:17-42:16).
[135] PX01518 (Otto Bock) at 024.
[136] PX01518 (Otto Bock) at 003.
[137] PX01518 (Otto Bock) at 009, 050.
[138] PX01057 (Otto Bock) at 023.

three knee products—Freedom's Plié 3, [redacted]—and settled on an initial price of approximately [redacted].[139] Otto Bock also developed a [redacted] explicitly comparing the C-Leg 4's features to the Plié 3, [redacted][140]

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

[redacted][147]

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[139] PX01524(Otto Bock) at 004, 007.
[140] PX01526 (Otto Bock) at 002.
[141] *See e.g.*, PX01162 (Freedom) at 018 [redacted]
[142] PX01158 (Freedom) at 001.
[143] PX01654 (Freedom) at 006; see also PX01162 (Freedom) at 018 [redacted]
[144] PX01655 (Freedom) at 006.
[145] PX01658 (Freedom) at 006.
[146] [redacted]; *see also* [redacted].
[147] PX03008 at 005.

In the spring of 2016, Maynard Carkhuff, Freedom's founder, former CEO, and current Chairman, provided the board of directors with a [redacted]. He noted that Freedom [redacted][148] The impact of the C-Leg 4 on Plié sales was even observable at the customer-level. For example, one member of Freedom's Board of Directors noted that [redacted][149]

Recognizing that the C-Leg 4 could have a [redacted][150] on its Plié sales, Freedom responded with new sales and marketing tactics and promotions that successfully pushed back on Otto Bock's [redacted][151] Freedom's message to its sales team was [redacted][152] Freedom equipped its sales team with new materials specifically highlighting the advantages of the Plié 3 over C-Leg 4, positioning its own MPK as [redacted][153] Taking direct aim at the assertions Otto Bock was making about the C-Leg 4, Freedom also developed a Plié 3 fact sheet addressing [redacted][154] Finally, Freedom reduced the price of the Plié 3[155] and [redacted]

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[148] [redacted]
[149] [redacted]
[150] PX01069 (Freedom) at 002; *see also* PX05114 (Ferris (Freedom) Dep. 174:16-20) [redacted]
[151] [redacted] *see also* PX01087 (Freedom) at 003 [redacted]
[152] PX01213 (Freedom) at 003.
[153] PX01213 (Freedom) at 003.
[154] PX08008 (Freedom).
[155] PX05114 Ferris (Freedom) Dep. 175:22-176:6; PX05123 (Solorio (Otto Bock) Dep. 72:21-74-16).

[redacted] which offered clinics a discounted or free foot with the purchase of a Plié 3.[157]

The [redacted] enabled Freedom to leverage its leading prosthetic foot portfolio to drive sales of its high-margin Plié 3 and has become a hallmark of Freedom's MPK promotional strategy.[158] Indeed, some version of this promotion has continued uninterrupted since its introduction by Freedom in late 2015.[159] Clinics benefited from this promotion because it provided them with a free or discounted product for which it could seek reimbursement.[160] These benefits, in turn, often flowed to the patients that use the MPKs because clinics could invest the additional margin provided by the free or heavily discounted foot to improve their facilities or fund various patient support services for which payers do not reimburse.[161]

Otto Bock documents reveal that it believed the [redacted][162] and Otto Bock began observing reduced pricing and an increase in promotions from competitors in response [redacted][163] In the words of Otto Bock's own Vice President of Government Medical Reimbursement and Future Development, Freedom responded to competition from the C-Leg 4 by offering [redacted][164] According to Otto Bock's U.S. Market Manager, Cali Solorio, compared to the other MPK manufacturers, [redacted]

[156] PX01158 (Freedom) at 001.
[157] *See* PX5109 (Carkhuff (Freedom) Dep. 126:6-13); PX01002 (Otto Bock) at 006.
[158] *See* PX5109 (Carkhuff (Freedom) Dep. 119:3-17); PX05123 (Solorio (Otto Bock) Dep. 86:10-20); *see also, e.g.*, PX01151 (Freedom) at 001, 005; PX01181 (Freedom) at 001.
[159] PX01256 (Otto Bock) at 001.
[160] PX05123 (Solorio (Otto Bock) Dep. 43:16-24).
[161] [redacted]
[162] PX01272 (Otto Bock) at 001.
[163] *Id.*; PX05010 (Schneider (Otto Bock) IH 124:8-12).
[164] Schneider (Otto Bock) IH 123:6-12. *See also* PX01272 (Otto Bock); PX05123 (Solorio (Otto Bock) Dep. 111:5-18).

[redacted][165]

Feeling the pressure of Freedom's aggressive promotions, Otto Bock's marketing group provided the sales team with guidance on [redacted][166] Otto Bock also ran various sales promotions, including a [redacted] discount on the C-Leg 4 for new MPK customers.[167] But, as Ms. Solorio admitted in her deposition, [redacted][168]

Freedom's aggressive pricing and innovative promotions seemingly paid off. By late 2016, [redacted][169] [redacted][170]

Clinic customers corroborate Respondent's documents and testimony, testifying that they have received tangible price, service, and innovation benefits from the sustained, head-to-head competition between Otto Bock and Freedom:

- [redacted] testified that his clinics benefited from competition between Otto Bock and Freedom with the companies [redacted]

[165] PX05123 (Solorio (Otto Bock) Dep. 116:4-15).
[166] PX01272 (Otto Bock) at 001.
[167] PX01519 (Otto Bock) at 001.
[168] PX05123 (Solorio (Otto Bock) Dep. 116:4-17); PX01278 (Otto Bock) at 001.
[169] PX05137 (Mathews (Freedom) Dep. 196:1-11).
[170] *Id.*; *see also, e.g.*, PX01644 (Freedom) at 005 [redacted]; PX01842 (Freedom) at 002 [redacted]
[171] [redacted]
[172] [redacted] *See,*

- [redacted]
- [redacted] testified that his clinic has benefited from competition [redacted]
- [redacted] testified that his clinics have benefited from Otto Bock and Freedom competition through [redacted]
- [redacted] A Freedom sales representative requested approval to discount the Plié and other prosthetics to [redacted] Freedom ultimately responded with a proposal to provide [redacted]

iii. Freedom's Planned [redacted]

[redacted]

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e.g., PX01334 (Otto Bock) at 002-003 [redacted] PX00862 (Freedom) at 004; PX01260 (Otto Bock) at 001-002.

[173] [redacted]

[174] [redacted]

[175] [redacted]

[176] [redacted]

[177] PX00862 (Freedom) at 004.

[178] *Id.* at 003.

[179] PX01068 (Freedom) at 031 [redacted]

[180] PX0511 (Prince (Freedom) Dep. at 88:15-23) [redacted] PX05162 (Ruhl (Otto Bock) Dep. 37:17-23).

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

By the time of the Merger, [redacted]

[181] PX05111 (Prince (Freedom) Dep. at 108:12-19).
[182] *See*, *e.g.*,PX01024 (Freedom) at 004 [redacted]
[183] PX01024 (Freedom) at 004 [redacted]
[184] PX01024 (Freedom) at 004 [redacted]
[185] PX05006 (Robertson (Freedom) IH 67:10-68:1).
[186] PX01223 (Freedom) at 030.
[187]
[188] [redacted]

[redacted] Freedom targeted a [redacted]

At the same time, Otto Bock was in the process of [redacted]

B. A Core Otto Bock Rationale for the Merger was Eliminating a Competitor

"Documents created by the merging parties in the ordinary course of business are often highly probative of both industry conditions and the likely competitive effects of a merger." *Polypore*, 150 F.T.C. at *9 (citing *Merger Guidelines* § 2.2.1). In this case, Otto Bock's internal due diligence analyses reveal [redacted]

When top Freedom executives met with high-ranking Otto Bock executives in the months leading up to the Merger, they discussed a number of issues related to Freedom's current

[189] [redacted]
[190] [redacted]
[191] PX05114 (Ferris (Freedom) Dep. at 96:23-97:6).
[192] *See* PX05148 (Swiggum (Otto Bock) Dep. 199:24-200:4) [redacted] *see also* PX07049 (Respondent's Amended Answer) at ¶ 54 ([redacted]); PX01762 (Otto Bock) at 053 [redacted]
[193] PX01762 (Otto Bock) at 068
[194] PX01762 (Otto Bock) at 068 [redacted]

business, including [redacted] [195] In October 2016, Otto Bock's owner, Hans Georg Näder, met with Freedom's CEO at the time, David Smith, and its Chairman, Mr. Carkhuff, in New York City to discuss a possible merger.[196] At that meeting, Mr. Carkhuff represented to Mr. Näder that Freedom engineers had been working on [redacted] [197]

Subsequently, in March 2017, Mr. Smith and Mr. Näder met again. Freedom documents prepared to guide discussions at this meeting state that the Freedom board was [redacted] Talking points that Mr. Smith developed for a subsequent meeting with Mr. Näder in July 2017 included the comment that the [redacted] [200]

Otto Bock's reaction to learning more details about [redacted] through its due diligence efforts reveals the significant competitive threat Freedom's [redacted] Otto Bock executives recognized that [redacted]

[195] [redacted].
[196] PX05109 (Carkhuff (Freedom) Dep. 36:23-37:23).
[197] PX01068 (Freedom) at 031; PX05109 (Carkhuff (Freedom) Dep. 50:18-51:13). Consistent with the intense innovation competition in the U.S. MPK market, Mr. Näder's response to Mr. Carkhuff was: [redacted] (Carkhuff (Freedom) Dep. 50:18-51:3).
[198] [redacted]
[199] [redacted]
[200] [redacted]

[redacted][201] Indeed, based on Freedom's prior pricing behavior, Otto Bock expected Freedom to price [redacted][202] Otto Bock executives determined it would have to put [redacted]

An acquisition of Freedom presented Otto Bock with the opportunity to eliminate a competitive threat and [redacted][204] Rather than compete with its own product improvements, Otto Bock decided it would be better to [redacted][205] In discussing the [redacted] for the acquisition, Otto Bock explicitly described the transaction as a [redacted] Otto Bock executives specifically discussed the value of preventing [redacted][207] which could have posed a significant threat to Otto Bock's MPK business.[208]

Otto Bock's due diligence efforts also analyzed the benefit of acquiring C-Leg's close rival, the Plié 3. For example, Otto Bock North America's CEO, Matthew Swiggum, emailed his VP of sales in August 2017 and indicated that Otto Bock could consider [redacted]

[201] PX01004 (Otto Bock) at 064-065; *see also* PX01302 (Otto Bock) at 082; PX05157 (Pfuhl (Otto Bock) Dep. 172:11-17) [redacted]
[202] PX05157 (Pfuhl (Otto Bock) Dep. 119:16-120:7).
[203] PX01070 (Otto Bock) at 004.
[204] *See* PX01004 (Otto Bock) at 064.
[205] *See* PX01004 (Otto Bock) at 064.
[206] PX01473 (Otto Bock) at 004 [redacted].
[207] PX05148 (Swiggum (Otto Bock) Dep. 96:15-24).
[208] *Id*. at 86:17-88:10.

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

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

Unilateral effects analysis typically requires a forward-looking assessment based on analysis of the extent of direct competition between the merging parties' products, as well as the incentives and abilities of Respondent to inflict competitive harm. Although the evidence described above amply demonstrates the likelihood of anticompetitive effects, this Court need not look any further than Respondent's own post-merger plans for the Plié 3 [redacted] to conclude this Merger will result in substantial unilateral anticompetitive effects.

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

[209] PX01462 (Otto Bock) at 001.
[210] PX05148 (Swiggum (Otto Bock) Dep. 104:4-8).
[211] *See* PX01304 (Otto Bock) at 004 [redacted]; PX01302 (Otto Bock) at 081-083; *see also* PX05148 (Swiggum (Otto Bock) Dep. 191:18-196:19).

[redacted][213]

In the month leading up to the November Meeting, the consolidation of Otto Bock and Freedom under common ownership was already [redacted]. For instance, Otto Bock's Head of Prosthetics Lower Limb Mechatronic Systems Business Unit [redacted][214] Mr. Swiggum replied, [redacted][215] Eliminating any uncertainty as to what this meant, [redacted][216] Around the same time, on October 5, 2017, Hans Georg Näder, the owner of Otto Bock, outlined a [redacted] that contemplated increasing the price of Freedom's Plié and replacing [redacted][217] Mr. Swiggum confirmed that at this time there had been [redacted][218] With respect to the termination of Otto Bock's [redacted]

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

[redacted] Mr. Swiggum agreed that [redacted][219]

When the November Meeting kicked off in Irvine on November 7, 2017, [redacted] presented on the topic of [redacted] In the audience for this presentation were [redacted] among others.[220]

During his presentation, Dr. Pfuhl explained [redacted] which unambiguously demonstrates how the Merger provided Respondent with the incentive and ability to impose an anticompetitive unilateral price increase in the MPK market.[221] Prior to the Merger, Freedom marketed the Plié 3, as Dr. Pfuhl described, [redacted] against Otto Bock's C-Leg 4.[222] However, as Mr. Swiggum acknowledged in his sworn testimony, with the Plié 3 and C-Leg 4 now under common ownership, [redacted][223] Thus, management recommended that going forward the Plié 3 and C-Leg 4 should be [redacted][224] and the combined firm should refocus the Plié 3 toward other products [redacted][225] Dr. Pfuhl also presented a strategy that involved [redacted][227] Specifically, Respondent estimated that the C-Leg 4 would recapture up to [redacted] percent of lost

[219] *Id*. 162:20-163:1.
[220] PX05157 (Pfuhl (Otto Bock) Dep. 155:24-157:16).
[221] *See* PX05148 (Swiggum (Otto Bock) Dep. 191:7-195:17); PX01302 (Otto Bock) at 081.
[222] PX05157 (Pfuhl (Otto Bock) Dep. 168:5-12).
[223] PX05148 (Swiggum (Otto Bock) Dep. 193:5-11).
[224] PX01302 (Otto Bock) at 081; PX05148 (Swiggum (Otto Bock) Dep. 191:18-192:8).
[225] PX05148 (Swiggum (Otto Bock) Dep. 191:18-192:8).
[226] *Id*. at 193:15-194:11.
[227] PX01302 (Otto Bock) at 081.

Plié 3 sales—and, in any event, no less than [redacted].[228] During his deposition, Otto Bock's CEO of North America, Matthew Swiggum, confirmed that Otto Bock was [redacted].[229]

Respondent's economic expert does not dispute the basic economic principle that a profit-maximizing firm might increase the price of the Plié 3 if Otto Bock could recapture [redacted] of diverted sales.[230] Dr. Argue also testified that [redacted] particularly considering that Mr. Swiggum was [redacted].[231] Complaint Counsel's expert, Professor Scott Morton, agrees, estimating that the resulting Gross Upward Pricing Pressure Index of the Plié 3 shows Otto Bock will have [redacted].[232]

Respondent's incentive and ability to impose competitive harm on the MPK market extends to Freedom's [redacted]. During [redacted], he and his colleagues discussed the future of [redacted]

[228] PX01003 (Otto Bock) at 022 [redacted] Otto Bock's low estimate of [redacted] revenue conversion rate implies a [redacted] diversion of units. *See also* PX01473 at 023. In these same due diligence documents, Otto Bock also calculated diversion from the Plié 3 to C-Leg 4 of approximately [redacted] if the Plié 3 were discontinued. *See* PX01003 (Otto Bock) at 009; PX01473 (Otto Bock) at 010; PX05148 (Swiggum (Otto Bock) Dep. 120:20- 123:19).
[229] PX05148 (Swiggum (Otto Bock) Dep. 194:12-195:5); *see also* PX05157 (Pfuhl (Otto Bock) Dep. 169:18-170:4).
[230] PX05173 (Argue (Respondent) Dep. 108:1-25).
[231] PX05173 (Argue (Respondent) 113:11-114:10).
[232] PX06001 (Scott Morton Report) § VI. C.

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

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

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

[redacted][240]

D. The Merger Has Already Harmed Competition

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

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

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[240] [redacted]

[241] PX06001 (Scott Morton Report) at ¶179.
[242] PX05109 (Carkhuff (Freedom) Dep. 15:1-16:2).
[243] PX06001(Scott Morton Report) at ¶179.
[244] PX05109 (Carkhuff (Freedom) Dep. 146:1-148:20); *see also* PX01156 (Freedom) at 005.
[245] PX01156 (Freedom) at 003.

Evidence also suggests that the Merger resulted in delays to Freedom's MPK research and development projects. For instance, [redacted][250]

III. Respondent Cannot Rebut the Strong Presumption of Illegality

Complaint Counsel will establish a strong *prima facie* case, and present additional direct evidence of competitive effects that have already or will result from the Merger, demonstrating the Merger's illegality under Section 7. In turn, Respondent bears a heavy burden to rebut the presumption of competitive harm. "'The more compelling the prima facie case'—including other evidence presented by Complaint Counsel that reinforces the structural presumption—'the more evidence defendant must present to rebut it successfully.'" *ProMedica*, 2012 WL 1155392 at *25 (quoting *Baker Hughes*, 908 F.2d at 991; *accord Chicago Bridge*, 534 F.3d at 426); *Staples*, 190 F. Supp. 3d at 115. Respondent cannot rebut Complaint Counsel's *prima facie* case because remaining MPK manufacturers could not constrain a combined Otto Bock/Freedom;

[246] PX05006 (Robertson (Freedom) IH 38:19-39:4; PX01034 (Freedom) at 012.
[247] PX05115 (Robertson (Freedom) Dep. 53:2-22).
[248] [redacted]
[249] [redacted]; PX05006 (Robertson (Freedom) IH 90:1-14).
[250] PX05006 (Robertson (Freedom) IH 90:15-91:10 [redacted]

entry will not be timely, likely or sufficient; Respondent has not identified cognizable efficiencies; Freedom was not a failing firm; and [redacted]

A. Remaining MPK Manufacturers Cannot Constrain the Merged Firm

In acquiring Freedom, Otto Bock eliminated one of its closest and most significant competitors in the U.S. MPK market. With the transaction, [redacted] but its MPK products are considered inferior to the C-Leg, Plie, and [redacted] and [redacted] has limited ability or incentive to check Otto Bock's post-acquisition behavior. [redacted] MPK supplier in the United States, is unlikely to expand to replace the lost competition because [redacted] The two remaining firms that currently sell MPKs—[redacted]—have not been able to make significant inroads in the United States despite having operated here for many years, and neither is likely to make the quantum leap that would be required to replace Freedom's competitive influence on the market. Taken individually or collectively, the remaining competitors cannot constrain Respondent's post-Merger plans to increase MPK prices to U.S. prosthetic clinics, nor can they replace the innovation competition an independent Freedom had been providing for years.

With the acquisition of Freedom, [redacted][251] However, [redacted] share of the market because, for many clinicians and patients, [redacted]

[251] PX06001 (Scott Morton Report) at ¶ 112, Table 6.

[redacted] As one clinician explained, [redacted][256] Freedom's Senior Product Manager explained that [redacted] [260] In sharp contrast, the Plié is viewed as a close substitute for the C-Leg 4, so Freedom aggressively attacked the C-Leg 4 with pricing

252 [redacted]
253 [redacted]
254 [redacted]
255 [redacted]
256 [redacted]
257 PX05112 (Ammouri (Freedom) Dep. 197:21-198:3) [redacted]
259 [redacted]
260 [redacted]

discounts and other incentives on the Plié 3.[261] has the ability or incentive to make significant inroads on Otto Bock's market share and will not replicate the competitive force Freedom had previously provided.

in the United States, has a share of only making it the size of the merged entity. As one Freedom sales person noted, despite promotions,[263] is unlikely to expand to replace the lost competition because[265]

, each with market shares of , sell *de minimis* numbers of MPKs in the United States. They are rarely mentioned in Otto Bock's or Freedom's

[261] *See, e.g.*, PX01173 (Freedom) at 004 ; PX05123 (Solorio (Otto Bock) Dep. 115:22-116:15) *see also infra* Section II.A.

[262] PX01075 (Freedom) at 109

[263] PX01700 (Freedom) ; *see*

[264]

[265]

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

[266] *See e.g.*, PX01025 (Freedom) at 008 [redacted]; PX01058 (Otto Bock) at 008 [redacted] PX01057 (Otto Bock) at 054 [redacted]; PX01002 (Otto Bock) at 006 [redacted] PX01262 (Otto Bock) at 024 [redacted] PX01061 (Otto Bock) at 073 [redacted]

[267] [redacted] Similarly, Otto Bock's Managing Director for North America, Brad Ruhl, testified that he does not focus on [redacted] specifically [redacted] PX05162 (Ruhl (Otto Bock) Dep. 57:12-20).

[268] [redacted]

[269] [redacted]

[270] [redacted]

[redacted][271]

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

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

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

[271] [redacted]

[272] PX05148 (Swiggum (Otto Bock) Dep. 120:20-123:19); PX01003 (Otto Bock) at 022 [redacted]; *see also* PX01473 (Otto Bock) at 023. Otto Bock also calculated diversion from the Plié 3 to C-Leg 4 of approximately [redacted]. *See* PX01003 (Otto Bock) at 009; PX01473 (Otto Bock) at 010.

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

First, [redacted]:

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

[redacted]

[redacted][279]

Respondent's expert could not identify a single likely MPK entrant either.[280]

Second, significant barriers to developing a successful MPK, including high intellectual property barriers, would prevent new entry post-Merger. As Respondent's economic expert testified, the MPK industry has high fixed costs due to long development times and IP barriers.[281] One significant challenge of developing an MPK that can compete effectively is navigating the strong patent portfolios of the market incumbents. As one market participant explained, [redacted][282] That minefield proved to be too much for [redacted] which started developing an MPK, only to abandon it in the face of the intellectual property obstacles.[283] Even [redacted][284]

Beyond the time required to design and begin manufacturing a new MPK product, a firm seeking to enter the market must then develop a brand and reputation within the prosthetic clinic

[279] [redacted]
[280] PX05173 (Argue (Respondent) Dep. 29:18-23) [redacted]
[281] PX05173 (Argue (Respondent) Dep. 175:06-17) [redacted]
[282] [redacted]
[283] [redacted]
[284] [redacted]

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

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

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

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

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

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

Respondent's efficiencies expert claims that the Merger could result in merger-specific efficiencies in the range of approximately [redacted][290] Respondent does not demonstrate that these efficiencies are verifiable or merger specific, however, failing to meet its burden of identifying any cognizable efficiencies that could offset the Merger's anticompetitive effects.

i. Respondent's Claimed Efficiencies Cannot be Verified

Courts have held that efficiencies claims are cognizable only if "it is possible to 'verify by reasonable means the likelihood and magnitude of each asserted efficiency[.]" *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Merger Guidelines* § 10); *see also Sysco*, 114 F. Supp. 3d at 82. Because "[e]fficiencies are inherently difficult to verify and quantify' . . . 'it is incumbent upon the merging firms to substantiate efficiency claims.'" *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Merger Guidelines* § 10).

Respondent stopped all work relating to the integration of Otto Bock and Freedom, including estimating potential synergies, by mid-December 2017.[291] At that time, Otto Bock had

[289] RX-1048 (Peterson Report) at ¶ 127, Table 8, ¶ 133, Table 9; PX05174 (Peterson (Respondent) Dep. 53:6–18) [redacted]

[290] RX-1048 (Peterson Report) ¶ 127, Table 8.

[291] PX05131 (Gück (Otto Bock) Dep. 131:24-132:7) [redacted]; PX05170 (Schneider (Otto Bock) Dep. (June 1, 2018) 22:14-20) [redacted]

not finalized any integration plans[292] and had not made any decisions about [redacted] [293] This extended to Otto Bock's synergy evaluations. According to [redacted], a consultant from [redacted] leading the integration process, by mid-December, [redacted] [294]

In identifying the Merger's synergies, Respondent's expert, Mr. Peterson, cites to this [redacted] work performed by Otto Bock. He argues that [redacted] [295] To support his analysis, Mr. Peterson relies on, but fails to independently verify, documents from Respondent's executives and integration consultant.[296] *See H&R Block*, 833 F. Supp. 2d at 91 (rejecting efficiencies claims based on "judgment of experienced executive" because of "the lack of a verifiable method of factual analysis"). He does not offer any evidence to show that the models upon which he relies have a solid factual basis or are supported and verifiable.[297]

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[292] [redacted] *see also id.* at 5:17-19, 11:5-19, 43:16-21; PX05131 (Gück (Otto Bock) Dep. 124:9-18 [redacted]

[293] PX05138 (Reissfelder (Freedom) Dep. 8:4-10, 125:8-24).

[294] [redacted]

[295] RX-1048 (Peterson Report) at ¶ 127.

[296] PX06004 (Hammer Rebuttal Report) at ¶ 76.

[297] PX06004 (Hammer Rebuttal Report) at ¶ 76. For example, it is unclear how Mr. Peterson calculated Respondent's purported Gross Margin Improvement efficiency with the expert only offering vague statements that do not translate to calculations. *See* RX-1048 (Peterson Report) at ¶ 131. And, the record is similarly unclear. Scott Schneider, testifying as Respondent's corporate designee on efficiencies, explained [redacted] estimated the gross margin. PX05170 (Schneider (Otto Bock) Dep. (June 1, 2018) 119:14-120:12). When Dr. Baggenstoss was asked about the estimates he prepared for Otto Bock, however, he testified that they [redacted].

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

ii. Respondent's Claimed Efficiencies are Not Merger Specific

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

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

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

[redacted][300] [redacted]

[redacted]

[redacted][302] In his attempt to demonstrate their merger specificity, Mr. Peterson explains that, [redacted]

[redacted]

[redacted][303] Likewise, he explains that, [redacted]

[redacted] All of these explanations fall far short of establishing the merger-specificity of Respondent's efficiencies claims.

Mr. Peterson failed to consider several factors that go against the alleged merger-specificity of the purported efficiencies. First, Mr. Peterson does not evaluate whether any of Respondent's claimed synergies could come from a less anticompetitive transaction, such as an alternative acquisition or licensing arrangement. He, instead, only makes vague assertions that the claimed efficiencies are [redacted]

[redacted][306] Second, Mr. Peterson admits that the claimed [redacted] making it clear that Freedom could achieve some, if not all, of these improvements independently,

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[300] *See* RX-1048 (Peterson Report) at ¶ 132.
[301] Efficiencies outside of the relevant market cannot be used to justify anticompetitive effects within the relevant market. *See Philadelphia Nat'l Bank*, 374 U.S. at 370-71 (explaining that "anticompetitive effects in one market could be justified by procompetitive consequences in another"). Here, the relevant geographic market is the United States, and there is no evidence that [redacted] would reverse harm for customers within the United States. Even if this efficiency is deemed merger-specific, it is not relevant to Respondent's defense.
[302] Because [redacted] it should not be considered a cognizable efficiency to offset the anticompetitive effects. *See* RX-1048 (Peterson Report) at ¶ 132.
[303] RX-1048 (Peterson Report) at ¶ 132.
[304] RX-1048 (Peterson Report) at ¶ 132.
[305] RX-1048 (Peterson Report) at ¶ 132.
[306] RX-1048 (Peterson Report) at ¶ 132.

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

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

Even if Respondent's claimed efficiencies were verifiable and merger-specific, they fail because there is no evidence its expected cost savings are likely to be passed on to customers. *See, e.g., FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 351 (3d Cir. 2016); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991). As the Commentary to the *Merger Guidelines* explains, price reductions to customers "are expected when efficiencies reduce the merged firm's marginal costs," but "reductions in fixed costs . . . typically are not expected to lead to immediate price effects and hence to benefit consumers in the short term."[307] There is no evidence in Mr. Peterson's report or elsewhere in the record as to which portion of the claimed efficiencies relate to fixed versus marginal costs, and thus there is no evidence as to whether customers will receive any price reductions from the Merger.[308] Respondent's economic expert, Dr. Argue, also admitted that he did not analyze whether any of the alleged efficiencies identified by Mr. Peterson would be passed through to customers.[309]

Finally, efficiency claims are only cognizable if they "do not arise from anticompetitive reductions in output or service."[310] Evidence shows that Otto Bock planned to discontinue certain Freedom products in United States after the Merger, including possibly the

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[307] FED. TRADE COMM'N AND U.S. DEP'T OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER 57 (2006).
[308] PX06004 (Hammer Rebuttal Report) at ¶ 87. In fact, not only does Mr. Peterson not explain how any alleged cost savings would be passed on to consumers, Mr. Peterson stated in his deposition that he [redacted] PX05174 (Peterson (Respondent) Dep. 283:22–284:21).
[309] PX05173 (Argue (Respondent) Dep. 35:19-36:3).
[310] *Merger Guidelines* §10.

Plié and [redacted][311] In addition, [redacted][312] It is unclear which, if any, portion of the claimed efficiencies come from these anticompetitive behaviors. To the extent any do, these efficiencies cannot serve as Respondent's defense to liability.

D. Respondent Cannot Meet its High Burden to Prove Freedom was a Failing Firm

Respondent cannot meet the strict standards of the failing firm defense. "Financial weakness, while perhaps relevant in some cases, is probably the weakest ground of all for justifying a merger," and "certainly cannot be the primary justification." *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1339, 1341 (7th Cir. 1981); *see also FTC v. Warner Commc'ns*, 742 F.2d 1156, 1165 (9th Cir. 1984). The failing company doctrine has "strict limits." *Warner Commc'ns*, 742 F.2d at 1164. To qualify, "[a] company invoking the defense has the burden of showing that its 'resources [were] so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure' . . . and further that it tried and failed to merge with a company other than the acquiring one." *U.S. v. General Dynamics Corp.*, 415 U.S. 486, 507 (1974) (quoting *Int'l Shoe Co. v. FTC*, 280 U.S 291, 302 (1930); citing *Citizen Pub. Co. v. United States*, 394 U.S. 131, 138 (1969)). The *Merger Guidelines* provide further detail to these criteria, requiring firms asserting the defense to prove that:

(1) the allegedly failing firm would be unable to meet its financial obligations in the near future;

(2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and

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[311] PX05148 (Swiggum (Otto Bock) Dep. 115:18–116:10, 193:15–195:17); *see also* PX01302 (Otto Bock) at -081 [redacted]

[312] PX01302 (Otto Bock) at -081; *see also* PX05148 (Swiggum (Otto Bock) Dep. 193:15–195:17).

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

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

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

At the time of the Merger, Freedom was not at risk of imminent failure. The company had emerged from a period of decreasing sales and earnings with a new management team, a concrete strategic plan to increase sales, and a renewed effort to replenish its research and development pipeline. Those initiatives, which began in the second quarter of 2016, started producing results by the end of 2016 and beyond.[313] As Freedom's VP of Sales testified, [redacted][314] As a longtime innovator, Freedom focused on its research and development projects, [redacted][316] While risks certainly remained for Freedom, Respondent cannot show that the company was likely to fail imminently.

Undeniably, in 2015 and into early 2016, internal and external factors led to a decline in Freedom's financial performance. Internally, [redacted][317] Externally, Otto Bock had released its competitive C-Leg 4 MPK, resulting in a steep decline in Freedom's MPK

[313] PX01109 (Freedom) at 001-002; [redacted]; PX05126 (Kim (Freedom) Dep. 62:2–63:20).
[314] PX05137 (Matthews (Freedom) Dep. 196:7–11).
[315] PX01851 (Freedom) at 001 [redacted]
[316] [redacted]
[317] [redacted]

sales.[318] To address these problems, Freedom's private equity owner and board replaced Freedom's former CEO with David Smith in April 2016.[319] Mr. Smith, in turn, replaced the company's COO and Head of Sales, revamped the company's sales and service structure, and focused on enhancing the productivity of its R&D pipeline.[320]

Armed with these changes, Mr. Smith prepared and presented a 2017 strategic plan that provided a sound roadmap to address its declining revenues and profits.[321] That plan immediately produced results. Beginning in December 2016, and continuing nearly every month until Respondent acquired the company, Freedom's revenues [322] Freedom's [323] The turnaround effort was so successful that Freedom's CFO ,[324] reflecting his belief that Freedom management had a viable plan to address its past deficiencies.[325] In the end, Freedom's independent auditor gave Freedom

[318] *Id.* at -005

[319] *Id.* at 006.

[320]

[321] PX01014 (Freedom) at 003-004; *see also*

[322] *See, e.g.*, PX01109 (Freedom) at 001 (January 2017 internal Freedom email explaining ; PX01108 (Freedom) at 008 (internal Freedom document showing ; PX01107 (Freedom) at 001 ; PX05126 (Kim (Freedom) Dep. 62:2-63:20)

[323] *See* PX05126 (Kim (Freedom) Dep. 116:1:17-119:15) (discussing PX01292 and agreeing that); *id.* at 121:3-122:23 (discussing PX01313 and); *see also* PX01105 (Freedom) at 005 PX01103 (Freedom) at 001-002

[324] PX01087 (Freedom) at 004 PX05126 (Kim (Freedom) Dep. 76:19-23) .

[325] PX05126 (Kim (Freedom) Dep. 76:19–23).

[redacted][325] In the end, Freedom's independent auditor gave Freedom [redacted]—just six months prior to the Merger.[326]

On September 16, 2017, Freedom's loans [redacted] were due. Freedom's positive operating results, along with its relationship with one of its two primary creditors, [redacted], make it highly unlikely that Freedom would have been unable to extend its existing credit arrangement or secure additional funding to satisfy the loan. As Freedom's CFO explained in an internal memo, it was [redacted] made clear that it was willing to continue to finance Freedom.[328] Moreover [redacted], a private equity firm [redacted] In the end, however, Freedom did not fully investigate [redacted][330] Nevertheless, these alternative funding scenarios [redacted] in lieu of bankruptcy or liquidation.[331]

[325] PX05126 (Kim (Freedom) Dep. 76:19–23).
[326] [redacted]
[327] PX01087 (Freedom) at 004.
[328] [redacted]
[329] [redacted]
[330] *See* PX01087 (Freedom) at 003-004 (discussing an acquisition under [redacted]).
[331] PX06002 (Hammer Report) at ¶ 57.

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

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

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

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

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[332] [redacted]

[333] PX06002 (Hammer Report) at ¶ 75. There are several variables considered when determining whether a company can reorganize successfully under Chapter 11, which include an increase in sales, reduction of costs, reduction of personnel, change in CAPEX spending, reduction of leverage, issuance of equity, change in top management, acquisition, and divestment of a portion of the business. [redacted] *See, e.g.*, PX01109 (Freedom) at 001; PX01108 (Freedom) at 008; PX01107 (Freedom) at 001; PX05126 (Kim (Freedom) Dep. 62:2–63:20).

[334] PX06002 (Hammer Report) at ¶ 75.

Court clearly stated, "The failing company doctrine plainly cannot be applied in a merger . . . unless it is established that the company that acquires the failing company . . . is the only available purchaser." *Citizen Pub. Co.*, 394 U.S. at 131; *see also U.S. v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 445 (D. Del. 2017). Here, the record is clear that Freedom focused its sales process on Otto Bock; rejected a viable proposal from another alternative purchaser, [redacted] and ignored promising leads from other interested suppliers of other lower limb prosthetic products, including at least one company that contacted Freedom to express its interest, but was ignored. When a firm does not respond to expressions of interest by other firms in its own industry, it cannot be said to have conducted the search for the alternative available purchaser that the failing company defense requires. *FTC v. Harbour Group Investments*, 1990 U.S. Dist. LEXIS 15542, 5 (D.D.C. 1990).

From the time that Mr. Smith became CEO, Freedom's private equity owner and creditors planned to [redacted][335] Accordingly, Mr. Smith started exploring the possibility of selling the company. In the fall of 2016, Mr. Smith discussed a potential sale of Freedom with Otto Bock's CEO, Hans Georg Näder.[336] Concurrently, he asked [redacted] an investment bank, to provide a [redacted] valuation of the company, though he did not ask [redacted] to seek out potential buyers or identify alternative sources of capital.[337] Shortly after the meeting with Mr. Näder, Mr. Smith met with him again to discuss details on Freedom's business, development projects and plans,

335 [redacted]

336 [redacted]

337 [redacted]

and potential benefits of a merger.[338] These discussions continued over the next seven months, with Freedom's focus remaining singularly on completing a transaction with Otto Bock.[339] It was not until the end of April, after the companies reached an apparent impasse,[340] that Freedom, via [redacted] began contacting alternative potential buyers.[341]

In April 2017, [redacted] on behalf of Freedom, reached out to [redacted][342] Although some other companies were contacted the following month to determine their interest in a possible [redacted] these companies did not operate in the prosthetics industry and were [redacted][343] On July 26, Otto Bock submitted an offer of [redacted][344] Aside from Otto Bock [redacted], no other prosthetics company was contacted about the potential Freedom sale or invited to submit a bid.[345]

The fact that only Otto Bock [redacted] made firm offers to acquire Freedom is not in and of itself proof that there were no other possible acquirers for the business. *See U.S. v. Energy Sols., Inc.*, 265 F.Supp. 3d at 445. (rejecting failing firm defense where only one firm offer was made when "[t]here was no clear 'for sale' sign until [defendants] announced its transaction"). Instead, it is clear that if Freedom had looked for strategic buyers in its own industry that did not raise clear antitrust problems, it would have found a wealth of interest in acquiring the

338 [redacted]
339 [redacted]
340 [redacted]
341 [redacted]
342 [redacted]
343 [redacted]
344 [redacted]
345 [redacted]

company.[346] [redacted] all have testified that they were never contacted about a potential acquisition of Freedom, but would have been interested had they been.[347] While Freedom executives offered a variety of after-the-fact excuses as to why it failed to reach out to these other prosthetics companies, their primary argument appears to be that these companies were too small to provide leverage to force Otto Bock to increase its bid.[348] Assuming such companies could not match Otto Bock or [redacted] bid, it might have been profit-maximizing for Freedom to exclude such companies from the sales process. But their exclusion does not satisfy the third-prong of the failing firm defense.[349]

Even if its search had been otherwise sufficient, Freedom cannot overcome the fact that it completely disregarded the articulated expression of interest by fellow prosthetic company [redacted] in its rush to come to an agreement with Otto Bock. In September 2017, according to an email from Freedom's Chairman, Mr. Carkhuff, Nabtesco contacted him when it heard that Freedom was for sale and affirmatively expressed [redacted] Mr. Smith, Freedom's CEO at the time, instructed Mr. Carkhuff to ignore that interest since Freedom

[346] [redacted] *see also* PX01288 (Freedom) at 002 [redacted]; PX05127 (Rössing (Otto Bock) Dep. 292:7–294:14).

[347] PX01288 (Freedom) at 002 [redacted]

[348] [redacted]

[349] Respondent's expert does not provide an opinion on the liquidation value of Freedom's assets prior to Freedom's sale to Otto Bock, and therefore cannot provide an expert opinion as to whether any of the potential alternative bidders could have made a "reasonable alternative offer" above the liquidation value for Freedom. PX05174 (Peterson (Respondent) Dep. 90:10–92:24; 145:11–146:1, 149:3–25, 153:15–21).

[350] PX01288 (Freedom) at 002.

already had [redacted] and Mr. Smith never followed up with [redacted]

Given the fact that Freedom did, in fact, have an alternative offer from [redacted] Respondent also bears the burden to demonstrate that [redacted] offer was not a "reasonable alternative" that would "pose a less severe danger to competition than" Otto Bock's acquisition.[353] As the *Merger Guidelines* explain, "[a]ny offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer."[354] [redacted] qualifies as a reasonable alternative to Otto Bock's offer.[355] Likewise, Respondent has not shown (and cannot show) that a sale to [redacted] would raise more significant antitrust issues than a sale to Otto Bock. [redacted][356] Outside of the MPK market, Respondent has not put forth evidence sufficient to define any relevant market in which the [redacted] transaction would result in greater harm.[357] Accordingly, Respondent fails to meet its burden to show that an [redacted] acquisition would not "pose a less severe danger to competition than" Freedom's sale to Otto Bock.

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[351] PX01288 (Freedom) at 002.
[352] [redacted]
[353] *Merger Guidelines* § 11.
[354] *Merger Guidelines* § 11, n. 16.
[355] *See* PX06002 (Hammer Report) at ¶¶ 119–122; *see also* [redacted]. Notably, neither of Respondent's experts attempted to calculate liquidation value for the Freedom business. PX05173 (Argue (Respondent) Dep. 49:16-18); PX05174 (Peterson (Respondent) Dep. 89:18-91:6).
[356] *See, e.g.*, PX01718 (Otto Bock) at 010 [redacted]
[357] For example, Defendant's economic expert, Dr. Argue, admitted that his report does not contain a SNNIP test, a critical loss analysis, any assessment of constraints on the ability of existing K3 prosthetic feet suppliers to expand, examination of conditions of entry, or estimation of whether [redacted] PX05173 (Argue (Respondent) Dep. 64:21-65:6, 65:19-66:8).

E. [redacted]

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

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

[358] [redacted]

[359] The Commission recently ruled that, in a consummated merger, evidence of a [redacted] *See* Opinion and Order of the Commission, *Otto Bock HealthCare North America Inc.*, Docket No. 9378 (F.T.C. Apr. 18, 2018) at 4 (hereinafter *Opinion of Comm'n).* [redacted]

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

The Commission has explained that [redacted]

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

[361] [redacted]

[362] [redacted]

[363] [redacted]

[redacted]

[364] [redacted]

[365] [redacted]

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

[redacted]

[redacted]

[367] PX05109 (Carkhuff (Freedom) Dep. 209:7-211:1 [redacted] PX05138 (Reissfelder (Freedom) Dep. 40:22-41:5) [redacted]

[368] PX05138 (Reissfelder (Freedom) Dep. 47:23-48:8) (explaining that Freedom's MPK salespeople [redacted]); PX05109 (Carkhuff (Freedom) Dep. 232:22-25) [redacted]

[369] PX05111 (Prince (Freedom) Dep. 39:2-41:19); *see also* PX01147 (Freedom) at 001 [redacted] (brackets in original); PX01435 (Freedom) at 013 [redacted]; *id.* [redacted]

[370] [redacted]

[371] [redacted]

[redacted]

[372] [redacted]

[redacted]

[372] [redacted]

[373] *See, e.g.*, PX05109 (Carkhuff (Freedom) Dep. 118:16-119:1) [redacted]; PX01391 (Freedom) [redacted]; PX01181 (Freedom) [redacted].

[374] PX05138 (Reissfelder (Freedom) Dep. 79:19-22); PX05114 (Ferris (Freedom) Dep. 77:19-25); PX05118 (Testerman (Freedom) Dep. 56:9-58:2); PX05109 (Carkhuff (Freedom) Dep. 119:6-17); PX05148 (Swiggum (Otto Bock) Dep. 148:13-149:11).

[375] PX01681 (Freedom) at 011 [redacted]; PX01160 (Freedom) (providing Freedom's total revenue for Q4 2015). [redacted] PX01681 (Freedom) at 011.

[376] PX05148 (Swiggum (Otto Bock) Dep. 149:7-11).

[377] PX05148 (Swiggum (Otto Bock) Dep. 148:13-149:11) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

378 [redacted]

379 [redacted]

380 [redacted]

[redacted]

i. [redacted]

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

[redacted]

381 [redacted]

382 [redacted]

383 [redacted]

384 [redacted]

385 [redacted]

386 [redacted]

387 [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

388 [redacted]

389 [redacted]

390 [redacted]

391 [redacted]

392 [redacted]

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394 [redacted]

395 [redacted]

[redacted]

396 [redacted]

397 [redacted]

398 [redacted]

399 [redacted]

400 [redacted]

[redacted]

[401] [redacted]

[402] [redacted]

[403] [redacted]

[404] PX05148 (Swiggum (Otto Bock) Dep. 142:20-143:20)

id. at 144:15-146:14

[redacted]

ii. [redacted]

As of today, Respondent represents that [redacted] Should that change, Complaint Counsel has significant concerns about [redacted]

[redacted]

[405] PX05148 (Swiggum (Otto Bock) Dep. 145:10-15). Otto Bock's Managing Director of North America similarly testified that he has not considered using a [redacted] PX05162 (Ruhl (Otto Bock) Dep. 183:25-184:17).

[406] [redacted]

[407] [redacted]

[408] RX-1049 (Argue Report) at 42.

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

iii. [redacted]

[redacted]

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

[410] [redacted]

[411] [redacted]

[redacted]

CONCLUSION

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

[redacted]

Dated: June 27, 2018

Respectfully Submitted,

/s/ Daniel Zach

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PX00829 - RX-1049

REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 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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CERTIFICATE FOR ELECTRONIC FILING

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

June 27, 2018 By: /s/ *Daniel Zach*