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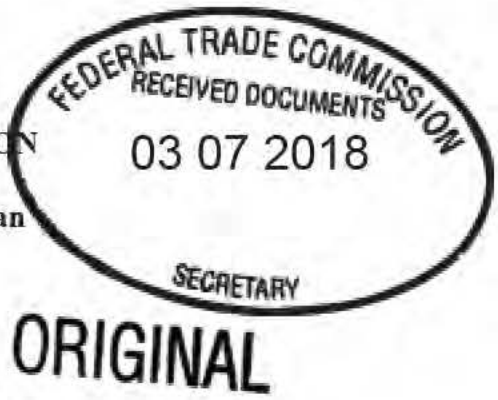

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of

Otto Bock HealthCare North America, Inc.,

a corporation,

Respondent.

Docket No. 9378

COMPLAINT COUNSEL'S REPLY TO RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO STRIKE RESPONDENT'S SEVENTH AFFIRMATIVE DEFENSE

Michael Moiseyev
Assistant Director

Daniel Zach
Deputy Assistant Director

James Weiss
Deputy Assistant Director

Stephen Mohr
Steven Lavender
Lisa DeMarchi Sleigh
Catherine Sanchez
Amy Posner
Lynda Lao
Jonathan Ripa
Meghan Iorianni
Yan Gao
William Cooke
Joseph Neely
Sarah Wohl
Attorneys

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2118
Email: dzach@ftc.gov
Counsel Supporting the Complaint

Dated: March 7, 2018

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

Respondent Otto Bock bought Freedom more than five months ago. The Complaint alleges that acquisition was illegal when it was consummated. The very simple issue raised by this motion is whether Respondent {[redacted]}. It cannot.

The decisions on which Respondent relies all hold that {[redacted]} They reach this conclusion because in that context, {[redacted]} That is a fundamentally different situation than presented here. Ottobock {[redacted]}[1] The case law is clear that the illegality of {[redacted]}

[1] Two days before filing its Opposition, Respondent {[redacted]}

Complaint Counsel's motion raises no fact issues. The only facts the motion relies on are: {[redacted]} Respondent does not dispute either of these facts.

The Commission should consider and grant Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense.

COMPLAINT COUNSEL'S MOTION TO STRIKE DOES NOT TURN ON ANY DISPUTED FACT

For the affirmative defense at issue (the Seventh Affirmative Defense) to survive, Respondent must show that even if all of the facts of the Complaint are true, it can demonstrate facts that avoid liability. *See Drzik v. Haskell Co.*, 2011 WL 2981565, at *1 (M.D. Fla. July 22, 2011). In its Opposition, Respondent claims several facts are disputed and material to Complaint Counsel's Motion, Opp. Brief at 4–5, but this Motion does not turn on any material fact in dispute. The only two facts that it relies upon are {[redacted]}, neither of which Respondent disputes.[2] Amended Answer at ¶ 1; Seventh Affirmative Defense. Respondent asserts that {[redacted]}

[2] The facts cited by Respondent are not relevant to the question of whether a {[redacted]} They provide context to the undisputed fact that Otto Bock acquired Freedom {[redacted]}

[redacted]

}. Whether a **{** [redacted] **}** is purely a legal question.

{ [redacted] **} CANNOT IMMUNIZE A TRANSACTION CONSUMMATED IN VIOLATION OF THE ANTITRUST LAWS**

Respondent opposes the Motion on the grounds that **{** [redacted] **}**. There are no facts that can **{** [redacted] **}**. As a matter of law, the competitive impact of a transaction is properly assessed at the time it is consummated. The cases cited by Respondent in its Opposition do not controvert this fundamental principle; indeed, they make clear that **{** [redacted] **}**.

Respondent does not assert that there was, in fact, **{** [redacted] **}**. By its own admission, Respondent acquired all of Freedom, including its microprocessor prosthetic knee business, on September 22, 2017, and continues to own all of Freedom today.[3] Respondent does not argue **{** [redacted] **}**. Once Respondent acquired Freedom, had the FTC not challenged that underlying merger, Respondent legally could have done whatever it saw fit with the

[3] According to Respondent, Freedom's microprocessor knee product was a "significant motivating reason" for the transaction at issue. Exhibit B to Opp. Brief, Pretrial Conference, Tr. at 45:4–46:1. Respondent cannot **{** [redacted] **}**.

Freedom business, including raising the price of Freedom's microprocessor knee products.[4] Respondent's decisions regarding Freedom after the acquisition—[redacted]—are all consistent with its total ownership and control of the Freedom business that it acquired.

There is no authority for Respondent's claim that a transaction that violated Section 7 of the Clayton Act at the time it was consummated can be made legal by [redacted].[6] On the contrary, the law is that the determination of whether a specific transaction violates Section 7 can be made when that transaction closes. *See, e.g., SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1211 (2d Cir. 1981) (evaluating defendant's agreement to acquire certain patents under Section 7 "at the time it was made").[7] Here, the challenged merger took place on September 22, 2017; that is

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[4] The antitrust laws distinguish between actions taken before and after a merger, even if the acquired entity behaves independently. For example, the antitrust laws do not prevent coordination between parent and subsidiary entities that would be illegal between independent entities, even those awaiting consummation of their transaction. *See e.g.*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984) (also noting that "[a] corporation's *initial acquisition of control* will always be subject to scrutiny under §1 of the Sherman Act and §7 of the Clayton Act") (emphasis added).

[5] *See* Opp. Brief at 6 (stating that "[w]ithin a week [of the acquisition] . . . Ottobock [redacted].

As a practical matter, it would be almost impossible for the Commission to challenge consummated transactions if Respondent's Seventh Affirmative Defense were cognizable. Under its theory, any respondent in an action challenging a consummated transaction under Section 7 and/or Section 5 could prevail merely by [redacted].

In consummated merger transactions, courts have occasionally found it informative to evaluate post-merger market conditions to assess whether a consummated transaction was, in fact, anticompetitive. This occurs in two principal contexts, neither of which is applicable to Respondent's Seventh Affirmative Defense. First, in some cases, courts have concluded that

the operative point at which to assess its legality, not after Respondent {[redacted]}. The instant case is fundamentally different from the situation in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), because here {[redacted]} does nothing to inform whether the underlying acquisition of Freedom by Otto Bock, at the time of the acquisition, was likely to cause anticompetitive harm.[8] Rather, {[redacted]}

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transactions that did not appear anticompetitive at the time of the merger may nevertheless be found to violate Section 7 based on subsequent developments in the market. *See, e.g.*, *Hosp. Corp. of America v. Fed. Trade Comm'n*, 807 F.2d 1381 (7th Cir. 1986) (affirming the Commission's determination that several acquisitions over the course of two years violated Section 7 of the Clayton Act in light of their effect on the overall Chattanooga hospital market). Second, courts have looked to certain post-acquisition evidence to inform whether the market at issue was vulnerable to anticompetitive effects from the merger, such as actual independent entry as evidence of low entry barriers, *see, e.g.*, *United States v. Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990), or the importance of key assets to future competitiveness, *see, e.g.*, *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). Of course, courts emphasize that antitrust liability cannot be avoided merely by refraining from anticompetitive behavior following the acquisition, and that evidence subject to manipulation by the defendants should be accorded little weight. *See, e.g.*, *General Dynamics Corp.*, 415 U.S. at 504–05; *Chicago Bridge & Iron Co. v. Fed. Trade Comm'n.*, 534 F.3d 410, 435 (5th Cir. 2008). Respondent's assertion that {[redacted]} runs afoul of both of these principles.

Respondent cites *General Dynamics* for the unremarkable proposition that Section 7 frequently requires predictions of anticompetitive effects. Opp. Brief at 2. The question in *General Dynamics* was whether the absence of uncommitted coal reserves affected the competitive implication of the market share held by the combined firm. 415 U.S. at 493–94, 501–02. In assessing whether, but for the acquisition, the acquired company would have been a significant competitor, the Court drew on, among other things, post-acquisition evidence showing that uncommitted coal reserves were competitively significant. *Id.* at 506. Here, the {[redacted]} does nothing to inform how Freedom would have competed had it not been acquired.

[9] In Respondent's Answer and Amended Answer, it characterizes {[redacted]}

Respondent tries to extend the rulings in pre-consummation cases to its consummated merger. {[redacted]} Respondent asserts that {[redacted]} in assessing the competitive effects of the underlying acquisition. Opp. Brief at 4, 6 (citing [redacted]. In doing so, Respondent ignores that {[redacted]} for its argument. Indeed, these cases demonstrate that {[redacted]}.

{[redacted]} Before the FTC filed its 13(b) action, {[redacted]

[redacted]

[redacted] **}** Here, Respondent consummated the acquisition of Freedom months ago, and **{** [redacted] **}** Thus, the reasoning of **{** [redacted] **}** provides no support for the proposition that the **{** [redacted] **}**

Respondent's other cases provide no better support. **{** [redacted]

[redacted]}[10]

There are no facts that can be developed that would {[redacted]} Performance under the original acquisition agreement occurred more than five months ago and {[redacted]}. When Otto Bock consummated its acquisition of Freedom, the violation was complete. {[redacted]}

THE COMMISSION SHOULD DECIDE THE MOTION

The Commission routinely hears and decides motions to strike in the first instance. *See 1-800 Contacts, Inc.*, 2017 WL 511541 (Fed. Trade Comm'n Feb. 1, 2017) (deciding to strike affirmative defenses as a matter of law). In its Opposition, Respondent suggests that if the Commission does not refer this Motion to the ALJ, it would be violating due process as well as "'reduc[ing] the quality of decision making'" or "'color[ing] the perception of the fairness and impartiality of Commission proceedings.'" Opp. Brief at 3-4 (quoting ABA Antitrust Section Comments to FTC's Proposed Part 3 Rulemaking (Nov. 6, 2008), https://www.ftc.gov/sites/default/files/documents/public_comments/rules-practice-16-cfr-parts-3-and-4-538311-00005/538311-00005.pdf) [hereinafter "ABA Comment"]). In those same

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10 {[redacted]}

comments, the ABA recognized the Commission as the "repository of antitrust expertise [and] as a body to advance substantive antitrust law by deciding difficult cases." ABA Comment at 11. Indeed, the ABA emphasized that the Agency should not "shy away from employing its expertise where appropriate." *Id.* at 5. While one could envision a scenario, as the ABA did, that could implicate perceived fairness and due process, that scenario is not present here.[11]

Complaint Counsel is not seeking a pretrial ruling on any disputed material fact at issue. Complaint Counsel does not wish to preclude Respondent from defending itself from the Complaint's allegations that the consummated merger violates the antitrust laws[12] or even from seeking permitted discovery relating to {[redacted]}. Complaint Counsel's Motion simply seeks to prohibit Respondent from arguing {[redacted]} is a defense to the allegations contained in the Complaint.[13]

This is precisely the type of fundamental issue of antitrust law that the Commission, as the expert body for antitrust matters, should decide. Both counsel and the ALJ would benefit from knowing how the Commission would {[redacted]}. Any concerns about the

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[11] The focus of the ABA's concern was that respondents would be dissuaded from seeking to dismiss complaints in Part 3 proceedings if those motions were decided by the Commission that voted out the complaint. *See, e.g.*, ABA Comment at 2–3.

[12] Though not germane to the issue presented in this Motion, Respondent incorrectly asserts that it is Complaint Counsel's burden to prove that {[redacted]}

In its Opposition, Respondent claims, erroneously, that it would be denied the ability to present evidence about {[redacted]} at trial if the Motion were granted. Opp. Brief at 1–2. But, as already explained, Respondent is free to take discovery on and present any evidence it chooses at trial regarding {[redacted]} Complaint Counsel Brief at 7 n.5.

"perception of fairness and impartiality" are not present because Respondent's **{** [redacted] **}** was not before the Commission at the time that it voted to issue the Complaint in this matter. Therefore, all parties and the ALJ would benefit from the Commission's guidance on the discrete issue of **{** [redacted] **}** could be an affirmative defense to violations of the Clayton Act resulting from a consummated merger. Thus, the Commission is the proper decision maker for this Motion.

CONCLUSION

Because Respondent's **{** [redacted] **}** does not affect the legality of its consummated transaction, the Commission should strike Respondent's Seventh Affirmative Defense from its Answer and prohibit Respondent from raising any **{** [redacted] **}** as a defense to the allegations in the Complaint.

Dated: March 7, 2018

Respectfully submitted,

/s/ Daniel Zach
Daniel Zach
Stephen Mohr
Steven Lavender
Lisa DeMarchi Sleigh
Catherine Sanchez
Amy Posner
Lynda Lao
Jonathan Ripa
Meghan Iorianni
Yan Gao
William Cooke
Joseph Neely
Sarah Wohl

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2118
Email: dzach@ftc.gov
Counsel Supporting the Complaint

UNITED STATES OF AMERICA
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COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

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

DECLARATION OF DANIEL ZACH IN SUPPORT OF COMPLAINT COUNSEL'S REPLY TO RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO STRIKE RESPONDENT'S SEVENTH AFFIRMATIVE DEFENSE

I, Daniel Zach, pursuant to 28 U.S.C. § 1746, state and declare as follows:

1. I am a Deputy Assistant Director at the Federal Trade Commission. I am licensed to practice law in the State of New York. I am over the age of 18, am capable of making this Declaration, know all of the following facts of my own personal knowledge, and, if called and sworn as a witness, could and would testify competently thereto.

2. Attached as Exhibit 1 is a true and correct copy of excerpts of the deposition transcript of Respondent, Otto Bock HealthCare North America, Inc. (Soenke Roessing, Ph.D), February 8, 2018.

3. Attached as Exhibit 2 is a true and correct copy of excerpts of the investigational hearing transcript of FIH Holdings, LLC (John Robertson), December 5, 2017.

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

Executed this 5th day of March 2018 in the District of Columbia.

/s/ Daniel Zach
Daniel Zach

EXHIBIT 1

Confidential - Redacted in Entirety

EXHIBIT 2

Confidential - Redacted in Entirety

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

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

Wayne A. Mack
Duane Morris LLP
30 S. 17th St.
Philadelphia, PA 19203
WAMack@duanemorris.com

Erica Fruiterman
Duane Morris LLP
30 S. 17th St.
Philadelphia, PA 19203
efruiterman@duanemorris.com

Edward G. Biester III
Duane Morris LLP
30 S. 17th St.
Philadelphia, PA 19203
EGBiester@duanemorris.com

Sarah Kulik
Duane Morris LLP
30 S. 17th St.
Philadelphia, PA 19203
sckulik@duanemorris.com

Sean P. McConnell
Duane Morris LLP
30 S. 17th St.
Philadelphia, PA 19203
SPMcConnell@duanemorris.com

William Shotzbarger
Duane Morris LLP
30 S. 17th St.
Philadelphia, PA 19203
wshotzbarger@duanemorris.com

Counsel for Respondent
Otto Bock HealthCare North America, Inc.

By: /s/ Daniel Zach

Daniel Zach
Complaint Counsel
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20024

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.

March 7, 2018

By: /s/ Daniel Zach