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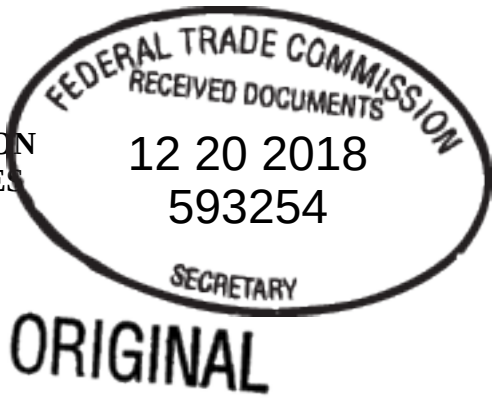

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

COMPLAINT COUNSEL'S POST-TRIAL REPLY BRIEF

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INTRODUCTION

When Otto Bock acquired Freedom on September 22, 2017 (the "Merger"), it cemented its dominance of the U.S. microprocessor knee ("MPK") market. It now controls more than [redacted] percent of that market and the Merger has already inflicted harm on consumers. Absent a remedy, Respondent has plans to raise Plié 3 prices and quash next-generation MPK competition. According to Otto Bock's due diligence, the Merger not only provided it with Freedom's MPK market share—the [redacted] (CCFF ¶ 1367)—it was also a successful [redacted] (CCFF ¶ 1314). Complaint Counsel has not only established an extremely strong *prima facie* case, proving concentration in the already highly concentrated U.S. MPK market will grow by 1,522 points to a post-Merger level of 6,767. It has buttressed the Merger's presumptive illegality with extensive direct evidence of anticompetitive effects.

While Respondent does not dispute the Merger is presumptively illegal, even in its own purported relevant market, it raises several arguments and defenses, none of which rebut Complaint Counsel's case. Noticeably absent from its post-trial brief is any attempt at addressing the ordinary course plans it has to raise MPK prices and decrease innovation post-Merger. Instead of fighting that losing battle, Respondent focuses on trying to challenge product market definition and other aspects of Complaint Counsel's unilateral effects case, while simultaneously presenting [redacted] divestiture [redacted] and alleging Freedom was a failing firm. Lacking reliable evidence of its own, Respondent's claims rely heavily on obfuscating facts, ignoring evidence it finds impossible to explain, and misapplying the law and basic economic principles.

First, Respondent argues that Complaint Counsel has failed to carry its burden of establishing a relevant antitrust market, alleging without support that Complaint Counsel's relevant product market is simultaneously too broad and too narrow. Resp. Post-Tr. Br. at 2-4. At the core of its critique, Respondent attempts to confuse the key issue in market definition by misrepresenting how the U.S. prosthetic industry works and simply asserting, without support, that K-3/K-4 patients are indifferent between MPKs and mechanical knees. Once it is understood that there is no market for all products bought by any K-3/K-4 patient—because different K-3/K-4 patients have access to different choices due to individualized medical need and insurance coverage—it is clear that Respondent's proffered "all K-3/K-4 knee" market is factually and analytically incorrect. Respondent can only try to muddy the issue, because even Otto Bock and Freedom executives view the sale of MPKs as the market in which they compete. In their public statements and internal materials, Otto Bock and Freedom constantly distinguish MPKs from mechanical knees, touting their superior functionality and safety. (CCFF ¶¶ 607, 717-41). In its internal documents, Respondent regularly calculates U.S. MPK market shares and uses them to conduct its business. (CCFF ¶¶ 969-75).

Second, Respondent makes a futile effort to rebut the extremely strong presumption of anticompetitive effects by alleging that Freedom and Otto Bock are not close MPK competitors, that existing MPK manufacturers could expand, and that power-buyers and third-party reimbursement would constrain a price increase. Resp. Post-Tr. Br. at 4-7. While each of these arguments fails for multiple reasons, the common flaw is Respondent's conscious effort to avoid its internal documents and testimony that lay bare its anticompetitive plans. For example, Respondent's post-trial brief does not discuss Otto Bock's due diligence documents that reveal its basic rationale for the Merger: [redacted]

[redacted] (CCFF ¶¶ 1355, 1362, 1367-70, 1381-82). Similarly, Respondent's post-trial brief avoids evidence from the November 2017 integration meeting between top Otto Bock and Freedom executives, where a central topic was [redacted] (CCFF ¶¶ 1384, 1394, 1410-11). Nor does Respondent attempt to address the testimony of Otto Bock's CEO at the time of the Merger, Matthew Swiggum, who admitted that he had proposed that Otto Bock [redacted] (CCFF ¶ 1353), [redacted] (CCFF ¶ 1364).

Respondent asks this Court to ignore all harm from its anticompetitive Merger because it has agreed to divest select MPK-related assets to a buyer [redacted] Resp. Post-Tr. Br. at 7-8. The "legitimate objective" in a Section 7 case is to "restore the competitive intensity" lost from the Merger, *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (quoting *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 72 (D.D.C. 2015)), and complete divestiture is the "natural remedy" for a Section 7 violation, *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 329 (1961) (hereinafter "*du Pont 1961*"). Although Respondent purports to divest "100% of Freedom's assets in the alleged relevant market," Resp. Post-Tr. Br. at 7, [redacted]

[redacted]

Finally, Respondent asserts that Freedom "easily qualifies" for the failing firm defense, or, if that defense is "technically lacking," at least a flailing firm claim. Resp. Post-Tr. Br. at 9, 76. However, Respondent makes no attempt to explain how Freedom's sales process satisfied its heavy legal burden to show it exhausted its efforts to elicit reasonable alternative offers, which is a prerequisite for either defense. To justify its exclusive focus on maximizing its sale price for shareholders, Respondent claims it met its burden, despite disregarding a tangible offer from Össur, unsolicited express interest from Nabtesco, and failing to reach out to several other interested companies in the industry. The law requires more. Specifically, Freedom had an obligation to pursue any less anticompetitive offers greater than liquidation value. The record is clear it did not.

Even if Respondent's claims were not riddled with misleading assertions, omissions of key evidence, and misapplications of the legal and economic principles, its arguments would still fail due to a lack of evidentiary support. Entire sections of Respondent's post-trial brief are devoid of citation, *see* Resp. Post-Tr. Br. at 77-78, while a number of its proposed findings are wholly unrelated to the claims for which they are cited, *see, e.g.*, Resp. Post-Tr. Br. at 65 (citing RPFF ¶¶ 1346-48). Several other purported findings are nothing more than bald assertions with no citation to record evidence. *See, e.g.*, (RPFF ¶¶ 1249, 1252, 1260). Still others cite only to self-serving testimony of a single Respondent executive, usually Otto Bock's Scott Schneider, because Respondent could not find an unbiased source for its assertion. *See, e.g.*, (RPFF ¶¶ 350-

52, 355, 361-63, 382, 399, 471, 478, 692, 1231, 1313). In addition, Respondent repeatedly violates this Court's prohibition against citing expert testimony to support factual propositions that should be established by fact witnesses and documents, s*ee, e.g.*, Responses to RPFF ¶¶ 511, 513-14, 535, or to a demonstrative exhibit, *see, e.g.*, (RPFF ¶¶ 1294-98, 1310-11). Other proposed findings simply misrepresent the substance of cited support. *See, e.g.*, Response to RPFF ¶ 798.

The Otto Bock/Freedom Merger was illegal. This case is not a close call. Complaint Counsel has met its burden with an extremely strong *prima facie* case, buttressed by extensive direct evidence of anticompetitive effects. Ample record evidence proves that clinics and amputees have and will continue to be harmed, and Respondent has failed to rebut Complaint Counsel's case establishing a violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. With respect to every defense raised, Respondent's evidence falls far short of the law's requirements. Thus, a remedy is justified and required to prevent further harm to competition. Complaint Counsel respectfully requests the Court issue its Proposed Order, which would divest an ongoing Freedom business to a qualified buyer and fully restore competition in the U.S. MPK market.

I. Overwhelming Evidence Established that the Sale of Microprocessor Prosthetic Knees is a Relevant Product Market

Complaint Counsel has proven that the sale of MPKs to prosthetic clinics is a relevant product market. As shown in its post-trial brief, Complaint Counsel's market definition is firmly supported by case law, established antitrust principles, and a voluminous trial record. *See* CC Post-Tr. Br. at 25-52. Both the *Brown Shoe* "practical indicia," *see id.* at 28-45, and the hypothetical monopolist test, *see id.* at 45-52, demonstrate that MPKs sold to U.S. prosthetic clinics is a properly defined relevant product market. This product market definition is consistent not only with the approach prescribed by the *Merger Guidelines*, but also the "commercial realities" of the prosthetics industry. *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962). It also mirrors the market described in Respondent's own ordinary course documents, which Respondent completely ignores in its post-trial brief. (CCFF ¶¶ 717-41). Nothing in Respondent's post-trial brief undermines this conclusion.

Respondent mischaracterizes Complaint Counsel's product market as the product of a "rigid assumption that any prosthetic knee that contains a microprocessor must be included in the market." Resp. Post-Tr. Br. at 4. But Complaint Counsel made no such "rigid assumption" in defining the relevant product market; it followed the exact approach set forth in the case law and *Merger Guidelines*. *See* CC Post-Tr. Br. at 25-52. That approach, applied to the facts here, clearly establishes that MPKs sold to U.S. clinics is a distinct relevant product market in which to assess the likely competitive effects of the Merger. Respondent's claim that this market definition improperly excludes so-called "Sophisticated Non-MPKs" and inappropriately includes "High-End MPKs" is wrong. The various arguments Respondent advanced in support of this assertion misapply the law on market definition, reflect a fundamental misunderstanding

of how the U.S. prosthetic industry works, and are contradicted by voluminous evidence that the sale of MPKs is a properly defined relevant product market.

A. Respondent's Argument that an MPK Market is Too Narrow is Incorrect

Respondent's principal criticism is that the market must include "Sophisticated Non-MPKs," Resp. Post-Tr. Br. at 2-3, 35-50, a term coined by Respondent in this litigation that has no accepted meaning in the prosthetics industry.[1] This argument is meritless. First, a considerable body of evidence shows that the *Brown Shoe* practical indicia point to a distinct relevant product market consisting only of MPKs. (CCFF ¶¶ 607-766). Respondent's claim that MPKs and non-MPKs are "reasonably interchangeable" is false, based on a misapplication of the *Brown Shoe* practical indicia (some of which Respondent completely ignores), and a mischaracterization of the evidence. Second, the hypothetical monopolist test demonstrates that the sale of MPKs to clinics is a properly defined relevant product market, refuting the notion that an MPK market is too narrow. (CCFF ¶¶ 767-94). Respondent's claim that the hypothetical monopolist test supports a broader product market that includes some mechanical knees is specious, as it relies only on its economic expert's flawed and incomplete application of the test.

[1] Though Respondent uses the term "Sophisticated Non-MPKs" sixty times in its post-trial brief, *see* Resp. Post-Tr. Br. at 1-126, and twenty-five times in its proposed findings of fact, *see* (RPFF ¶¶ 1-1634), Respondent does not cite to a single ordinary course document that uses the term, *see generally* (RPFF ¶¶ 1-1634). The genesis of this made-for-litigation class of mechanical knees is the self-serving testimony of Respondent's own executive, Scott Schneider. *See* (RPFF ¶ 143) (citing Schneider (Otto Bock) Tr. 4335). When asked if Otto Bock considered its 3R60 mechanical knee to be a "sophisticated knee," Mr. Schneider responded: "Yes. This is a -- this is a super cool knee. There's lots of sophistication here." (Schneider (Otto Bock) Tr. 4335). Mr. Schneider never uses the term "Sophisticated Non-MPK" in his trial testimony, nor does he describe any other mechanical knee as "sophisticated" (though Respondent's counsel uses the term on a few additional occasions during his examination of Mr. Schneider). *See generally* (Schneider (Otto Bock) Tr. 4259-763). Respondent's post-trial brief and proposed findings of fact classify several knees as "Sophisticated Non-MPKs," *see* Resp. Post-Tr. Br. at 27 (citing RPFF ¶ 143), but Respondent never defines the term nor does it ever articulate the characteristics that make a particular mechanical knee "sophisticated." The closest Respondent comes to defining "Sophisticated Non-MPKs" is in its post-trial brief, where it asserts—*without citation*—that these mechanical knees "utilize hydraulic and/or pneumatic controls for the swing and/or stance phases of the knee." *Id.* at 27. In stark contrast to MPKs, which are universally recognized by the industry as a distinct class of prosthetic knees, *see infra* § I.A.1.a, "Sophisticated Non-MPKs" are little more than a concocted term designed to confuse the issues in this case.

1. The *Brown Shoe* Practical Indicia Establish that MPKs are a Relevant Product Market and that Mechanical Knees are Properly Excluded

The relevant product market refers to the "product and services with which the defendants' products compete." *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 193 (D.D.C. 2017) (internal quotations omitted), *aff'd* 855 F.3d 345 (D.C. Cir.). As explained in Complaint Counsel's post-trial brief, *see* CC Post-Tr. Br. at 25, a relevant product market includes all goods that are "reasonable substitutes," *Sysco*, 113 F. Supp. 3d at 25 (internal citations omitted); *see also Anthem*, 236 F. Supp. 3d at 194-95. Whether goods are "reasonable substitutes" depends on two factors: "functional interchangeability," which refers to whether buyers view similar products as substitutes, and cross-elasticity of demand. *Sysco*, 113 F. Supp. 3d at 25; *see also H&R Block*, 833 F. Supp. 2d at 51 (holding that "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") (internal quotations omitted); *In re Polypore Int'l, Inc.*, No. D-9327, 150 F.T.C. 586, 2010 WL 9549988, at *11 (F.T.C. Nov. 5, 2010) ("Interchangeability of use and cross-elasticity of demand look to the availability of products that are similar in character or use to the product in question and the degree to which buyers are willing to substitute those similar products for the product.") (internal quotations omitted). Cross-elasticity of demand refers to "the responsiveness of the sales of one product to price changes of the other." *United States v. E.I. du Pont De Nemours & Co.*, 351 U.S. 377, 400 (1956) (hereinafter "*du Pont 1956*"); *Sysco*, 113 F. Supp. 3d at 25. So, "[i]f an increase in the price for product A causes a substantial number of customers to switch to product B, the products compete in the same market." *Sysco*, 113 F. Supp. 3d at 25; *see also du Pont 1956*, 351 U.S. at 400. Evaluating

whether an increase in the price for MPKs would cause a substantial number of customers to switch to mechanical knees is an essential part of defining the product market in this case.

The "practical indicia" identified by the Supreme Court in *Brown Shoe* are "evidentiary proxies for proof of substitutability and cross-elasticities of supply and demand." *H&R Block*, 833 F. Supp. 2d at 51 (internal citation omitted); *see also Polypore*, 150 F.T.C. at *11 (internal citations omitted). These practical indicia include "industry or public recognition of the [relevant 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 Aetna*, 240 F. Supp. at 21; *Sysco*, 113 F. Supp. 3d at 27; *H&R Block*, 833 F. Supp. 2d at 51. As the Commission noted in *Polypore*, "These observable market facts provide evidence of interchangeability and the cross-elasticity of demand." 150 F.T.C. at *11.

Although Respondent recognizes that the *Brown Shoe* practical indicia are important to defining the relevant product market, *see* Resp. Post-Tr. Br. at 35-36, it errs in the application of these indicia. Respondent ignores key evidence—most notably, its own documents—and fails to even discuss key indicia—namely, "distinct prices" and "sensitivity to price changes"—that disprove its claim that the relevant product market includes some mechanical knees. Respondent's discussion of the other practical indicia, including whether MPKs have "peculiar characteristics and uses," "distinct customers," and "specialized vendors," misrepresents the record, particularly with respect to how medical professionals prescribe, insurers reimburse, and clinics purchase MPKs.

a) Respondent Ignores Voluminous Evidence, Including Its Own Documents, Showing the U.S. Prosthetics Industry Recognizes MPKs are Sold in a Separate Market from Mechanical Knees

Industry recognition of a product or service as a "separate economic entity" is powerful evidence of the relevant product market. *Brown Shoe*, 370 U.S. at 325; *see also Sysco*, 113 F. Supp. 3d at 30; *H&R Block*, 833 F. Supp. 2d at 52-53. In particular, courts pay "close attention to the defendants' ordinary course of business documents" because they "reveal the contours of competition from the perspective of the parties," who "may be presumed to have accurate perceptions of economic realities." *Aetna*, 240 F. Supp. 3d at 21 (internal quotations omitted); *see also H&R Block*, 833 F. Supp. 2d at 52-53 (concluding that the merging parties' documents was "strong evidence" of the relevant product market); *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C. 1986) (observing that market definition "is a matter of business reality—a matter of how the market is perceived by those who strive for profit in it"). It is therefore telling that Respondent's post-trial brief does not cite any Otto Bock or Freedom documents—not one—to support its claim that the prosthetics industry does not recognize MPKs as a distinct market separate from non-MPKs. *See* Resp. Post-Tr. Br. at 45-46.[2]

Respondent ignores its own documents because they refute its claim that MPKs are not in a distinct relevant product market. As Complaint Counsel demonstrated in its post-trial brief, *see* CC Post-Tr. Br. at 22-24, 40-41, both Otto Bock and Freedom consistently recognize MPKs as a

[2] In support of its "industry recognition" argument, Respondent cites only to product catalogs and other marketing materials that include both MPKs and mechanical knees used by K-3/K-4 amputees and a few statements by its own executive. *See* Resp. Post-Tr. Br. at 45-46 (citing RPFF ¶¶ 340, 476, 483, 490, 596). The fact that marketing materials produced by manufacturers and clinics include the full range of products offered for K-3/K-4 patients does not illuminate anything relevant to product market definition. The same materials also include other products these vendors offer, like prosthetic knees intended for K-1 and K-2 patients, yet even Respondent does not assert they are in the market as a result. The materials cited by Respondent simply list all of the products that manufacturers or clinics offer, and are not intended to identify which products are economic or functional substitutes for one another. (PX03114 (COPC) at 006-07); (RX0178 (Endolite) at 035); (RX0906 (Össur) at 001). That Respondent relies on such material shows how thin its support for its "industry recognition" claim really is.

distinct market from mechanical knees in the ordinary course of business, (CCFF ¶¶ 717-41).[3] Otto Bock's ordinary course documents reveal that the company regularly estimates its share of the U.S. MPK market, as well as the shares of Freedom and a few other MPK manufacturers. (CCFF ¶ 718) (January 2015 internal analysis of the U.S. MPK market estimating that Otto Bock has a [redacted] percent share, Freedom has an [redacted] percent share, and Össur and Endolite have a [redacted] percent and [redacted] percent share, respectively); (CCFF ¶ 720) (November 2015 internal analysis of the U.S. MPK market estimating that Otto Bock has an [redacted] percent share, Freedom has a [redacted] percent share, and Össur and Endolite have an [redacted] percent and [redacted] percent share, respectively); (CCFF ¶ 722) [redacted]

Otto Bock's internal analyses of the U.S. MPK market are consistent over time, (CCFF ¶¶ 967-75), and across different business settings, (CCFF ¶¶ 976-80), lending them additional credence. Moreover, they are prepared regularly and make their way to the highest levels of the company. (CCFF ¶ 717) (Matthew Swiggum, Otto Bock's CEO at the time of the Merger, testified that Otto Bock internally generates market share estimates of the U.S. MPK market on a regular basis); (CCFF ¶ 721) (identifying internal analyses of the U.S. MPK market sent to Otto Bock's primary owner, Hans Georg Näder).

Freedom also consistently analyzed the MPK market separate and apart from mechanical knees. (CCFF ¶¶ 727-28); *see also* (CCFF ¶ 726) [redacted]. For example, an

[3] Even Otto Bock's own publicly available website states that "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." (CCFF ¶ 607).

internal Freedom analysis of the [redacted] (CCFF ¶ 727). [redacted] (CCFF ¶ 728). Maynard Carkhuff, Freedom's Chairman and former CEO, testified that the [redacted] (CCFF ¶ 728).

Respondent ignores that the rest of the prosthetics industry also recognizes that MPKs compete in a separate market from mechanical knees. (CCFF ¶¶ 742-66). Other MPK manufacturers, such as Össur and Endolite, view MPKs as a distinct market. (CCFF ¶ 754) [redacted]; (CCFF ¶ 756) (Endolite's Executive Chairman, Stephen Blatchford, testified that Endolite "only look[s] at other MPKs" and not mechanical knees when analyzing competition for the Orion 3 because "the price point is completely different" and "customers don't tend to think of [the two types of knees] in the same way"). Likewise, mechanical knee manufacturers, including College Park and Fillauer, do not view mechanical knees as competing with MPKs. (CCFF ¶¶ 759-66); (CCFF ¶ 763) (College Park internal analysis describing a new mechanical knee for K-3 patients as [redacted]; (CCFF ¶ 765) [redacted]

[redacted]. MPKs and mechanical knees also qualify for different sets of L-Codes and therefore insurers, including Medicare and private payers, reimburse clinics different amounts for the two classes of products. (CCFF ¶ 746).

b) Respondent Ignores the Distinct Prices of MPKs and Mechanical Knees and that MPK Prices Are Not Sensitive to Mechanical Knee Prices

Respondent's analysis of the *Brown Shoe* practical indicia disregards the very "distinct prices" of MPKs and mechanical knees. *See* Resp. Post-Tr. Br. at 36-46. But Respondent cannot avoid the fact that MPKs are—without question—significantly more expensive than mechanical knees, (CCFF ¶¶ 701-06), which indicates that MPKs constitute a separate relevant product market, *see FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 119-20 (D.D.C. 2016) (discussing "distinct prices" as evidence of a relevant product market); *see also Aetna*, 240 F. Supp. 3d at 28 (same). In 2017, the average sales price of an MPK was approximately [redacted], while the average sales price of a mechanical knee was only about [redacted] (CCFF ¶¶ 705-06). Similarly, insurance providers reimburse clinics substantially more for MPKs than they do for mechanical knees. (CCFF ¶¶ 707-11). According to Respondent's own economic expert, Dr. Argue, the Medicare reimbursement rate for MPKs ranged from approximately $26,000 to $35,000, while the Medicare reimbursement rate for non-MPKs ranged from about $5,000 to $8,000. (CCFF ¶ 711). These stark differences in both the price and reimbursement of MPKs as compared to mechanical knees clearly shows that MPKs are a distinct product market and

severely undermines Respondent's claim that mechanical knees are "reasonably interchangeable" with MPKs.[4]

Respondent's discussion of the *Brown Shoe* practical indicia likewise ignores the fact that MPK prices are not sensitive to mechanical knee prices. *See* Resp. Post-Tr. Br. at 36-46. Though Respondent's post-trial brief observes that "sensitivity to price changes" is one of the practical indicia used to define a relevant product market, *see id.* at 36, it fails to discuss the case law or evidence on this issue. As Complaint Counsel explained in its post-trial brief, *see* CC Post-Tr. Br. at 25-26, courts look at "the responsiveness of the sales of one product to price changes of the other" to evaluate the cross-elasticity of demand between products, *du Pont 1956*, 351 U.S. at 400; *see also Sysco*, 113 F. Supp. 3d at 25; *Swedish Match*, 131 F. Supp. 2d at 158-59. "If an increase in the price for product A causes a substantial number of customers to switch to product B, the products compete in the same market." *Sysco*, 113 F. Supp. 3d at 25; *see also du Pont 1956*, 351 U.S. at 400. The critical question in this case is thus whether an increase in the price of MPKs would cause a substantial number of customers—*i.e.*, clinics—to switch to mechanical knees to meet the medical needs of the amputees they serve. *See, e.g.*, *du Pont 1956*, 351 U.S. at 400; *Sysco*, 113 F. Supp. 3d at 25; *Merger Guidelines* § 4. Yet Respondent's post-trial brief never addresses this key question.

Respondent's omission is glaring because there is no evidence in the record that medical professionals have moved patients from MPKs to mechanical knees (or vice versa) based on the prices that clinics pay for MPKs or mechanical knees. (CCFF ¶ 525); *see also* (CCFF ¶¶ 526-27) (none of the clinic customers who testified said that their prosthetists had ever switched a patient

[4] A significant price and reimbursement gap also exists between MPKs and Respondent's so-called "Sophisticated Non-MPKs." (RPFF ¶¶ 143, 149) (classifying Otto Bock's 3R60 as a "Sophisticated Non-MPK" and admitting that the 3R60 has an average sales price of $4,000 and is reimbursed at $11,000).

from an MPK to a mechanical knee based solely on price); (CCFF ¶ 528) (Respondent's expert could not identify any testimony in the record of a customer who had switched a patient from an MPK to a mechanical knee because of price where the patient was able to demonstrate medical necessity and insurance coverage for an MPK). Rather, prosthetists testified that the choice between fitting a patient with an MPK or a mechanical knee (if insurance coverage was available for both products) is a *clinical* one and not based on the relative prices a clinic pays for MPKs and mechanical knees. (CCFF ¶ 529).

Ignoring the pricing evidence, and without citing to any fact witness or ordinary course documents, Respondent asserts that clinics sometimes earn higher margins on mechanical knees and that, as a result, they are willing to substitute MPKs and non-MPKs on the basis of margin. *See* Resp. Post-Tr. Br. at 44-45. But there is no factual support in the record for this proposition.[5] To the contrary, the record shows that prosthetists have an ethical obligation to fit a patient with a prosthetic knee that best meets her medical needs, (CCFF ¶¶ 524, 814), and that as long as clinics can fit an MPK on a patient who has a prescription and insurance coverage, without losing money, they will, (CCFF ¶¶ 807-13).

The evidence is clear that mechanical knees have no impact on the pricing of MPKs, (CCFF ¶¶ 600, 602-04), and play no role in the pricing negotiations between clinics and MPK manufacturers, (CCFF ¶¶ 712-13). MPK manufacturers have testified that when the prices of mechanical knees fluctuate, they do not change the prices of their MPKs in response. (CCFF ¶ 603) (Endolite's Executive Chairman testified that [redacted]

[5] To support its claim that clinics substitute between MPKs and non-MPKs on the basis of margin, Respondent cites only the opinion of its expert, which is improper. *See* Resp. Post-Tr. Br. at 44-45 (citing RPFF ¶¶ 433, 435); *see also* (Responses to RPFF ¶¶ 433, 435); Order on Post-Trial Briefs, *In re Otto Bock HealthCare North America, Inc.*, Docket No. 9378 (Oct. 10, 2018) at 3. Moreover, as discussed *infra*, *see* § I.A.2.b, Dr. Argue's "Model of Clinic Profitability," on which Respondent relies, is unreliable, severely flawed, and inconsistent with the record in this case. *See* Resp. Post-Tr. Br. at 44-45; (Responses to RPFF ¶¶ 433-435).

[redacted]**)**; (CCFF ¶ 604) (Össur's Executive Vice President of Research & Development testified that Össur does [redacted]). The prices of Otto Bock's C-Leg 4 and Freedom's Plié 3 are similarly immune to changes in the prices of mechanical knees. (CCFF ¶ 731) ([redacted]); (CCFF ¶ 735) (Freedom's Vice President of National and Key Accounts testified that when setting the price of the Plié 3, Freedom looks at the pricing of other MPKs, but not at the pricing of mechanical knees). Likewise, clinics have testified that in their negotiations with manufacturers they cannot threaten to switch to mechanical knees to negotiate lower MPK prices. (CCFF ¶ 712) (COPC's President of Kentucky/Indiana Operations testified that he has never threatened to shift the clinic's MPK purchases to mechanical knees as a negotiating tactic because the shift "would be a disservice to patients and poor patient care"); (CCFF ¶ 713) (CEO of Empire Medical testified that he is unable to use the pricing of mechanical knees when negotiating with MPK manufacturers on the price of MPKs because "[i]t's a different product category").

This undisputed evidence on how MPK prices are set disproves Respondent's claim that MPKs and mechanical knees are in the same relevant product market. *See, e.g.*, *Aetna*, 240 F. Supp. 3d at 24-25 (evidence that Aetna does not assess the price of Medicare Advantage plans when it sets the price of MedSupp plans indicates that the two types of plans are not in the same relevant product market); *H&R Block*, 833 F. Supp. 2d at 53 (the development of "pricing and business strategy with [a particular] market and those competitors in mind" is "strong evidence" of the relevant product market); *Swedish Match*, 131 F. Supp. 2d at 165 ("The Commission

amassed evidence showing that loose leaf pricing is determined upon the basis of competition with other loose leaf products . . . ."); *Coca-Cola Co.*, 641 F. Supp. at 1132-33 (evidence that concentrate companies "make pricing and marketing decisions based primarily on comparisons with rival carbonated soft drink products, with little if any concern about possible competition from other beverages" shows that carbonated soft drinks is a relevant product market).

c) Respondent's Attempts to Distinguish Freedom's Plié 3 from Other MPKs are Unavailing

As Complaint Counsel described in its post-trial brief, *see* CC Post-Tr. Br. at 29-36, there is a tremendous amount of evidence that MPKs possess unique physical attributes that provide patients with significant safety and performance benefits over mechanical knees. (CCFF ¶¶ 607-700). The safety, health, and quality of life benefits experienced by amputees who wear MPKs over those who wear mechanical knees are demonstrated in a large body of clinical research, (CCFF ¶¶ 617-48), recognized by surgeons, prosthetists, and clinics, (CCFF ¶¶ 649-56), and touted by MPK manufacturers, including Otto Bock and Freedom, (CCFF ¶¶ 657-700). In an attempt to overcome this overwhelming evidence on the "peculiar characteristics and uses" of MPKs, *Brown Shoe*, 370 U.S. at 325, Respondent seeks to distinguish Freedom's Plié 3 in two respects. First, Respondent argues that the Plié 3 is not a true "swing and stance" MPK like Otto Bock's C-Leg, but rather a microprocessor-controlled "switch-only" knee that is more similar to "Sophisticated Non-MPKs." Resp. Post-Tr. Br. at 37-38. Second, Respondent argues that the clinical studies establishing the benefits of MPKs over mechanical knees do not apply to the Plié 3. *See id.* at 38-39. Neither argument withstands scrutiny.

(1) Respondent's Claim that the Plié 3 is in a Separate Class of "Switch-Only" MPKs is Incorrect, Made-for-Litigation, and Contradicted by Substantial Evidence that the Plié 3 Competes Directly with the C-Leg 4

Respondent claims that the microprocessor in the Plié 3 "can switch the knee from a fixed stance phase resistance and a fixed swing phase resistance, but it cannot vary the resistance throughout the gait cycle." *Id.* at 28. According to Respondent, as a "switch-only" MPK with limited functionality, the Plié 3 is more similar to "Sophisticated Non-MPKs" than it is to "swing and stance" MPKs, like Otto Bock's C-Leg 4. *See id.* at 28-30, 37-38. Respondent raises this argument to suggest that if an MPK market exists, the Plié 3 would not be included in it. But the evidence belies Respondent's disingenuous claim that the Plié 3 is not a "true" MPK. Respondent's made-for-litigation class of "switch-only" MPKs conveniently includes only one product sold in the United States: the Plié 3. (RPFF ¶ 167). In the ordinary course of business, however, neither Respondent, nor payers, nor any other company in the prosthetics industry recognizes a class of "switch-only" MPKs. On the contrary, a considerable body of evidence shows that the Plié 3 is a "swing and stance" MPK that competes directly with Otto Bock's C-Leg 4, Össur's Rheo, and Endolite's Orion 3.

Respondent's class of "switch-only" MPKs is a fiction created solely to sow confusion in this litigation. As even Respondent admits, there is no L-Code for "switch-only" MPKs. (RPFF ¶ 165). Moreover, not a single customer[6] described a separate class of "switch-only" MPKs that

[6] Respondent's proposed findings describing the purported class of "switch-only" MPKs (or "MP-Switch" knees) do not cite to any customer testimony; they rely solely on the self-serving testimony of its own executives. (RPFF ¶¶ 164-73). Respondent's suggestion that the testimony of Maynard Carkhuff, Freedom's Chairman and former CEO, supports its claim that the Plié 3 is a "switch-only" MPK is misleading. *See* Resp. Post-Tr. Br. at 28. At trial, Mr. Carkhuff clearly testified that the Plié 3 has swing and stance control. (Carkhuff (Freedom) Tr. 350-51) (noting that "the swing and stance control" for the Plié 3 "is provided by our hydraulic system"). Mr. Carkhuff further testified that Freedom represents both on its website and in its public marketing materials that both the Plié 3 and C-Leg 4 have swing and stance control. (Carkhuff (Freedom) Tr. 350-51). The evidence is clear that Freedom positioned the

competed against mechanical knees, but not against the C-Leg 4 and other "swing and stance" MPKs. Likewise, Respondent cannot point to a single ordinary course document—from its files or anywhere else—that discusses a separate class of "switch-only" MPKs. In fact, Respondent's own documents disprove its claim that the Plié 3 is a so-called "switch-only" MPK that does not compete directly with Otto Bock's C-Leg 4. In a November 2017 document, prepared in connection with its post-Merger planning, [redacted]

[redacted]

Plié 3 as a superior knee to Otto Bock's C-Leg, and, according to Mr. Carkhuff, the Plié 3 is, in fact, superior. (CCFF ¶ 1016).

[redacted] There is no mention of a "switch-only" MPK segment; [redacted] (CCFF ¶ 974). As the chart unambiguously shows, Respondent estimated that Freedom had an [redacted] (CCFF ¶ 974).[8]

Respondent's argument ignores overwhelming evidence that the Plié is a "true" MPK with swing and stance control. Indeed, several Freedom witnesses testified that the Plié 3 is an MPK, (CCFF ¶ 3064), with functionality that competes directly against Otto Bock's C-Leg 4. (CCFF ¶¶ 1016, 1056, 1083). At trial, Freedom's Vice President of Marketing and Product Development, Eric Ferris, testified that the Plié has microprocessor swing and stance control. (CCFF ¶ 3081) ("Q: But the Plié does in fact have swing and stance control, doesn't it? A: I believe so. Again, according to my engineers, yes."); (CCFF ¶ 663) [redacted] Freedom's documents confirm that the company views the Plié 3 as a swing and stance MPK and that it recommends its customers to seek reimbursement under L-Code 5856, which is for microprocessor swing and stance knees. (CCFF ¶¶ 3064-67, 3069-72).

[7] At the time of the Merger, Freedom's only commercially available prosthetic knee was the Plié 3, (CCFF ¶ 28), so its share of the "MPK Swing & Stance Control" segment is solely the Plié 3. Indeed, in November 2017, [redacted] (CCFF ¶ 974).

[8] Otto Bock's CEO at the time of the Merger, Matthew Swiggum, also testified that in November 2017, Otto Bock estimated that the combined firm's share of the U.S. MPK swing and stance control segment was [redacted] percent in terms of revenue. (PX05148 (Swiggum (Otto Bock) Dep. at 190) (*in camera*)).

Other industry participants also view the Plié as an MPK that competes directly with the C-Leg and other MPKs. Össur and Endolite agree that the Plié competes directly with the C-Leg 4 and their own MPKs. (CCFF ¶ 754) [redacted]; (CCFF ¶ 758) [redacted] Even Otto Bock consistently identifies the Plié, along with other swing and stance MPKs, as the C-Leg's primary competitors. (CCFF ¶ 3088). The views of MPK manufacturers are shared by clinics, who consider the Plié 3 a direct competitor of the C-Leg and other MPKs. (CCFF ¶¶ 1147-62). Importantly, insurers reimburse the Plié as a "swing and stance" MPK under L-Code 5856. (CCFF ¶¶ 3072, 3080) (United Healthcare reimburses clinics the same amount for the C-Leg 4 and Plié 3); *see also* (CCFF ¶¶ 3067-70, 3074-78, 3082) (clinics receive the same reimbursement for the Plié as they do for the C-Leg).

Respondent's litigation argument is a rehash of marketing attacks that Otto Bock levied against the Plié in 2015, and that Freedom successfully refuted in the marketplace. (CCFF ¶ 994). In response to Otto Bock's claim that the Plié 3 was not a true "swing and stance" MPK, Freedom published a "Fact Sheet" on its website (which was still there at the time of trial) that directly compared the functions of the Plié 3 with those of the C-Leg 4. (CCFF ¶ 994). In a section of the Fact Sheet entitled "Ottobock Claims vs Reality," Freedom stated that, "Both Plié 3 and C-Leg 4 have swing and stance control" and, in fact, "Plié 3 samples data at rate of 1000Hz which is 10x faster than C-Leg 4. The speed of Plié 3 processor makes it Real Time." (CCFF ¶ 994). Since posting its Fact Sheet in 2015, Freedom has sold thousands of Plié 3 MPKs to customers, all of which had the opportunity to buy a C-Leg 4, but chose a Plié 3 instead.

(CCFF ¶ 966, Table A2). Otto Bock's criticisms of the Plié 3 did not work in 2015; nor do they today.

(2) Respondent's Claim that Clinical Studies Do Not Support the Superior Functionality and Performance of the Plié over Mechanical Knees is Contradicted by Respondent's Own Statements and Actions

Complaint Counsel has proven that a large body of clinical research shows that amputees who wear MPKs experience significant safety, health, and quality of life benefits over those who wear mechanical knees. (CCFF ¶¶ 617-48). At trial, Dr. Kenton Kaufman of the Mayo Clinic, a leading expert on MPK research, testified that "[t]he published articles have shown improved safety, [MPKs] have improved mobility, better satisfaction, and one of the recent articles show[s] that in a ten-year time frame they would have less arthritis." (CCFF ¶ 617); (CCFF ¶¶ 621-31) (discussing Dr. Kaufman's "FASTK2" study); (CCFF ¶¶ 632-40) (discussing the RAND study); (CCFF ¶¶ 641-46) (discussing other MPK studies). According to Jason Kahle of the University of Southern Florida and Prosthetics Design & Research, "the biggest benefit of a microprocessor knee" is reduction in stumbles and falls, which is "the reason why microprocessor knees are paid for by both CMS and most insurance companies." (CCFF ¶ 648).

Respondent does not take issue with the conclusions of the clinical studies relied upon by Complaint Counsel. Instead, Respondent argues that the clinical research does not show that *the Plié* offers superior functionality and performance over "Sophisticated Non-MPKs." *See* Resp. Post-Tr. Br. at 38-39. Respondent argues that because most MPK studies were based on the C-Leg, "it is not appropriate to extrapolate the results" to Freedom's Plié "simply because the knee also happens to contain a microprocessor." *Id.* at 38. Although Respondent does not dispute that Dr. Kaufman's FAST K2 study tested the Plié 3, it tries to minimize the study's significance by

arguing that because Dr. Kaufman focused on K-2 patients, his FAST K2 study does not show the benefits of the Plié over "Sophisticated Non-MPKs." *See id.* at 39. Respondent's arguments are belied by Freedom's own behavior, (CCFF ¶¶ 657-73), the purchasing decisions of U.S. clinics that chose to buy the Plié instead of the C-Leg, (CCFF ¶¶ 1147-62), and the undisputed fact that insurers reimburse clinics for both MPKs pursuant to L-Code 5856, (CCFF ¶¶ 749, 3072, 3080).

Though Respondent now claims that the clinical research on MPKs does not establish the health, safety, or quality of life benefits of the Plié over mechanical knees, Freedom maintained otherwise before the Merger. (CCFF ¶¶ 657-73). In an ordinary course document titled [redacted]

[redacted] Other ordinary course documents, including material on Freedom's website, likewise show that Freedom uses peer-reviewed clinical research on MPKs to promote the Plié. (CCFF ¶ 672) (Freedom's website includes materials for use by Plié customers to help with reimbursement, including a "Microprocessor Knee Literature Review" that summarizes the clinical research on the benefits of MPKs); (CCFF ¶ 670) [redacted] (CCFF ¶ 671) (internal Freedom presentation with slides entitled "What makes MPC Knees different?" and listing the benefits of MPKs over non-MPKs); (CCFF ¶ 672) (Freedom's internal training materials list the benefits of MPKs).

Respondent's argument that the Plié cannot be included in a product market of "clinically proven" MPKs is a red herring. Resp. Post-Tr. Br. at 39. The relevant product market is the sale of MPKs, not "clinically proven" MPKs. The fact that many clinical studies focus on the C-Leg and not other MPKs is irrelevant to the prosthetists who recommend and insurers who pay for the Plié—and thus irrelevant to the product market issues here. (CCFF ¶¶ 649-56) (prosthetists and clinics recognize that MPKs provide benefits over mechanical knees); (CCFF ¶¶ 1147-50, 1154, 1157-60) (clinic testimony on head-to-head competition between the Plié and C-Leg); (CCFF ¶ 3080) (United reimburses clinics the same amount for the C-Leg 4 and Plié 3). As Respondent's own witness admitted, prosthetists submit—and insurers accept—the clinical evidence on the

superiority of MPKs generally to support reimbursement of *any* MPK, including Freedom's Plié. (PX05150 (Kannenberg (Otto Bock) Dep. at 85-86)) (Otto Bock's Executive Medical Director testifying that insurance companies "are pretty generous in accepting evidence" on the C-Leg "for the other microprocessor knees"). This shows that the key actors in the prosthetics industry accept Freedom's claim that the Plié, like all MPKs, provides significant safety and performance benefits over mechanical knees.

d) Respondent's Claim that the Relevant Product Market Should Be Defined in Terms of K-Level Reflects a Fundamental Misunderstanding of How the U.S. Prosthetics Industry Works

As explained in Complaint Counsel's post-trial brief, MPKs are used by a distinct subset of patients: K-3 and K-4 amputees for whom an MPK is the best medical option, as determined by their healthcare professionals, *and* for whom an MPK is a "medical necessity," as determined by their insurance provider. *See* CC Post-Tr. Br. at 17-20, 36; (CCFF ¶¶ 392-561). This distinct class of end-user—who not only would benefit medically from an MPK, but also has insurance coverage that will reimburse the clinic for the cost of the MPK—almost always receives an MPK instead of a mechanical knee. (CCFF ¶¶ 531-37). For these amputees, a mechanical knee is not a substitute for an MPK, (CCFF ¶¶ 524-29), which indicates that MPKs are a separate relevant market, *see Brown Shoe*, 370 U.S. at 325 ("distinct customers" is evidence of a distinct relevant product market); *Staples*, 190 F. Supp. 3d at 119-20.

Respondent denies that a distinct subset of K-3/K-4 amputees use MPKs. *See* Resp. Post-Tr. Br. at 39-44. It claims that "Sophisticated Non-MPKs" are "medically appropriate, and often chosen as superior, for the very same patient population – higher activity patients receiving so-called 'K-3' and 'K-4' mobility designations – that is eligible to receive MPKs," *id.* at 2, and thus argues that "it makes a great deal more practice sense to consider [the] relevant prosthetics

market in terms of mobility level, *i.e.*, or K-Level, which defines the set of products that are available and potentially appropriate for each patient," *id.* at 41-42. Respondent's argument that the relevant product market should be defined as *any* knee that *any* K-3/K-4 amputee may wear reflects a fundamental misunderstanding of how the U.S. prosthetics industry works, misapplies the law, and makes no economic sense.

Respondent's product market definition is wholly inconsistent with the process by which medical professionals prescribe MPKs to patients and insurers reimburse clinics for fitting MPKs on patients. (CCFF ¶¶ 430-523). The evidence in this case shows that healthcare professionals and insurers determine whether to prescribe and reimburse for an MPK based on individualized factors for each patient beyond the patient's K-level; that is, a patient's K-level simply makes her a *candidate* for an MPK. (CCFF ¶¶ 447-87). It is the differences in these individualized factors that determine which subset of K-3/K-4 patients receive MPKs and which receive mechanical knees. (CCFF ¶¶ 447-87).[9]

[9] In an effort to support its argument that the relevant product market should be defined as all prosthetic knees used by any K-3 or K-4 amputee, Respondent claims that "the increased risk" of Recovery Audit Contractor ("RAC") audits has caused "some clinics to fit Non-MPKs at higher rates for patients who otherwise might receive MPKs." Resp. Post-Tr. Br. at 42-43 (citing RPFF ¶ 442). For this proposition, [redacted] (CCFF ¶¶ 2994-3005). [redacted] Moreover, clinics uniformly testified that they have not reduced their purchases of MPKs in response to RAC audits. (CCFF ¶ 2995) (Mark Ford, President and Managing Partner of Prosthetic and Orthotic Associates, testified that the concern of RAC audits does not cause POA to shift patients from MPKs to mechanical knees); (CCFF ¶ 2996) (Keith Senn, President of the Kentucky and Indiana operations for COPC, testified that COPC has not instructed its prosthetic clinics to avoid fitting any specific MPKs due to the risk of a RAC audit); (CCFF ¶ 2997) (Jeffrey Brandt, CEO of Ability Prosthetics and Orthotics, testified that the risk of a RAC audit has not affected the number of MPKs that Ability fits on patients); (CCFF ¶ 2999) (Michael Bright, a certified prosthetist and owner of North Bay Prosthetics,

To determine whether an MPK is medically appropriate for a particular K-3/K-4 patient, healthcare professionals consider several factors, beyond just K-level, that inform whether an MPK would provide substantial benefits over a mechanical knee. (CCFF ¶¶ 447-87). Among other factors, they evaluate (1) a patient's age, overall health, and fitness; (2) the activities in which the patient engages or desires to engage; (3) the degree to which the patient stumbles, falls, or experiences other negative consequences when wearing a mechanical knee; and (4) the patient's comfort with an MPK. (CCFF ¶¶ 461-87). If a patient's healthcare professionals determine an MPK would provide significant medical benefits over a mechanical knee (*i.e.*, she would fall or stumble less, engage in more activities, or otherwise experience improved health or quality of life), they will prescribe an MPK and the clinic treating her will evaluate whether insurance is likely to cover the MPK. (CCFF ¶¶ 428, 445-87). If a patient's specific health or lifestyle characteristics make an MPK not medically appropriate, then she will be prescribed a mechanical knee. (CCFF ¶¶ 543-55).

Insurers typically determine whether an amputee's clinic should receive reimbursement for an MPK based on evaluating whether the clinic has documented evidence that an MPK is a "medical necessity" relative to a lower-cost product, such as a mechanical knee. (CCFF ¶¶ 496-

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testified that North Bay has not stopped fitting MPKs in response to RAC audits and that if an MPK was medically appropriate for a patient, he would not fit the patient with a mechanical knee out of fear of a RAC audit); (CCFF ¶¶ 3000-05) (similar clinic testimony). A clinic owner and prosthetist called at trial by Respondent explained that clinics do not substitute mechanical knees for MPKs based on the possibility of RAC audits because doing so would be immoral. Scott Sabolich, owner and Clinical Director of Scott Sabolich Prosthetics and Research, LLC, testified that, "[i]f you're choosing a mechanical K3 knee over a microprocessor K3 knee based solely on the fact that you could get audited and shut your business down, you're making an *immoral* decision based on your clinical connotations of ethics that shouldn't be made. You should make the best decision for the patient." (CCFF ¶ 3003) (emphasis added). Respondent acknowledges that RAC audits existed before, and have continued after, the Merger, and that the Merger has not changed anything about the way RAC audits are conducted. (CCFF ¶ 387). Before the Merger, the presence of RAC audits existed for every sale that Freedom made, (CCFF ¶ 388), yet Freedom and other MPK suppliers have sold thousands of MPKs in recent years, (CCFF ¶¶ 964, 966). Thus, no evidence in the record supports a conclusion that RAC audits would prevent Respondent from raising the price on either the Plié or one of Otto Bock's MPKs post-Merger.

514). In making the medical necessity determination on a particular patient, insurers likewise consider more than just the patient's K-level. (CCFF ¶¶ 515-19). Although medical necessity requirements vary to some degree based on the policy, in general, insurers require clinics to document evidence showing that a patient will experience significant, health, safety, or quality of life benefits by wearing an MPK rather than a mechanical knee. (CCFF ¶¶ 515-19). This evidence includes physicians' notes, narrative justifications of medical necessity from the prosthetist, and/or completed PAVET forms (or the like). (CCFF ¶¶ 515-19). If a clinic cannot document medical necessity, an insurer will deny coverage for an MPK, and approve coverage only for a mechanical knee. (CCFF ¶¶ 520-23).[10]

The process by which healthcare professionals and insurers, respectively, prescribe and cover MPKs illustrates that there is no product market for *all* prosthetic knees bought by *any* K-3 or K-4 patient because different K-3/K-4 patients have access to different choices. (CCFF ¶¶ 430-523). Respondent ignores that the U.S. healthcare system sorts K-3/K-4 amputees into two buckets: (1) those with an MPK prescription and insurance coverage for an MPK and (2) those who lack one, the other, or both. (CCFF ¶¶ 530-61). The first group does not view mechanical knees, and their inferior technology, as substitutes for the MPKs that their healthcare professionals have prescribed and their insurers have covered to improve their health, safety, and quality of life. (CCFF ¶¶ 531-37, 602). The second group has no ability to choose an MPK, since they do not have a valid prescription and/or insurance coverage. (CCFF ¶¶ 520-23).

[10] Respondent asserts that "[i]f insurance determines that an MPK is 'medically necessary' for a patient as defined by the applicable insurance plan, the prosthetist, physician, or patient can still decide to use a Non-MPK. This happens often." Resp. Post-Tr. Br. at 41 (citing RPFF ¶ 459). In support of its claim, Respondent cites only the self-serving testimony of Otto Bock executive Scott Schneider. (RPFF ¶ 459). The testimony of Mr. Schneider is not reliable testimony for the proposition that patients who have been prescribed an MPK and have insurance coverage "often" opt for a mechanical knee. Moreover, Mr. Schneider's testimony is contrary to the weight of the evidence, which demonstrates that the vast majority of patients who are prescribed and have insurance for an MPK receive one. (CCFF ¶¶ 531-37).

Respondent's failure to understand this process produced the fatal error underlying its product market definition: it assumes that because *some* mechanical knees (*i.e.*, so-called "Sophisticated Non-MPKs") are prescribed for *some* K-3/K-4 amputees, then *all* "Sophisticated Non-MPKs" are substitutes for MPKs for *all* K-3 and K-4 amputees. *See* Resp. Post-Tr. Br. at 2-3 (arguing that "Sophisticated Non-MPKs" are "medically appropriate, and often chosen as superior, for *the very same patient population* . . . that is eligible to receive MPKs") (emphasis added); *id.* at 40 (asserting that "Sophisticated Non-MPKs are . . . deemed 'medically necessary' for *the same patient population*" that uses MPKs) (emphasis added). The trial record in this case conclusively establishes that Respondent's assumption is false.

Respondent's argument that some K-3/K-4 amputees prefer mechanical knees to MPKs reveals, yet again, its poor grasp of market definition principles. *See id.* at 43-44. Certainly some K-3/K-4 amputees prefer a mechanical knee. *See* CC Post-Tr. Br. at 19. For example, some amputees engage in activities or work that is not conducive to wearing an MPK, such as fishing or farming, where exposure to water or dust, or general wear and tear, are problematic for wearing a high-tech MPK. (CCFF ¶¶ 543-55). Those patients typically wear a mechanical knee when engaging in such activities. In addition, a small number of K-3/K-4 amputees simply prefer the feel of a mechanical knee, particularly when they have worn one for many years. (CCFF ¶¶ 559-61).

But the fact that some K-3/K-4 amputees prefer a mechanical knee in no way undermines Complaint Counsel's product market definition. The critical legal and economic issue in this case is whether an increase in the price of MPKs would cause a substantial number of clinics to switch to mechanical knees. *See du Pont 1956*, 351 U.S. at 400; *Sysco*, 113 F. Supp. 3d at 25; *Merger Guidelines* § 4. The fact that a group of K-3/K-4 patients exists that would not choose

an MPK in the first place—for reasons completely unrelated to the price of MPKs charged to clinics—is irrelevant to the market definition exercise set forth in the case law and *Merger Guidelines*. Patients who would not have been fit with an MPK before the Merger or after a hypothetical MPK price increase are not in the relevant market and thus play no role in defining it. In any event, there is no evidence that a change in the price of an MPK *paid by the clinic* would affect the decisions of patients who have access to an MPK but prefer a mechanical knee. (CCFF ¶¶ 559-61). For those patients who prefer and had access to MPKs before the Merger, the evidence is clear that clinics could not switch them to mechanical knees to defeat an MPK price increase. (CCFF ¶¶ 767-828).

e) Respondent's Claim that MPKs are Not Sold by Specialized Vendors is Contradicted by the Record

In its post-trial brief, Respondent asserts that, "none of the manufacturers of MPKs in the United States use specialized sales forces to sell MPKs." Resp. Post-Tr. Br. at 45. This claim is misleading and refuted by the record. (CCFF ¶¶ 1676-714). As Complaint Counsel discussed in its post-trial brief, *see* CC Post-Tr. Br. at 43-45, the sale of MPKs requires highly specialized personnel who possess deep knowledge about MPKs to assist prosthetists with fittings and to provide clinics a variety of educational and other services they find valuable. (CCFF ¶¶ 1676, 1678, 1686-87, 1692, 1695, 1697-98). Successful manufacturers therefore employ direct sales models to sell their MPKs in the United States. (CCFF ¶ 1676) (Freedom's Chairman testifying that any manufacturer who wants to sell MPKs effectively in the U.S. has to have a sales force to interact with prosthetists and patients); (CCFF ¶ 1676) (Össur executive testifying that a direct sales force is "absolutely necessary" to sell MPKs to clinics); (CCFF ¶ 2891) [redacted]

[redacted] (CCFF ¶ 2823); *see also* (CCFF ¶ 2886) [redacted]

Mechanical knees, on the other hand, are far more likely to be sold through a distributor than a manufacturer's own sales force. (CCFF ¶ 2892). [redacted] (CCFF ¶ 2878). While evidence shows it would be problematic for a company trying to compete in the U.S. MPK market to rely primarily on distributors, (CCFF ¶¶ 2885, 2887, 2889, 2893-96), selling mechanical knees in this manner does not raise the same problems, (CCFF ¶ 2892).

* * * * *

As the above discussion makes clear, nothing in Respondent's post-trial brief undermines the conclusion that the *Brown Shoe* practical indicia establish that MPKs are in a separate relevant product market from mechanical knees in general and so-called "Sophisticated Non-MPKs" in particular. (CCFF ¶¶ 607-766). As explained below, a correct application of the hypothetical monopolist test confirms that the relevant product market in which to analyze the effects of the Merger is the sale of MPKs to clinics.

2. The Hypothetical Monopolist Test Shows that MPKs are a Relevant Product Market and that Mechanical Knees Are Properly Excluded

In addition to the *Brown Shoe* practical indicia, courts and the Commission also rely on the approach prescribed by the *Merger Guidelines* to define the relevant product market—the hypothetical monopolist test. *See, e.g.*, *Staples*, 190 F. Supp. 3d at 121-22; *Sysco*, 113 F. Supp. 3d at 33-34; *In re ProMedica Health Sys., Inc.*, No. 9346, 2012 WL 1155392, at *14 (F.T.C. Mar. 28, 2012) (citations omitted); *Polypore*, 150 F.T.C. at *11; *see also Merger Guidelines* § 4. This test asks whether a hypothetical monopolist of a particular group of substitute products could profitably impose a "small but significant and non-transitory increase in price" ("SSNIP")—typically 5 percent—on at least one of the products in the candidate market, or whether customers switching to alternative products would make such a price increase unprofitable.[11] *Merger Guidelines* §§ 4.1.1-4.1.3. Here, the question is whether a hypothetical monopolist, owning all (or some subset) of the MPKs in the marketplace, could profitably impose a SSNIP on all MPKs—or just the Plié or one of Otto Bock's MPKs—because if it could, MPKs would constitute a relevant product market.

As Complaint Counsel explained in its post-trial brief, *see* CC Post-Tr. Br. at 45-49, its economic expert, Dr. Scott Morton, proved that the answer to this question is yes. (CCFF ¶¶ 767-73). Consistent with the *Merger Guidelines*, Dr. Scott Morton conducted a critical loss analysis to test whether a hypothetical monopolist of Freedom's Plié and Otto Bock's MPKs could profitably impose a SSNIP on one of those products. § 4.1.3 ("Critical loss analysis asks

[11] As the court explained in *Sysco*, "The theory behind the test is straightforward. If enough consumers are able to substitute away from the hypothetical monopolist's product to another product and thereby make a price increase unprofitable, then the relevant market cannot include only the monopolist's product and must also include the substitute goods. On the other hand, if the hypothetical monopolist could profitably raise price by a small amount, even with the loss of some customers, then economists consider the monopolist's product to constitute the relevant market." 113 F. Supp. 3d at 33.

whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits."). To perform the critical loss test, Dr. Scott Morton used Respondent's own margin data and diversion analysis for the Plié 3 and Otto Bock's MPKs, which Otto Bock used to analyze the likely competitive effects of the Merger. (CCFF ¶¶ 777, 783-86). Dr. Scott Morton confirmed that imposing a SSNIP on one of the merged firm's MPKs would, in fact, be profitable, (CCFF ¶¶ 790-91), and thus concluded that a candidate market consisting of only Otto Bock's MPKs and Freedom's Plié 3 constituted a relevant product market, (CCFF ¶¶ 790-91).[12]

In order to account for evidence indicating that other MPKs sold in the United States compete significantly with the Plié and C-Leg, Dr. Scott Morton also analyzed the effects of the Merger in the broader relevant market for all MPKs. (CCFF ¶ 958). Given how the hypothetical monopolist test works, if a hypothetical monopolist could profitably raise price on the Plié or an Otto Bock MPK if it owned only those products, it would necessarily be able to impose a SSNIP on clinics if it owned all MPKs.[13] Thus, Dr. Scott Morton concluded that if the narrow candidate market of Otto Bock's MPKs and Freedom's Plié 3 is a relevant antitrust market, then "a wider market consisting of all microprocessor knees sold in the United States is also a relevant market." (CCFF ¶ 792).

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[12] The reason that a hypothetical monopolist controlling only Freedom's Plié and Otto Bock's MPKs could profitably impose a SSNIP is because the margins that Respondent earns on its MPKs are very high (well over [redacted], (CCFF ¶¶ 778, 789, 780-81), and, according to Respondent's own analysis, the diversion between its MPKs is very high as well (the C-Leg would recapture at least [redacted] percent of all Plié 3 sales, and likely far more). (CCFF ¶ 782). According to the *Merger Guidelines*, "[t]he higher the pre-merger margin, the smaller the recapture percentage necessary for the candidate market to satisfy the hypothetical monopolist test." § 4.1.3; *id.* § 6.1 (stating that "[d]iversion ratios between products sold by one merging firm and products sold by the other merging firm can be very informative for assessing unilateral price effects, with higher diversion ratios indicating a greater likelihood of such effects").

[13] By adding MPKs to the candidate market, including those manufactured by Össur, Endolite, Nabtesco, and DAW, the hypothetical monopolist simply recaptures a greater percentage of sales it otherwise would have lost to products outside the candidate market when it controlled only Freedom and Otto Bock's MPKs.

Relying only on the opinions of its economic expert, Dr. Argue, Respondent falsely claims that the hypothetical monopolist test actually supports a relevant product market broader than MPKs that also includes "Sophisticated Non-MPKs." *See* Resp. Post-Tr. Br. at 46-50. Dr. Argue's application of the test is severely flawed, as is his "Model of Clinic Profitability," on which Respondent also relies to support its relevant product market definition. Respondent's criticisms of Dr. Scott Morton application of the hypothetical monopolist test are similarly misplaced. *See id.* at 51-53.

a) Dr. Argue's Critical Loss Analysis is Flawed and Does Not Show Clinics Would Switch from MPKs to Mechanical Knees in Response to a SSNIP

Although Dr. Argue purports to apply the hypothetical monopolist test, his critical loss analysis not only makes unsound assumptions that are inconsistent with the record, it also misapplies the *Merger Guidelines*. (CCFF ¶¶ 2936-45). To begin with, Dr. Argue's critical loss test inappropriately assumed that every MPK has the same margin, (CCFF ¶ 2937), which even he admits is not the case, (CCFF ¶ 2938) (testifying that Otto Bock's and Freedom's MPKs have different sales prices and thus different margins). In addition, Dr. Argue's critical loss analysis included an unnecessary restriction that the price increase tested had to be on *all* MPKs, contrary to the *Merger Guidelines*, which instruct that a hypothetical monopolist only needs to be able to impose a SSNIP on *one* product in the candidate market. § 4.1.1 (explaining that the hypothetical monopolist test asks whether a SSNIP can be imposed profitably on "at least one product sold by one of the merging firms"); *see also id.* § 4.1.3. Finally—and most importantly—Dr. Argue did not perform a complete critical loss analysis. (CCFF ¶ 2944). According to the *Merger Guidelines*, critical loss analysis involves an evaluation of whether "the *predicted* loss is less than the critical loss." § 4.1.3 (emphasis added). The "critical loss" is

defined as "the number of lost unit sales that would leave profits unchanged," while the "predicted loss" is defined as "the number of unit sales that the hypothetical monopolist is predicted to lose due to the price increase." *Id.* Although Dr. Argue estimated a *critical* loss, he did *not* calculate a *predicted* loss to compare to his critical loss estimate. (CCFF ¶¶ 2943-44). Simply put, Dr. Argue did not even attempt to determine whether clinics would switch any of their MPK purchases to mechanical knees in response to a SSNIP, as prescribed by the *Merger Guidelines*. §§ 4.1.1-4.1.3.

Complaint Counsel completed the steps Dr. Argue did not, and showed that mechanical knees are properly excluded from the relevant product market (which, presumably, is why Dr. Argue did not perform them himself). Dr. Scott Morton completed Dr. Argue's critical loss analysis by calculating the predicted loss given his assumptions, (CCFF ¶ 2945), and she demonstrated why Respondent's claim that mechanical knees should be included in the relevant product market is wrong. Acknowledging that Dr. Argue "found that only 5.8% of customers had to switch to mechanical knees," Dr. Scott Morton demonstrated that, "[Dr. Argue] did not take the next step and calculate how many customers would switch products given a price increase in the first place." (PX06003 at 012 (¶ 21) (Scott Morton Rebuttal Report)). Dr. Scott Morton demonstrated that "only [redacted] of buyers of [MPKs] would switch away from the product they now buy, given a 5% price increase."[14] (PX06003 at 012 (¶ 21) (Scott Morton

[14] To be clear, Dr. Scott Morton's reference to "switch[ing] away from the product they now buy" refers to clinics switching from the specific MPK that they currently purchase to any other product. In the face of a 5 percent price increase, clinics have three options: (1) continue to purchase their current MPK at a higher price; (2) switch purchases to another MPK; or (3) switch purchases to a non-MPK. Dr. Scott Morton's analysis shows that clinics would not switch [redacted] percent of their current MPK purchases. (PX06003 at 012 (¶ 21) (Scott Morton Rebuttal Report) (*in camera*)). Dr. Argue's analysis (had it been completed) shows only that of the [redacted] percent of MPK purchases that would be switched to some other product in the face of a price increase, [redacted] percent of those purchases would need to be to non-MPKs, rather than other (*e.g.*, lower-priced) MPK products, for the predicted loss to exceed Dr. Argue's critical loss.

Rebuttal Report)). Therefore, Dr. Argue's analysis (had he completed it) shows nothing more than that "[redacted] of current microprocessor knee customers who *would choose to switch products* given a 5% price increase on all microprocessor knees would have to choose a mechanical knee or other outside good to defeat a price increase on microprocessor knees."[15] (PX06003 at 012 (¶ 21) (emphasis added) (Scott Morton Rebuttal Report) (*in camera*)). This, of course, is highly unlikely. Nothing in the record shows that clinics would switch such an extremely high percentage of MPK patients to mechanical knees in response to a SSNIP; in fact, evidence shows they would not. (CCFF ¶ 529) ([redacted]); (CCFF ¶ 525) (no evidence in the record that medical professionals have moved patients from MPKs to mechanical knees based on the prices that clinics pay for MPKs or mechanical knees); (CCFF ¶¶ 526-27) (none of the clinic customers who testified said that their prosthetists had ever switched a patient from an MPK to a mechanical knee based solely on price). Dr. Argue therefore has no basis to conclude that mechanical knees should be included in the relevant product market.

b) Dr. Argue's "Model of Clinic Profitability" is Flawed and Does Not Show it Would Be Unprofitable for Clinics to Sell MPKs After a Five Percent Price Increase

Respondent also relies on Dr. Argue's "Model of Clinic Profitability" to support its claim that clinics would switch to "Sophisticated Non-MPKs" in response to an increase in the price of

[15] Stated another way, because evidence shows that only [redacted] percent of *all* current MPK customers would switch from their current product—and thus that the remaining [redacted] percent would not switch, but would *keep* their current MPK—that means that [redacted] percent of that small population of switching patients would need to buy a mechanical knee for [redacted] percent of all switching patients to leave the MPK market and exceed Dr. Argue's critical loss figure. (PX06003 at 012 (¶ 21) (Scott Morton Rebuttal Report) (*in camera*)).

MPKs. *See* Resp. Post-Tr. Br. at 44-45, 49-50. But Dr. Argue's model is inherently flawed and inconsistent with the record. (CCFF ¶¶ 2946-72). The model is unreliable because it depends on assumptions—about reimbursement amounts, co-pay collection rates, and clinic profit margins—that are unsupported and/or inconsistent with the record. (CCFF ¶¶ 2946-57). Moreover, Dr. Argue's model focuses solely on clinic margins for the fitting of the knee portion of a lower-limb prosthesis, despite abundant evidence showing that clinics take into account the reimbursement of *all* components of the prosthesis when assessing the profitability of fitting an MPK. (CCFF ¶¶ 2958-61, 3041-47).

Dr. Argue's model also ignores several ways that clinics could reduce costs in the face of an MPK price increase, including switching purchases from more expensive MPKs (like the C-Leg) to less expensive MPKs (like the Plié). (CCFF ¶¶ 2962-66). Dr. Argue's conclusion that it would not be profitable for a clinic to fit MPKs if the prices of all MPKs increased by five percent is inconsistent with MPK purchasing data showing clinics would still earn a profit fitting lower-limb prostheses with MPKs post-SSNIP. (CCFF ¶ 2969). Dr. Argue's model does not take into account that a 5 percent increase in the price of the Plié 3 would result in a total Plié price that would still be less than the current price of the C-Leg 4. (CCFF ¶ 2970). Moreover, Dr. Argue's model is inherently flawed, as he does not consider the profitability of the clinic if it switched patients with private insurance to alternative microprocessor knees. (CCFF ¶ 2971). Using Dr. Argue's model and data, Dr. Scott Morton showed that it would still be profitable for clinics to fit patients (even those with private insurance) with the Plié even after a five percent price increase on all microprocessor knees. (CCFF ¶ 2972). Dr. Argue admitted that he does "not have sufficient information from each clinic to determine whether a 5% price increase in

MPKs would make that product unprofitable for the clinic." (RX1049 at 25 (¶ 43) (Argue Expert Report)).

c) Respondent's Criticisms of Dr. Scott Morton's Analyses and Conclusions Lack Merit

Respondent asserts that Dr. Scott Morton uses "a flawed economic approach" to conclude that Otto Bock's MPKs and Freedom's Plié 3 "constitute their *own* relevant product market." Resp. Post-Tr. Br. at 51 (emphasis in original). This argument reflects Respondent's misunderstanding of the way the hypothetical monopolist test is conducted under the *Merger Guidelines*, and contradicts its own ordinary course documents.

Dr. Scott Morton's application of the hypothetical monopolist test strictly adhered to the prescriptions of the *Merger Guidelines*. (CCFF ¶¶ 767-94). Under the *Merger Guidelines*, it is appropriate to apply the hypothetical monopolist test first on a candidate market comprised of at least one product of each merging firm. §§ 4.1.1-4.1.3. As Complaint Counsel explained in its post-trial brief, *see* CC Post-Tr. Br. at 46, the test "is iterative, meaning it should be repeated with ever-larger candidates until it defines a [relevant market]," but once a candidate set of products passes the test, the analysis can stop.[16] *FTC v. Advocate Health Care Network*, 841 F.3d 460, 468 (7th Cir. 2016) (internal citation omitted). Under the "narrowest market" principle, *Sysco*, 113 F. Supp. 3d at 26-27 (internal citation omitted), "the relevant product market should ordinarily be defined as the smallest product market that will satisfy the hypothetical monopolist test," *H&R Block*, 833 F. Supp. 2d at 59 (citing *Merger Guidelines* § 4.1.1 ("[W]hen the Agencies rely on market shares and concentration, they usually do so in the

[16] If enough customers would switch to products outside the candidate market in the face of a SSNIP to render the price increase unprofitable, then the candidate market is too narrow. *Merger Guidelines* §§ 4.1.1-4.1.3. In that case, 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. *Id.*

smallest relevant market satisfying the hypothetical monopolist test.")). Here, no more products must be added to Dr. Scott Morton's candidate market because her analysis shows that a hypothetical monopolist could profitably impose a SSNIP on clinics if it owned only Freedom's Plié and Otto Bock's MPKs. (CCFF ¶¶ 790-91).

Dr. Scott Morton's conclusion that it would be profitable for a hypothetical monopolist to impose a SSNIP on either the Plié or one of Otto Bock's MPKs is perfectly consistent with Respondent's internal analysis of the likely competitive effects of the Merger.[17] (CCFF ¶¶ 803-06). During its due diligence on Freedom, Otto Bock's then-CEO suggested it should evaluate the benefits [redacted] (CCFF ¶ 805). [redacted] (CCFF ¶ 806). [redacted] (CCFF ¶ 806). [redacted] which would [redacted] (CCFF ¶ 804). [redacted]

[17] Respondent suggests that the fact that a candidate market consisting of only Freedom's Plié 3 and Otto Bock's MPKs passes the hypothetical monopolist test is somehow a weakness of Complaint Counsel's case. *See* Resp. Post-Tr. Br. at 50-52. To the contrary, the consistency of Complaint Counsel's narrowest definition of the relevant market with Respondent's own internal analyses showing Otto Bock obtained the ability to raise Plié 3 prices (and had plans to do so) after acquiring Freedom shows the strength, and proves the validity, of Complaint Counsel's market definition. (CCFF ¶¶ 803-06).

[redacted] (CCFF ¶ 805).[18]

Respondent claims that after Dr. Scott Morton demonstrated that Freedom's Plié 3 and Otto Bock's MPKs constitute a properly defined relevant antitrust market, she "simply start[ed] including additional knees in the alleged market, without analyzing whether or not those knees are properly included, or articulating any reason for including them." Resp. Post-Tr. Br. at 51. Respondent's claim is demonstrably false.

As previously explained, by the design of the hypothetical monopolist test in the *Merger Guidelines*, if the narrow candidate market of Freedom's Plié 3 and Otto Bock's MPKs satisfies the test, "then a wider market consisting of all microprocessor knees sold in the United States is also a relevant antitrust market." (PX06001A at 075-76 (¶ 93) (Scott Morton Expert Report)). This follows because, if it is profitable for a hypothetical monopolist to impose a SSNIP in the narrow market, then it is profitable for a hypothetical monopolist to impose a SSNIP in the wider market as well. (PX06001A at 075-76 (¶ 93) (Scott Morton Expert Report)).[19] Dr. Scott Morton's approach is entirely consistent with the *Merger Guidelines*, which state that "[t]he Agencies may evaluate a merger in any relevant market satisfying the [hypothetical monopolist]

[18] Respondent also claims to no avail that by "[a]pplying the Lerner Condition, Dr. Scott Morton arrives at the nonsensical conclusion that Ottobock and Freedom MPKs constitute their own relevant antitrust market, a conclusion that completely lacks support in the record." Resp. Post-Tr. Br. at 51-52. This claim reveals Respondent's failure to apply basic and reliable economic principles, and record evidence. All of the economic principles Dr. Scott Morton applies in her critical loss analysis are sound and widely accepted. *See, e.g.*, A. P. Lerner, "The Concept of Monopoly and the Measurement of Monopoly Power," 1 The Review of Economic Studies 157 (1934). Moreover, Dr. Scott Morton's application of the Lerner Condition is supported by the facts of this case. [redacted] There is no denying the sense it made to Otto Bock's business executives that by acquiring Freedom it could [redacted]—no matter how "nonsensical" Respondent's lawyers now claim such a plan would be during litigation. (CCFF ¶¶ 803-06).

[19] As discussed *infra*, *see* § I.B, Dr. Scott Morton also explained exactly why she included "high-end" MPKs in the relevant product market. PX06001A at 63-64 (¶¶ 82-83) (Scott Morton Expert Report) (*in camera*).

test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects." § 4.1.1. Dr. Scott Morton evaluates the competitive effects of the Merger in a relevant market that includes other MPKs because a large body of evidence, including testimony and documents from Respondent and several third parties, indicates that other MPKs, unlike mechanical knees, compete significantly with Respondent's MPKs. (PX06001A at 059-65 (¶¶ 78-83) (Scott Morton Expert Report)). Adding additional MPK suppliers to the relevant market is a conservative approach through which Complaint Counsel demonstrated that, even with the addition of other MPKs, the Merger is presumptively illegal. (CCFF ¶¶ 964-66). Given overwhelming evidence that the *Brown Shoe* practical indicia demonstrate that MPKs are a distinct relevant product market from mechanical knees, *see supra* § I.A.1, Dr. Scott Morton's conclusion that the relevant market is the sale of MPKs is correct.[20]

B. Respondent's Argument that an MPK Market is Too Broad is Incorrect

Respondent also claims that Complaint Counsel's product market is too broad, though it devotes only two paragraphs to this issue in the argument section of its post-trial brief. *See* Resp. Post-Tr. Br. at 53-54. Specifically, Respondent argues that Complaint Counsel's product market definition "incorrectly includes certain extremely high-end MPKs that are not substitutes for the vast majority of MPKs and Sophisticated Non-MPKs available in the United States with respect to functionality, quality, or price." *Id.* at 3. According to Respondent, the inclusion of "High-End MPKs" in Complaint Counsel's relevant product market "renders its calculation of market shares unreliable." *Id.* at 4. This argument is misplaced—Complaint Counsel has demonstrated

[20] Not surprisingly, Respondent also contends that the *Brown Shoe* practical indicia do not support Dr. Scott Morton's economic conclusion that the sale of MPKs is a separate relevant product market. *See* Resp. Post-Tr. Br. at 52-53. However, as Complaint Counsel has demonstrated, *see supra* § I.A.1, an enormous body of evidence disproves Respondent's claim.

that the Merger is presumptively illegal not only in a relevant product market that includes high-end MPKs, but also one that excludes them. (CCFF ¶¶ 964-66).

Respondent correctly observes that Complaint Counsel defines the relevant product market in this case as "*no broader than* the manufacture and sale of [MPKs] to prosthetic clinics in the United States." Resp. Post-Tr. Br. at 2 (citing Compl. ¶ 17) (emphasis added). Under the *Merger Guidelines*, a merger may properly be analyzed in more than one relevant product market. § 4.1.1 (noting that the hypothetical monopolist test "does not lead to a single relevant market" and that "[t]he Agencies may evaluate a merger in any relevant market[] satisfying the test"). Here, Complaint Counsel has proven that the hypothetical monopolist test shows that a relevant product market consisting of only Otto Bock's MPKs and Freedom's Plié 3 exists. (CCFF ¶¶ 790-91). But, for the compelling reasons discussed above, *see supra* § I.A.2, Dr. Scott Morton also analyzed the effects of the Merger in two broader relevant markets: (1) the sale of *all* MPKs to U.S. clinics, (CCFF ¶ 958); and (2) a market containing only Otto Bock's C-Leg, Freedom's Plié, Össur's Rheo, Endolite's Orion, each of DAW's MPKs, and Nabtesco's Allux, (CCFF ¶ 959); (PX06001A at 059-65 (¶¶ 78-83) (Scott Morton Expert Report)). Dr. Scott Morton demonstrated that the Merger is presumptively illegal, by a wide margin, in both of these relevant markets. (CCFF ¶¶ 964, 966). Therefore, Respondent's criticism that Complaint Counsel inappropriately included "High-End MPKs" is wrong. Complaint Counsel analyzed the effects of the Merger in a relevant market that included these products, and one that excluded them, and the result is the same: the Merger is presumptively anticompetitive.

Respondent also insists that Dr. Scott Morton "articulates no reason – record-based, economic, or otherwise – for including every knee that contains a microprocessor in her market . . . ." Resp. Post-Tr. Br. at 52. But again, this allegation is simply untrue. Dr. Scott

Morton explained, in detail, why she evaluated the effects of the Merger in a relevant market that included all MPKs, in addition to a narrower relevant product market that excluded high-end and low-end MPKs. (PX06001A at 059-65 (¶¶ 78-83) (Scott Morton Expert Report)). Specifically, she evaluated the effects of the Merger in a relevant market that included "more expensive, feature-rich, higher functioning" high-end MPKs, such as Otto Bock's Genium and Össur's Rheo XC, because evidence shows that "the [MPK] market is evolving, and that its participants are continuously adding features to their [MPKs] in an effort to win customers from their rivals." (PX06001A at 063-64 (¶¶ 81-82) (Scott Morton Expert Report)). For example, Dr. Scott Morton explained, [redacted] and "[a]s competition drives manufacturers of microprocessor knees to increase the quality of their products in the future, the currently higher-functioning microprocessor may well become more relevant." (PX06001A at 062 (¶ 82) (Scott Morton Expert Report)).

Respondent fails to even acknowledge that Dr. Scott Morton also calculated market shares and HHI estimates for a "narrower MPK market" that excludes high-end and low-end MPKs. (CCFF ¶¶ 959, 965-66). Dr. Scott Morton's conclusion that the Merger is presumptively illegal by a wide margin in this narrower MPK market completely undermines Respondent's criticism about the boundaries of Complaint Counsel's product market. (CCFF ¶¶ 965-66). Dr. Scott Morton's analyses of market shares and HHIs in both the broader market for all MPKs and the narrower MPK market reach consistent, reliable results, (CCFF ¶¶ 964-66), which are corroborated by Respondent's ordinary course analyses of the U.S. MPK market (CCFF ¶¶ 967-80), disproving Respondent's unfounded claim that Complaint Counsel's market shares are "unreliable." Resp. Post-Tr. Br. at 4.

II. The Merger Substantially Reduced Competition in the U.S. MPK Market and Is Likely to Result in Anticompetitive Effects

Respondent asserts that "there has not been, and will not be, any harm to competition in Complaint Counsel's alleged market because Freedom and Ottobock are not close competitors generally or with respect to MPKs specifically." Resp. Post-Tr. Br. at 4. Respondent contends that "[m]arket concentration is not a useful gauge of competitive harm" and that evidence shows "unilateral anticompetitive effects are not reasonably likely." *Id*. at 54, 57. Both arguments fail.

Complaint Counsel has buttressed the overwhelming *prima facie* case that the Merger lessened competition with an abundance of direct evidence proving the Merger will cause substantial unilateral anticompetitive effects. As shown in Complaint Counsel's post-trial brief, documents, data, and testimony from Respondent, customers, and competitors, show that Otto Bock and Freedom competed vigorously in the U.S. MPK market prior to the Merger, *see* CC Post-Tr. Br. at 63-74, and this direct and intense competition resulted in significantly lower prices and higher-quality products for clinics and amputees, *see id*. at 72-74.

The record is replete with Respondent's ordinary course documents and testimony from its executives that show the Merger was anticompetitive and customers have been, and will continue to be, harmed by it. These documents have been featured by Complaint Counsel in opening arguments and throughout the trial, but Respondent opted to ignore this evidence completely in its post-trial brief. For example, Respondent makes no mention of Otto Bock's due diligence documents that clearly establish Otto Bock viewed acquiring Freedom as a [redacted] (CCFF ¶ 1314). Nor does Respondent address its own documents showing that Otto Bock viewed acquiring Freedom's MPK market share as [redacted]

[redacted] (CCFF ¶ 1367). Respondent simply pretends that documents showing Otto Bock concluded that [redacted] and would result in the [redacted] do not exist. (CCFF ¶ 1316). These highly illuminating documents laying bare Otto Bock's basic rationale for acquiring Freedom go entirely unaddressed because Respondent simply has no response for them.

Similarly, Respondent's post-trial brief contains no mention of Otto Bock's post-Merger strategy [redacted] As described in Complaint Counsel's post-trial brief, on November 7 and 8, 2017, more than a month-and-a-half after the Merger, top executives from Otto Bock and the former-Freedom gathered in Irvine, California, to discuss the go-forward strategy for Freedom's MPKs. CC Post-Tr. Br. at 87-90. The Plié "recommendation" was to [redacted] (CCFF ¶¶ 141, 1394), or [redacted] (CCFF ¶ 1403). With respect to Quattro, Respondent's top executives focused on [redacted] (CCFF ¶ 1411). Respondent has no response to this direct evidence of unilateral effects that reveals the anticompetitive plan that Respondent would have pursued but for this litigation and the illegal nature of the Merger.

Finally, the core of any unilateral effects analysis is the assessment of likely diversion between products sold by the merging (or in this case, merged) firms. This is because "[a]dverse unilateral price effects can arise when the merger gives the merged entity an incentive to raise

the price of a product previously sold be one merging firm and thereby divert sales to products previously sold by the other merging firm, boosting the profits on the latter products." *Merger Guidelines* § 6.1. Respondent's post-trial brief contains no evaluation of diversion between Freedom's and Otto Bock's MPKs. During due diligence and post-Merger integration planning, however, Respondent's executives performed precisely the analysis set out in the *Merger Guidelines* to determine whether a transaction raises competitive concerns. Otto Bock's executives estimated that it would capture no less than [redacted] percent, and as much as [redacted] percent, of all Plié 3 sales lost by Freedom as a result of a price increase on, or discontinuation of, the Plié. (CCFF ¶ 1363). [redacted] (CCFF ¶¶ 1397-98). Based on this analysis, the same one used by Complaint Counsel and its expert to establish that Otto Bock obtained the incentive and ability to raise MPK prices through the Merger, Otto Bock executives [redacted] (CCFF ¶¶ 141, 1394).

A. Market Concentration Is a Useful Indicator of Likely Anticompetitive Effects in the Prosthetics Industry according to the Case Law and Respondent's Own Documents

Respondent asserts that "Complaint Counsel has failed to establish any basis for a legal presumption that Ottobock could exercise unilateral market power post-Acquisition." Resp. Post-Tr. Br. at 54. Under well-established Section 7 case law, however, 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." *In re Polypore, Int'l, Inc.*, No. 9327, 149 F.T.C. 486, 850

(F.T.C. Mar. 1, 2010) (Chappell, A.L.J.) (internal quotations omitted). Here, the Merger presumptively violates Section 7 of the Clayton Act and Section 5 of the FTC Act because it significantly increased concentration by [redacted] points, resulting in a post-Merger HHI of [redacted] in the already highly concentrated U.S. MPK market. (CCFF ¶ 964 (Table 6)); *see also* (CCFF ¶¶ 953-90). Respondent does not assert in its post-trial brief that these market shares and concentration estimates are flawed or inaccurate, Resp. Post-Tr. Br. at 54-57, and even Respondent's own economic expert conceded that the Merger triggers a presumption of anticompetitive harm, (CCFF ¶¶ 986, 987).

The remainder of Respondent's market concentration argument appears to be that Complaint Counsel's market shares "do not accurately reflect the current competitive environment." Resp. Post-Tr. Br. at 56. This argument, however, is undermined by Respondent's own ordinary course market share estimates, (CCFF ¶¶ 967-80), and its use of those estimates to make key business decisions, (CCFF ¶¶ 976-80), thus showing that market shares are informative to its business executives competing in the U.S. MPK market. Otto Bock's ordinary course market share estimates, which consistently show the combined firm has more than an [redacted] percent share of the U.S. MPK market, informed Otto Bock's C-Leg 4 launch strategy, (CCFF ¶ 976), its annual marketing plans, (CCFF ¶¶ 970, 975, 980), its decision to acquire Freedom, (CCFF ¶¶ 971-72), and its Post-Merger planning for the integration of Freedom's product portfolio into Otto Bock, (CCFF ¶ 974).

B. Respondent Cannot Rebut Complaint Counsel's Strong *Prima Facie* Case

Mergers that eliminate significant head-to-head competition are likely to result in anticompetitive unilateral effects. *See ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 569 (6th Cir. 2014) ("'The extent of direct competition between the products sold by the merging

parties is central to the evaluation of unilateral price effects.'") (quoting *Merger Guidelines* §6.1); *see also Anthem*, 236 F. Supp. 3d at 217; *H&R Block*, 833 F. Supp. 2d at 81. Respondent contends that "[d]ocuments, testimony, and data from Respondent, competitors, prosthetic clinics, physicians, and a leading third-party payer all confirm that unilateral anticompetitive effects are not reasonably likely." Resp. Post-Tr. Br. at 57. Respondent does not dispute that Otto Bock's and Freedom's MPKs have competed with each other on the basis of price and quality. (CCFF ¶¶ 991, 1000, 1001). Instead, Respondent appears to advance four main arguments:[21] (1) Otto Bock and Freedom "are not close competitors," (2) Össur is Otto Bock's closest competitor, (3) a "Dual Brand Strategy" will promote competition, as indicated by a purported lack of competitive harm post-Merger, and (4) the Merger will result in cognizable efficiencies. Resp. Post-Tr. Br. at 57-58. Each of these arguments fail because they are unsupported, contradicted by voluminous testimonial and documentary evidence, and/or irrelevant to an analysis of unilateral competitive effects.

1. Respondent's Documents and Testimony from Respondent Executives and Third-Party Witnesses Establish a Long History of Intense Head-to-Head Competition between Otto Bock and Freedom

Respondent argues that Otto Bock and Freedom are not close competitors with a series of arguments based on irrelevant functional differences in the companies' MPKs, a mischaracterization of Freedom's product development efforts, and unsupported, made-for-litigation explanations that attempt to minimize the voluminous evidence in the record detailing

[21] In its "Summary of Argument," Respondent describes its power-buyer, third-party reimbursement, and flailing firm arguments as distinct arguments from its unilateral effects claims. *See* Resp. Post-Trial Brief at 4-9. Following the organization set forth in Respondent's Summary of Argument, Complaint Counsel similarly addresses those arguments separately from the discussion of competitive effects even though Section III.B of Respondent's post-trial brief confusingly combines all of these arguments—as well as Respondent's claims about entry and expansion—into a single section of its brief. *See* Resp. Post-Tr. Br. at 57-58.

the intense, head-to-head competition between Otto Bock and Freedom that the Merger eliminated. Resp. Post-Tr. Br. at 58-65.

a) Respondent's Claim that Freedom's Plié 3 is Not a "True" MPK is Refuted by the Trial Record and Irrelevant to an Analysis of the Likelihood of Competitive Harm

The competitive effects section of Respondent's post-trial brief begins by simply recycling its claim that Freedom's Plié 3 is not a swing-and-stance MPK that competes directly with Otto Bock's C-Leg. *Id*. at 59-62.[22] This made-for-litigation argument finds no support in Respondent's ordinary course documents, with industry participants, or even from Respondent's own executives. *See supra* § I.A.1.c.(1).

Respondent proclaims, against the overwhelming weight of the record, that "there is scant evidence of head-to-head price competition between Freedom's Plié, on the one hand, and Ottobock's C-Leg or [redacted], on the other hand." Resp. Post-Tr. Br. at 62. Only by turning a blind eye to countless internal Respondent documents and the testimony of its own witnesses could Respondent describe the evidence of head-to-head competition between Otto Bock and Freedom as "scant." For example, [redacted] (CCFF ¶¶ 1028-1033). Freedom, in turn, responded to the launch of the C-Leg 4 with the creation of the "Ideal Combo," reduced Plié 3 pricing, and other aggressive marketing. *See* CC Post-Tr. Br. at 69-70. Feeling the pressure of Freedom's aggressive promotions, Otto Bock's marketing group provided its sales team with guidance on

[22] Respondent also suggests that Freedom's Plié 3 is closer in function to Össur's mechanical Mauch Knee and Ottobock's mechanical 3R80 knee. This assertion is unfounded and contrary to the evidence. For example, the record shows that [redacted] (Response to RPFF ¶ 382); *see generally* (CCFF ¶¶ 760-64).

"Countering Freedom's Latest Promo." (CCFF ¶ 1135). Otto Bock also ran various sales promotions, including a $2,500 discount on the C-Leg 4 for new MPK customers. (CCFF ¶ 1135). These are only a few of the many examples of direct, head-to-head competition between Freedom and Otto Bock in the U.S. MPK market that Respondent ignores. *See generally* (CCFF ¶¶ 1008-174). The record is also replete with testimony from clinic customers detailing tangible price, quality, and innovation benefits from this sustained, head-to-head competition between Otto Bock and Freedom. CC Post-Tr. Br. at 72-73.

b) Respondent's Claim that Freedom Has Failed to Innovate with Respect to Its MPKs is Contradicted by the Record and Ignores Freedom's [redacted]

Respondent alleges, without support, that Freedom "failed to meaningfully participate in the significant innovation that has characterized the MPK marketplace over the last three years." Resp. Post-Tr. Br. at 62. Respondent characterizes Freedom as essentially frozen in time while "other MPK manufacturers have all released innovative, new MPK products." *Id.* These assertions about Freedom's development efforts are contradicted by Freedom's continued MPK innovation, as evidenced by its sustained improvements to the Plié 3, (CCFF ¶¶ 1117-29), [redacted] (CCFF ¶¶ 1456-68), and its development of the Quattro [redacted] (CCFF ¶¶ 1179-1318).

Although Respondent implies that Freedom has made no changes to the Plié 3 since its release in 2014, the record is clear that Freedom has continually improved and updated the Plié 3's technology, including after Otto Bock introduced the C-Leg 4 in 2015. (CCFF ¶¶ 1117-29). Since its launch, Freedom has shortened the time it takes to program the Plié 3, made it more

durable, and improved its electrical system. (CCFF ¶¶ 1118-23); *see also* (CCFF ¶¶ 1125-26). David Smith, who joined Freedom in April 2016, testified that [redacted] (CCFF ¶ 1832). These improvements maintained the Plié 3's competitiveness with the C-Leg 4 and other MPKs, causing [redacted] (CCFF ¶ 964, Table 7).

Respondent's post-trial brief also contains no mention of the Plié 3's [redacted] that would have provided customers a new higher-quality MPK by [redacted] (CCFF ¶¶ 1456-57, 1463). As late as August 2017, the [redacted] remained on schedule for an [redacted] (CCFF ¶¶ 1463-64). However, when Otto Bock bought Freedom, [redacted] (CCFF ¶ 1468).

Despite clear evidence from its own executives that [redacted] Resp. Post-Tr. Br. at 63. Only by ignoring an enormous body of evidence, including its own representations to [redacted] and the Court, can Respondent characterize the Quattro as [redacted]

[redacted] (CCFF ¶ 1311). Respondent's own executives testified at trial that the [redacted] (CCFF ¶¶ 1224, 1225, 1228).

During due diligence, Otto Bock closely scrutinized the Quattro, including testing it in-person for several hours, [redacted] (CCFF ¶¶ 1355, 1357, 1361). [redacted] (CCFF ¶ 1355).

Respondent's contention that the Quattro [redacted] is incorrect and misleading. Resp. Post-Tr. Br. at 63. Prior to the Merger, Freedom consistently projected [redacted]

[23] For example, Respondent highlights [redacted] *See* Resp. Post-Tr. Br. at 63. Respondent's focus on these issues is misleading because record evidence shows that Freedom has [redacted] (CCFF ¶¶ 1223-25).

[redacted]

[redacted]

c) Respondent's Claim that Otto Bock Has Not Competed against Freedom Aggressively is Contradicted by the Record

Respondent vaguely asserts that Otto Bock has not competed "particularly aggressively against Freedom with respect to MPKs," Resp. Post-Tr. Br. at 63, but its characterization of pre-Merger competition between Freedom and Otto Bock's MPKs ignores the voluminous documentary and testimonial evidence detailing the intense head-to-head competition between the now merged firms and the benefits that competition created for customers. *See* CC Post-Tr. Br. at 63-74. Respondent's overarching claim that Otto Bock and Freedom did not compete aggressively pre-Merger is based on several related claims, all of which lack support in the record. First, Respondent alleges there is "no evidence that the discounting of the C-Leg 3 was" in response to competition with Freedom. Resp. Post-Tr. Br. at 63. This claim is demonstrably false. Following the launch of the Plié 3, Otto Bock's own documents reveal that it deployed multiple competitive countermeasures against Freedom, including [redacted] (CCFF ¶¶ 1028-33). [redacted] (CCFF ¶ 1031); *see also* (CCFF ¶ 1029). Otto Bock also developed marketing campaigns specifically targeting the Plié 3, such as arming its sales and marketing staff with "arguments to convince customers to not walk away from the C-Leg and continue to buy C-Legs and fit C-Legs on their patients instead of Plies." (CCFF ¶ 1033).

Next, Respondent erroneously claims that Otto Bock's C-Leg 4 launch materials "focused much more heavily on the other MP-swing-and-stance knees that were sold at the time from Össur and Endolite than it does the Plié 3." Resp. Post-Tr. Br. at 64. Respondent cites to nothing to support this contention, however, because it is not true. Otto Bock's own C-Leg 4 launch materials prove the speciousness of this assertion, because an explicit goal of the C-Leg 4 launch, as stated in Otto Bock's internal launch plan, was to [redacted] (CCFF ¶ 1043) (emphasis added). Otto Bock's [redacted] was confirmed by Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs and Future Development, who testified that Otto Bock [redacted] (CCFF ¶ 1044). Respondent's C-Leg 4 launch plans also included Otto Bock's calculation of shares in the "MPK" market, estimating Otto Bock's share to be 78 percent, and identifying Freedom as the next-largest competitor with an 11 percent share. (CCFF ¶ 1039).

To support its claim that Otto Bock has "not competed particularly aggressively" against Freedom, Respondent relies heavily on a single email from September 2016 which Freedom's Mark Testerman sent to his colleague, Jeremy Mathews. Resp. Post-Tr. Br. at 64-65. Respondent asserts that this email explains why Freedom experienced a "decline in Plié 3 sales in the United States in 2016," *id*. at 64, but Mr. Testerman's trial testimony made clear that this statement related only to a [redacted] as Respondent implies, (Testerman (Freedom) Tr. at 1298-99 (*in camera*)). Moreover, Respondent's reliance on this email to support its claim is misleading because Freedom executives throughout the

company had determined that the C-Leg 4 launch—above any other market development—had dealt a significant blow to Freedom's MPK business. (CCFF ¶¶ 1056-73).

d) Respondent's Erroneous Claims about Reasons Freedom Priced Its Plié 3 Aggressively Fail to Undermine Extensive Evidence Showing Otto Bock and Freedom Competed Intensely in the U.S. MPK Market

Respondent conjures up several theories about how Freedom's aggressive pricing of the Plié 3 could be unrelated to competition with Otto Bock, but none of them are supported by the record, nor do they undermine the extensive record evidence showing that, in fact, Otto Bock and Freedom competed intensely with each other in the U.S. MPK market. First, Respondent alleges, without support, that "Freedom's aggressive discounting of the Plié 3 in 2017 related to Freedom's effort to drive up top-line revenue to make the company look more attractive in the sale process." Resp. Post-Tr. Br. at 65. Respondent cites three facts in support of this claim, (RFOF ¶¶ 1346-48), none of which even mention the Plié 3, an "effort to drive up top-line revenue," or Freedom's sale process, and Respondent's own witness at trial, David Smith, Freedom's CEO in 2017, directly contradicted this assertion. At trial, Mr. Smith explicitly [redacted] (CCFF ¶ 3163). Moreover, a large body of record evidence illustrates that Freedom's aggressive pricing strategy for the Plié 3 stemmed primarily from competition with Otto Bock. (CCFF ¶¶ 1098-116).

Alternatively, Respondent suggests that Freedom's "aggressive discounting" may have been "related to the fact that the market considered the Plié 3 to be obsolete in 2017." Resp. Post-Tr. Br. at 65. This argument is unsupported by the scant evidence Respondent cites and contradicted by evidence showing Freedom continually improved the Plié 3 since its launch in

2014 and substantially grew Plié 3 sales from 2016 to 2017, *see supra* § II.B.1.b. Respondent asserts that one of Freedom's largest customer, SPS (a subsidiary of Hanger), believed "that the Plié 3 was not a competitive product." Resp. Post-Tr. Br. at 65. But the CEO of Hanger, the parent company of SPS, testified that the Plié 3 [redacted] (CCFF ¶ 1014). Consistent with his testimony, the record shows [redacted] (CCFF ¶ 1025).

2. Respondent's Claim that Össur is Otto Bock's Closest Competitor is Directly Contradicted by Respondent's Own Documents and Irrelevant to Determining Whether the Merger Resulted in Competitive Harm

According to Respondent, the Merger is unlikely to result in competitive harm because it alleges that Össur, not Freedom, is Otto Bock's closest competitor. Resp. Post-Tr. Br. at 65. This argument misunderstands the law and is factually unsupported. The case law is clear that merging companies need not be each other's closest competitors for the merger to result in unilateral anticompetitive effects. *See H&R Block*, 833 F. Supp. 2d at 83; *see also* FED. TRADE COMM'N AND U.S. DEP'T OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 28 (2006)[24] ("A merger may produce significant unilateral effects even though a non-merging product is the 'closest' substitute for every merging product . . . ."). Thus, even if it were true that Össur was Otto Bock's closest MPK competitor, this argument would prove little because the evidence is very clear that Otto Bock and Freedom are very close competitors and the elimination of the Freedom will result in higher MPK prices. The Court need look no further than Respondent's own post-Merger plans for proof of this harm. (CCFF ¶¶ 1384-411). Further,

[24] Previously attached as Attachment C to Complaint Counsel's post-trial brief.

Respondent's own documents show that in actuality Freedom is Otto Bock's closest MPK competitor (and vice versa).

First, Respondent's contention that Össur is Otto Bock's closest competitor is largely based on assertions without any citation to evidence. *See, e.g.*, Resp. Post-Tr. Br. at 68 (lacking any citation for the claim that "Ossur considers Ottobock to be its primary and closest competitor in most prosthetic segments, including MPKs."). In contrast to the voluminous evidence of head-to-head price competition between Freedom and Otto Bock submitted by Complaint Counsel, *see* CC's Post-Tr. Br. at 63-74, Respondent's post-trial brief does not include even a single instance of price competition between Otto Bock and Össur.

Second, Respondent asserts—again without citation to any evidence—that "[t]he Rheo, like the C-leg, has been well-received in the United States for its functionality, quality, reliability, and innovative design." Resp. Post-Tr. Br. at 68. However, extensive evidence, including testimony from Össur's own executive, shows that Össur's Rheo MPK relies on a unique and proprietary "magnetorheologic technology," (CCFF ¶ 1480), that is a "very different platform" compared to the C-Leg 4 and the Plié 3, which both use "hydraulic technology" and are "more similar" to one another, (CCFF ¶ 1481); *see also* (CCFF ¶¶ 1482-92). [redacted] (CCFF ¶¶ 1483-92), and many clinicians and patients regard the [redacted] *see, e.g.*, (CCFF ¶¶ 1483-91); (CCFF ¶ 1489) [redacted]

[redacted] Many customers have safety and reliability concerns about Össur's MPK technology. (CCFF ¶¶ 1493-516).

Finally, Respondent's own documents demonstrate that Freedom was a much greater threat to Otto Bock's MPK business than Össur. [redacted] (CCFF ¶¶ 1280, 1283-84), [redacted] For example, Otto Bock executives wrote in a due diligence presentation [redacted] After extensive in-person testing of the Quattro, Otto Bock executives determined that one of the "RISKS IF WE DO NOT CONTROL QUATTRO" was that "Ossur could have something that will compete better with C-Leg 4 because the stance phase functions *will be much better than Rheo can acheive* [sic]." (CCFF ¶ 1517) (emphasis added). And during post-Merger planning for the Quattro at the November 2017 meeting, [redacted] (CCFF ¶¶ 1409-10).

Throughout its post-trial brief, Respondent repeatedly describes Endolite, Nabtesco, and DAW as Freedom's closest competitors. *See, e.g.*, Resp. Post-Tr. Br. at 65, 68-70. But Respondent never explains or cites any evidence to demonstrate why Endolite, Nabtesco, and DAW are allegedly close competitors to Freedom. *See id.* at 65-69. The only discussion of Endolite and Nabtsco relates to Respondent's arguments about expansion (which Complaint Counsel addresses *infra* § III.B-C). *Id.* at 68-70. And other than Respondent's bald assertions

about being a close competitor to Freedom, DAW is not discussed at all. Any notion that these fringe MPK providers—which collectively account for less than 5 percent of the U.S. MPK market, (CCFF ¶¶ 964, Table 6; 975; 981)—are close competitors to Freedom is dispelled by Respondent's own diversion analysis performed in conjunction with the Merger. As discussed *supra* § II, Respondent's executives estimated that Otto Bock would capture no less than [redacted] percent, and as much as [redacted] percent, of all Plié 3 sales lost as a result of a price increase on or discontinuation of the Plié. (CCFF ¶ 1363); *see also* (CCFF ¶¶ 1397-98). The fact that at least a majority, and likely much more, of any lost Plié sales would be recaptured by Otto Bock's C-Leg, shows, beyond a doubt, that Otto Bock is Freedom's closest competitor—no matter what Respondent may now claim in litigation.

3. The Merger Has Already Harmed Competition

Respondent declares that "there has been no evidence of anticompetitive conduct post-Acquisition," Resp. Post-Tr. Br. at 77, but tellingly, it does not cite to any evidence to support its claim, *see* Resp. Post-Tr. Br. at 77-78. Nor does Respondent attempt to address, even in argument, its termination of the Plié 3 Fast Fit launch set for October 2017, but halted by Otto Bock shortly after the Merger in September 2017. Similarly, Respondent does not address the delays in the Quattro launch caused by the Merger and this litigation. *See* CC's Post-Tr. Br. at 92-93. Instead, Respondent simply makes the unsupported claim that a "Dual Brand Strategy" will maintain competition, as if [redacted] would somehow benefit consumers. The idea that two product lines, owned by one company, will compete defies logic and is contradicted by Respondent's own documents and testimony.

In claiming that Otto Bock "never planned to eliminate Freedom as a competitor" and "intended to allow Freedom to independently compete," Resp. Post-Tr. Br. at 77, Respondent

implies that there can be no anticompetitive effects from the Merger as long as Freedom's products are maintained as a separate brand. But Respondent never explains why Otto Bock and Freedom, consolidated into a single, profit-maximizing entity, would attempt to undercut each other in the market. (PX05173 (Argue (Respondent) Dep. at 161)) (Respondent's expert conceding the merged firm will operate as a single profit-maximizing organization). Basic economic principles establish that profit-maximizing firms seek to maximize their profits over the entire organization; they do not allow one part of the company to compete against another and cannibalize the overall organization's profits—to do otherwise would harm the company's shareholders. That is why [redacted]

(CCFF ¶ 1473). As the *Merger Guidelines* explain:

> A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost due to the price rise will merely be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable prior to the merger.

§ 6.1. Thus, even if Freedom and Otto Bock operate under a dual brand strategy, as an economically rational company, Respondent will set prices to maximize profits for the entire company. As Complaint Counsel's economic expert, Dr. Fiona Scott Morton, explained, [redacted] (CCFF ¶ 1811).

Otto Bock's dual brand strategy documents—which Respondent fails to cite—confirm that a dual brand strategy will still result in price increases and harm to innovation. For example, Respondent's top executives discussed implementing a dual brand strategy at the November 2017 meeting, three months after the Merger. (CCFF ¶¶ 1395-96). With respect to the Plié, a presentation from that meeting states, [redacted] (CCFF ¶ 1395). Matthew Swiggum testified that he and other Otto Bock executives discussed adjusting the price of the Plié 3 in the context of the dual brand strategy. (CCFF ¶ 1397); *see also* (CCFF ¶ 1812) (Respondent's own expert conceding that, under a dual brand strategy, it would still be possible to raise the price of the Plié 3). And after the November 2017 meeting, Respondent decided to pursue the [redacted] (CCFF ¶¶ 141, 1394), assigning a top Freedom executive an action item in furtherance of this recommendation, (CCFF ¶ 1403).

[redacted] (CCFF ¶ 1405); *see also* (CCFF ¶ 1406). The other option Respondent evaluated was [redacted]

[redacted] (CCFF ¶ 1411).

Respondent also claims that "there has been no evidence of anticompetitive conduct post-Acquisition." Resp. Post-Tr. Br. at 77. Contrary to this unsupported assertion, however, the record is clear that Otto Bock halted [redacted] which was set for October 2017 at the time of the Merger. (CCFF ¶¶ 1456-68). The Plié 3 Fast Fit would have provided customers a new higher-quality MPK by [redacted] (CCFF ¶¶ 1456-57, 1463). As a result of the Merger, customers have been deprived the benefits of this new product. Respondent does not address this harm in its post-trial brief. The record is also clear that [redacted] Respondent's executives admit as much, (CCFF ¶¶ 1452-53), but again, Respondent fails to confront this evidence in its post-trial brief, Resp. Post-Tr. Br. at 77-78**.** Freedom's incentives to compete as an independent MPK manufacturer have also changed significantly. According to Freedom's CEO, Otto Bock executives expressed concern about perceived aggressive promotions and discounting on the Plié 3, making it clear that they did not want Freedom competing aggressively against Otto Bock anymore. (CCFF ¶ 1477). This reduction in the intensity of competition between Otto Bock and Freedom since the Merger has undoubtedly led to less favorable outcomes for customers. *See* (CCFF ¶¶ 1478-79).

C. Respondent's Alleged Efficiencies Are Not Verifiable or Merger Specific and There is No Evidence Any Purported Savings Would Be Passed on to Consumers

Respondent argues that cognizable efficiencies outweigh any reasonably likely anticompetitive effects. Resp. Post-Tr. Br. at 78. Respondent concedes that it "'has the burden of production to show that efficiencies offset any likely anticompetitive effects of the increase in market power produced by the merger,'" *id.* (quoting *Polypore*, 149 F.T.C. at 801), yet it fails to demonstrate how any of its alleged efficiencies are either verifiable or merger specific, *Merger Guidelines* § 10; *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001); *Staples*, 190 F. Supp. 3d at 137-38 n.15; *Sysco*, 113 F. Supp. at 82. Respondent also fails to show that its claimed efficiencies would be passed on to consumers, as required by the case law, *see, e.g.*, *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 350-51 (3d Cir. 2016); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 74 (D.D.C. 2009), and the *Merger Guidelines*, § 10. Thus, Respondent's unsupported assertion that efficiencies will prevent harm from the Merger has no merit.

1. Respondent's Claimed Efficiencies are Not Verifiable

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); *see also FTC v. Wilh. Wilhelmsen Holding ASA,* No. 18-cv-00414-TSC, 2018 WL 4705816, at *23 (D.D.C. Oct. 1, 2018). To satisfy this requirement,

Respondent's "estimate of the predicted saving must be reasonably verifiable by an independent party." *H&R Block*, 833 F. Supp. 2d at 89; *see also Sysco*, 114 F. Supp. 3d at 82.

Respondent maintains that "Ottobock and Freedom both analyzed the efficiencies created by the Acquisition" and, at trial, it bases its efficiencies claims on integration planning and [redacted] Resp. Post-Tr. Br. at 78-79. While Respondent describes its work with A.T. Kearney as proof of "cognizable efficiencies that are specific to the Acquisition," *id.* at 78, Respondent and A.T. Kearney did not come close to developing verifiable estimates, (CCFF ¶¶ 1748-64). An integration team comprised of personnel from Otto Bock, Freedom, and A.T. Kearney began efforts to estimate potential synergies from the Merger, but all work on integration planning and synergies stopped in [redacted][25] (CCFF ¶¶ 1737, 1748, 1756). [redacted] testified that when integration efforts ceased in mid-[redacted] the work to identify synergies opportunities was "all early stage" and "incomplete." (CCFF ¶¶ 1738, 1748); *see also* (CCFF ¶ 1760) (Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs, and Future Development testifying that "I don't believe we have a set number [of cost savings] that we'd be able to tell you"); (CCFF ¶ 1758) (David Reissfelder, Freedom's CEO, testifying that, "in the U.S., I don't believe there were any decisions really made at any point about, you know, honestly, any aspect of the integration").[26] [redacted]

[25] The integration team's work [redacted] on estimating potential synergies from the Merger is reflected in a financial model created by [redacted] and other members of the integration team. (CCFF ¶ 1736-1738, 1756 (citing PX03185)).

[26] Respondent also asserts that "Freedom's current CEO, David Reissfelder, testified that efficiencies would be realized because of the Acquisition, including at least [redacted] Resp. Post-Tr. Br. at 79. There is no support or other

[redacted] (CCFF ¶ 1749) [redacted] When Respondent's work ceased in December, none of the identified synergies opportunities had progressed even to [redacted] (CCFF ¶ 1751). At trial, Complaint Counsel's expert, Ms. Christine Hammer, concluded that Otto Bock's failure even to set definitive synergies targets makes the claimed efficiencies too preliminary and speculative to be verified. (CCFF ¶ 1754).

Respondent further asserts that its financial expert, Mr. James Peterson, "analyzed and critiqued the synergies and efficiencies identified by Ottobock and A.T. Kearney," Resp. Post-Tr. Br. at 80, but the record is clear that Mr. Peterson did nothing to verify Respondent's early-stage synergies work. For example, Mr. Peterson failed to test any of the numerous assumptions underpinning Respondent's early-stage synergies estimates when formulating his opinion. (CCFF ¶¶ 1766-71); (CCFF ¶ 1772) (Mr. Peterson [redacted] *see also* FED. TRADE COMM'N AND U.S. DEP'T OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 52 (2006) (stating that verification of efficiencies claims usually includes "an assessment of the parties' analytical methods, including . . . an evaluation of the reasonableness of assumptions in the analysis, and scrutiny into how well the parties' conclusions stand up to modifications in any assumptions").

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evidence in the record that Mr. Reissfelder's claims are reliable and meet the standards of the case law; rather they are just baseless, self-serving assertions. Moreover, Respondent's reliance on Mr. Reissfelder's testimony is misleading because [redacted] (PX05138 (Reissfelder (Freedom) Dep. at 132-133)).

Although Respondent claims that Mr. Peterson conducted an "Efficiencies Sensitivity Analysis" on the work done by Ottobock and A.T. Kearney, Resp. Post-Tr. Br. at 79, in reality, Mr. Peterson did not conduct any type of sensitivity analysis to test the robustness of the early-stage financial model put together by Respondent's executives. All Mr. Peterson did was [redacted] (CCFF ¶ 1774). As Complaint Counsel's expert, Ms. Hammer, explained at trial, applying [redacted] is not a valid method of verifying efficiencies and fails to meet the requirements of the *Merger Guidelines*. (CCFF ¶ 1775). Respondent cannot pass off Mr. Peterson's simplistic reduction of unverified early-stage estimates to satisfy its obligation to actually verify claimed efficiencies, because [redacted] does nothing to test the financial model's assumptions or provide "a reasonably derived estimate of the future efficiency." (CCFF ¶¶ 1775-76). Moreover, Mr. Peterson's claim that Otto Bock and A.T. Kearney [redacted]—even if it were true—does not constitute verification that meets the requirements of the case law. (CCFF ¶ 1770); *H&R Block*, 833 F. Supp. 2d at 91 (rejecting efficiencies claim based on "estimation and judgment of experienced executives" because of "the lack of a verifiable method of factual analysis"). Because he did not independently verify Otto Bock's efficiency claims through reliable means,[27] Mr. Peterson's assertions do nothing to bolster

[27] Respondent's other expert, Dr. David Argue, did not do any independent assessment to verify the cost savings that Mr. Peterson calculated in his report. (CCFF ¶ 1782).

Respondent's preliminary and incomplete efficiency estimates. Consequently, Respondent has failed to meet its burden to substantiate its efficiency claims. (CCFF ¶ 1781).

Respondent also makes the unsupported claim that its "Dual Brand Strategy contemplates substantial efficiencies," Resp. Post-Tr. Br. at 79, without identifying any of these alleged efficiencies. Indeed, Respondent's economic expert, Dr. David Argue, testified that he [redacted] (CCFF ¶ 1815). Additionally, efficiency claims that potentially arise from anticompetitive reductions in output cannot be cognizable. *See Penn State Hershey*, 838 F.3d at 348-49; *Heinz*, 246 F.3d at 722; *Univ. Health*, 938 F.2d at 1223; *Merger Guidelines* § 10. The dual brand strategy involves an anticompetitive reduction in output [redacted] s*ee, e.g.*, (CCFF ¶¶ 1395-97); *supra* § II.B.3; therefore, any claimed savings related to the dual brand strategy are not cognizable.

2. Respondent's Claimed Efficiencies are Not Merger Specific

Respondent bears the burden of demonstrating that its claimed efficiencies are merger specific. *See Sysco*, 113 F. Supp. 3d at 82. In its post-trial brief, Respondent labels its estimated efficiencies as "[a]cquisition-specific," Resp. Post-Tr. Br. at 78, but there is no explanation of why any purported efficiencies are merger specific nor is there any evidence cited by Respondent in support of this claim, *see id*. at 78-81. As Complaint Counsel explained in its post-trial brief, CC's Post-Tr. Br. at 112-14, Respondent's efficiencies are, in fact, not merger specific because they could be achieved through independent cost-saving initiatives, (CCFF ¶¶ 1784-90), or through other, less anticompetitive transactions, (CCFF ¶¶ 1791-97).

3. There is No Evidence that Respondent's Claimed Efficiencies Would be Passed on to Customers

Respondent argues that its purported efficiencies will be passed on to consumers, Resp. Post-Tr. Br. at 79, but this claim is contradicted by the record and Respondent's own experts, (CCFF ¶¶ 1798-815). Thus, Respondent's claimed efficiencies defense fails. *See, e.g.*, *Penn State Hershey*, 838 F.3d at 350-51; *Univ. Health*, 938 F.2d at 1223; *see also CCC Holdings*, 605 F. Supp. 2d at 74 ("Even assuming *arguendo* that the Defendants will achieve significant cost savings in a timely manner, there is no evidence to suggest that a sufficient percentage of those savings will accrue to the benefit of the consumers to offset the potential for increased prices.").

At trial, Respondent's expert, Mr. Peterson, admitted that [redacted] (CCFF ¶ 1798) (Mr. Peterson testifying that [redacted] *see also* (CCFF ¶ 1799) (Mr. Peterson admitted at his deposition that [redacted] Furthermore, 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 showing customers will receive any price reductions from the Merger. (CCFF ¶¶ 1803-04); *see also* FED. TRADE COMM'N AND U.S. DEP'T OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER 57 (2006) (explaining that 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"). Respondent's economic expert, Dr. Argue, similarly admitted he did not analyze whether any of the claimed

efficiencies identified by Mr. Peterson would be passed through to customers. (CCFF ¶¶ 1801-02).

III. Remaining MPK Sellers Will Not Prevent the Merger's Anticompetitive Effects

Respondent argues that there will be no anticompetitive harm from the Merger because "existing participants in the alleged relevant market have the capability, incentive, and desire to continue ongoing expansion well in excess of Freedom's annual output." Resp. Post-Tr. Br. at 1, 5. Respondent ignores, however, that it is *Respondent's* burden to show that expansion of existing competitors is "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." *H&R Block*, 833 F. Supp. 2d at 73 (internal quotations omitted); *see also CCC Holdings*, 605 F. Supp. 2d at 47. It is not enough to simply show that expansion will replace "*some* of the competition" lost from the Merger, *Swedish Match*, 131 F. Supp. 2d at 170 (emphasis added), rather Respondent must demonstrate that such expansion will "'fill the competitive void that will result'" from the Merger, *H&R Block*, 833 F. Supp. 2d at 73 (quoting *Swedish Match*, 131 F. Supp. 2d at 169).

In its post-trial brief, Respondent argues only that the current MPK market participants—Össur, Endolite, Nabtesco, and DAW—are willing and able to "compete for market share." Resp. Post-Tr. Br. at 65-70. The mere desire to compete, however, is insufficient. *See In re Chi. Bridge & Iron Co.*, No. 9300, 138 F.T.C. 1024, at *1071 (F.T.C. Dec. 22, 2004) ("[T]he mere fact that . . . fringe firms have an intent to compete does not necessarily mean that those firms are significant competitors capable of replacing lost competition."). Respondent offers no evidence that any of these firms can actually replace the competition lost from the Merger and counteract its anticompetitive effects. Thus, Respondent has failed to meet its burden to show that

expansion by Össur, Endolite, Nabtesco, or DAW will be "timely, likely, and sufficient" to prevent the Merger's anticompetitive effects.

A. Respondent Fails to Show that Össur Will Replace the Competition Lost from the Merger

Respondent argues that [redacted] Resp. Post-Tr. Br. at 68. Aside from broad statements that [redacted] of its MPKs, Resp. Post-Tr. Br. at 68, Respondent offers no evidence supporting the extent of this claimed expansion or its impact on competition. As such, there is no basis for any claim that expansion by Össur will be "timely, likely, and sufficient" to counteract the anticompetitive effects of the Merger.

Evidence is clear that, even if Össur has the *ability* to expand,[28] it is unlikely to do so, as customers consider Össur's Rheo 3 as an unattractive alternative to Otto Bock's and Freedom's MPKs. Respondent baldly asserts that [redacted] Resp. Post-Tr. Br. at 68. Respondent, however, does not cite to a single piece of evidence to support its claim. This omission is glaring, particularly because actual record evidence tells a different story. Rather than being [redacted] clinic customers testified that they [redacted] (CCFF ¶ 1487); *see also* (CCFF ¶ 1491) [redacted]

[28] During trial, [redacted] Mr. De Roy did not testify that Ossur has actual plans to expand.

[redacted] And, far from being known for its "reliability," many market participants expressed significant safety concerns with the Rheo. *See* (CCFF ¶¶ 1495, 1502, 1505). Even [redacted] (CCFF ¶ 1492). Given these material concerns, even if Össur does decide to expand, Respondent has offered no evidence to prove that clinic customers would actually switch to Össur's Rheo or that clinics and patients would not experience harm (in terms of higher prices or lower-quality) if they were forced to switch from their preferred MPKs to the Rheo.

The inability of potential Össur expansion to counteract the anticompetitive effects of the Merger is even starker considering the [redacted] Freedom designed its [redacted] (CCFF ¶¶ 1518-19). Consequently, even if customers switch to Össur's Rheo in the face of an anticompetitive price increase by Respondent, customers will [redacted] than they would have from an independent Freedom. While Respondent argues that [redacted] Resp. Post-Tr. Br. at 68, this claim is not supported by evidence. Mr. De Roy testified only that [redacted] (De Roy (Össur) Tr. 3626 (*in camera*)). Without any further details on the timeliness and likelihood of this [redacted] this point fails to show that Össur's expansion will significantly affect the competitiveness of the U.S. MPK market.

B. Respondent Fails to Show that Endolite Can Fill the Competitive Void Left from the Merger

While Respondent offers that Endolite is also [redacted] Resp. Post-Tr. Br. at 68, Endolite's long history as a small competitor in the U.S. MPK market tells a markedly different story. Despite being a twenty-year veteran in the MPK industry, Endolite has not been able to gain more than a [redacted] share of the U.S. MPK market. (CCFF ¶ 964); *see also* (CPFF ¶ 975) [redacted] Although Endolite has seen some sales growth since the launch of the Orion 3 in September 2016, customers that have experience with Endolite's Orion MPK testify that the function is inferior to that of the C-Leg 4 and the Plié. (CCFF ¶¶ 1539, 1543-44). And, customers have expressed difficulty with Endolite's customer support because they "don't have as much support staff . . . don't have as large a sales force, [and] they have far fewer clinicians." (CCFF ¶ 1540). Aggravating these shortcomings, [redacted] (CCFF ¶ 1541). In fact, Mr. Blatchford testified that, [redacted] (Blatchford (Endolite) Tr. 2165 (*in camera*)).

Respondent attempts to bypass Endolite's flaws by asserting that Endolite plans to [redacted] Resp. Post-Tr. Br. at 69. While Mr. Blatchford testified about his [redacted] he does not actually attribute any of this growth to sales of MPKs in the United States. (Blatchford (Endolite) Tr. 2209). [redacted] (Blatchford (Endolite) Tr. 2179 (*in camera*)); (CCFF ¶ 440).

C. Respondent Fails to Show that Any Fringe MPK Competitor Will Replace Competition Lost from the Merger

Respondent is hard-pressed to argue that negligible industry participants Nabtesco and DAW can expand to replace competition lost by the Merger. Both companies have [redacted] Respondent has failed to meet its burden to prove that Nabtesco and DAW even have the ability to expand enough to counteract the anticompetitive effects of the Merger, much less that they will.

Due to Nabtesco's insignificant U.S. MPK sales, Respondent chooses to spend the vast majority of its Nabtesco argument discussing Proteor, an entirely separate entity, instead. *See*

Resp. Post-Tr. Br. at 69-70. By referring to Nabtesco as "Nabtesco/Proteor," Respondent seeks to imply that Proteor's qualifications apply to Nabtesco. *See id*. Proteor Inc., however, is simply a distributor that sells prosthetic products manufactured by Nabtesco. (CCFF ¶ 1551). Nabtesco does not own Proteor, and Proteor does not own Nabtesco. (CCFF ¶ 1553). Accordingly, Respondent's arguments about *Proteor's* prior acquisitions, R&D budget, and growth as a prosthetic manufacturer, Resp. Post-Tr. Br. at 69-70, do not reflect anything about Nabtesco's MPK expansion plans.

It appears that Respondent's assessment of Nabtesco's potential to expand is based on its claim that, after [redacted] and evidence points to the contrary. In fact, many of Otto Bock and Freedom's clinic customers have never even heard of Nabtesco's MPKs, (CCFF ¶¶ 1593-98), including the [redacted]

[29] In Respondent's introduction, it states that Nabtesco [redacted] Resp. Post-Tr. Br. at 5-6. Respondent does not provide a citation for this statement, and no one from Nabtesco testified to these projections. [redacted]

[30] [redacted]

[redacted] (CCFF ¶ 1591). Even those that have heard of Nabtesco testified that they would not fit a Nabtesco MPK on a patient. (CCFF ¶¶ 1599-603). It is no wonder that [redacted] except, as Freedom's Director of Field Sales and Clinical Training put it, to note that Nabtesco's Allux is a "piece of crap." (CCFF ¶¶ 1572-73, 1585, 1604). As such, there is no support for a conclusion that Nabtesco's expansion would be "timely, likely, and sufficient" to cure the anticompetitive effects of the Merger.

Aside from passing references, Respondent does not support its claim that DAW is "willing and able to expand and compete for share in the marketplace." Resp. Post-Tr. Br. at 65-66. Nor can it. This Court has not heard from a single customer—at trial or in deposition—that currently purchases MPKs from DAW. (CCFF ¶¶ 1614, 1616). It is no surprise, then, that [redacted] (CCFF ¶ 966). In fact, many customers testified that they would never fit a DAW MPK because of concerns about reliability or negative experiences with DAW staff. (CCFF ¶¶ 1620-23). By failing to provide any evidence to the contrary, Respondent has not come close to meeting its burden to show that DAW's negligible sales will grow in a timely, likely, and sufficient manner to "fill the competitive void" left by Freedom. *H&R Block*, 833 F. Supp. 2d at 73.

IV. Neither Power Buyers nor Third-Party Payers Would Constrain the Ability of Respondent to Raise Post-Merger MPK Prices

A. Respondent Fails to Show that Hanger is a "Power Buyer" that Will Prevent Post-Merger MPK Price Increases

Respondent's claim that Hanger has "significant buying power" and therefore "the ability and willingness to prevent any reasonably likely anticompetitive effects" is analytically unsound and refuted by the record. Resp. Post-Tr. Br. at 71. As the *Merger Guidelines* explain, "Even

buyers that can negotiate favorable terms may be harmed by an increase in market power." § 8. "The ability of large buyers to keep prices down . . . depends on the alternatives these large buyers have available to them." *Sysco*, 113 F. Supp. 3d at 48 (internal citations omitted). Thus, "[i]n assessing a power buyer argument, the court should 'examine the choices available to powerful buyers and how those choices likely would change due to the merger,' keeping in mind that '[n]ormally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer.'" *Wilhelmsen*, 2018 WL 4705816, at *22 (quoting *Merger Guidelines* § 8); *see also Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 440 (5th Cir. 2008) (where a merger eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage, the merger is likely to cause competitive harm).[31]

Respondent fixates on Hanger's size and alleged purchasing power, *see* Resp. Post-Tr. Br. at 71-73, but ignores evidence showing that Hanger's power to negotiate lower MPK prices pre-Merger derived from its ability to shift or credibly threaten to shift sales from Otto Bock to Freedom (and vice versa), (CCFF ¶¶ 1154-55, 3090). For example, Maynard Carkhuff, Freedom's Chairman, testified that Hanger's ability to threaten to move its Plié volume to the C-Leg allowed it to negotiate lower prices from Freedom. (CCFF ¶ 3090) ("Q. And so in negotiations with Freedom, Hanger may be able to negotiate a lower price based on that bargaining leverage, right? A. Yes. Q. And the ability of Hanger to negotiate lower prices turns in part on whether it could credibly threaten to switch to another microprocessor knee some portion of its sales to say, like, C-Leg 4, right? A. Yes. Q. And so if that threat is credible, they may use that to negotiate lower prices from Freedom for the Plié 3, right? A. Right."). [redacted]

[31] As the Third Circuit explained in *Penn State Hershey*, a customer's leverage remains unaffected by a merger; only the merged firm's leverage changes, and the relevant question is "whether the merger will cause such a significant increase in the [merged firm's] bargaining leverage that [it] will be able to profitably impose" a price increase. 838 F.3d at 346.

[redacted] (CCFF ¶¶ 1154-55). Thus, while Hanger may have had significant negotiating leverage before, the elimination of Freedom as an independent competitor will enable Otto Bock to extract higher prices than it would have been able to absent the Merger. *See ProMedica*, 2012 WL 1155392 at *45 (finding that, even though managed care organizations had leverage of their own in negotiations with hospitals, they would find it harder to resist the merged hospital's price demands post-merger).

Evidence indicates that this increase in Respondent's bargaining leverage created by the Merger will harm Hanger, forcing it to pay higher prices for its preferred MPKs, just as it will harm other clinics. Accordingly, [redacted]

Respondent's assertion that Hanger "has structures and tools in place that will enable it to constrain MPK prices moving forward" is false. Resp. Post-Tr. Br. at 72. This argument rests largely on [redacted]

[32] Respondent also relies on Hanger's ability to set the prices that it charges its own clinics in support of its "power buyer" argument. *See* Resp. Post-Tr. Br. at 6, 73. This argument confuses *intracompany* pricing (*i.e.*, the prices that

[redacted]

Hanger charges its own clinics for prosthetics products) with *intercompany* pricing (*i.e.*, the prices that Hanger pays manufacturers for prosthetics products in the first instance). While Hanger can charge an intracompany markup (as any company could) to incentivize its clinicians, for example, to shift purchases away from Otto Bock's C-Leg to another MPK, Hanger obviously does not control the prices that Otto Bock, Freedom, or any of the other MPK manufacturer charges it for MPKs. Nothing in the trial record shows that Hanger could use intracompany pricing to prevent harm from the Merger; in fact, evidence indicates that it would be difficult for Hanger to switch substantial MPK volume away from Respondent, even with the use intracompany pricing tools, in the face of a post-Merger price increase. (CCFF ¶¶ 3098-103).

[33] [redacted]

[redacted]

Even if Hanger could somehow avoid an MPK price increase as a result of its size, "there is no reason to believe that other [] customers would fare as well." *Polypore*, 150 F.T.C. at *32; *see also Merger Guidelines* § 8 ("[E]ven if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers"). Where prices are individually negotiated, as is the case here, (CCFF ¶¶ 568-76, 580), "smaller buyers would not be protected by [any] resistance offered by larger, more powerful customers," *Polypore*, 150 F.T.C. at *32 (citing *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1085 (D. Del. 1991) (large customers would not shelter smaller buyers from increased prices); *FTC v. Bass Bros. Enter., Inc.*, Nos. C84-1304, C84-1311, 1984 WL 355, at *16 (N.D. Ohio June 6, 1985) (large buyers could not protect remainder of purchasers)). Hanger's ability to resist an MPK price increase post-Merger would thus do nothing to help "smaller buyers" of MPKs, which comprise [redacted] (CCFF ¶¶ 3109-10), resist such a price increase, *Polypore*, 150 F.T.C. at *32. Respondent does not even attempt to argue otherwise. *See* Resp. Post-Tr. Br. at 70-74.

B. Respondent Fails to Show that Insurer Reimbursement Rates Will Prevent Post-Merger MPK Price Increases

Respondent's claim that the "third-party payer reimbursement system in the United States constrains the ability of [MPK] manufacturers to raise prices" is false and flatly contradicted by the record. Resp. Post-Tr. Br. at 74. Though Medicare and other third-party payers reimburse prosthetic clinics the same fixed dollar amount for all MPKs, including the Plié 3 and C-Leg 4, (CCFF ¶¶ 381-83, 748-49, 3039-3040), these fixed rates will not preclude post-Merger price increases, (CCFF ¶¶ 3054, 3059).

Respondent argues that MPK manufacturers could not profitably impose a price increase because prosthetists already earn "very thin margins" as a result of the reimbursement ceiling set by Medicare. Resp. Post-Tr. Br. at 74. This argument conveniently ignores several crucial facts. First, clinics are reimbursed for—and earn their profit margin on—the complete lower limb prosthetic, not simply the MPK. (CCFF ¶¶ 3041-47); (CCFF ¶ 3041) [redacted] Thus, even if an MPK price increase squeezed a clinic's margin on that component, margin earned by the clinic on other components could still make fitting a prosthesis with an MPK profitable. (CCFF ¶¶ 2959-61); (CCFF ¶ 3038) (Össur's Executive Vice President of R&D testified that, "there's fair margins" for prosthetists at the current reimbursement levels).[34] Second, MPK manufacturers compete with each other by offering discounts and rebates, and the actual prices charged by different manufacturers vary

[34] [redacted]

significantly. (CCFF ¶¶ 3050-53). Thus, the margins clinics earn on an MPK vary depending on the brand of MPK they buy. (CCFF ¶ 3052) [redacted]; (CCFF ¶ 3053) [redacted]

Respondent's argument cannot be reconciled with the fact that many, if not all, clinics pay substantially more for the C-Leg 4 than the Plié 3 today, but still fit the C-Leg 4 profitably.[35] (CCFF ¶ 3052). Therefore, if Respondent raised the price of the Plié 3 by 10 percent, clinics could still fit prostheses with the Plié 3 profitably because even after such an increase the Plié 3 typically would still cost less than Otto Bock's C-Leg 4 does today. [redacted]

[35] Respondent relies on the trial testimony of two witnesses—Cali Solorio, Otto Bock's Senior Prosthetics Marketing Manager, and Kim De Roy, Össur's Executive Vice President of Research and Development—to support its claim that "[m]anufacturers . . . do not have room to profitably impose [MPK] price increases." Resp. Post-Tr. Br. at 74 (citing Solorio (Otto Bock) Tr. 1624; De Roy (Össur) Tr. 3557-58). But neither Ms. Solorio nor Mr. De Roy said anything of the sort. In her testimony cited by Respondent, Ms. Solorio simply testified that [redacted] (Solorio (Otto Bock) Tr. 1624). Similarly, Mr. De Roy testifies, when asked how he is aware of reimbursement rates for K-3/K-4 mechanical knees, that "these prices are mentioned in our different business cases, they're mentioned in our product line plans, so this is information that is important for us to define where do we position our product, how do we price our product, and what can the cost of the product be when we're developing it." (De Roy (Össur) Tr. 3557-58). Simply put, Respondent's reliance on the trial testimony of Ms. Solorio and Mr. De Roy to support its unfounded claim that Otto Bock could not raise MPK prices post-Merger misrepresents the trial record. Lacking any direct evidence from MPK manufacturers to support its argument, Respondent cites the trial testimony of Scott Sabolich, the owner and Clinical Director of Scott Sabolich Prosthetics and Research, for the proposition that clinics "*believe* the prosthetics industry's unique third-party payer system constrains the ability of manufacturers to raise [MPK] prices." Resp. Post-Tr. Br. at 74 (citing Sabolich (Scott Sabolich Prosthetics) Tr. 5866) (emphasis added). The relevant portion of Mr. Sabolich's trial testimony is as follows: "Again, Medicare sets the price, which just makes me want to sort of stand up and scream why are we all here. If Medicare is setting the price, then manufacturers can't change the price of a knee. If they wanted to buy Freedom and raise the price of a knee, all they're doing is cutting out my profit margin, which makes me not want to use them." (Sabolich (Scott Sabolich Prosthetics) Tr. 5866). Although Mr. Sabolich testified that, "manufacturers can't change the price of a knee," the evidence in this case, cited above, plainly shows otherwise. (CCFF ¶¶ 824-27, 3052).

[redacted]

The fixed reimbursement system has not precluded MPK price increases in the past and it would not prevent future price increases post-Merger. (CCFF ¶ 3059) [redacted] (CCFF ¶ 3054) (Össur's Executive Vice President of R&D testified that there is "room" for Össur to raise the price of its MPK with current reimbursement rates). [redacted] (CCFF ¶ 3056). The trial record thus refutes Respondent's unfounded claim that the reimbursement system for MPKs would prevent a post-Merger price increase.

V. Respondent's Divestiture [redacted] Fail to Cure Its Anticompetitive Merger

Respondent claims that it has "agreed to divest 100% of Freedom's assets in the market alleged by Complaint Counsel" to [redacted] and that, "[a]s a result, there can be no harm to competition." Resp. Post-Tr. Br. at 81. Respondent's [redacted] however, divest far less than an ongoing MPK business, and nowhere close to "100% of Freedom's [MPK] assets," and [redacted] Respondent's [redacted] do not include many of the assets Freedom uses to research, develop, manufacture, and sell MPKs. Respondent has refused to divest [redacted] Respondent has not agreed to divest [redacted] Respondent has restricted the [redacted] And Respondent has refused to [redacted] Respondent's exclusions result in a divestiture that would produce, at best, a crippled MPK competitor. Despite Respondent's assertions,[36] it has failed to meet its burden to show that [redacted] will restore competition lost from the Merger.

[36] Many of Respondent's conclusions regarding its divestiture are entirely unsupported by Respondent's cited evidence. For example, Respondent makes a blanket and conclusory assertion that [redacted] Resp. Post-Tr. Br. at 86. For that, it cites RPFF ¶ 1578, which discusses the Quattro and not [redacted] Even if one assumes that Respondent intended to cite RPFF ¶ 1579, that finding only cites [redacted] without any evidence to support [redacted] prospects for success. Similarly, for the claim that [redacted] Respondent cites RPFF ¶ 1092, (Resp. Post-Tr. Br. at 87), which does not address [redacted]

A. Respondent's Divestiture [redacted] Cannot Undo the Merger's Consummation in Violation of Section 7 or the Additional Harm That Has Already Occurred

Respondent asks this Court to ignore all harm from its anticompetitive Merger because of its tepid attempt to divest select MPK-related assets to a potential divestiture buyer at some point in the future. According to Respondent, this Court should consider the "entire transaction, including the divestiture" when assessing competitive effects. Resp. Post-Tr. Br. at 81. Respondent's plea, however, goes squarely against established law. In fact, the Commission has already rejected Respondent's argument that the Merger agreement and the divestiture agreement must be considered an "entire transaction." Opinion and Order of the Commission, *Otto Bock HealthCare North America*, Docket No. 9378 (April 18, 2018) ("Commission Order"). As the Commission noted, all of the cases in which a divestiture and merger agreement were considered a single transaction for Section 7 purposes, including cases that Respondent continues to rely on today, involved *unconsummated* mergers. *Id* at 4. The Commission distinguished those cases from the divestiture proposed by Respondent:

> [T]he courts in those cases were analyzing the likely competitive harm that would result when the challenged transactions and planned divestitures were to occur concurrently. In those circumstances, the courts ruled, the concurrent divestiture should be considered part of the challenged transaction. . . . In those cases, unlike this one, the fact that the merger had not been consummated meant that the only potential harm to competition could be addressed or mitigated by a divestiture simultaneous with (or effectively simultaneous with) the consummation.

Id. at 4-5. The Commission concluded that a future divestiture "cannot eliminate the potential for demonstrating likely anticompetitive effects" before it takes place. *Id.* at 4.

Since a proposed divestiture cannot undo Respondent's illegal Merger, Respondent contends, "Complaint Counsel has introduced no evidence of anticompetitive effects from the

Acquisition either before or after the Hold Separate Agreement was entered." Resp. Post-Tr. Br. at 83 n.4. This assertion contradicts Respondent's own understanding of the law. As Respondent explains in its post-trial brief, the law is clear that Respondent bears the burden "of producing evidence tending to rebut the government's *prima facie* case." Resp. Post-Tr. Br. at 84 (quoting *Aetna*, 240 F. Supp. 3d at 61). The law also provides that, like every aspect of Respondent's rebuttal, the more "compelling the [FTC's] prima facie case, the more evidence the defendant must present [regarding the divestiture] to rebut successfully." *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990). The strength of Complaint Counsel's *prima facie* case and additional direct evidence of anticompetitive effects, including harm that has already occurred, impose a heavy burden on Respondent to show that the Merger, from the time of its consummation to the time of a divestiture, did not cause anticompetitive harm.

Respondent avers, in a footnote, that its decision to enter into a Hold Separate Agreement with the FTC three months after acquiring Freedom allays any competitive concerns from the Merger. Resp. Post-Tr. Br. at 83 n.4. This is simply untrue. In the Commission Order, the Commission explained that, "representations about [redacted] do not preclude a finding of likely future anticompetitive effects. As courts and the Commission have repeatedly recognized, a merged firm's choice not to take anticompetitive actions while litigation is pending does not preclude a finding of likely anticompetitive effects." Commission Order at 4 n.3 (citing *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 504-05 (1974) ("If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.")). Thus, even if it were

true that Respondent refrained from price increases (or other anticompetitive conduct made possible by the Merger) in the period following the Merger, it would not preclude a determination that Respondent violated Section 7 when it acquired Freedom. Commission Order at 4 n.3.

Even though Complaint Counsel does not have to prove anticompetitive harm after establishing its *prima facie* case, it has done so. CC Post-Tr. Reply Br. § II.B.3. When Respondent closed its acquisition on September 22, 2017, concentration increased dramatically, an important rival in the U.S. MPK market was eliminated, and Otto Bock's incentives replaced those of an independent Freedom. Respondent fired or allowed numerous Freedom employees to leave, (CCFF ¶¶ 124, 127), and began handling Freedom's international distribution, (CCFF ¶ 150). [redacted] (CCFF ¶¶ 1446-68), including the [redacted] (CCFF ¶¶ 1456-68). And Freedom's incentives to compete as an independent MPK manufacturer also changed, (CCFF ¶¶ 1473, 1477), which affected customers, (CCFF ¶¶ 1478-79). Respondent confronted none of this evidence.

B. Respondent Cannot Meet its Burden to Show Its Proposed [redacted] Restore Competition

Respondent's post-trial brief recognizes that Respondent must prove that the proposed [redacted] will restore competition lost by the Merger. Resp. Post-Tr. Br. at 84. When presenting evidence of a "planned divestiture" as rebuttal to a *prima facie* case, the law requires that a Respondent bear the burden of showing that (1) "the divestiture . . . replace[s] the competitive intensity lost as a result of the merger;" and (2) its proposal is "sufficiently non-

speculative for the court to evaluate its effects on future competition." *Aetna*, 240 F. Supp. 3d at 60 (internal quotation marks omitted). Respondent fails to meet its burden to show that [redacted] "sufficiently non-speculative" and will restore competition in the U.S. MPK market.[37] As detailed in Complaint Counsel's post-trial brief, *see* CC's Post-Tr. Br. § IV.G, [redacted] remains uncertain and contingent on additional negotiations and due diligence. [redacted] is a divestiture of an ongoing business, but only a sale of a narrow set of MPK-related assets that leaves behind key assets that Freedom uses to compete in the MPK market. [redacted] also requires the buyer to rely heavily on Respondent post-divestiture. Instead of taking these shortcomings head-on in its post-trial brief, Respondent offers only conclusory, thinly supported (or, in many instances, unsupported) assertions. *See* Responses to RPFF ¶¶ 1081-1290, 1572-1634. Actual evidence presented at trial, however, disproves Respondent's claims, and shows that [redacted] can be counted on to restore the competitive significance of an independent Freedom.

1. The Proposed Divestiture to [redacted] Will Not Restore Competition

Respondent argues that its proposed divestiture to [redacted] "[c]ontradicts [a]ny [h]arm [t]o [c]ompetition." Resp. Post-Tr. Br. at 84. Respondent's support for this

[37] Respondent incorrectly focuses its arguments on the HHIs that will result from the proposed [redacted] arguing that maintaining the current HHIs means "there is no likely substantially adverse effect on competition." Resp. Post-Tr. Br. at 81-82. The law is clear, though, that restoring competition is the "key to the whole question of an antitrust remedy." *du Pont 1961*, 366 U.S. at 326. "Restoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels." *FTC v. Sysco*, 113 F. Supp. 3d 1, 72 (D.D.C. 2015) (quoting U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 5 (2004)). To hold otherwise means that Respondent could simply dispose of Freedom's MPK assets, without regard to the sufficiency of the assets or the capabilities of the buyer. Furthermore, Respondent's contentions about post-divestiture HHIs are merely a rehash of its claim about the divestiture and not the product of an actual HHI analysis with a divestiture to [redacted]

conclusion falls far short of meeting its high burden. Looking closely at Respondent's arguments, Respondent offers few details about the specific assets it plans to divest to [redacted], no information on how [redacted] will account for excluded assets, no basis for [redacted] sales projections, and no support for the effectiveness of [redacted] post-divestiture plans. Resp. Post-Tr. Br. at 84-89. Respondent relies only on unsupported conclusions that a divestiture to [redacted] will increase MPK sales, enhance innovation, and provide [redacted] with everything it needs.

Unlike Respondent's surface-level contentions, Complaint Counsel has fully detailed the myriad shortcomings of the planned divestiture to [redacted] CC Post-Tr. Br. § IV.G.4-9. First, though [redacted] excludes key assets necessary to compete in the U.S. MPK market. [redacted] Respondent does not explain, and [redacted] *cannot* explain given its minimal due diligence, how [redacted] can compete effectively without these assets. (CCFF ¶¶ 2440-47, 2463-83). Second, critical aspects of the divestiture to [redacted] remain uncertain, including [redacted] and

which transition services Respondent will provide. (CCFF ¶¶ 2281-82; 2401-02). Third, [redacted] current business plan for Freedom's MPK assets is problematic, with [redacted] when a high-touch specialized sales force is required. (CCFF ¶¶ 2873-2909). Given these deficiencies, Respondent's divestiture proposal to [redacted] has significant risk of failure, and Respondent has not shown otherwise.

a) [redacted] Will Not Help it Sell MPKs

Respondent attempts to bolster its deficient divestiture proposal by touting [redacted] as a "leader in the prosthetics industry." Resp. Post-Tr. Br. at 84. While Complaint Counsel does not dispute that [redacted] in not on par with other manufacturers in the sale of prosthetic devices. [redacted] has a limited line of prosthetic foot products that have a poor reputation in the marketplace and are considered by market participants as [redacted] to those of Freedom. (CCFF ¶¶ 2244, 2597-2629). [redacted] has attempted to develop an MPK in the past and failed. (CCFF ¶¶ 2707-09). Given [redacted] lackluster performance in the development and sale of actual prosthetic devices, Respondent has not shown how [redacted] will be helpful to the manufacture and sale of MPKs. In fact, [redacted]

[redacted] There is no evidence that [redacted] or other prosthetic products will help MPK sales any more than they have helped its prosthetic foot sales.

b) A Divestiture to [redacted] Will Not Increase MPK Sales

Respondent argues that [redacted] will be able to increase Freedom's MPK sales because of its "strong relationships" with clinics. Resp. Post-Tr. Br. at 86. Evidence shows otherwise. [redacted] (CCFF ¶ 2877). [redacted] (CCFF ¶ 2878). Due to its limited contact with customers, clinics know little about [redacted] products, [redacted] Keith Watson, President of Fourroux Prosthetics, testified that [redacted] executives do not come into Fourroux's clinics and educate them on [redacted] products. (PX05166 (Watson (Fourroux Prosthetics) Dep. at 183-84). Jeff Sprinkle, of Sprinkle Prosthetics, testified, "I don't know a lot about [redacted] feet, and I never have . . . it's very rare that I fit a [redacted] foot." (PX05168 (Sprinkle (Sprinkle Prosthetics) Dep. at 66-67)). As it must "hand[] off" customer interaction to its distributors, (CCFF ¶ 2878), [redacted] is also handing off its relationships with them.

Respondent also claims that [redacted] will sell more MPKs than Freedom. For support, it points to [redacted] financial projections, which it claims are "far more reliable" than ones prepared by Freedom. Resp. Post-Tr. Br. at 86.[38] Respondent,

[38] Respondent asserts that Freedom's projections were "aggressive" and "not realistic." [redacted]

however, fails to explain how [redacted] has any basis to make projections. [redacted] projections are likely *less* reliable than Freedom's, since Freedom executives have years of experience with their products and the MPK business, whereas [redacted] had minimal due diligence and its CEO does not know who came up with his own company's projections.[39] Even taking [redacted] projections at face value, Respondent omits that [redacted] It is misleading and irrelevant that [redacted] expects that it will beat Freedom's *current* MPK sales because Freedom projects that its sales will continue to increase, particularly after it releases the Quattro. (CCFF ¶¶ 1270-86).

Finally, Respondent has apparently determined that [redacted] will increase MPK sales because of its "credible" business plan. Resp. Post-Tr. Br. at 87. In [redacted] one and only business plan, made [redacted] states that its sales strategy for MPKs is to [redacted] (CCFF ¶¶ 2873-74, 2876, 3286). Unlike [redacted]

[39] During his first deposition, [redacted]

[redacted] (CCFF ¶¶ 2878, 2884). [redacted] (CCFF ¶¶ 2893-95). [redacted] Respondent did not show how [redacted] could replace Freedom's MPKs sales with a distribution-focused approach when first-hand experience from MPK manufacturers shows otherwise.[40]

c) A Divestiture to [redacted] Would Harm Innovation in the MPK Market

Respondent makes the conclusory claim that [redacted] "will be a stronger innovator in MPKs than Freedom," based on the observation that [redacted] is developing some products[41] and "has numerous engineers." Resp. Post-Tr. Br. at 87.

[40] [redacted]

[41] Respondent refers primarily to [redacted]

Respondent ignores that [redacted] (CCFF ¶ 2740). [redacted] has even attempted to develop an MPK, but its engineers were unable to find a path around existing intellectual property to design an MPK that it could market. (CCFF ¶¶ 2708-09). In contrast, "Freedom has a history of innovation," with "new products introduced at least every year." (CCFF ¶ 22). [redacted] (CCFF ¶ 1383). Respondent's take on [redacted] which could not even finish its MPK development project, is unconvincing.

In addition, Respondent's own divestiture proposal to [redacted] severely limits [redacted] ability to innovate MPKs post-divestiture by restricting the intellectual property that will transfer pursuant to the divestiture. The [redacted] (CCFF ¶ 2278). [redacted] (CCFF ¶¶ 2690-93). [redacted]

[redacted]

[redacted] (CCFF ¶¶ 2695-96). [redacted] (CCFF ¶¶ 2697-2700, 2705-06). [redacted] (CCFF ¶¶ 2696, 2706).

d) The [redacted]

Rather than detailing the assets that Respondent plans to divest to [redacted] Respondent relies on the pronouncement by [redacted] Resp. Post-Tr. Br. at 88. That confidence is meaningless, however, since [redacted] has performed very little due diligence on Freedom's business, including its MPK products, to understand what assets [redacted] will need to compete in the U.S. MPK market. [redacted] executives admitted that they received no information on Freedom's prosthetic foot products, including whether and to what extent Freedom uses those products to sell its MPKs. (CCFF ¶¶ 2441-42, 2592). [redacted] even admitted that she has no idea how Freedom markets its MPKs. (CCFF ¶ 230). With respect to the MPK products themselves, [redacted]

[redacted] (CCFF ¶ 2481). He also testified that he is unaware of the [redacted] (CCFF ¶¶ 2481, 2482-83, 2658, 2665). [redacted] (CCFF ¶¶ 237, 2378). Thus, it is clear that [redacted] executives lack the basis to opine on the sufficiency of the assets in the divestiture.

Respondent claims that the [redacted] Respondent implies that its warranty that [redacted] is sufficient to ensure the adequacy of the divestiture. Resp. Post-Tr. Br. at 88. Respondent omits the fine print it included in the [redacted]

Respondent also seeks to assure the Court that [redacted] can hire any Freedom employee that [redacted] needs to run the business. Resp. Post-Tr. Br. at 89. Mere assurances, without more, do little to ensure [redacted] success, particularly when contradicted by the actual [redacted]

[redacted] (CCFF ¶ 2281). If [redacted] (CCFF ¶ 2282). [redacted] CC Post-Tr. Br. at 169-76. [redacted]

Respondent concedes that it would take time under the [redacted] to reconstitute Freedom's manufacturing and development operations, and that [redacted] would rely on Freedom for "supply and support on transfer of manufacturing, R&D efforts, and sales and marketing efforts for up to six to twelve months." Resp. Post-Tr. Br. at 89. [redacted] (CCFF ¶¶ 2286, 2401). Even if it were, [redacted] reliance on Respondent is "a problem" both because it increase[s] a buyers vulnerability to the sellers behavior," *Sysco*, 113 F. Supp. 3d

at 77, and fails to produce the required independent competitor, *CCC Holdings*, 605 F. Supp. 2d at 59 (citing *White Consol. Indus. v. Whirlpool Corp.*, 781 F.2d 1224, 1228 (6th Cir. 1986)).

2. Respondent's [redacted] Fail to Restore Competition

Respondent hardly attempts to show that a divestiture to [redacted] would restore competition. Resp. Post-Tr. Br. at 89-90. Respondent dedicated only one paragraph to [redacted] but there is almost nothing to say about [redacted] since [redacted] came up only in the middle of trial and remain entirely contingent and uncertain. (CCFF ¶¶ 2296, 2317, 2340, 2413-37). Respondent does not explain, nor can it, what assets will be divested, how [redacted] will use the divested assets, or how [redacted] would restore competition in the U.S. MPK market. Instead, Respondent only provides a cursory one-sentence overview of the products [redacted] Resp. Post-Tr. Br. at 90.

Looking beyond Respondent's cursory arguments, record evidence is clear that the proposed [redacted] far too speculative "for the court to evaluate its effects on future competition." *Aetna*, 240 F. Supp. 3d at 60. [redacted] (CCFF ¶¶ 2297, 2318, 2341, 2413-14). [redacted] (CCFF ¶¶ 2534-46, 2630-37, 2655-77, 2710-28), [redacted] (CCFF ¶¶ 2307-08, 2327-28, 2350-51**).** [redacted]

[redacted] (CCFF ¶¶ 2447-62, 2484-93). [redacted] (CCFF ¶ 2436). Given the considerable uncertainties remaining in [redacted] certainly too speculative for the Court to evaluate their effects on future competition. As the Commission observed when presented with a [redacted] Commission Order at 3.

Respondent's [redacted] also will not "replace the competitive intensity lost as a result of the merger." *Aetna*, 240 F. Supp. 3d at 60. [redacted] (CCFF ¶¶ 2910, 2919, 2924). [redacted] (CCFF ¶¶ 2340, 2356, 2633-34, 2910, 2920, 2922). Additionally, far from restoring competition, a divestiture to [redacted] raises competitive concerns of its own. (CCFF ¶¶ 2925-27).

C. Divestiture of Freedom's Ongoing Business is the Proper Remedy, Will Restore Competition, and is Not Punitive

Respondent objects to the divestiture of an ongoing business, arguing that such a remedy would be "punitive and wholly unnecessary to achieve Complaint Counsel's only legitimate objective of restoring competition." Resp. Post-Tr. Br. at 91. The "legitimate objective" in a Section 7 case is to "restore the competitive intensity" lost from the Merger. *Aetna*, 240 F. Supp. 3d at 60 (quoting *Sysco*, 113 F. Supp. 3d at 72). Far from being "punitive" and "unnecessary," divestiture of an ongoing business is considered by courts to be the "natural remedy" for a Section 7 violation. *du Pont 1961*, 366 U.S. at 329; *see also Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) (stating that "[c]omplete divestiture is particularly appropriate where . . . acquisitions violate the antitrust laws"); *RSR Corp.*, 602 F.2d at 1326 n.5 (stating that "complete divestiture of all pre-merger assets is the usual remedy for a Section 7 violation"). This is because an existing business entity already has "the 'personnel, customer lists, information systems, intangible assets and management infrastructure' necessary to competition." *Aetna*, 240 F. Supp. 3d at 60. Divestitures of only selected assets, "even with upfront buyers, succeed[] less often and raise[] more concerns than divestitures of ongoing businesses."[42] The FTC Remedy Study, which analyzed all of the Commission's merger orders from 2006 to 2012, explained that "all remedies involving divestitures of assets comprising ongoing businesses succeeded," whereas "buyers of less than an ongoing business . . . did not always succeed at maintaining competition, suggesting that the more limited scope of the asset package increases the risk that a remedy will not succeed." FTC Remedy Study at 5.

[42] The FTC's Merger Remedies 2006-2012 (January 2017) at 32, *available at* https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf (hereinafter "FTC Remedy Study") (attached to Complaint Counsel's post-trial brief as Attachment F).

In arguing against divestiture of an ongoing business, Respondent claims that because Complaint Counsel has not alleged "adverse effects on competition in any market that includes prosthetic feet," a divestiture of only some MPK-related assets must be sufficient. Resp. Post-Tr. Br. at 90. Respondent's reasoning is faulty and ignores the law. Nowhere is there a prerequisite that a complaint must allege harm in markets for every asset before they can be included in a divestiture package. A divestiture of an ongoing business is so important that complementary assets must be included even if used outside of the relevant market at issue if they are "necessary to restore competition within the relevant market." *Polypore*, 150 F.T.C. 586 at *33; *Chi. Bridge* 138 F.T.C. at *1163-64 (ordering a divestiture of water tank business to support the cryogenic tanks business of concern to ensure viability); FTC Remedy Study at 32 ("[A] proposal to divest selected assets as a remedy may need to include, for example, assets relating to complementary products outside of the relevant market[.]"). As established in Complaint Counsel's post-trial brief, [redacted] have been integral to Freedom's success in the U.S. MPK market. CC Post-Tr. Br. at 158-62. Although [redacted] has received information on Freedom's prosthetic feet, (CCFF ¶¶ 2440-62), [redacted] (CCFF ¶¶ 2590-91), [redacted] (CCFF ¶¶ 2593-94).

To ensure a successful remedy that includes all of the assets necessary to "restore the competitive intensity" lost from the Merger, Complaint Counsel has proposed an order

("Proposed Order" or "CCPO") that requires Respondent to divest the ongoing Freedom business to a Commission-approved buyer. The divested business includes Freedom's MPKs, as well as [redacted] (CCFF ¶¶ 2501-23). Complaint Counsel's Proposed Order allows Respondent to retain certain prosthetic foot assets so long as in doing so, the competitive intensity of Freedom in the MPK market is not compromised. Due to the limited due diligence Respondent has afforded to [redacted] to date, (CCFF ¶¶ 2440-93), the Proposed Order establishes a process for the proposed buyer to receive the information "customarily provided in a due diligence process[.]" (CCPO ¶ II.A.4). If, after conducting proper and complete due diligence, the buyer concludes that certain Freedom prosthetic foot products are not required to compete effectively in the U.S. MPK market, it may opt not to acquire them. (CCPO ¶¶ I.I, I.J, I.M, I.N, II.A.1). Because the Proposed Order tailors the divestiture to the particular needs of the buyer, Respondent is assured that the "natural remedy" of divesting Freedom's ongoing business is not "punitive."

VI. Respondent Has Failed to Meet Its Burden to Show that Freedom Was a Failing or Flailing Firm

Respondent asserts that the Merger should be immunized from Section 7 liability because Freedom "easily qualifies" for immunity under the failing firm defense. Resp. Post-Tr. Br. at 9. But the failing company defense is "narrow in scope," *Citizen Publishing*, 394 U.S. 131, 139 (1969), and "has strict limits," *FTC v. Warner Communications Inc.*,, 742 F.2d 1156, 1164 (9th Cir. 1984), and "[t]he burden of proving that the conditions of the failing company doctrine have been satisfied is on those who seek refuge under it," *Citizen Publishing*, 394 U.S. at 138-39. Because of the burden and the exacting requirements of the defense, it "rarely succeeds." *United*

States v. Energy Sols., Inc., 265 F. Supp. 3d 415, 444 (D.Del. 2017). Respondent has failed to prove that this is the rare case where it qualifies for *any* of the elements of the defense, much less *all* of them. As a fallback, Respondent asserts that Freedom was a "flailing firm," a defense that it mistakenly believes applies when the failing company defense is "technically lacking." Resp. Post-Tr. Br. at 9, 75-77. Respondent ignores not only an extensive evidentiary record showing that Freedom was a vibrant competitor at the time of the Merger, but also that "[f]inancial weakness . . . is probably the weakest ground of all for justifying a merger," and "certainly cannot be the primary justification" for permitting an anticompetitive one. *Kaiser Aluminum & Chemical Corp. v. FTC*, 652 F.2d 1324, 1339, 1341 (7th Cir.1981); *see also Univ. Health*, 938 F.2d at 1221; *FTC v. Warner Commc'ns*, 742 F.2d at 1164. As with the failing company defense, "courts have imposed an extremely heavy burden on defendants seeking to rebut the structural presumption on [flailing company] ground[s]." *ProMedica*, 2012 WL 1155392, at *25. Respondent has not come close to making the requisite showing.

A. Respondent Has Failed to Satisfy Any of the Three Elements of the Failing Firm Defense

The Supreme Court has held that, if Respondent seeks immunity for an anticompetitive transaction, it bears the burden of proving that (1) the allegedly failing company had "resources so depleted" and "the prospect of rehabilitation [is] so remote that it faced the grave probability of a business failure," *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 302 (1930); (2) there was "no other prospective purchaser," *id.*; and (3) "the prospects of reorganization . . . [were] dim or nonexistent." *Citizen Publ'g Co., Inc.*, 394 U.S. at 136-39; *Gen. Dynamics*, 415 U.S. at 507 (quoting *Int'l Shoe Co.*, 280 U.S. at 302). The *Merger Guidelines* refine these criteria further, explaining that those asserting the defense must 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 (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. Failure to satisfy any one of the criteria is fatal to the successful assertion of the defense. *See Merger Guidelines* §11; *Energy Sols.*, 265 F. Supp. 3d at 444-45 (rejecting failing firm defense on basis that defendants failed to show the acquirer was the only available purchaser without considering whether the firm being acquired was at risk of imminent failure).

Respondent's failing firm defense suffers from multiple mortal wounds. Respondent did not demonstrate that Freedom faced "imminent failure" at the time of the acquisition. CC Post-Tr. Br. at 117-24. Respondent did not demonstrate that reorganization, which would have protected Freedom from any efforts by creditors to call its corporate debt, was not a feasible alternative. *Id.* at 124-25. And Respondent could not demonstrate that Freedom had made good-faith, unsuccessful efforts to sell the company to alternative purchasers, having rejected a reasonable formal offer, ignored other expressions of interest, and failing to even gauge the interest of smaller firms in the industry. *Id.* at 125-34.

1. Respondent Has Failed to Show that Freedom Was Unable to Meet Its Financial Obligations in the Near Future

Respondent did not prove that Freedom was at risk of "imminent failure." *FTC v. ProMedica Health Sys., Inc.*, 2011 WL 1219281, at *42 (N.D. Ohio 2011); *Merger Guidelines* § 11. As a threshold matter, Respondent overstates Freedom's financial challenges by focusing on the company's historical performance and ignoring evidence of improvements to the business in

the year preceding the Merger. Resp. Post-Tr. Br. at 93-100. Respondent strains to explain away Freedom's recent financial performance by asserting current sales levels cannot be sustained, Resp. Post-Tr. Br. at at 100-102, but that assertion does not withstand scrutiny. It then pins its argument that Freedom's failure was imminent on its belief that Freedom's lenders would have forced the company into liquidation, Resp. Post-Tr. Br. at 102-12, but it did not assess the incentive of the lenders to do so, and the evidence makes clear that they had no reason to call the debt when it would have meant taking significant and unnecessary losses. Consequently, Respondent has not met its burden to prove that Freedom would have been liquidated but-for the Merger.

a) Respondent Exaggerates Freedom's Financial Difficulties and Ignores Evidence of Freedom's Turnaround

In an effort to portray Freedom as being on the brink of demise, Respondent makes the blanket assertion that "Freedom was failing by virtually every financial measure." Resp. Post-Tr. Br. at 94. To support this exaggerated claim, Respondent dredges up old financial data, disregarding almost entirely data from Freedom's recent financial turnaround and its above-plan performance, which began in 2016 and continued up until the Merger. *Id.* at 93-95. Instead, Respondent observes that "from 2012 to 2016," Freedom's EBITDA, operating income and gross profit percentage "fell every single year." *Id.* at 94.

Respondent notes that "Freedom's financial condition was so poor in 2016, Freedom replaced Carkhuff as CEO with David Smith, effective April 1, 2016."[43] Resp. Post-Tr. Br. at

[43] Respondent repeatedly asserts that Freedom [redacted] for years. Resp. Post-Tr. Br. at 8, 75, 93, 95, 98. This phrase is drawn from the testimony of Freedom's former CEO, David Smith, who clarified that what he meant was that the financial projections of the former management team had been overly optimistic. Mr. Smith emphasized, [redacted] (Smith (HEP) Tr. 6509 (*in camera*)).

97. Subsequently, Respondent begrudgingly acknowledges that Freedom showed "top-line" (*i.e.*, revenue) improvement and positive EBIDA during the first two quarters of 2017. *Id*. at 98. But then it relies on the ousted Mr. Carkhuff, who insisted that "the health of the business was deteriorating." *Id.* In fact, under Mr. Smith's leadership, the "financial metrics" that Respondent highlights improved dramatically. By the end of 2016, Freedom had a concrete strategic plan and several months of increased sales and earnings. Unlike in prior years, Freedom's revenues and profits had begun to exceed the goals of its financial plan. (CCFF ¶ 1848); *see also* (CCFF ¶ 1847); (CCFF ¶ 1850). [redacted] (CCFF ¶¶ 1885); *see also* (CCFF ¶¶ 1856, 1861, 1864, 1881-83, 1887-89, 1894-95, 1898-1902). As Complaint Counsel's financial expert observed, this record of success showed that "Freedom's financial position had significantly improved by the time Otto Bock acquired it in September 2017." (CCFF ¶ 1908).

Respondent tries to downplay the significance of the turnaround, characterizing it as "not sustainable." Resp. Post-Tr. Br. at 100. Relying almost exclusively on the opinion of its

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(CCFF ¶ 1270). Thus, whether or not earlier projections had been off, that criticism did not apply to Freedom financial projections in late 2016 or 2017.

[44] [redacted] (CCFF ¶ 1862); *see also* (CCFF ¶ 1858)

financial expert, Respondent concludes that Freedom's positive trajectory and market position could not continue because the company had declining margins and aggressive prices. *Id.* at 100-02. In fact, Freedom's EBITDA and cash flow consistently exceeded plan in 2017, so it is hardly relevant that gross margin declined. (PX06004 at 16-17 (¶¶ 31-32) (Hammer Rebuttal Report)) (explaining that examining Freedom's gross margin can be misleading given that Freedom did not begin to see turnaround effects until December 2016). Respondent and its financial expert omit that the reason for decline in margin was not a lack of robust demand for Freedom's popular prosthetic foot and MPK products, but rather the [redacted] (Smith (HEP) Tr. 6545-46 (*in camera*)). The Kinnex, which is the first product to incorporate Freedom's innovative "voice coil technology," was introduced at [redacted] that was [redacted] (Smith (HEP) Tr. 6545-46 (*in camera*)). Respondent certainly did not prove that the [redacted] at that time would bring an end to Freedom's turnaround.

Respondent also failed to prove the turnaround was the product of an "unsustainable" Freedom pricing strategy, an assertion that it supports only with the speculation of its financial expert. Resp. Post-Tr. Br. at 101**.** [redacted] *Id.* at 101-02. Nowhere does Respondent mention that [redacted] (CCFF ¶ 3163). Respondent and its expert also omit that margins on the Plié remained [redacted] *see* (PX06001A at 078 n.193 (Scott Morton Expert Report) (estimating Plié 3 margin)); *see also*

(PX05173 (Argue (Respondent) Dep. at 56)) (Respondent's expert Dr. Argue uses a similar margin in his analysis), and [redacted] (Smith (HEP) Tr. 6545-46 (*in camera*)), not slashing prices. [redacted] (PX05122 (Smith (HEP) Dep. at 42-44) (*in camera*)).

Respondent's claim that Freedom could not maintain the positive financials of the past year is undermined further by its complete failure to account for [redacted] (CCFF ¶¶ 1918, 2021). By the time of the Merger, according to Mr. Smith, [redacted]

[45] Respondent attempts to disparage Freedom's projections as unreliable, stating that the company is unable "to make reasonable financial projections." Resp. Post-Tr. Br. at 97. [redacted] (CCFF ¶¶ 1909-10). [redacted] (CCFF ¶¶ 1909-10). [redacted] (CCFF ¶¶ 1848, 1851-1855, 1857, 1866-67, 1877-78, 1883-86, 1892-93, 1896-97, 1900, 1903-1906); (PX01659 (Freedom) at 001-016 (*in camera*)).

[redacted] (CCFF ¶ 1279).

b) Respondent Failed to Demonstrate that Freedom's Debt Was "Insurmountable"

Respondent has not demonstrated, as is its burden, that Freedom would have been liquidated, but-for the Merger. *Citizen Publ'g Co.*, 394 U.S. at 137 (holding that failing company defense not met where "[t]here is no indication that the owners of the Citizen were contemplating a liquidation"). Respondent bases its entire claim that Freedom would have been liquidated by its lenders, Bank of Montreal and Madison Capital, on the opinions of Freedom's Chairman and former CEO and the fact that the debt had an approaching maturity date at the time of the Merger. Respondent presented absolutely no evidence at trial from either of Freedom's lenders. (CCFF ¶¶ 2037-39, 2041-43). Had Respondent called lender witnesses, they likely would not have corroborated Respondent's theory, because the banks had little incentive to force Freedom into liquidation. In a liquidation scenario, [redacted] (Smith (HEP) Tr. 6468 (*in camera*)), whereas in an above-liquidation sale of Freedom, [redacted] Without evidence that the lenders believed [redacted] would have been a better option than a sale, Respondent fails to prove that Freedom's debt equated to a "grave probability of a business

failure." *Gen. Dynamics*, 415 U.S. at 507 (internal quotations omitted); *see also Energy Sols.*, 265 F. Supp. 3d at 444.

In the absence of testimony from Freedom's lenders, Respondent instead relies on the suspicions of Mr. Smith and Mr. Carkhuff. [redacted] *See* (Carkhuff (Freedom) Tr. 725 (*in camera*)).[46] While Mr. Smith was at least authorized to negotiate with the banks (unlike Mr. Carkhuff), Resp. Post-Tr. Br. at 103, his testimony about what he *thought* the banks *might* do is plainly insufficient to meet the rigorous standards under the failing firm defense. After all, [redacted] (PX05122 (Smith (HEP) Dep. at 154-55) (*in camera*)). [redacted] *See* Resp. Post-Tr. Br. at 104. As then, there is no reason to believe that the banks would have forced a liquidation in September 2017.

It is unlikely that Freedom would have been unable to extend its existing credit arrangement with the banks. [redacted]

[46] [redacted]

[redacted] *See* (CCFF ¶¶ 2027-28, 2031-32). In the run-up to that due date, Freedom never even attempted to perform a liquidation valuation "because Freedom wasn't going to be liquidated." (CCFF ¶ 2014); (Kim (Freedom) Tr. 2548). [redacted]

Whatever the self-serving opinions of Freedom officials may be today, the reality is that in fall of 2017 the banks had no financial incentive to force a liquidation. Both Freedom and the banks knew that if the banks did not ultimately extend the Credit Agreement, a liquidation would be insufficient to cover the debt owed. As David Smith testified at trial, [redacted] (CCFF ¶ 2045). [redacted] (Peterson, Tr. at 6811 (*in camera*)). This is why Complaint Counsel's financial expert concluded that, "even if Freedom

had not been able to refinance or complete an acquisition by September 2017 . . . Freedom's creditors likely would not have forced it into bankruptcy or liquidation." (CCFF ¶ 2046).

c) Respondent Incorrectly Claims that Freedom's Auditors Had Substantial Doubt that Freedom Could Continue as a Going Concern in April 2017

Respondent erroneously claims that Freedom's auditors had substantial doubt that Freedom could continue as a going concern. Resp. Post-Tr. Br. at 104. Despite having the burden of demonstrating that the Merger "was the last straw at which [Freedom] grasped," *Citizen Publ'g Co.*, 394 U.S. at 137, Respondent did not depose any officials from Freedom's outside auditing firm, Squire, nor did it call anyone from Squire to testify at trial to corroborate its theory. (CCFF ¶¶ 2007-2011). Thus, the only available evidence as to the views of Freedom's auditors are Squire's correspondence with Freedom CFO Lee Kim, the Independent Auditor's Report Squire issued in April 2017, and Freedom's 2016 audited financial statements. That evidence contradicts, rather than supports, Respondent's assertion that Squire doubted Freedom's viability as a going concern.

[redacted]

Resp. Post-Tr. Br. at 108.

[redacted]

Id.; (CCFF ¶¶ 1955-59, 1963-64).

[redacted]

[redacted]

(PX02023 (HEP) 015 (*in camera*)). [redacted]

Faced with Freedom's unquestionably [redacted] Respondent endeavors to call into question the legitimacy of the audit itself by impugning the effort of Mr. Kim's contact at Squire, Shane Edwards, assailing him for allegedly not taking [redacted] Resp. Post-Tr. Br. at 109. Respondent's attack, however, is itself unsupported, as RPFF ¶ 1423 is just a conclusory recitation of the claim, without citation to any evidence. *See* Response to RPFF ¶ 1423. Then,

without evidence from Mr. Edwards, Mr. Kim, or Squire, Respondent substitutes its own opinion that [redacted] Respondent Post-Tr. Br. at 109. Respondent omits that the [redacted] Whatever Respondent's theory may be, it did not produce any evidence to show Mr. Edwards did not conduct any investigation *before or after* Mr. Kim sent his memo. All that is in evidence is Mr. Kim's trial testimony that his team "had a lot of interaction, with the auditors as well." (Kim (Freedom) Tr. 2498).

Respondent also attacks Mr. Kim's competence and veracity. Resp. Post-Tr. Br. at 109-110. For such an incendiary claim, Respondent's support is woefully thin. For example, while Respondent claims that Mr. Kim alone prepared the Going Concern Memo "without input from Freedom's management team," the record shows that in actuality Mr. Kim received significant input from Freedom's management team. *See* (PX05126 (Kim (Freedom) Dep. at 37-40, 48-50, 52-53, 55)). Respondent's effort to discredit Mr. Kim also did not work at trial. Mr. Kim is a licensed CPA with "many years of experience in accounting at Deloitte and in-house for numerous private industry companies." Resp. Post-Tr. Br. at 108. He confirmed that he strived to be truthful in his communications with Squire. (CCFF ¶ 1964). He testified that when he drafted the going concern memo in March 2017 he believed that the plan that Freedom's management had in place could alleviate the conditions raising doubt about the company's ability to continue as a going concern. (CCFF ¶ 1984). Though Mr. Smith now paints Mr. Kim as a rogue, Mr. Kim has always been responsible for managing the audit process, interacting with

Freedom's independent auditor, and providing the auditor with information free from material misstatements. (CCFF ¶¶ 1955-59, 1963-64). [redacted] (CCFF ¶ 1991). Having delegated the responsibility of interacting with the auditors to Mr. Kim, benefitted from the clean audit report that Mr. Kim obtained, and never raising a concern when he reviewed the audited financials, it is not credible for Mr. Smith to now claim, only in litigation, that Mr. Kim acted inappropriately or untruthfully.

2. Respondent Has Failed to Meet Its Burden to Show that Freedom Would Not Have Been Able to Successfully Reorganize under Chapter 11 of the Bankruptcy Act

Respondent cannot avail itself of the failing firm defense because it has not shown that Freedom "would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act." *Merger Guidelines* § 11; *see also Citizen Publ'g Co.*, 394 U.S. at 138. Respondent's attempt to write this requirement out of the failing firm defense is a clear misstatement of the law. As the Supreme Court clearly stated:

> Moreover, we know from the broad experience of the business community since 1930, the year when the *International Shoe* case was decided, that companies reorganized through receivership, or through Chapter X or Chapter XI of the Bankruptcy Act often emerged as strong competitive companies. The prospects of reorganization of the Citizen in 1940 would have had to be dim or nonexistent to make the failing company doctrine applicable to this case.

Citizen Publ'g Co., 394 U.S. at 138; accord *Merger Guidelines* § 11.

Despite Respondent's claim that Freedom [redacted] Resp. Post-Tr. Br. at 112, Freedom did not initiate Chapter 11 bankruptcy proceedings, and there is no evidence to suggest that it ever seriously explored the possibility of doing so. (CCFF ¶ 2061); *see also* (CCFF ¶ 2063) (Freedom's then-

CEO, David Smith, testifying that Freedom [redacted] This is particularly problematic because Respondent has made its debt obligations the centerpiece of its claim that but-for the Merger, Freedom would have been liquidated. Resp. Post-Tr. Br. at 102-108. Chapter 11 is the vehicle by which the banks would be compelled to work with Freedom if they were not inclined to do so on their own.

With no evidence showing that Chapter 11 was ever seriously contemplated, Respondent is left only with the after-the-fact testimony of Freedom's former CEO and its expert Mr. Peterson to support its claim that Chapter 11 was not a viable option. Respondent failed to acknowledge, much less address, that Complaint Counsel's expert, Ms. Hammer, flatly contradicted the opinions of Mr. Smith and Mr. Peterson. As Ms. Hammer testified, [redacted] (CCFF ¶ 2069). Because Freedom's "reorganization efforts were proving to be successful outside of Chapter 11," Ms. Hammer concluded "there is no reason to believe . . . that Freedom could not have reorganized successfully in Chapter 11 or implemented a successful reorganization plan." (CCFF ¶ 2064).

The opinion expressed by Respondent's financial expert is unreliable. For example, Mr. Peterson, [redacted] (CCFF ¶ 2070). Ms. Hammer explained that it is not at all unusual for companies entering Chapter 11 to have limited cash on hand, and the Chapter 11 process itself contemplates that

circumstance by allowing companies in Chapter 11 access to "debtor-in-possession" or "DIP" financing. (CCFF ¶ 2071).

3. Respondent Has Failed to Show that It Made Good Faith Efforts to Elicit Reasonable Alternative Offers

Regardless of whether Freedom was at risk of imminent failure, Respondent cannot successfully invoke the failing company defense unless it can prove that "there was no other prospective purchaser for [Freedom]." *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 555 (1971). It can do so only if no prospective purchasers surfaced in the course of a "good faith effort[] to elicit reasonable alternative offers . . . that would both keep it in the market and pose a less severe danger to competition." *Energy Sols.*, 265 F. Supp. 3d at 445 (citing *Dr. Pepper/Seven-Up Co. v. Fed. Trade Comm'n*, 991 F.2d 859, 865 (D.C. Cir. 1993)). Respondent cannot meet these strict requirements. Freedom's search focused only on maximizing the return to the company and its owners, so it spent a year courting Otto Bock and a few months engaging with Össur, the two largest prosthetics companies, as merger partners. Both submitted offers, which in and of itself is enough to disqualify Respondent's failing company claim.

Respondent excuses its limited search by asserting that the alternative purchaser prong "does not impose an obligation to contact every possible financing partner or strategic alternative." Resp. Post-Tr. Br. at 114. That may be, but Freedom's search does not pass muster because it completely ignored the smaller players in the industry that were also interested in acquiring Freedom. *Greater Buffalo Press*, 402 U.S. at 555. Respondent counters that gauging the interest of such firms would have been "fruitless," Resp. Post-Tr. Br. at 117, but almost every other prosthetics firm has testified that, in fact, they had an interest in buying Freedom, *see, e.g.*, (CCFF ¶¶ 2131-33, 2160-61). Respondent also suggests that these smaller firms lacked the

resources to acquire Freedom, but that argument ignores that a "reasonable alternative offer is '[a]ny offer to purchase the assets of the failing firm for a price above the liquidation value of those assets.'" *Energy Sols.*, 265 F. Supp.3d at 446 (citing *Merger Guidelines* § 11 n.16). Thus, even if the sale process Freedom employed was "consistent with typical sale and refinancing processes employed by similar companies," the law compels Freedom to inquire further within its industry if it wants to take advantage of the protection of the failing company defense. *Greater Buffalo Press*, 402 U.S. at 555; *FTC v. Harbour Grp. Invs., L.P.*, 1990 WL 198819, at *3-4 (D.D.C. 1990); *see also* IV Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 954d1 (4th ed. 2016) (stating that a firm "must make reasonable inquiries within its market, perhaps to all the firms when they are few in number"). Because it did not do so, and because it rejected an actual *bona fide* offer from Össur, the transaction does not qualify for the failing company defense.

a) Respondent's Argument is Based on a Misapplication of the Law and Evidence Shows Freedom's Sales Process Was Not Sufficiently Robust or Far-Reaching

Respondent characterizes Freedom's sale process as "robust and far-reaching." Resp. Post-Tr. Br. at 117-118. Contrary to that assertion, however, Freedom did not undertake good-faith efforts to find *reasonable* alternative offers, *i.e.* offers above liquidation value that could have avoided a clearly anticompetitive sale to Otto Bock. Resp. Post-Tr. Br. at 114. Instead, it focused only on maximizing the sale price of the company, and precluded likely additional offers above liquidation value. (CCFF ¶ 2119-63). Thus, Freedom's search was "clearly focused on obtaining what it perceived to be [the acquired firm's] fair value, not an offer above the liquidation value, which is likely to be less." *Energy Sols.*, 265 F. Supp. 3d at 446; *see Merger Guidelines* § 11, n.16.

Freedom's CEO when the sale process was undertaken admitted that he was [redacted] (CCFF ¶ 2120). Jon Hammack, Managing Director at Moelis—and the person leading Freedom's sale process—admitted he did not reach out to companies that, in his view, [redacted] for Freedom, well above any estimate of Freedom's liquidation value. (CCFF ¶¶ 2119, 2203-11). A search with that purpose may be [redacted] Resp. Post-Tr. Br. at 117, but plainly does not satisfy the legal requirements of the failing firm defense.

Respondent attempts to justify Freedom's narrowly focused search by explaining, "Freedom was not able to contact every conceivable company in the prosthetics industry." Resp. Post-Tr. Br. at 117. Respondent's straw-man argument misses the point. Respondent must show that its search was "exhaustive." *Olin Corp. v. FTC*, 986 F.2d 1295, 1307 (9th Cir. 1993). Several of the smaller prosthetic companies Freedom elected not to contact testified they had interest in acquiring Freedom. [redacted] (CCFF ¶¶ 2145-46). Thus, Freedom's search was not "reasonable" and "good-faith" under the failing company defense because it did not extend to several obvious smaller companies in the

same industry. *See* IV Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 954d1 (4th ed. 2016); *Harbour Grp.*, 1990 WL 198819, at *4-5.

Narrow searches that exclude smaller firms in the market are insufficient to meet the "strict limits" of the failing company defense. In *Greater Buffalo Press*, the Supreme Court summarily rejected the adequacy of a search on the grounds that "numerous smaller companies in the industry were never approached." 402 U.S. at 556. Similarly, the defendants in *Harbour Group* argued, as Respondent does, that, "it is unreasonable to require it to approach smaller companies in the industry that could not be expected to have an interest or ability to purchase a larger company." *Harbour Grp.*, 1990 WL 1988119, at *4. Citing the Supreme Court's guidance in *Greater Buffalo Press*, the *Harbour Grp.* Court held that, "at least in some cases, approaching smaller companies in a given industry might be exactly what is required of a company seeking the protection of the failing company defense." 1990 WL 198819, at *4. Antitrust scholars agree. As Areeda and Hovenkamp explain, a firm "must make reasonable inquiries within its market, perhaps to all the firms when they are few in number." IV Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 954d1 (4th ed. 2016). Freedom's sale process, in which it did not approach a single smaller prosthetics company, cannot constitute a good-faith effort to elicit reasonable alternative offers.

Respondent seeks cover for Freedom's limited search by pointing to its engagement of Moelis to assist with the sale process. Resp. Post-Tr. Br. at 117. Respondent stresses that the investment bank received rejections from large companies in different industries like [redacted] to lend credence to its argument that only Össur and Otto Bock were interested in acquiring Freedom. Resp. Reply Br. at 118. But Respondent's argument proves too

much; had its search been truly a good-faith effort to find companies willing to pay more than liquidation for Freedom, Moelis would have realized that the only interest was coming from firms in the prosthetics industry and turned its attention there. Even less convincing is its argument that some firms in the industry like [redacted] knew that Freedom was for sale "and chose not to make an offer." Resp. Post-Tr. Br. at 118. Freedom's former CEO emphasized that during the sale process Freedom was [redacted] (Smith, Tr. 6475), meaning that, "[t]here was no clear 'for sale' sign." *See Energy Sols.*, 265 F.Supp. 3d at 445. Indeed, one company that did act on its knowledge that Freedom was for sale was fellow prosthetic company Nabtesco, (CCFF ¶¶ 2122-34), which Respondent ignores altogether in its post-trial brief. When Nabtesco contacted Maynard Carkhuff expressing "interest in acquiring Freedom," (CCFF ¶ 2124), Freedom demurred, reasoning that Freedom already had "several good offers in hand,"[47] (CCFF ¶ 2125).

b) Freedom Received a Reasonable Alternative Offer from Össur

The final blow to Respondent's failing company defense is that Freedom actually received a written offer of [redacted] from Össur, which it rejected. (CCFF ¶ 2110). Respondent claims the rejection of that offer should be overlooked because Össur's bid was not sufficiently "concrete" or "binding." Resp. Post-Tr. Br. at 119. Alternatively, Respondent assails Össur's offer as "not serious," reflecting a "lack of sincerity," and "unreasonably low."

[47] The rationalization that by September it would have been too late for Freedom to pursue a sale to any firm other than Otto Bock completely misses the point. Freedom's obligation was to conduct a broad enough search to prove that the Merger was the only available alternative and to start that search in time for the company to avail itself of options that would be less anticompetitive than a sale to Otto Bock. Its search was overly narrow to begin with. Likewise, Respondent's assertion that it had no obligation to start its broader search sooner than mid-2017 fails because Freedom had known about [redacted] (RX-0826 (Freedom) at 028 (Credit Agreement, signed February 16, 2012)), and had been engaged with Otto Bock as a potential merger partner in 2016, *see generally* (CCFF ¶¶ 2075-2118). Having essentially engaged for the better part of a year in a "single bidder process," *Energy Sols*., 265 F. Supp. 3d at 445, Respondent cannot turn around and say that the time pressures at the end should excuse it from its search obligations.

Resp. Post-Tr. Br. at 119-122. Finally, Respondent claims that an Össur acquisition of Freedom would have been even more anticompetitive than the Merger. Resp. Post-Tr. Br. at 122-23. None of these arguments survives scrutiny.

The failing company defense requires Respondent to make a good-faith search for alternative offers. *Energy Sols.*, 265 F. Supp. 3d at 445. The law does not permit Respondent to ignore Össur's clear expression of interest, simply because it was not in the form of a "binding," "concrete" agreement having "legal effect." Resp. Post-Tr. Br. at 119. To meet its burden, Respondent must pursue reasonable alternative offers, such as Össur's; it was not Össur's obligation to make a binding offer before Freedom consummated the Merger with Otto Bock. *See Energy Sols.*, 265 F. Supp. 3d at 445 (finding that the defendant did not meet its burden to elicit reasonable alternative offers when it abruptly ended discussions with a potential alternative purchaser before receiving a bid). The cases to which Respondent cites are entirely unavailing. In *United States v. Culbro*, the court found a "*vague* generalization of 'intense interest'" to be insufficient. 504 F. Supp. 661, 669 (S.D.N.Y 1981) (emphasis added). Likewise, in *California v. Sutter Health Sys.*, the court found that a "*vague* expression of interest is not sufficient" to constitute an offer. 130 F. Supp. 2d 1109, 1136-37 (N.D. Cal. 2001) (emphasis added). Moreover, the facts in *Culbro* and *Sutter Health* are inapposite because, unlike the vague expressions of interest in *Culbro* and *Sutter*, Össur made a specific offer, dedicated resources to due diligence, participated in two rounds of bidding, and submitted letters indicating that it was prepared to move forward swiftly towards closing a transaction. (CCFF ¶¶ 2176, 2181).

Respondent next resorts to questioning the sincerity of Össur's offer. [redacted] (CCFF

¶¶ 2180, 2183-84). [redacted] (CCFF ¶ 2181). Finally, Össur's decision not to increase its offer in the final round of bidding reflects the company's independent business judgment, based on its independent valuation of the company, not insincerity. (CCFF ¶ 2185). [redacted] (CCFF ¶ 2185).[48]

Respondent also argues that Össur's bid does not qualify as a "reasonable alternative offer" because it "was too unreasonably low." Resp. Post-Tr. Br. at 121-22. Össur offered [redacted]—a substantial sum—to buy Freedom. (CCFF ¶ 2176). Whatever standard Respondent would apply for an offer to be "too unreasonably low," it is not "unreasonable" as that term is used in the *Merger Guidelines* or the case law. The only question that is relevant to whether it was "above the liquidation value of those assets," which it was. *Merger Guidelines* § 11, n.6; *Energy Sols.*, 265 F. Supp. 3d at 446. Respondent did not attempt to prove the liquidation value of Freedom, either through its expert or lay witnesses, but it is clear that Freedom operated on the assumption that it was far less than Össur's [redacted] offer.[49] (CCFF ¶¶ 2194-2211). Respondent then suggests that the Court depart from existing case law and adopt a standard for

[48] Respondent also points to Össur's refusal to sign a non-solicitation agreement as evidence of its insincerity. Resp. Post-Tr. Br. at 120. Freedom was hardly concerned with Össur's decision, however, as it did not withhold any people from Össur during the due diligence process. (CCFF ¶ 3160). In fact, Jon Hammack, Managing Director at Moelis, could not "recall there being significant differences" in the information that Otto Bock and Össur received during the due diligence process. (CCFF ¶ 3160).

[49] Freedom believed that the liquidation value was less than the $27 million that it owed its lenders. (CCFF ¶¶ 2203-05). Nowhere in the record is there support for Respondent's financial expert's suggestion that a [redacted] offer was "liquidation-like in character." *See* (CCFF ¶¶ 2203-2219, 3152).

reasonableness based on the "range of reasonable corporate valuations." Resp. Post-Tr. Br. at 121. There is no legitimate basis to do so.

Respondent's last attack on Össur's offer is that an Össur acquisition would have been more injurious to competition than the Merger. Resp. Post-Tr. Br. at 122-23. However, Respondent failed to carry its burden to prove this claim. Complaint Counsel has made an overwhelming showing of the anticompetitive nature of the Merger, including proving that the relevant market is the sale of MPKs to U.S. clinics and that concentration in that market is extraordinarily high and increased substantially with the Merger, as well as producing a large amount of direct evidence of anticompetitive effects. In stark contrast, Respondent has produced almost no evidence that an acquisition of Freedom by Össur would be anticompetitive at all, much less as anticompetitive (or more) as the Otto Bock acquisition.

Relying almost exclusively on the testimony of its economic expert, Respondent suggests that a merger of Össur and Freedom produces post-merger HHIs in the MPK market in a range that is "presumed to be likely to enhance market power" under the Merger Guidelines. Resp. Post-Tr. Br. at 123. The argument that a merger of the second- and third-largest players in a market dominated by Otto Bock would be as anticompetitive as the acquisition of Freedom by Otto Bock is barely worthy of response, particularly since Respondent produced no other evidence showing how such an Össur/Freedom merger would injure competition.[50] Obviously, the post-Merger market concentration levels and increase in concentration produced by the Merger are far higher than they would be with an Össur acquisition. (*Compare* CCFF ¶ 964 *with* RPFF ¶ 1500).

[50] [redacted]

Respondent's claim that Freedom and Össur are two of the leading suppliers of prosthetic feet and that there will be harm in some unproven prosthetic foot market also fails. Resp. Post-Tr. Br. at 123. Respondent, again relying only on the report of its economic expert, Dr. Argue, assumes without analysis or evidence that a relevant market for "K-3 and K-4 prosthetic feet" exists. Resp. Post-Tr. Br. at 123. But Dr. Argue admitted that he did not [redacted] (CCFF ¶¶ 2220-26). Additionally, Respondent completely ignores evidence in the trial record that the U.S. prosthetic foot market is highly competitive and far less concentrated than the U.S. MPK market. (CCFF ¶ 2235-40). Respondent therefore falls well short of proving that an Össur acquisition of Freedom was a more anticompetitive alternative than the Merger at issue in this case.

B. Respondent Has Failed to Establish that Freedom was a "Flailing Firm" at the Time of the Acquisition

As an alternative to its attempt to avoid liability under the failing company defense, Respondent asserts that Freedom was a "flailing company" at the time of the Merger. Respondent asserts that because of its debt, and allegedly unsustainable pricing, margins, and EBITDA, Freedom was "about to collapse." Resp. Post-Tr. Br. at 76-77. According to Respondent, the "weakened competitor" defense is available to a firm with a failing firm argument that is "technically lacking in some respect." *Id.* at 76. Respondent is both legally and factually incorrect. While a firm's financial health is one of many factors Respondent may attempt to use to overcome a *prima facie* case, *Warner Commc'ns*, 742 F.2d at 1164-65, it "is

probably the weakest ground of all for justifying a merger" and "certainly cannot be the primary justification," *Kaiser Aluminum & Chemical Corp.*, 652 F.2d at 1341 (7th Cir. 1981); *see also Univ. Health*, 938 F.2d at 1221; *Warner Commc'ns*, 742 F.2d at 1164. Thus, "courts have imposed an extremely heavy burden on defendants seeking to rebut the structural presumption on this ground." *ProMedica*, 2012 WL 1155392, at *25. To satisfy its burden, Respondent must "'make[] a *substantial showing* that [Freedom's] weakness, which cannot be resolved by any competitive means, would cause [Freedom's] market share to reduce to a level that would undermine the government's prima facie case.'" *FTC v. Tenet Healthcare Corp.*, 17 F. Supp. 2d 937, 947 (E.D. Mo. 1998) (citing *Univ. Health*, 938 F.2d at 1221) (emphasis added). Further, as with any rebuttal argument, the "more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully." *Baker Hughes*, 908 F.2d at 991.

Respondent failed to show that this is "one of those 'rare cases' where . . . financial weakness rebuts the presumption of illegality." *ProMedica*, 2012 WL 1155392, at *26, *30. As with the failing company defense, the Merger does not qualify unless Respondent shows that Freedom's alleged financial weakness "cannot be resolved" by other means. *Univ. Health*, 938 F.2d at 1221. Respondent cannot meet this basic requirement because numerous alternative merger partners were available to Freedom. (CCFF ¶ 2124) [redacted]; (CCFF ¶ 2146) [redacted]; (CCFF ¶ 2154) [redacted]; (CCFF ¶ 2160) [redacted]; (CCFF ¶ 2176) [redacted]. Many of these firms remain interested in acquiring Freedom today. (CCFF ¶¶ 2132-33) [redacted]; (CCFF ¶ 2163) [redacted]; (CCFF ¶ 107) [redacted]; *see also* (CCFF ¶ 2140) [redacted]. Respondent therefore has not proven that Freedom's financial issues could not be addressed "through new financing or acquisition by other than a

leading competitor."[51] *Univ. Health*, 938 F.2d at 1221 (citing IV P. Areeda & D. Turner, Antitrust Law ¶ 935b, at 140 (1980)).

Respondent also failed to prove, as it must, that Freedom's alleged financial weakness would cause its market share to decline so precipitously as "to bring the merger below the threshold of presumptive illegality." *ProMedica*, 2012 WL 1155392, at *25. On this point, all Respondent offers is its speculation that "Freedom was days away from liquidation" due to its debt obligations, Resp. Post-Tr. Br. at 76, but it never proved that assertion at trial. *See supra* § VI.A.1. Respondent does not even attempt to address evidence showing that Otto Bock and Freedom predicted that Freedom would *gain* MPK market share with the upcoming release of the Quattro. (CCFF ¶¶ 1178, 1230-37, 1272, 1275, 1338-1383, 1405-1411). It therefore has not shown that, because of Freedom's financial prospects, Complaint Counsel's strong *prima facie* case does not accurately reflect the Merger's likely effect on future competition. *Univ. Health*, 938 F.2d at 1221.

[51] Respondent also argues—incorrectly—that Freedom's bank debt made it a "flailing firm." *See* Resp. Post-Tr. Br. at 75. Although Freedom owed its banks approximately $27 million at the time of the Merger, this "weakness" would have been resolved through its acquisition by another company. *See ProMedica*, 2012 WL 1155392, at *26. When Otto Bock acquired Freedom on September 22, 2017, [redacted] (CCFF ¶ 113). Had another company—such as Ossur—acquired Freedom, its debt would have been paid off in a similar fashion.

CONCLUSION

For the foregoing reasons, the evidence presented at trial and admitted to the record establishes that Otto Bock's acquisition of Freedom on September 22, 2017 violated Section 7 of the Clayton Act and Section 5 of the FTC Act, as alleged in the Complaint, and justifies entry of the Proposed Order that was enclosed with Complaint Counsel's post-trial brief and any such other relief that the Court deems necessary and proper.

Dated: December 20, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 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.

December 20, 2018 By: /s/ *William Cooke*