PUBLIC

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

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

RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY FROM [redacted]

INTRODUCTION AND BACKGROUND

[redacted] who will provide important, practical, first-hand knowledge of prosthetic knees for the Court. [redacted] was specifically named as a potential witness on Otto Bock HealthCare North America, Inc.'s ("Ottobock's") Final Witness List filed on May 29, 2018 and, as an Ottobock employee, falls within the category of individuals identified in Complaint Counsel's initial disclosures, and named by reference on Respondent's Preliminary Witness List. Good cause exists to permit [redacted] testimony because Respondent first became aware of the need for his testimony after receiving Complaint Counsel's expert report, which contained an in-depth analysis of alleged differences between microprocessor knees and went so far as to opine that an antitrust market existed of only the Ottobock and Freedom microprocessor knees ("MPKs"). Further, Respondent is willing to make [redacted] available for a deposition to eliminate any conceivable prejudice to Complaint Counsel.

ARGUMENT

The Motion should be denied. Motions *in limine* are strongly disfavored. Complaint Counsel will not be prejudiced, and any evidence will not disrupt the orderly and efficient trial of the case.

I. The Motion *in Limine* Standard Compels Denial of the Motion

The Court's Scheduling Order states that "Motions *in limine* are strongly discouraged." Scheduling Order at ¶ 9 (Jan. 18, 2018). "Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (April 20, 2009) (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *SEC v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002))." *Id.*; *see also In re Pom Wonderful LLC*, Dkt. No. 9344, 2011 WL 2160775, *2 (F.T.C. 2011) (Chappell, J.). Motions *in limine* are appropriate *only in extreme circumstances* where they will "eliminate plainly irrelevant evidence" or "needlessly cumulative evidence." *In re Rambus Inc.*, No. 9302, 2003 WL 21223850, *1 (F.T.C. Apr. 21, 2003). The Scheduling Order also informs the parties that "the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence." Scheduling Order at ¶ 9.

In assessing whether to exclude trial testimony, courts have considered:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified (2) the ability of that party to cure the prejudice, (3) the extent to which *waiver of the rule against calling unlisted witnesses* would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the district court's [scheduling] order.

In re Basic Research, LLC, Dkt. No. 9318, 2005 FTC LEXIS 167, *5 (2005) (quoting *In re Kreta Shipping, S.A.*, 181 F.R.D. 273, 277 (S.D.N.Y. 1998) (alteration in original)).

"Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context." *In re McWane, Inc.*, Dkt. No. 9351, 2012 WL 3597375, *2 (F.T.C. 2012) (Chappell, J.). Finally, it is well settled that the right to present a defense is a fundamental element of due process. *See Washington v. Texas*, 388 U.S. 14, 19 (1967).

II. Good Cause Exists to Permit Testimony from [redacted]

[redacted] has spent nearly his entire life wearing prosthetic knee products, and at trial he would testify to his personal experience wearing various lower-limb prosthetics products. *See id.* [redacted] testimony provides an important perspective that is virtually unrepresented in this case, and it should be admitted at trial. To the best of Respondent's knowledge, no other witness on either side's witness list is a [redacted], and none could provide the unique perspective of [redacted].

Rule 3.43(b) provides that "[r]elevant, material, and reliable evidence shall be admitted." 16 C.F.R. § 3.43(b). Here, Complaint Counsel concedes [redacted] relevance in this matter. [redacted] has the necessary context to frame his personal experience and assist the Court, thus presenting material, unique, and reliable evidence.

[1] All exhibits are attached to the Declaration of Sean P. McConnell.

Good cause exists to permit testimony from [redacted]. Respondent first became aware of the need for [redacted] testimony after reviewing Complaint Counsel's May 8, 2018 expert report submitted by Fiona Scott Morton. Complaint Counsel's expert report contained considerable analysis of the alleged differences between different MPKs. *See, e.g.;* Exhibit B, excerpts of Expert Report of Fiona Scott Morton, at ¶¶ 20-27. Indeed, Complaint Counsel's expert went so far as to opine that an antitrust market existed of only the Ottobock and Freedom MPKs. *See* Exhibit B, excerpts of Expert Report of Fiona Scott Morton, at ¶¶ 64, 95-109. [redacted] testimony would assist the fact finder because [redacted] experience as a [redacted] afford him the ability to provide uniquely relevant testimony to product market definition (including whether sophisticated K3/K4 non-MPK knees compete with MPK knees and would be appropriate to fit on patients otherwise suitable for MPKs), and competitive effects analysis (including whether, as Complaint Counsel's expert suggests, the C-Leg and Plié are the closest competitors, or whether other MPKs are very close substitutes to the C-Leg and Plié). As the only [redacted] on either side's witness list, [redacted] testimony would assist the fact finder by providing firsthand knowledge of life as a [redacted], rather than the fact finder relying solely on studies or the perspective of manufacturers and clinics.

Recognizing [redacted] utility to the Court, Complaint Counsel does not argue his relevance, but instead claims that it would be prejudiced if [redacted] is allowed to testify at trial because its expert witnesses did not have [redacted] testimony to rely upon in formulating their opinions. Complaint Counsel does not attempt to address how its experts would have utilized [redacted] testimony in formulating their opinions, which is simply

not enough for it to meet its burden of proof. *See In re Basic Research, LLC*, Dkt. No. 9318, 2006 WL 159736, at *8 (2006) ("Complaint Counsel, as the party with the burden on its motion *in limine*," must "clearly articulate[] the evidence sought to be excluded or the reasons therefor."). While [redacted] testimony regarding his personal experience would help the fact finder by providing a full picture of prosthetic knee products, an expert is unlikely to rely on this type of personal testimony. Indeed, neither of Respondent's experts are relying on any information provided by [redacted] in their respective opinions.

III. Complaint Counsel Will Not Be Prejudiced by [redacted].

Complaint Counsel will not be prejudiced by [redacted] testimony because [redacted] was specifically named as a potential witness on Ottobock's Final Witness List filed on May 29, 2018 and, as an Ottobock employee, falls within the category of individuals identified in Complaint Counsel's initial disclosures and named on Respondent's Preliminary Witness List.[2]

Complaint Counsel's initial disclosures identified "[c]urrent and former employees, board members, officers, agents, consultants, and representatives of Otto Bock Health Care." *See* Exhibit C, excerpts of Complaint Counsel's Initial Disclosures, Jan. 18, 2018 at 53. On its Preliminary Witness List, Respondent in turn named anyone identified on Complaint Counsel's initial disclosures. *See* Exhibit D, excerpt of Respondent's Preliminary Witness List, Feb. 13,

[2] As set forth in section II *supra*, Respondent did not appreciate the need for testimony from [redacted] until after the factual record was developed, and the lack of insight from [redacted] became glaring.

2018. [redacted] is an Ottobock employee, and as such is fairly included within the category of individuals named on Respondent's Preliminary Witness List.[3]

Complaint Counsel argues that Respondent's position would allow Respondent "to call any of the more than seven thousand current and former Otto Bock employees and officials at trial." However, this argument ignores Complaint Counsel's own use of catchall categories referenced throughout its initial disclosures. Indeed, Complaint Counsel saw fit to include in its initial disclosures such catchalls as:

- 198 references to unnamed "relevant individual(s)" with information about lower-limb prosthetics,
- 21 references to unnamed "relevant individual(s)" with information regarding prosthetic componentry,
- 17 references to unnamed "relevant individual(s)" with information about an acquisition of Freedom Innovations,
- All "Current and former employees, board members, officers, agents, consultants, and representatives" of Ottobock,
- All "Current and former employees, board members, officers, agents, consultants, and representatives" of Freedom Innovations, and
- Prosthetic clinics among the top 20 customers of Freedom Innovations' Plié microprocessor knees, as measured by revenue and units sold, from 2014-2017.

See Exhibit C, excerpts of Complaint Counsel's Initial Disclosures, Jan. 18, 2018 at Appendix A.

Given the myriad identifiable individuals within these categories, Respondent was forced to name on its Preliminary Witness List anyone identified on Complaint Counsel's initial disclosures. *See* Exhibit D, excerpt of Respondent's Preliminary Witness List, Feb. 13, 2018.

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[3] Complaint Counsel's concern that [redacted] was not among the custodians whose files Respondent searched for documents in response to Complaint Counsel's discovery requests is unfounded given the fact that [redacted] will be testifying based on his personal experience as a [redacted] and not based on his role as [redacted].

Complaint Counsel now asks this Court to overlook its use of catchall provisions because [redacted] falls squarely within one of the categories identified in its initial disclosures. However, this Court has held that parties may call at trial individuals who were categorically identified on a Preliminary Witness List. *See In re Basic Research, LLC*, Dkt. No. 9318, 2005 FTC LEXIS 157, *2-*4 (2005) (Respondent allowed to call president of third-party company at trial even though president was not identified by name until final proposed witness list, where Respondent's Preliminary Witness List stated that Respondents "may call yet to be identified representatives of the following entities to testify as to the evaluation and/or regulation of the products identified in the Complaint" and listed company). And, while Complaint Counsel claims that the Court recently barred parties from calling at trial witnesses not specifically listed by that party, it neglects to mention that the Court's ruling barred testimony from individuals not named *at any point* in the litigation, including on a final proposed witness list. *See In re Tronox Ltd.*, May 16, 2018 Tr., at 15:13-17:6 (parties barred from presenting testimony from individuals not listed on Final Witness List). Here, [redacted] was categorically identified on Respondent's Preliminary Witness List, and after recognition that his testimony would be valuable to the Court, he was listed on Respondent's Final Witness List.

IV. Respondent is Willing to Make [redacted] Available for a Deposition.

Even assuming, *arguendo*, that Complaint Counsel is prejudiced by [redacted] inclusion on Respondent's Final Witness List, any conceivable prejudice would be cured by a deposition. Respondent has offered, and remains willing, to make [redacted] available for a deposition prior to trial. Exhibit E, [redacted] Respondent offered to conduct the deposition by phone or in-person, at the mutual convenience of both parties. [redacted] Respondent's offer

comports with the practice of this court and eliminates any conceivable prejudice. Indeed, where an individual was not identified by name until Respondent's final witness list, this Court granted Complaint Counsel ten business days or a date mutually agreed upon to conduct the deposition of that individual so as "[t]o avoid any undue prejudice." *In re Basic Research, LLC*, Dkt. No. 9318, 2005 FTC LEXIS 157, *4 (2005).

Despite Respondent's offer, Complaint Counsel has not requested to depose [redacted] in the two weeks since it alleges it became aware of [redacted] inclusion on Respondent's Final Witness List. Instead, Complaint Counsel vaguely suggests that allowing [redacted] deposition would "impose costs." Once again failing to meet its burden to prove prejudice, Complaint Counsel does not define, calculate, or identify what these nebulous costs might be. Based on Complaint Counsel's failure to articulate any reasonable prejudice, this Court's relief, if any, should be limited to allowing Complaint Counsel to depose [redacted] at a mutually agreed upon date prior to trial.

CONCLUSION

[redacted] provides useful background information which will help the Court. Complaint Counsel will not be prejudiced by his testimony because [redacted] was categorically identified in Complaint Counsel's initial disclosures and Respondent is willing to provide [redacted] for a deposition to eliminate any imaginable prejudice. The Motion should be denied.

Dated: June 19, 2018

Respectfully submitted,

/s/ Sean P. McConnell
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Attorneys for Respondent Otto Bock HealthCare North America, Inc.

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

DECLARATION OF SEAN P. MCCONNELL IN SUPPORT OF RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY FROM [redacted]

I, Sean P. McConnell, pursuant to 28 U.S.C. § 1746, state and declare as follows:

1. I am an attorney at Duane Morris LLP. I am licensed to practice law in the Commonwealth of Pennsylvania. I am over the age of 18, am capable of making this Declaration, know all of the following facts of my own personal knowledge, and, if called and sworn as a witness, could and would testify competently thereto.

2. Attached as **Exhibit A** is a true and correct copy of [redacted]

3. Attached as **Exhibit B** is a true and correct copy of excerpts of the Expert Report of Complaint Counsel's Expert Witness Fiona Scott Morton dated May 8, 2018.

4. Attached as **Exhibit C** is a true and correct copy of excerpts of Complaint Counsel's Initial Disclosures dated January 18, 2018.

5. Attached as **Exhibit D** is a true and correct copy of excerpts of Respondent's Preliminary Witness List dated February 13, 2018.

6. Attached as **Exhibit E** is a true and correct copy of [redacted]

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

Executed on this 19th day of June, 2018 in Philadelphia, PA.

/s/ Sean P. McConnell
Sean P. McConnell

Public Version

EXHIBIT A

REDACTED IN ENTIRETY

Public Version

EXHIBIT B

REDACTED IN ENTIRETY

Public Version

EXHIBIT C

REDACTED IN ENTIRETY

Public Version

EXHIBIT D

REDACTED IN ENTIRETY

Public Version

EXHIBIT E

REDACTED IN ENTIRETY

IN CAMERA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 19, 2018, I caused a true and correct copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion *in Limine* to Exclude Testimony From [redacted] to be served via the FTC E-Filing System and e-mail upon the following:

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/s/ Sean P. McConnell
Sean P. McConnell

Notice of Electronic Service

I hereby certify that on June 19, 2018, I filed an electronic copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion to Exclude Testimony, with:

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I hereby certify that on June 19, 2018, I served via E-Service an electronic copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion to Exclude Testimony, upon:

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