PUBLIC

ORIGINAL

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 FINDINGS OF FACT AND CONCLUSIONS OF LAW

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RESPONDENT'S PROPOSED FINDINGS OF FACT

I. BACKGROUND

A. Parties

1. Ottobock

1. Otto Bock HealthCare North America, Inc. ("Ottobock") is a pioneering prosthetics and orthotics company and is a subsidiary of Otto Bock Healthcare SE & Co. KGaA headquartered in Germany ("Ottobock Germany"). (Kannenberg Tr. 1932-1933, Schneider Tr. 4277-4279, 4337-4342, 4281-4284, Carkhuff Tr. 710-711; (PX05155 (Ehrich (Ottobock), Dep. at 60)). Ottobock Germany provides upper and lower limb prosthetics, orthotics, mobility solutions, and medical-related services to customers in various countries throughout the world. (RX-0964).

Response to Finding No. 1

Complaint Counsel has no specific response.

2. Ottobock Germany is named after its founder, Otto Bock, a certified prosthetist and orthotist who founded the company in 1919 in Berlin, Germany. (RX-0964; Schneider, Tr. 4277). Otto Bock is regarded as the Henry Ford of prosthetics. (Schneider, Tr. 4277). The current majority owner of Ottobock Germany is Otto Bock's grandson, Professor Hans Georg Näder. (Schneider, Tr. 4279).

Response to Finding No. 2

Complaint Counsel has no specific response.

3. Ottobock Germany opened its first foreign branch, Ottobock, in 1958 in Minneapolis, Minnesota. (Schneider, Tr. 4279). Ottobock moved its American headquarters from Minneapolis to Austin, Texas in 2014, and the Austin headquarters employs about 100 individuals. (Schneider, Tr. 4284, 4285). Ottobock also has manufacturing and R&D facilities in Salt Lake City, Utah that employ between 220 and 250 employees, as well as logistics facilities in Louisville, Kentucky where another 25 people work. (Schneider, Tr. 4285). Ottobock also employs between 75 and 100 people in the field that work as sales representatives, clinical specialists, or reimbursement specialists. (Schneider, Tr. 4285).

Response to Finding No. 3

Complaint Counsel has no specific response.

4. Ottobock sells all of these products in the United States. (Schneider, Tr. 4304).

Response to Finding No. 4

The proposed finding is unclear as to what "products" Otto Bock sells in the United States. Mr. Schneider testified that Otto Bock sells "[a]ll" of the different types of "components" of lower limb prosthetic devices—for example, sockets, prosthetic knees, feet, and foot shells—in the United States, but did not specify which specific lower limb products Otto Bock sells in the United States. The proposed finding also is incorrect to the extent it suggests that Otto Bock sells every product that it manufactures in the United States. For example, Mr. Schneider testified that Otto Bock does not sell its 3E80 prosthetic knee in the United States. (Schneider (Otto Bock) Tr. 4675-76).

2. Freedom

5. FIH Group Holdings, LLC ("Freedom") was founded in 2002. (RX-0947; Carkhuff, Tr. 293). Freedom sells over twenty different brands of prosthetic feet and two prosthetic knees, the Liberty and the Plié, in the United States. (RX-0949). Freedom has facilities in Utah and California and employs approximately 150 people. (Carkhuff, Tr. 321, 329). Prior to the acquisition by Ottobock, Freedom had been privately held, and the majority shareholder had been Health Evolution Partners Fund I (AIVI), LP ("HEP"), a private equity firm. (PX05113 (Chung, Dep. at 119); Lee, Tr. 2542).

Response to Finding No. 5

Complaint Counsel has no specific response.

6. Freedom was founded in 2002 by Dr. Roland Christensen and Rick Myers. Freedom is based in Irvine, California with a manufacturing facility in Gunnison, Utah. (RX-0947). Freedom has a portfolio of lower limb prosthetic solutions and support services focusing mostly on prosthetic feet and ankles. (RX-0947). In particular, Freedom markets 23 brands of carbon fiber feet that can be customized to fit any lifestyle from everyday walking to extreme sports. (RX-0949). The vast majority of Freedom's revenue is derived from the sale of prosthetic feet and ankles, and *not* prosthetic knees.

Response to Finding No. 6

The proposed conclusion is unclear, unsupported, misleading, and incorrect. The proposed conclusion is unclear because the terms "portfolio of lower limb prosthetic solutions and support

services" and "vast majority" are not defined. The proposed finding is unsupported because no evidence is cited for the last sentence. The proposed finding is misleading because [redacted]

7. For the first five years of Freedom's existence, it sold exclusively carbon fiber foot products. (Carkhuff, Tr. 293). Since 2007, Freedom has only manufactured one prosthetic knee, the Plié. (Carkhuff, Tr. 294). The Plié utilizes a microprocessor solely to switch between the stance phase and swing of the knee, but the Plié's microprocessor does not control the knee's resistance levels within each phase of walking. (Carkhuff, Tr. 335-336; [redacted] Unlike the C-Leg and other swing-and-stance MPKs available in the United States, the Plié's resistance levels must be adjusted manually using a wrench and a pump. [redacted]

Response to Finding No. 7

[redacted]

[redacted]

8. At the time of the Acquisition, Freedom expected [redacted] Freedom has claimed to be developing a new MPK known as the "Quattro Project." (Prince, Tr. 2673). [redacted]

Response to Finding No. 8

[redacted]

[redacted]

[redacted]

9. The history of Freedom's founding informs the type of company that it is today, and is therefore important to understand. In 1985, Freedom's current Chairman, Maynard Carkhuff, joined a one-product company called Flex-Foot, and helped to grow that company to establish a broad portfolio of carbon fiber foot products. (Carkhuff, Tr. 587). Though Flex-Foot was California-based, it manufactured its carbon fiber foot products in a manufacturing plant owned by Dr. Christensen and his company Applied Composite Technology ("ACT"), in Gunnison, Utah. (Carkhuff, Tr. 304-305). Dr. Christensen sat on the Flex-Foot R&D team and produced 90 percent of Flex-Foot's

prototypes, but his company, ACT, was separate from Flex-Foot and acted as Flex-Foot's vendor. (Carkhuff, Tr. 305).

Response to Finding No. 9

The proposed finding is irrelevant. The citations and discussion do not relate to the "history of Freedom's founding" because Flex-Foot did not become Freedom. In fact, Flex-Foot was sold to Össur in 2000. (Carkhuff (Freedom) Tr. 304).

10. After developing its line of foot products, Flex-Foot acquired a knee manufacturing company called Mauch Laboratories, and sold the fluid-controlled Non-MPK that Mauch had developed. (Carkhuff, Tr. 587-588). Flex-Foot then entered into a joint venture with MIT to develop an MPK. (Carkhuff, Tr. 588).

Response to Finding No. 10

Complaint Counsel has no specific response.

11. In February 2000, before Flex-Foot could commercialize the MPK, Flex-Foot was sold to Össur. (Carkhuff, Tr. 588). After that acquisition, Carkhuff worked for Össur as the President and CEO of Össur Prosthetics, and Flex-Foot was merged into Össur's business. (Carkhuff, Tr. 588-589). Össur continued to manufacture Flex-Foot carbon fiber foot products in the ACT manufacturing plant owned by Dr. Christensen. (Carkhuff, Tr. 306).

Response to Finding No. 11

Complaint Counsel has no specific response.

12. Össur continues to sell products from the Flex-Foot acquisition under its brand name today, including a commercialized version of the MIT joint venture MPK, which is now known as the "Rheo." (Carkhuff, Tr. 589). Before Össur purchased Flex-Foot, Össur was primarily a liner company. [redacted] Össur has grown significantly since it purchased Flex-Foot in 2000, and it is now a publicly traded company. (Carkhuff, Tr. 588-589).

Response to Finding No. 12

The proposed finding is unclear. First, the transcript pages cited in the finding do not explain which products Ossur continues to sell today that it purchased from Flex-Foot in 2000,

and it is unclear how those products have been enhanced or improved in the eighteen years since the acquisition. Additionally, the term "significantly" is unclear.

13. In August of 2001, Össur terminated Mr. Carkhuff's employment. (Carkhuff, Tr. 590). Össur then moved the carbon fiber manufacturing from ACT's plant in Gunnison, Utah to Össur's headquarters in Reykjavik, Iceland. (Carkhuff, Tr. 306). That left Dr. Christensen with an empty plant, a large number of employees, and knowledge about carbon foot products. (Carkhuff, Tr. 306). In 2002, Dr. Christensen formed Freedom with Myers, who was the head of operations for the Flex-Foot, and who was out of a job once Össur moved the manufacturing to Iceland. (Carkhuff, Tr. 306). Following a contractual non-competition period, Carkhuff because the President of Freedom in 2005. (Carkhuff, Tr. 590-591).

Response to Finding No. 13

Complaint Counsel has no specific response.

14. Since its inception, Freedom has manufactured its carbon fiber foot products in the same plant that Flex-Foot (and Össur) had previously manufactured carbon fiber foot products. (Carkhuff, Tr. 598). [redacted]

Response to Finding No. 14

[redacted]

[redacted]

15. In 2007, Freedom launched the Plié prosthetic knee. (Carkhuff, Tr. 294). The Plié 2 was released in 2010, and the Plié 3 was released in 2014. (Carkhuff, Tr. 294). Freedom markets the Plié 3 as an MPK. (Carkhuff, Tr. 323). In 2017, [redacted]

Response to Finding No. 15

[redacted]

16. At the time of the acquisition, Freedom owed Bank of Montreal and Madison Capital approximately $27.5 million with a debt maturity date in September 2017, was running out of funds to operate and make payroll, had cut R&D projects, and had retained investment bankers to shop Freedom for sale. (Smith Tr. 6485-6486; PX05007 (Carkhuff, IH at 26); Hammock, Tr. 6065, 6125).

Response to Finding No. 16

The proposed finding is unclear, unsupported, incomplete, and misleading. It is unclear because Respondent does not define the terms "running out of funds" and "cut R&D projects." The proposed finding is unsupported because none of the sources cited state that Freedom "was running out of funds to operate and make payroll" or "cut R&D projects."

(CCFF ¶¶ 2027-36, 2044-47; *see also* Response to RPFF ¶ 1510). The proposed finding is incomplete and misleading because Freedom's R&D budget in 2017 reflected an increase over 2016. (*See* Response to RPFF ¶ 1325).

B. The Acquisition

17. Ottobock acquired Freedom on September 22, 2017 pursuant to an Agreement and Plan of Merger (the "Acquisition"). (RX-0548; RX-0820 at 001). Ottobock acquired Freedom for A substantial piece of the consideration for the Acquisition was used to pay off Freedom's debt.

Response to Finding No. 17

[redacted]

C. Witness Backgrounds

1. Ottobock Witnesses

a. Scott Schneider, Ottobock

18. Scott Schneider is Vice President of Government, Medical Affairs, and Future Development at Ottobock. (Schneider, Tr. 4260). Mr. Schneider remains involved in patient care in his role at Ottobock, and he is familiar with how prosthetic devices are manufactured by Ottobock and reimbursed by insurance providers. (Schneider, Tr. 4267-4268, 4272). Mr. Schneider also analyzes new technologies, new business models, and strategic opportunities. (Schneider, Tr. 4272).

Response to Finding No. 18

The proposed finding is misleading. Mr. Schneider is not a Board Certified Prosthetist. (PX05010 (Schneider (Otto Bock) IHT at 18)). He stopped seeing patients on a regular basis in 1995 and stopped teaching prosthetists in 2010. (Schneider (Otto Bock) Tr. 4267).

19. Mr. Schneider has worked in the prosthetics industry for 30 years. (Schneider, Tr. 4260). Schneider worked as a prosthetist from 1988 to 1995 in St. Cloud, Minnesota at a clinic called Northwestern Artificial Limb and Brace. (Schneider, Tr. 4261). As a prosthetist and an orthotist, Mr. Schneider fitted patients with prosthetic devices, including prosthetic knees. (Schneider, Tr. 4261, 4264).

Response to Finding No. 19

Complaint Counsel has no specific response.

20. Mr. Schneider was also co-owner of TEC Interface, a business that specialized in prosthetic socket technology. (Schneider, Tr. 5262-6263). After significantly growing the company and developing nearly twenty patents, Mr. Schneider sold the business to Ottobock in 2003. (Schneider, Tr. 4262-4263).

Response to Finding No. 20

The proposed conclusion is misleading. Mr. Schneider testified that he worked at TEC Interface, which hired engineers, and ultimately, the company had 17-18 patents. (Schneider (Otto Bock) Tr. 4262-63). However, he did not testify that he had any hand in developing any of those patents. (Schneider (Otto Bock) Tr. 4262-63). The use of the term "significantly grow" in the proposed finding is also misleading. Mr. Schneider testified that "it was a very small firm starting off in the beginning" but he did not testify how it grew, if at all. (Schneider (Otto Bock) Tr. 4262).

21. Mr. Schneider has worked in various product development, operations, research and development, sales, marketing, and executive positions both at Ottobock and Ottobock Germany. (Schneider, Tr. 4264-4266). From 2011 until the end of 2013, Mr. Schneider was the Regional Vice President of Ottobock, which was equivalent to a CEO position. (Schneider, Tr. 4269-4271). During that time, the executive team also included Brad Ruhl, who was the President of the healthcare prosthetics division and who is today the Managing Director of Ottobock. (Schneider, Tr. 4271, 4274).

Response to Finding No. 21

The proposed conclusion is unclear and incomplete. First, the proposed conclusion is unclear in that though Mr. Schneider testified that he was equivalent to a CEO while a Regional Vice President, he did not explain what that meant. Otto Bock had a CEO at that time, and it was not and still is not Mr. Schneider. Second, the proposed finding in incomplete in that is does not list each of the members of the executive team between 2011 and 2013. Finally, the proposed finding is incomplete in that it neglects to mention that from 2013 until the time of the Merger, Mr. Schneider was President of Medical Care and, at the time of the Merger, he reported to Matt Swiggum, who was CEO of Otto Bock. (PX05010 (Schneider (Otto Bock) IHT at 20-22)).

b. Dr. Andreas Kannenberg, Ottobock

22. Dr. Andreas Kannenberg is the Executive Medical Director for Ottobock. (Kannenberg, Tr. 1819). He has held that position since the summer of 2013. (Kannenberg, Tr. 1819). As the Director of Medical Affairs, Dr. Kannenberg established Otto Bock's clinical research department. (Kannenberg, Tr. 1821). The department is responsible for gathering new evidence and developing existing evidence regarding Ottobock's products to assist payers for reimbursement purposes. (Kannenberg, Tr. 1821, 1823). The department is also responsible for providing education and training to prosthetists, orthotists, physical therapists, physicians, and payers around the world. (Kannenberg, Tr. 1822).

Response to Finding No. 22

Complaint Counsel has no specific response.

23. Dr. Kannenberg received his M.D. in 1989 and a Ph.D. in 1992 from Humboldt University of Berlin. (Kannenberg, Tr. 1820). He joined Otto Bock in 2003 as the Director of Medical Affairs, and held that position until he became the Executive Medical Director. (Kannenberg, Tr. 1821). As Director of Medical Affairs, he learned how the clinical team works to select products for patients and the criteria used for reevaluating reimbursement claims for prosthetists. (Kannenberg, Tr. 1822-1823). In 2014, he also assumed responsibility for the Reimbursement Department. (Kannenberg, Tr. 1823).

Response to Finding No. 23

Complaint Counsel has no specific response.

c. Cali Solorio, Ottobock

24. Cali Solorio is the senior prosthetics marketing manager at Ottobock. (Solorio, Tr. 1575). Ms. Solorio assumed her current position in March 2017. (Solorio, Tr. 1575). In her previous position as marketing manager for microprocessor knees at Ottobock, Ms. Solorio's responsibilities included managing Otto Bock's microprocessor knee products in North America. (Solorio, Tr. 1575). Ms. Solorio has assisted in creating the marketing strategy for microprocessor knees and had responsibility for Otto Bock's pricing and promotions on microprocessor knees. (Solorio, Tr. 1576-1577). Ms. Solorio joined Otto Bock in December 2014 as a marketing manager generalist. (Solorio, Tr. 1573).

Response to Finding No. 24

The proposed finding is misleading and incomplete to the extent that it suggests Ms. Solorio is no longer responsible for managing Otto Bock's microprocessor business in the United States. In her *current* role as Senior Prosthetics Marketing Manager, Ms. Solorio is responsible

for managing Otto Bock's MPK products through their life cycles in the North American Market. (CCFF ¶ 3195).

2. Freedom Witnesses

a. Maynard Carkhuff, Freedom

25. Maynard Carkhuff is currently the Chairman of Freedom, which is a senior strategic position and a position he has held since October 2017. (Carkhuff, Tr. 290, 292). Mr. Carkhuff has worked in the healthcare industry for over thirty years. (PX05007 (Carkhuff IH, at 20)).

Response to Finding No. 25

Complaint Counsel has no specific response.

26. Mr. Carkhuff joined Freedom in 2005 as the President, and in 2012 became CEO and President of Freedom. (Carkhuff, Tr. 291-292). In 2014, Mr. Carkhuff became the Chairman of Freedom's Board of Directors. (Carkhuff, Tr. 291). In April of 2016, Mr. Carkhuff became Vice Chairman and Chief Innovation Officer. (Carkhuff, Tr. 292). During 2014 through 2016, Mr. Carkhuff was a board member of AOPA. (Carkhuff, Tr. 301).

Response to Finding No. 26

Complaint Counsel has no specific response.

27. Prior to joining Freedom, Mr. Carkhuff co-founded Flex-Foot in 1985, which was a prosthetics company and the predecessor company to Freedom. (PX05007 (Carkhuff IH, at 20). Flex-Foot was sold in 2000 to Össur, and Mr. Carkhuff was named President and CEO of Össur Prosthetics. (PX05007 (Carkhuff IH, at 20). Mr. Carkhuff left Össur after a year and a half, and then joined Freedom in 2005. (PX05007 (Carkhuff IH, at 21).

Response to Finding No. 27

Complaint Counsel has no specific response.

b. Mark Testerman, Freedom

28. Mark Testerman is the Vice President of National and Key Accounts for Freedom. (Testerman, Tr. 1072-1073). He has served in that position since February 2014.

(Testerman, Tr. 1073). National and Key Accounts are Freedom Innovation's top fifty accounts. (Testerman, Tr. 1073). Mr. Testerman reports to Jeremy Matthews, the Senior Vice President of Sales and Marketing. (Testerman, Tr. 1074-1075). Testerman works with the decision makers at prosthetic clinics, which could be prosthetists, chief operating officers, or CEOs. (Testerman, Tr. 1080). Testerman contacts each of Freedom's key accounts every quarter. (Testerman, Tr. 1081). Testerman has authority to approve certain discounts for particular customers. (Testerman, Tr. 1082-1083). Testerman is responsible for negotiation of prices and setting prices for Freedom's key accounts, including SPS. (Testerman, Tr. 1085; 1085).

Response to Finding No. 28

Complaint Counsel has no specific response.

29. Prior to serving as the vice president of national and key accounts, Mr. Testerman was the Vice President of domestic sales. (Testerman, Tr. 1073). Mr. Testerman joined Freedom in 2010. (Testerman, Tr. 1072). As Vice President of Domestic Sales, Testerman directed the daily activities of the sales team, spent time in the field working with the sales team, helped the sales team with problem solving, and worked with Freedom's customers. (Testerman, Tr. 1075).

Response to Finding No. 29

Complaint Counsel has no specific response.

c. Eric Ferris, Freedom

30. Eric Ferris is the Vice President of Marketing, Customer Service, and Client Development for Freedom. (Ferris, Tr. 2299, 2304). Mr. Ferris is a member of Freedom's Operating Committee, Executive Committee, Product Approval Committee, and Intellectual Property Committee. (Ferris, Tr. 2299-2300).

Response to Finding No. 30

Complaint Counsel has no specific response.

31. Mr. Ferris joined Freedom in 2015 as the Director of Marketing and Customer Service. (Ferris, Tr. 2298). He held that role until February 2018, when he assumed his current role. (Ferris, Tr. 2298-2299). As the Director of Marketing for Freedom, Mr. Ferris' responsibility was to promote, market, and message Freedom's products, as well as to perform competitive assessments and analyze pricing for Freedom, and educate customers about Freedom's products. (Ferris, Tr. 2303). Prior to working at Freedom, Mr. Ferris had multiple positions in product development and marketing. (Ferris, Tr. 2301).

Response to Finding No. 31

Complaint Counsel has no specific response.

d. Lee Kim, Freedom

32. Lee Kim is currently the Chief Financial Officer (CFO) of Freedom, a position he has held since joining Freedom in February 2008. (Kim, Tr. 2492). As CFO, Mr. Kim is responsible for preparing Freedom's financial statements. (Kim, Tr. 2493). Mr. Kim is also responsible for developing Freedom's financial forecasts and reporting those forecasts to Freedom's board of directors. (Kim, Tr. 2494). Mr. Kim was responsible for providing Freedom's lenders with compliance reports that were required under credit agreements. (Kim, Tr. 2495). Mr. Kim was responsible for engaging outside accountants to conduct the audit of Freedom's annual financial statements. (Kim, Tr. 2497).

Response to Finding No. 32

The proposed finding is incorrect and incomplete. [redacted] (CCFF ¶ 1909). The proposed finding is incomplete with regards to Mr. Kim's responsibilities. Mr. Kim was the Freedom executive with the ultimate authority for ensuring the accuracy of Freedom financial statements. (CCFF ¶ 3183). Mr. Kim is a Certified Public Accountant licensed in California and is familiar with the Financial Accounting Standards Board Codification. (CCFF ¶ 3184). Mr. Kim was responsible for engaging outside accountants to conduct the annual audit of Freedom's financial statements and was the executive responsible for managing the audit process while it was ongoing each year. (CCFF ¶ 3185). Mr. Kim testified that he "had overall responsibility for the audit" process. (CCFF ¶ 3185). Following Freedom's acquisition by Otto Bock, Mr. Kim continues to be the executive overseeing the annual audit process for Freedom. (CCFF ¶¶ 3183-3186).

e. Dr. Stephen Prince, Freedom

33. Dr. Stephen Prince is a project manager for Freedom. (Prince, Tr. 2672). Prince has worked at Freedom since June 2012 when he joined as an engineer. (Prince, Tr. 2673). Dr. Prince is currently the project manager and technical leader for Freedom's Quattro R&D project. (Prince, Tr. 2673). Dr. Prince was previously one of two mechanical engineers in charge of developing the Kinnex microprocessor ankle. (Prince, Tr. 2674).

Response to Finding No. 33

The proposed finding is incomplete as to Dr. Prince's experience and responsibilities. As the Quattro Project Manager and Technical Leader, Dr. Prince manages both the core team, "a cross-functional team within Freedom," and the R&D team at Freedom working on the Quattro project. (CCFF ¶ 3190). Dr. Prince also helps lead the internal Project Approval Committee ("PAC") for the Quattro project including "prepar[ing] the documentation and present[ing] the majority of that material." (CCFF ¶ 3192). [redacted] (CCFF ¶ 3193). [redacted] **(CCFF ¶ 3194).**

3. Manufacturer Witnesses

a. Össur hf. ("Össur")

34. Össur is headquartered in Reykjavik, Iceland and has a U.S. headquarters in Foothill Ranch, California. (De Roy, Tr. 3537). It manufactures and sells medical devices within the field of prosthetics and noninvasive orthopedics. (De Roy, Tr. 3526). Össur sells the full range of lower-limb prosthetic products to restore mobility, including non-MPKs and MPKs. (De Roy, Tr. 3537). Össur employs between 300 and 400 employees in the U.S. (De Roy, Tr. 3538). Össur's U.S. sales force consists of fifty employees that educate and assist with reimbursement and fittings. (De Roy, Tr. 3539).

Response to Finding No. 34

Complaint Counsel has no specific response.

b. Kim Peter Viviane De Roy, Össur

35. Kim Peter Viviane De Roy is the Executive Vice President of Research and Development at Össur. (De Roy, Tr. 3525-3527). Mr. De Roy is responsible for overseeing all research and development projects at Össur, including those related to prosthetic knees and feet. (De Roy, Tr. 3527). Mr. De Roy has been in his current role since November 2017. (De Roy, Tr. 3527).

Response to Finding No. 35

Complaint Counsel has no specific response.

36. Prior to his current role, Mr. De Roy was Össur's Vice President of Sales, Prosthetics from 2013 to 2017. (De Roy, Tr. 3528). He also simultaneously served as the vice president of global marketing prosthetics from 2012 to 2017. (De Roy, Tr. 3528-3529). As Vice President of Sales, Prosthetics, Mr. De Roy oversaw all sales-created activities for prosthetics in the Americas market, including prosthetic knees (which also included both microprocessor knees and K-3 Non-MPKs). (De Roy, Tr. 3529). Mr. De Roy also served as Vice President of Global Marketing, Prosthetics, and he oversaw the global activities in marketing for prosthetics, including the Americas, Europe, and Asia Pacific. (De Roy, Tr. 3529).

Response to Finding No. 36

Complaint Counsel has no specific response.

c. Charles A. Blatchford & Sons Limited d/b/a Endolite (Blatchford or Endolite)

37. Blatchford is a family-owned business which manufactures lower limb prosthetic devices and provides patient care services in a number of locations in the United Kingdom and Norway. (Blatchford, Tr. 2089-2090). Blatchford was founded in 1890 by Mr. Blatchford's great grandfather. (Blatchford, Tr. 2090).

Response to Finding No. 37

Complaint Counsel has no specific response.

38. Blatchford products are sold under the trade name Endolite throughout the world, including the United States. (Blatchford, Tr. 2099). Endolite sells a wide range of prosthetics products in the United States, including energy-storing feet, hydraulic ankles, microprocessor-controlled feet, non-MPKs, and MPKs, among other products. (2099-2100). Endolite employs roughly 80 people in the United States, including 60 at its Miamisburg, Ohio headquarters and 15 sales reps and 5 clinical support specialists that operate throughout the United States. (Blatchford, Tr. 2100-2101).

Response to Finding No. 38

Complaint Counsel has no specific response.

39. [redacted]

Response to Finding No. 39

[redacted]

d. Brian Stephen Blatchford, Endolite

40. Stephen Blatchford is employed by Blatchford in the United Kingdom. (Blatchford, Tr. 2089). Mr. Blatchford is also executive chairman of Blatchford. (Blatchford, Tr. 2091). His main responsibilities include looking at the strategic direction of the company and managing the board. (Blatchford, Tr. 2091). Mr. Blatchford is particularly interested in product development, and retains responsibility for the strategic direction of the products developed by Blatchford. (Blatchford, Tr. 2091). Mr. Blatchford spends a lot of his time looking at what Blatchford's competitors are doing, trying to understand what the market is doing, and what Blatchford should be doing. (Blatchford, Tr. 2092). [redacted]

Response to Finding No. 40

[redacted]

e. Proteor, Inc. d/b/a Nabtesco Proteor USA (Nabtesco Proteor)

41. Nabtesco Proteor is a subsidiary of Proteor, France. (Mattear, Tr. 5516-5517). Nabtesco Proteor was established in 2016. (Mattear, Tr. 5518). Nabtesco Proteor sells prosthetics products manufactured by Proteor France, based in Dijon, France, and Nabtesco Corporation, based in Kobe, Japan, directly to prosthetics and orthotics clinics in the United States. (Mattear, Tr. 5516-5517, 5519-5522).

Response to Finding No. 41

The proposed finding is unclear and misleading to the extent it suggests that Nabtesco has any ownership interest in Proteor Inc. It is unclear what "Nabtesco Proteor" refers to and Respondent does not explain what it means by "Nabtesco Proteor." To avoid any confusion, Complaint Counsel notes that the record shows that Nabtesco Corp. ("Nabtesco") manufactures prosthetic devices including microprocessor knees, non-microprocessor knees, microprocessor feet, and non-microprocessor feet. (CCFF ¶ 924). As of September 1, 2018, Proteor, Inc. (d/b/a Nabtesco & Proteor in USA) is the exclusive distributor of prosthetic devices manufactured by Nabtesco Corporation and Proteor S.A. (CCFF ¶ 927). The proposed finding is misleading to the

extent that it suggests Nabtesco has any ownership interest in Proteor, Inc., because it does not; there is a distribution agreement executed by the two companies. (CCFF ¶ 927). Proteor Inc. is owned by Proteor Holdings. (CCFF ¶ 3332). Nabtesco Corporation does not own Proteor Inc. (CCFF ¶ 3332).

42. In 2018, Nabtesco Proteor acquired Ability Dynamics, the manufacturer of the RUSH Foot, and Ability Dynamics' sales force and clinical team. (Mattear, Tr. 5518-5520; 5527-5528, 5555-5561). Nabtesco Proteor now has seven sales representatives, a certified prosthetist clinician, and a business development manager. (Mattear, Tr. 5527-5528; 5555-5559; 5563-5564).

Response to Finding No. 42

The proposed finding is unclear and misleading to the extent it suggests that Nabtesco has any ownership interest in Proteor Inc. (*See* Response to RPFF ¶ 41). Complaint Counsel adds, for the sake of clarity, Proteor, Inc. acquired Ability Dynamics in or around June of 2018. (Mattear (Proteor) Tr. 5527-28).

f. Brad Mattear, Nabtesco Proteor

43. Bradley Mattear has been the Managing Director of Nabtesco Proteor since 2016. (Mattear, Tr. 5510, 5523). Mr. Mattear is a certified prosthetic assistant, and he has the ability to evaluate, fit, adjust, and modify prosthetics. (Mattear, Tr. 5511). Mr. Mattear has worked in the prosthetics industry for over fifteen years. (Mattear, Tr. 5510). Mr. Mattear went into orthopedics and sports medicine after graduate school, and transitioned into orthotics and prosthetics with a company called Restorative Care of America. (Mattear, Tr. 5510). From 2003 to 2011, Mr. Mattear worked for a company named Orthotics and Prosthetics 1, a custom fabrication manufacturer of prosthetics and orthotics, sockets for amputees, and assistive devices. (Mattear, Tr. 5510-5511, 5514). From 2011 to 2016, Mr. Mattear was a business development manager in charge of the Midwest region for Cascade, a distributor of prosthetic products. (Mattear, Tr. 5514). In that position, Mr. Mattear created business relationships with practitioners on staff at various facilities so that they would buy their necessary prosthetic components from Cascade. (Mattear, Tr. 5515).

Response to Finding No. 43

The proposed finding is unclear and misleading to the extent it suggests that Nabtesco has any ownership interest in Proteor Inc. (*See* Response to RPFF ¶ 41). For the sake of clarity,

Complaint Counsel adds Mr. Mattear works for Proteor, Inc., and does not report to Nabtesco in any way. (CCFF ¶ 3333).

g. Ohio Willow Wood Company (Willow Wood)

44. Willow Wood was founded in 1907, and it manufactures and sells prosthetic products in the United States. (Arbogast, Tr. 4932). Willow Wood is a multi-national business, which sells its product offerings in over 30 markets. (Arbogast, Tr. 4933). Willow Wood is one of the leading liner manufacturers in the United States. (Matera, Tr. 5226; Schneider, Tr. 4304). They also manufacture knees, ankles, feet, sockets, and the LimbLogic vacuum pump. (Matera, Tr. 5226).

Response to Finding No. 44

The proposed finding is unclear regarding what Respondent means by "30 markets" and Respondent does not specify which countries Willow Wood manufactures product in and sell to. The proposed finding also does not explain anything about the extent to which Willow Wood manufactures knees and feet. [redacted]

45. Willow Wood also sells software services, including a scan system which allows prosthetists to scan a limb of the amputee so that Willow Wood can make a socket for the residual limb. (Matera, Tr. 5226). Willow Wood also creates products and technologies

for prosthetics, including a recent CAD/CAM software technology which modernizes the shape capture and fabrication processes for amputees, a LimbLogic system comprised of a microprocessor-controlled vacuum or suspension system that holds the prosthesis onto the limb, and a Myoliner liner with electrodes and circuitry integrated to allow an amputee to more intuitively use a powered or a myoprocessor-controlled device. (Arbogast, Tr. 4933-4934).

Response to Finding No. 45

Complaint Counsel has no specific response.

h. Ryan Arbogast

46. Ryan Arbogast is majority owner and CEO of Willow Wood. (Arbogast, Tr. 4929). Mr. Arbogast owns 67 percent of Willow Wood, and each of his three sisters own 11 percent. (Arbogast, Tr. 4930). In addition to his role at Willow Wood, Mr. Arbogast previously served on the Ohio level orthotics and prosthetics board and as advisor to the national-level AOPA board. (Arbogast, Tr. 4930).

Response to Finding No. 46

[redacted]

[redacted]

[redacted]

i. John Matera

47. John Matera is the Chief Operating Officer at Willow Wood. (Matera, Tr. 5224-5225). He has served in that position for the last five years. (Matera, Tr. 5225). Mr. Matera reports to Mr. Arbogast, President and CEO of Willow Wood. (Matera, Tr. 5229). Prior to joining Willow Wood, Mr. Matera worked for General Electric Company in operations positions, with Tosoh SMD as the operations manager and purchasing manager, and at Diamond. (Matera, Tr. 5225).

Response to Finding No. 47

The proposed finding is incomplete. Mr. Matera has no prior experience in the assembly or manufacture of microprocessor knees, (CCFF ¶ 3310), no experience troubleshooting issues that arise during the development of MPKs, (CCFF ¶ 3311), no experience handling repairs of MPKs, (CCFF ¶ 3312), and has not been involved in any acquisitions while at Ohio Willow Wood. (CCFF ¶ 3313).

j. College Park Industries (College Park) and William Carver, III

48. College Park is a prosthetic manufacturer that sells prosthetic feet, knees, liners, endo components, and upper limb products in the United States. (Carver, Tr. 2003). [redacted]

Response to Finding No. 48

Complaint Counsel has no specific response.

49. William James Carver, III is president and chief operating officer of College Park. (Carver, Tr. 2003). Mr. Carver began working at College Park in 2009 as College Park's operations manager. (Carver, Tr. 2003-2004). Mr. Carver was next promoted to the director of operations position, where his responsibilities included receiving, returns, manufacturing, some of the manufacturing and engineering department, and the toolmakers and machining department. (Carver, Tr. 2004). Mr. Carver became chief operating officer in 2011. (Carver, Tr. 2005). As COO, the executive management team reports to Mr. Carver, and

Mr. Carver assists in developing the strategy and business plan of the company. (Carver, Tr. 2005).

Response to Finding No. 49

Complaint Counsel has no specific response.

4. Clinic Witnesses

a. Hanger, Inc. (Hanger) and Southern Prosthetic Supply (SPS)

50. Hanger provides healthcare services for through a large network of orthotic and prosthetic patients in forty-four states and Washington, D.C. (Asar, Tr. 1307; Testerman, Tr. 1259). Hanger has two business segments: (1) its patient care segment, which fits prosthetic knees, and (2) its products and services segment, which has a distribution business and a therapeutic solutions business that calls on skilled nursing facilities. (Asar, Tr. 1307-1309). Hanger's total revenues are approximately one billion dollars. (Asar, Tr. 1307). Over eighty percent of its revenues, or about $850 million, comes from its patient care segment. (Asar, Tr. 1307-1308). Hanger has 800 clinics across the country, and there are about 3,400 to 3,500 total clinics in the United States. (Asar, Tr. 1379). Hanger employs about 1500 clinicians, and there are about 6,000 clinicians in the United States. (Asar, Tr. 1313, 1380).

Response to Finding No. 50

Complaint Counsel has no specific response.

51. Hanger is the largest U.S. customer of virtually every seller of prosthetics in the United States, including Freedom, [redacted] (Carkhuff, Tr. 298, Testerman, Tr. 1098; [redacted]

Response to Finding No. 51

[redacted]

[redacted]

52. SPS, owned by Hanger, is the largest distributor in the country. (Schneider, Tr. 4402; Mattear, Tr. 5515). Stephen Blatchford testified that 60% of Endolite's sales are through SPS, with 60% of that going to Hanger itself, and 40% going to independent clinics. (Blatchford, Tr. 2103).

Response to Finding No. 52

Complaint Counsel has no specific response.

b. Vinit Asar, Hanger and SPS

53. Mr. Vinit Asar is the President and Chief Executive Officer of Hanger. (Asar, Tr. 1308). Mr. Asar is also a board member on Hanger's board. (Asar, Tr. 1308). Vinit Asar is not a prosthetist, has never fit a device, and is not involved in patient care. [redacted]

Response to Finding No. 53

[redacted]

c. Scheck & Siress Prosthetics, Inc. (Scheck & Siress) and Michael Oros

54. Scheck & Siress is an orthotic and prosthetic provider in the Chicago metro area. (Oros Tr., 4771). Scheck & Siress is one of the largest private clinic organizations in the United States. (Oros Tr., 4773). Sheck & Siress currently has fifteen locations. (Oros Tr., 4771). Its locations are spread between the State of Illinois and Northwest Indiana. (Oros Tr., 4771). Scheck & Siress employs a little less than 200 people. (Oros Tr., 4771). Scheck & Siress employs thirty-two certified prosthetists and orthotists. (Oros, Tr. 4772).

Response to Finding No. 54

Complaint Counsel has no specific response.

55. Mr. Oros is a certified prosthetist and orthotist and is the president and CEO of Scheck & Siress. (Oros Tr., 4774, 4771). Mr. Oros has been president of Scheck & Siress for 13 years and CEO for the past four years. (Oros, Tr. 4773). He has worked at Scheck & Siress for twenty-two years. (Oros, Tr. 4773). Before he became president of Scheck & Siress, Mr. Oros was a clinical lab manager of one of its facilities for approximately six or seven years. (Oros, Tr. 4773). Mr. Oros is the immediate past president of the American Orthotic and Prosthetic Association ("AOPA"). (Oros, Tr. 4780).

Response to Finding No. 55

The proposed finding is incomplete because it does not include Mr. Oros's relationship to Respondent. Mr. Oros testified that he has met with Otto Bock's primary owner, Hans Georg Näder, in the past to discuss an acquisition of Scheck & Siress by Otto Bock. (CCFF ¶ 3339). Within the past year Scheck & Siress entered into a partnership agreement with Otto Bock and Scheck & Siress works with Otto Bock on "one-off projects on a new foot" or "a new knee." (CCFF ¶¶ 3340-341).

d. Scott Sabolich and Scott Sabolich Prosthetic & Research (SSPR)

56. SSPR is headquartered in Oklahoma City, Oklahoma. (Sabolich, Tr. 5788). Sabolich is a prosthetics-only facility which was founded in 1947 by Mr. Sabolich's grandfather. (Sabolich, Tr. 5790). Sabolich employs fifty people, twelve of whom are certified prosthetists and two of whom are prosthetic assistants. (Sabolich, Tr. 5793). Sabolich's main office is in Oklahoma City, and its secondary office is in Dallas, Texas. (Sabolich, Tr. 5788). SSPR has two locations, one in Oklahoma City and one in Dallas, Texas. (Sabolich, Tr. 5788). SSPR considers itself to be a destination facility (Sabolich, Tr. 5800).

SSPR's Dallas facility is 12,000 square feet, which they believe to be the largest prosthetics-only privately owned facility in Texas. (Sabolich, Tr. 5803). SSPR frequently sees patients that have been fit at other facilities that are having issues (Sabolich, Tr. 5804-05). SSPR has a running track and golf course so that they can service patients who have goals like running or playing golf. (Sabolich, Tr. 5811-13).

Response to Finding No. 56

Complaint Counsel has no specific response.

57. Scott Alan Sabolich is a prosthetist and the owner and clinical director of SSPR. (Sabolich, Tr. 5788). Mr. Sabolich has been the owner of SSPR since May 1999. (Sabolich, Tr. 5790). Scott Sabolich has been involved in the U.S. Paralympics since 1996. (Sabolich, Tr. 5812).

Response to Finding No. 57

The proposed finding is incomplete because it does not include information about Mr. Sabolich's relationship to Otto Bock. Mr. Mr. Sabolich testified that "most of my money goes to [Otto Bock], and so [he's] got to be in as close of a relationship as [he] can possibly be with them to streamline profitability on [his] company." (CCFF ¶ 3372). Mr. Sabolich agreed to testify at this trial because Otto Bock does a lot for him so he tries to do a lot for Otto Bock. (CCFF ¶ 3347). Otto Bock and SSPR have been in a clinical relationship for at least five years. (CCFF ¶¶ 3348-49). Otto Bock has released some of its products from the SSPR clinics, done Facebook Live events from the clinic, and done photo shoots from the clinic. (CCFF ¶¶ 3350-52). Mr. Sabolich beta-tests Otto Bock products on his patients. (CCFF ¶ 3354). Mr. Sabolich purchased a Össur Pro-Flex XC foot for Otto Bock at Otto Bock's request. (CCFF ¶¶ 3357-59). Mr. Sabolich talks to other clinics, including Scheck & Siress, about Otto Bock's partnership program and tries to influence them to join the program. (CCFF ¶¶ 3363-65). Mr. Sabolich has a relationship with many Otto Bock employees including Hans Georg Näder, Brad Ruhl, Dr. Andreas Kannenberg, Scott Schneider, Adam McPherson, Russ Lundstrom, Cali Solorio, Walter Governor, and Michael Leach. (CCFF ¶¶ 3358, 3376-83).

e. Keith Senn and Center for Orthotic and Prosthetic Care (COPC)

58. COPC is an orthotic and prosthetic company which orthotic and prosthetic devices and services to patients. (Senn, Tr. 149). COPC operates 25 offices. (Senn, Tr. 151; 156-157). COPC employs approximately 120 people. (Senn, T. 157). Approximately fifteen prosthetists work at the clinics located in Kentucky and Indiana. (Senn, Tr. 158). COPC does not offer patient care support. (Senn, Tr. 182).

Response to Finding No. 58

The proposed finding is unclear and misleading. It is unclear because Respondent does not define the term "patient care support." The proposed finding is misleading because COPC does offer support to its patients. COPC employees visit amputees in the hospital, fit them with shrinker stockings, fit them with a test socket and create a definitive prosthesis. (Senn (COPC) Tr. 165). COPC employees meet with each patient approximately three to six times during the process of fitting the prosthetic knee. (Senn (COPC) Tr. 171). After the prosthetic is fit, the patient comes back to COPC every two weeks to check on the patient's progress and how the knee is programmed. (Senn (COPC) Tr. 181). After three months, the patient comes back three months later, then every six months and eventually, the patient visits the clinic yearly. (Senn (COPC) Tr. 181).

59. Keith Senn is president of the Kentucky and Indiana operations at COPC. (Senn, Tr. 149). Mr. Senn is not a prosthetist, does not work directly with any prosthetists, does not provide any patient care, cannot write or fill prescriptions, and does not directly fit any prosthetics. (Senn, Tr. 152-154). Mr. Senn has never observed COPC patients with MPKs navigating terrain such as hills or stairs. (Senn, Tr. 173). Mr. Senn has been employed at the COPC since January 1997, when the center first began operating. (Senn, Tr. 149-150). Mr. Senn's current responsibilities at the COPC involve setting up policy and procedural manuals so that the COPC clinics in Indiana and Kentucky are all following the same procedures. (Senn, Tr. 152).

Response to Finding No. 59

The proposed finding is misleading regarding Mr. Senn's experience working with prosthetics and his involvement in patient care. As CFO, Mr. Senn helped establish guidelines for

insurance reimbursement and compliance, as well as a process for purchasing and accounts receivable. (CCFF ¶ 3275). Mr. Senn's current role as the President of COPC's Kentucky and Indiana operations involves overseeing the various departments within COPC and the day-to-day operation of the company. (CCFF ¶ 3276). As President, Mr. Senn helps create policy manuals to establish set procedures for patient care across the clinics in the Kentucky and Indiana regions. (CCFF ¶ 3277). These policy manuals include a "purchasing guideline" listing preferred products for patients based on feedback from prosthetists across COPC's clinics. (CCFF ¶ 3277). Mr. Senn also assists in the creation of bi-weekly "work in progress" reports to monitor the progress of COPC patients as they progress through their treatment and insurance reimbursement. (CCFF ¶ 3277). Four employees in the Kentucky and Indiana region report directly to Mr. Senn, including the general manager, accounts receivable manager, and marketing staff. (CCFF ¶ 3278). The general manager is a certified prosthetist who oversees the other prosthetists employed at COPC's clinics in the region. (CCFF ¶ 3278). Mr. Senn speaks with the general manager of COPC's Kentucky and Indiana regions about staffing issues, the operations at its facilities, patient care, and other concerns about the day-to-day operations of the company. (CCFF ¶ 3278).

f. Mark Ford and Prosthetic and Orthotic Associates (POA)

60. POA is an orthotic and prosthetic clinic. (Ford, Tr. 902). Mark William Ford is the President and Managing Partner at POA. (Ford, Tr. 902). Mark Ford is not a prosthetist, has never been a prosthetist, and is not personally involved in providing patient care. (Ford, Tr. 918-19). Mr. Ford has been President and Managing Partner since June 2016. (Ford, Tr. 902). As the President of POA, Mr. Ford oversees the business operations, manages the partner team, and he oversees operations at POA facilities. (Ford, Tr. 902). Mr. Ford works with POA's top key suppliers to create plans with them regarding their relationships, including negotiations on price. (Ford, Tr. 904).

Response to Finding No. 60

The proposed finding is misleading. Though Mr. Ford is not a prosthetist, he is qualified to discuss the different products available for a below-the-knee amputee. Mr. Ford has "almost twenty years of experience" in the prosthetics industry. (CCFF ¶ 3249). Mr. Ford testified that he has held positions "where [he] needed to understand the product lines that prosthetists work with, and in order to understand how our products work best for them, [he] needed to understand the process, so [he has] been in hundreds if not thousands of prosthetic facilities in the last twenty years in 21 different countries." (CCFF ¶ 3249). Mr. Ford has "daily interaction" with POA prosthetists, as well as weekly "work in progress" calls that include discussions about "what's going on with [each] patient, what do we see is the activity level of this patient, what do we see that the patient is wanting to be able to do, what is the initial evaluation that the clinician has done with that patient, [and] what do they anticipate the treatment plan to become." (CCFF ¶ 3252). Mr. Ford has discussions with POA clinicians related to MPKs, including "the features and benefits of each of those different MPK systems that are out there, how those features and benefits are valuable to different types of patients." (CCFF ¶ 3253).

g. Mid-Missouri Orthotics and Prosthetic (Mid-Missouri) and Tracy Ell

61. Mid-Missouri provides orthotics and prosthetics, artificial limbs, and braces. (Ell, Tr. 1659). Mid-Missouri fits a variety of levels of prosthetics of all different extremities, as well as bracing. (Ell, Tr. 1559-1660). Tracy Duncan Ell is the owner and chief prosthetist at Mid-Missouri. (Ell, Tr. 1659). Mr. Ell has been the owner of Mid-Missouri for 18 years. (Ell, Tr. 1659).

Response to Finding No. 61

Complaint Counsel has no specific response.

h. Ability Prosthetics and Orthotics (Ability P&O) and Jeff Brandt

62. Ability P&O provides patient care to both amputee and brace wearers in ten facilities across three states. (Brandt, Tr. 3742). Ability employs certified prosthetists and orthotists to provide that care. (Brandt, Tr. 3742). Once a patient is referred to Ability P&O for its services, Ability P&O evaluates, designs, and fits the prescribed device, and then provides ongoing follow-up care and maintenance for that patient over the course of the lifetime of the device. (Brandt, Tr. 3742).

Response to Finding No. 62

The proposed finding is incomplete regarding the size of Ability P&O. Ability has "roughly 43" employees, 18 of whom are certified prosthetists. (CCFF ¶ 3231).

63. Jeffrey M. Brandt is the CEO of Ability P&O. (Brandt, Tr. 3742). [redacted] Mr. Brandt founded Ability P&O in 2004, and has worked there for about fourteen and a half years. (Brandt, Tr. 3742, 3744).

Response to Finding No. 63

[redacted]

5. Cascade Orthopedic Supply (Cascade) and Jeffrey Collins

64. Cascade is a wholesale distributor of medical supplies and equipment, specifically serving certified, independently owned, *i.e.*, non-Hanger-owned, orthotic and prosthetic clinics in the United States. (Collins, Tr. 3271-3272). In addition to private clinics, Cascade has national contracts with large institutions like the Shriners Hospitals and other university hospitals, as well as a number of governmental agencies including the DOD and the VA. (Collins, Tr. 3272).

Response to Finding No. 64

Complaint Counsel has no specific response.

65. Jeffrey James Collins is the president of Cascade. He also serves as the president of a Canadian subsidiary, OrthoPed ULC. (Collins, Tr. 3270). Mr. Collins leads a team of directors, and oversees day-to-day management of his team. He provides strategic planning efforts for the business, and performs other administrative tasks. (Collins, Tr. 3271). Mr. Collins speaks with Cascade's customers at least weekly, and discusses industry-related matters with customers. (Collins, Tr. 3272. Mr. Collins also discusses specific commercial questions and topics that are relevant to his commercial activities. (Collins, Tr. 3273). Mr. Collins is on the board of the American Orthotic and Prosthetic Association, and in that capacity is aware of reimbursement trends and matters, policy issues, regulatory matters, and industry-related matters. (Collins, Tr. 3272-3273). Mr. Collins joined Cascade in 2002 as the controller of the firm. (Collins, Tr. 3271). He was promoted to vice president of finance two years later. (Collins, Tr. 3271). Mr. Collins became president of Cascade in 2006. (Collins, Tr. 3271).

Response to Finding No. 65

Complaint Counsel has no specific response.

6. Payer Witnesses

a. United HealthCare (United or UHC) and Jack Sanders

66. United is a national health insurance company. (Sanders, Tr. 5370-5371). It is one of the largest insurers of prosthetics in the United States. (DeRoy, Tr. 3631; Sanders, Tr. 5371). United Healthcare is a subsidiary of United Health Group and is sometimes referred to as UHC. (Sanders, Tr. 5371).

Response to Finding No. 66

Complaint Counsel has no specific response, other than to add that although United is "one of the largest [private] insurers of prosthetics in the United States," Medicare is the largest insurer of prosthetics in the United States, with 31% of reimbursement claims in the United States. (CCFF ¶ 375).

67. Jack Sanders is a senior clinical program consultant at United, a national health insurance company. (Sanders, Tr. 5370-5371). Mr. Sanders has been in that role for five years. (Sanders, Tr. 5371). Mr. Sanders' responsibilities as a senior clinical program consultant include the areas of durable medical equipment, prosthetics, orthotics, and supplies.

(Sanders, Tr. 5371). Mr. Sanders handles all aspects of those areas, including training nurses and doctors who perform prior authorization and predetermination insurance reviews, research, and net promoter scores. (Sanders, Tr. 5372, 5374). Mr. Sanders has handled the prosthetic category for health plans for the last eighteen to nineteen years. (Sanders, Tr. 5372). Jack Sanders is not and has never been a certified prosthetist. (Sanders, Tr. 5377).

Response to Finding No. 67

The proposed finding is misleading to the extent that it suggests Mr. Sanders is not able to discuss MPKs knowledgeably. Mr. Sanders regularly provides training to his clinical staff on microprocessor knees, including on the current state of equipment and offerings for microprocessor knees available in the marketplace. (CCFF ¶ 3389).

7. Doctor Witnesses

a. Dr. Potter

68. Benjamin Kyle Potter, M.D., is the Chief of the Department of Orthopedics at Walter Reed National Military Medical Center, a tertiary medical treatment facility in Bethesda, Maryland. (Potter, Tr. 744). Dr. Potter performs the majority of the amputation surgery at Walter Reed National Military Medical Center. (Potter, Tr. 747). Dr. Potter performs surgeries from initial wounding (in the case of a trauma or combat-related amputation, including definitive revision and closure, and additional surgeries for amputees, including reoperations or revision procedures. (Potter, Tr. 747).

Response to Finding No. 68

Complaint Counsel has no specific response.

69. Dr. Potter treats amputees of all ages. (Potter, Tr. 748). Dr. Potter treats patients who require amputations due to cancer, trauma, combat-related injuries, and diabetic and dysvacular-type injuries. (Potter, Tr. 748). He started performing transfemoral amputations in 2003, and has performed over one hundred transfemoral amputations since then. (Potter, Tr. 754).

Response to Finding No. 69

The proposed finding is incomplete with regard to Dr. Potter's involvement in post-operative care of transfemoral amputees. Dr. Potter sees patients every day while they are in the

hospital. (Potter (DoD) Tr. 759). He sees them again once they are discharged two to three weeks after surgery to do a wound check. (Potter (DoD) Tr. 760). Dr. Potter sees the patient once every week or two during the rehabilitation process informally, and then once again six-weeks post-operation. (Potter (DoD) Tr. 762). At that six-week visit, Dr. Potter usually writes the first prescription for a prosthesis. (Potter (DoD) Tr. 762). He sees the patient informally every couple of weeks and then formally again three months, six months, and one year after surgery. (Potter (DoD) Tr. 763).

b. Dr. Douglas Smith

70. Dr. Douglas George Smith is an orthopedic surgeon who is board-certified in orthopedic surgery. (Smith, Tr. 5961, 5968). Dr. Smith is a professor emeritus in the Department of Orthopedic Surgery at the University of Washington in Seattle. (Smith, Tr. 5961). He also has a part-time job with the military through the Henry Jackson Foundation for the Advancement of Military Medicine as a professor in the Department of Physical Medicine and Rehabilitation at the Uniformed Services University of Health Sciences. (Smith, Tr. 5961-5962). Dr. Smith was asked for apply for, and received privileges at Walter Reed, where he performed some surgeries and worked with younger surgeons to try to pass along insight, see patients, and help with decision-making. (Smith, Tr. 5971).

Response to Finding No. 70

The proposed finding is incomplete in that it does not explain that Dr. Smith has not performed an amputation or written a prescription for a prosthetic knee since December of 2016. (CCFF ¶ 3393).

71. Dr. Smith attended medical school at the University of Chicago, performed his residency in orthopedic surgery and rehabilitation at Loyola University, and performed a one-year advanced clinical training in Seattle, Washington with the former chair of orthopedic surgery at the University of Washington. (Smith, Tr. 5961-5963). Dr. Smith then worked at Harborview Hospital, where he ran the Level 1 trauma call, performing amputation services including surgeries and working in an amputee clinic. (Smith, Tr. 5965, 5968). Harborview is the only Level 1 trauma center for Washington, Alaska, Montana, Idaho, and part of Wyoming. (Smith, Tr. 5964-5965).

Response to Finding No. 71

Complaint Counsel has no specific response to this finding.

72. Dr. Doug Smith estimates that throughout the course of his career, he performed 150 amputation surgeries per year for 28 years, about 80 to 85 percent of which were lower-limb amputations. (Doug Smith, Tr. 5979). Dr. Doug Smith began learning about prosthetic components when he was a resident at Loyola in Chicago, and decided to do a one-year fellowship in Seattle at an amputee clinic, and continued to be heavily involved in prosthetics throughout his career. (Doug Smith, Tr. 5977, 5979). Dr. Smith also was involved with the beginning of military amputee care programs in the United States. (Smith, Tr. 5970). He also gave a series of lectures on amputation surgeries, including different levels and decision-making, and rehabilitation and care of amputees, including insight into prosthetics. (Smith, Tr. 5970).

Response to Finding No. 72

The proposed finding is incomplete, unclear, unsupported, misleading, and contradicted by record evidence. The proposed finding is incomplete because, although Dr. Smith testified that he performed about 150 amputations per year for 28 years, he has not performed an amputation or written a prescription for a prosthetic knee since December of 2016. (CCFF ¶ 3393). The proposed finding is also incomplete because, although Dr. Smith testified that he has knowledge of prosthetic components, he is not a certified orthotist or prosthetist and does not fabricate limbs for patients. (CCFF ¶ 3392).

The proposed finding is unclear because Respondent does not explain what "heavily involved in prosthetics" means. The proposed finding is unsupported because Dr. Smith does not testify that he has "continued to be heavily involved in prosthetics throughout his career." The proposed finding is misleading and contradicted by record evidence to the extent it implies that Dr. Smith has current knowledge of prosthetic components. During his deposition, Dr. Smith testified that he did not know which version of the C-Leg was on the market. (CCFF ¶ 3394). During trial, he testified that he did not know the size of Otto Bock's marketing team, how long it took Otto Bock to develop the C-Leg 4, or how much it costs. (CCFF ¶ 3394). He also testified that he is not sure if he has ever seen Freedom's Plié 3 or seen a patient using one. (CCFF ¶ 3399).

He is not aware of any improvements Freedom made to the Plié knee in 2016 or 2017 because he "did not follow the product." (CCFF ¶ 3399). As such, he is not familiar with the product specifications of the Plié 3. (CCFF ¶ 3399). Likewise, Dr. Smith does not have recent experience with Endolite's Orion knee or DAW's knees, and is not sure if he has ever seen a Nabtesco knee. (CCFF ¶¶ 3396-98).

c. David Smith

73. David Smith was the Chairman and CEO of Freedom from April 1, 2016 through September 2017. (Smith, Tr. 6408). David Smith's tenure as Chairman and CEO of Freedom ended the Friday before the Acquisition. (PX05122, Tr. 7). Prior to the Acquisition, Mr. Smith had been involved in approximately 130 to 150 merger and acquisition transactions. (Smith, Tr. 6412).

Response to Finding No. 73

[redacted]

74. Prior to joining Freedom, Mr. Smith was a CPA with PriceWaterhouseCoopers, and he later joined PSS World Medical, where he served in such positions as CFO, Chairman and CEO. (Smith, Tr. 6409). After working for PSS World Medical, Mr. Smith joined Health Evolution Partners ("HEP"), and worked in a variety of roles. (Smith, Tr. 6409). Mr. Smith was an operating partner of HEP and was the CEO of one of HEP's portfolio companies. (Smith, Tr. 6409). Mr. Smith left HEP in the spring of 2016. (Smith, Tr. 6409). Mr. Smith was not a partner of HEP after he became CEO and Chairman of Freedom. (Smith, Tr. 6410). Prior to joining Freedom, Mr. Smith had no experience in the prosthetic industry, nor did Mr. Smith have any knowledge concerning prosthetics products, prosthetics manufacturers, prosthetics customers or prosthetics regulations. (Smith, Tr. 6411).

Response to Finding No. 74

Complaint Counsel does not have a specific response to this finding.

d. Dr. Kenton Kauffman

75. Kenton Richard Kaufman, Ph.D. is employed by the Mayo Clinic in Rochester, Minnesota. (Kenton, Tr. 807). Dr. Kaufman is the W. Wendell Hall, Jr. Musculoskeletal Research Professor, a professor of biomechanical engineering, and the director of the Motion Analysis Laboratory. He is also on staff in the departments of orthopedic surgery, physiology, and biomechanical engineering at the Mayo Clinic. (Kenton, Tr. 808). Dr. Kaufman occasionally works with clinicians who are fitting prosthetics on patients by providing objective data on a patient's gait to provide information on things that cannot be seen, like forces, moments, muscle activity, and asymmetry. (Kenton, Tr. 814).

Response to Finding No. 75

Complaint Counsel does not have a specific response to this finding.

76. Dr. Kaufman is not qualified to select which knee is appropriate for a particular patient, does not fit patients with prosthetic devices, and does not determine the K-level of any particular amputee. (Kenton, Tr. 872-873). Dr. Kaufman is also not involved with reimbursements on microprocessor-controlled knees, nor does he generally know the relative costs to prosthetic clinics for fitting different types of knees. (Kenton, Tr. 875-876).

Response to Finding No. 76

This proposed finding is unclear, unsupported, and misleading. The proposed finding is unclear because Respondent does not explain what "not qualified" means. The proposed finding is unsupported because Dr. Kaufman does not testify that he is "not qualified to select which knee is appropriate for a particular patient," only that it is the prosthetist's job to do so. The proposed finding is misleading because, although Dr. Kaufman testified that he "[i]n general" does not know the relative costs to prosthetic clinics for fitting different types of prosthetic knees, he testified that he *is* familiar with the margins earned by prosthetists for fitting prosthetic knees. (Kaufman (Mayo Clinic) Tr. at 875-76).

8. Moelis & Company (Moelis) and Jon Hammack

77. Jon Hammack is currently the Managing Director at Moelis, an independent investment bank. (Hammack, Tr. 6062–6063). Mr. Hammack's industry focus is within the medical

device industry. (Hammack, Tr. 6063-6064). Mr. Hammack was the lead representative from Moelis in charge of its formal engagement with Freedom, which began in May of 2017. (Hammack, Tr. 6063). Mr. Hammack has worked at Moelis for five years, and has sixteen years' of experience in the investment bank industry. (Hammack, Tr. 6063). Mr. Hammack has been involved in between forty and fifty merger and acquisition transactions in his career, with more than twenty of those involved a company that was sold through a bidding process. (Hammack, Tr. 6063). Prior to joining Moelis, Mr. Hammack was the managing director and head of the medical technology group at Morgan Stanley for just under eight years, and also worked in the healthcare investment banking groups at Credit Suisse and Bank of America Securities. (PX05110 (Hammack Dep, at 11).

Response to Finding No. 77

[redacted]

9. Expert Witnesses

a. Dr. David Argue

78. Dr. David Argue is currently a Corporate Vice President and Principal at Economists Incorporated. (Argue, Tr. 6132). Dr. Argue's area of specialization is in industrial organization, and, specifically, in competition and antitrust issues. (Argue, Tr. 6134). For the last twenty-five years, Dr. Argue's practice has been heavily devoted to economic and competition issues within the healthcare industry. (Argue, Tr. 6134). Dr. Argue has worked on roughly seventy mergers; and, of those seventy, more than sixty have involved the healthcare industry. (Argue, Tr. 6135-6136). Dr. Argue has worked on forty to fifty private litigation matters involving the healthcare industry. (Argue, Tr. 6136). Prior to this matter, Dr. Argue has previously been retained as an expert by the FTC. (Argue, Tr. 6137). Dr. Argue has previously been retained by the Utah state legislature to evaluate the competitiveness of the markets for healthcare services in Utah. (Argue, Tr. 6137).

Response to Finding No. 78

Complaint Counsel does not disagree with the proposed finding, but adds that Dr. Argue did not provide expert testimony on behalf of the FTC. (Argue (Respondent) Tr. 6137).

79. Economists Incorporated provides economic consulting, with a special focus on antitrust matters. (Argue, Tr. 6132). Dr. Argue has worked at Economists Incorporated for twenty-eight years. (Argue, Tr. 6132). Dr. Argue began working at Economists Incorporated in 1990, immediately after he graduated from the University of Virginia with a Ph.D. in Economics and a specialty in industrial organization. (Argue, Tr. 6133). Before Dr. Argue received his Ph.D., he received his Master's Degree in Economics from the University of Virginia and his undergraduate degree in Economics from American University. (Argue, Tr. 6133).

Response to Finding No. 79

Complaint Counsel has no specific response to this finding.

80. Dr. Argue was retained by Respondent to consider the prosthetic knee businesses of Ottobock and Freedom, and to evaluate in properly defined antitrust markets whether there would be any adverse competitive effects likely as a result of Ottobock acquiring Freedom. (Argue, Tr. 6141).

Response to Finding No. 80

Complaint Counsel has no specific response to this finding, but adds that Economists Incorporated billed about 1,600 hours on this matter, amounting to about $1 million. (Argue (Respondent) Tr. 6141-42).

b. James Peterson

81. James Peterson is currently a principal at Deloitte, within Deloitte's Transaction and Business Analytics division. (Peterson, Tr. 6594–95). Mr. Peterson is the head of Deloitte's Life Sciences and Healthcare Mergers and Acquisitions practice group ("LSHMA"). (Peterson, Tr. 6595). Mr. Peterson has operational responsibilities within the LSHMA group for the corporate finance practice, valuation practice, financial practice, corporate turnaround practice, and the due diligence practice. (Peterson, Tr. 6595). Prior to joining Deloitte in July 2002, Mr. Peterson worked in Arthur Andersen's economic financial consulting practice group for five to six years. (Peterson, Tr. 6595).

Response to Finding No. 81

Complaint Counsel has no specific response to this finding.

82. For the last twenty-two years, during his time at Deloitte and Arthur Andersen, Mr. Peterson has focused solely on healthcare merger and acquisition transactions. (Peterson, Tr. 6594-6595). Mr. Peterson has expertise from the concept stage of a transaction all the

way to planning for integration and then actually executing on post-merger integration. (Peterson, Tr. 6596). Mr. Peterson has worked on hundreds of merger and acquisition transactions. (Peterson, Tr. 6596). Mr. Peterson has also worked on hundreds of transactions where he performed analyses to determine whether the companies will be able to meet their financial obligations in the near future. (Peterson, Tr. 6597). Mr. Peterson has also been involved in dozens of transactions where companies were analyzing whether they would be able to successfully reorganize under Chapter 11 of the bankruptcy laws. (Peterson, Tr. 6597-6598). In those transactions, Mr. Peterson also performed liquidation valuations and sensitivity analyses. (Peterson, Tr. 6597).

Response to Finding No. 82

Complaint Counsel has no specific response to this finding.

83. Mr. Peterson has been involved in the sale bidding process for dozens of merger and acquisition transactions. (Peterson, Tr. 6598). Mr. Peterson has been named an expert in the past, but has never, until the trial in this matter, testified as an expert witness in court. (Peterson, Tr. 6599). Mr. Peterson has, however, served as an expert witness during public hearings. (Peterson, Tr. 6601). Mr. Peterson has previously made a presentation to the Federal Trade Commission to assist a client with a failing firm analysis in a hospital analysis. This presentation was made before the merger was consummated, and, after the presentation of the failing firm primary defense, the government ultimately permitted the sale. (Peterson, Tr. 6603-6604).

Response to Finding No. 83

The proposed finding is incomplete in that Respondent does not explain that Mr. Peterson has only been retained *once* as an expert witness offering an opinion as to whether a particular transaction would yield cognizable efficiencies as defined under the Merger Guidelines, and Mr. Peterson has never before issued an expert report on such an opinion. (CCFF ¶ 3420). The proposed finding is also incomplete because, although Mr. Peterson has made a presentation before the FTC, Mr. Peterson is not familiar with the Commentary on the Merger Guidelines and indicated in his deposition that he does not believe he has reviewed the document or considered it in formulating his opinions on claimed efficiencies in this matter. (CCFF ¶ 3421).

c. Fiona Scott Morton

84. Fiona Scott Morton is a professor at Yale University and a senior consultant at Charles River Associates. (Morton, Tr. 3847). Ms. Morton has worked at Yale since 1999, with the exception of a nineteen-month leave that she took from May 2011 to December 2012 to serve as the deputy assistant attorney general for economic analysis at the Department of Justice Antitrust Division. (Morton, Tr. 3849-3850). Ms. Morton is being paid $945 an hour to work on this case. (Morton, Tr. 3963). While Ms. Morton did not know how many hours she had spent on this case, she knows it is less than one hundred hours, but not much less. (Morton, Tr. 3963). She does not know how much time her firm, Charles River Associates, has spent on this case. (Morton, Tr. 3964). Between two-thirds and three-quarters of her annual income is derived from her expert testimony work. (Morton, Tr. 3965-3966).

Response to Finding No. 84

The proposed finding is incomplete and misleading. The proposed finding is incomplete because it does not explain that during Dr. Scott Morton's time at the Department of Justice, she held what is "known as the chief economic job" at the Antitrust Division, where she oversaw the analysis of "dozens and dozens of mergers" and several proposed divestitures that occurred in that period. (CCFF ¶ 3407). Dr. Scott Morton has also published "twenty-plus" articles in peer-reviewed academic journals relating to the economic analysis of competition among firms. (CCFF ¶ 3409). She has also served as referee for AER, QJE and RAND, which are all peer-reviewed economic journals and frequently presents at professional conferences related to antitrust economic analysis. (CCFF ¶ 3409).

The proposed finding is misleading in that it refers to Charles River Associates ("CRA") as "her firm." Dr. Scott Morton testified that, while she is a senior consultant at CRA, she is an *external* consultant, meaning that she does not have an internal position at CRA, and does not have access to CRA employee accounts to know how much time CRA employees have spent on this matter. (Scott Morton, Tr. 3964).

d. Christine Hammer

85. Christine Hammer has been self-employed since 1981 at Hammer & Associates, which currently only employs Ms. Hammer. (Hammer, Tr. 2868). Ms. Hammer was engaged as an expert witness by Complaint Counsel in January 2018. (Hammer, Tr. 3000). Ms. Hammer is being compensated for her work in this case at a rate of $800 per hour. (Hammer, Tr. 3001). As of June 11, 2018, Ms. Hammer had earned about $300,000 working on this case. (Hammer, Tr. 3001). Ms. Hammer was assisted in this case by Cornerstone Research, an economic consulting firm. (Hammer, Tr. 3001). Ms. Hammer receives an additional financial benefit, on top of the $800 per hour, from Cornerstone Research's work; although, Ms. Hammer only knows that she receives somewhere between seven and fifteen percent of Cornerstone Research's staff billings. (Hammer, Tr. 3002). As on August 17, 2018, Cornerstone Research had been paid roughly one million dollars ($1,000,000.00) by the Federal Trade Commission for their work on this case. (Hammer, Tr. 3008). During Ms. Hammer's forty-five year career, she has worked in some capacity on about eight to ten merger and acquisition transactions. (Hammer, Tr. 3017). Only in four of those transactions was Ms. Hammer involved before the transaction was consummated. (Hammer, Tr. 3018). Ms. Hammer has only worked on two pre-consummation transactions on behalf of a target company, and, during those two transactions, Ms. Hammer did not focus on any bidding process. (Hammer, Tr. 3019). One of those transactions occurred in the late 1970's, and the other transaction took place in the early 1980's. (Hammer, Tr. 3020). Neither transaction involved the healthcare industry. (Hammer, Tr. 3020). Ms. Hammer has served as a proposed expert witness about 100 times. (Hammer, Tr. 3023). Ms. Hammer has testified as an expert witness thirty-five times. (Hammer, Tr. 3023). In recent years, Ms. Hammer has focused much more on litigation than on consulting. (Hammer, Tr. 3022). In 2017, 90-100% of Ms. Hammer's work was litigation-related. (Hammer, Tr. 3022). Other than this case, Ms. Hammer has had no experience in the prosthetics industry. (Hammer, Tr. 3027).

Response to Finding No. 85

Complaint Counsel has no specific response to this finding, but adds that, prior to starting Hammer & Associates, Ms. Hammer worked at Crocker Bank where she did forecasting, strategy and estimated synergies related to Crocker Bank's acquisition of Midland Bank. (CCFF ¶ 3404).

10. Other Witnesses

a. Matt Swiggum

86. Mr. Swiggum was terminated as regional president and CEO of Ottobock after less than two years in the role. (Swiggum, Tr. 3313, 3316). Mr. Swiggum joined Otto Bock in 1997 as a sales representative. (Swiggum, Tr. 3315). He was subsequently promoted to a district sales manager position, and in 2004 became the regional sales manager of the central region. (Swiggum, Tr. 3315). In 2005, Mr. Swiggum became the director of sales for

technical orthopedics for Otto Bock U.S., and in 2010 he became the business unit director of mobility solutions for Otto Bock North America. (Swiggum, Tr. 3316).

Response to Finding No. 86

The proposed finding is incomplete because, although Mr. Swiggum's employment with Otto Bock was terminated on February 22, 2018, he receives $30,000 per month from Otto Bock until about April 2019 and provides Otto Bock with consulting services. (CCFF ¶ 3204). The proposed finding is also incomplete because it fails to include that, prior to Mr. Swiggum's termination, he was personally involved in meetings regarding the integration of Freedom after the Merger, he was responsible for maintaining and generating a sustainable profit for Otto Bock and for all customer-facing responsibilities, and he was involved in analyzing Freedom's Plié 3 business after Otto Bock's acquisition of Freedom. (CCFF ¶¶ 3200-02). In total, Mr. Swiggum spent almost 21 years at Otto Bock. (Swiggum (Otto Bock) Tr. 3317).

II. INDUSTRY BACKGROUND

A. Lower Limb Prostheses

87. Transfemoral, or above-the-knee, amputees and individuals born with partial lower limbs often receive a lower-limb prosthesis to enable them to ambulate. (PX05002 (Asar, Dep. at 16); (DeRoy, Tr. 3540)).

Response to Finding No. 87

Complaint Counsel has no specific response to the proposed finding.

88. A lower-limb prosthesis for an above-the-knee amputee consists of either a suspension or a liner, a socket, which is a rigid or semi-rigid negative of the residual limb, a knee, a pylon connecting the knee to a foot, and a foot shell and any other cosmesis covering. (Schneider, Tr. 4303-4304; Senn, Tr. 171).

Response to Finding No. 88

Complaint Counsel has no specific response to the proposed finding.

89. Prosthetic clinics purchase most components from prosthetic manufacturers or distributors, but may fabricate certain components themselves, such as sockets. Typically, clinics do not stock prosthetic components, but purchase them individually for each particular patient. (Oros, Tr. 4778-4779).

Response to Finding No. 89

The proposed finding is unsupported because it relies only on the testimony of one clinic, Scheck & Siress, to support a fact about what "[p]rosthetic clinics" do. Mr. Oros testifies that his own clinic only fabricates a socket, but does not testify as to what other clinics do. Mr. Oros also does not testify about purchasing from distributors or whether he stocks prosthetic components.

90. A socket is a device that is typically custom-manufactured by a prosthetist from commodity products, such as plastics, polypropylene or carbon fiber. (Carkhuff, Tr. 600). The socket is custom-made by the prosthetist to fit the patient's residual limb. The creation of the socket is important, to make sure that the product is very comfortable to the patient, avoiding nerves and scars that could cause pressures. (Carkhuff, Tr. 600). And then the socket goes over the patient's residual limb, and the socket provides a means to secure the device to the patient, and then from the bottom of the socket all of the prosthetic components are attached. (Carkhuff, Tr. 600).

Response to Finding No. 90

Complaint Counsel has no specific response to the proposed finding.

91. Patients desiring a lower-limb prosthesis have varying degrees of potential mobility. (Schneider, Tr. 4287-4288). The "K-Level" rating system was developed by Medicare and is generally accepted in the prosthetics industry in the United States to classify patients into five ascending mobility levels, K-0 to K-4. (JX01, ¶ ¶ 16-18; PX08003 at 002; Schneider, Tr. 4287-4288).

Response to Finding No. 91

The proposed finding is unclear. Respondent does not explain what is meant by "[p]atients desiring a lower-limb prosthesis" or "varying degrees of potential mobility." Complaint Counsel does not disagree that the "K-Level" rating system was developed by Medicare and is generally accepted in the prosthetics industry in the United States to classify patients into five ascending mobility levels, K-0 to K-4.

92. The following table reflects Medicare's description of each K-Level and describes in general terms the type of prosthetic knee that Medicare will cover for each K-Level. (PX08003 at 002).

K-Level	Description	Medicare Reimbursed Prosthetic Knee
K-0	Non-ambulatory: "Does not have the ability or potential to ambulate or transfer safely with or without assistance and a prosthesis does not enhance quality of life or mobility."	None
K-1	Household Ambulator: "Has the ability or potential to use a prosthesis for transfers or ambulation on level surfaces at fixed cadence."	Constant Friction Knee
K-2	Limited Community Ambulator: "Has the ability or potential for ambulation with the ability to traverse low-level environmental barriers such as curbs, stairs, or uneven surfaces."	Constant Friction Knee
K-3	Unlimited Community Ambulator: "Has the ability or potential for ambulation with variable cadence. Typical of the community ambulator who has the ability to traverse most environmental barriers and may have vocational, therapeutic, or exercise activity that demands prosthetic utilization beyond simple locomotion."	Fluid Control Knee, Non-Microprocessor or Microprocessor-Controlled Knee
K-4	Very Active: "Has the ability or potential for prosthetic ambulation that exceeds the basic ambulation skills, exhibiting high impact, stress, or energy levels, typical of the prosthetic demands of the child, active adult, or athlete."	Fluid Control Knee, Non-Microprocessor or Microprocessor Controlled Knee

Response to Finding No. 92

The proposed finding is misleading to the extent it suggests that the chart provided by Respondent comes from Medicare. Instead, the chart comes from an article by Dr. Andreas Kannenberg, the Executive Medical Director for Otto Bock HealthCare North America. (PX08003 at 001; CCFF ¶ 3174).

The proposed finding is also misleading to the extent it suggests that K-3/K-4 patients choose equally between MPKs and mechanical knees. In the United States, the vast majority of K-3/K-4 patients who are prescribed an MPK by medical professionals and have insurance coverage for an MPK receive and wear one. (CCFF ¶¶ 531-37). That does not mean every K-3/K-4 amputee receives, or from a medical perspective should receive, an MPK. K-3/K-4 amputees typically wear a mechanical knee when their insurance company denies coverage for an MPK or their medical professionals determine that an MPK is not medically appropriate given an amputee's specific health or lifestyle characteristics. (CCFF ¶¶ 538-55). 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 ¶¶ 543-44, 549, 554-55). Those patients typically wear a mechanical knee when engaging in such activities. In addition, even K-3/K-4 amputees who may become eligible for an MPK are typically fitted with a mechanical knee for their initial and temporary prostheses, worn during the post-surgery recovery process. (CCFF ¶¶ 556-58). Finally, 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).

93. Prosthetic knees available for sale to prosthetics clinics in the United States range in sophistication from "basic mechanical knees, single-axis brake knees, all the way to knees that are designed for . . . K-3 or K-4 level ambulatory, so they have swing and stance control, stumble recovery." (Solorio Tr. 1637**).**

Response to Finding No. 93

Complaint Counsel has no specific response.

94. Prosthetic Feet are grouped by mobility level, like other lower-limb prosthetics. Prosthetic Feet range from softer, low activity feet to carbon fiber or glass composite feet that have energy return and are appropriate for K-3/K-4 patients. (Mattear, Tr. 5558; Schneider, Tr. 4305; Arbogast, Tr. 4960-4961).

Response to Finding No. 94

The proposed finding is unsupported. None of the cited testimony explains that the lower-range prosthetic feet are "softer" than carbon fiber or glass composite feet. Moreover, Respondent cites no source for the first sentence which asserts feet and "other lower-limb prosthetics" are "grouped by mobility level;" record evidence is clear that, in many cases, including in connection with prescribing MPKs and mechanical knees, different classes of prosthetic products are not substitutes for patients who may share the same K-level designation. (*See, e.g.,* CCFF ¶¶ 427-561)

B. The Prosthetic Fitting Process

1. Amputation Surgery

95. About 75 percent of leg amputations occur because of vascular disease like diabetes. (Schneider, Tr. 4287). Other causes include trauma, cancer, and flesh-eating bacteria. (Schneider, Tr. 4287; Senn, Tr. 163; Doug Smith, Tr. 5982-83). The surgeon's goal in performing a lower-limb amputation is usually to amputate only as much of a limb as is necessary. (Doug Smith, Tr. 5988).

Response to Finding No. 95

Complaint Counsel has no specific response to the proposed finding.

96. When a patient undergoes amputation surgery, that procedure is typically performed by an orthopedic or vascular surgeon, who determines where on the limb to do the amputation. (Doug Smith, Tr. 5988). Surgeons prefer to leave as long of a residual limb as possible following amputation and will perform the amputation at the most distal part of the limb that is clinically available. (Doug Smith, Tr. 5988; 5999-6000).

Response to Finding No. 96

Complaint Counsel has no specific response to the proposed finding, but notes that Dr. Smith does not testify that amputation surgery is "performed by an orthopedic or vascular surgeon."

97. An above-the-knee amputation is also referred to as a transfemoral amputation. (Doug Smith, Tr. 5988). In a typical transfemoral amputation, after a patient is under anesthesia, the surgeon makes a skin incision generally just above the knee level. (Potter, Tr. 756). He then reflects the skin flaps towards the hip, dissects down and divides the muscle typically a little bit longer than the skin flaps so the muscle would be available to fold over the bone for both residual limb control and padding, and the surgeon transects the muscle at that level. (Potter, Tr. 756). Then the surgeon isolates the femur and transects the femur with a saw. (Potter, Tr. 756). Then, he or she must divide the muscles of the posterior leg, get control of the bigger blood vessels which require isolation, and tie those off. (Potter, Tr. 756-757). The surgeon then identifies the sciatic nerve and makes sure that it is not at the bottom of the residual limb when the patient is going to be walking. (Potter, Tr. 757).

Response to Finding No. 97

Complaint Counsel does not disagree with the proposed finding.

98. After the amputation is complete, the surgeon must make sure that the residual limb is closed up properly, which can be more difficult than removing the leg. (Potter, Tr. 757). The surgeon endeavors to put the amputation back together in the most functional possible status, typically consisting of tying some critical muscle groups into the bone to allow the amputee to be able to move the residual limb. (Potter, Tr. 757). The surgeon anchors the muscle groups into the bone for function and for additional padding. (Potter, Tr. 757). Then, the surgeon trims the skin edges and closes the skin with sutures, after placing a drain in the leg to prevent extra fluid from accumulating. (Potter, Tr. 757-58).

Response to Finding No. 98

Complaint Counsel does not disagree with the proposed finding.

2. Initial Prosthesis

99. Following surgery, patients typically stay overnight at an inpatient facility from at least three days to a more than a week. (Potter, Tr. 758-59). While inpatient, the patient is fit with a "shrinker" stocking on the residual limb to decrease the swelling and mold the limb to prepare it for eventual socket use. (Potter, Tr. 760-61). After three weeks, a patient is typically ready to have sutures removed, and after six weeks, to be fit with an initial prosthesis. (Potter, Tr. 762).

Response to Finding No. 99

Complaint Counsel does not disagree with the proposed finding.

100. About sixty days after surgery, the physician refers the patient to a prosthetist to be evaluated for an initial prosthesis, which is also known as a temporary prosthesis. (Sabolich, Tr. 5841).

Response to Finding No. 100

Complaint Counsel has no specific response to the proposed finding, but adds that the surgeon or a physiatrist provides the patient with a prescription to receive the initial prosthesis. (CCFF ¶ 332).

101. Prosthetists typically fit a basic K-1/K-2 level knee as the initial prosthesis that is stable in design. (Sabolich, Tr. 5841). The socket that is created is meant to be used short term, because the residual limb is still swollen from surgery and has not reduced to its final size and shape. (Sabolich, Tr. 5841-5842).

Response to Finding No. 101

Complaint Counsel has no specific response to the proposed finding, but notes that Mr. Sabolich did not testify that patients receive a K-1/K-2 level knee as the initial prosthesis, only that patients usually receive "a basic low-level knee" as the initial prosthesis.

3. Definitive Prosthesis

102. After a patient has been wearing a temporary prosthesis for about six months to a year, the patient is ready to receive a definitive prosthesis, or more permanent prosthetic device. (Sabolich, Tr. 5842).

Response to Finding No. 102

Complaint Counsel has no specific response to this finding.

103. Typically, to begin their evaluation for a definitive prosthesis, prosthetists receive a vague referring prescription which does not specific a type of knee to be fit on a patient, but may indicate the physician's assessment of mobility level. (Sabolich, Tr. 5838; Oros, Tr. 4783; Potter, Tr. 774-775).

Response to Finding No. 103

The proposed finding is unclear, misleading, and contradicted by record evidence to the extent it implies that all prescriptions do not specify the type of knee to be fit on a patient. The proposed finding is unclear in that it does not explain what is meant by "vague referring prescription." The proposed finding is misleading and contradicted by record evidence to the extent it implies that all prescriptions do not specify the type of knee to be fit on a patient. In some cases, a prescription will specify the type of prosthetic knee. (*See* Ell (Mid-Missouri) Tr. 1692, 1761-62; Kannenberg (Otto Bock) Tr. 1894; Brandt (Ability) Tr. 3746-47).

104. Once the treating physician clears a patient to receive a definitive prosthesis, the prosthetist begins consulting with the patient to determine the best prosthetic componentry for that patient. (Sabolich, Tr. 5833, 5844).

Response to Finding No. 104

The proposed finding is misleading to the extent it implies that the prosthetist and the patient are the only two decision makers as to which prosthetic componentry should be fit on the patient. With respect to the prosthetic knee, several categories of healthcare professionals play a role in determining whether fitting a K-3/K-4 amputee with an MPK is medically appropriate. The surgeon, who performs the amputation, or another medical doctor, must write a prescription for a prosthetic knee. (CCFF ¶¶ 402-04). The prosthetist at the clinic to which the amputee is referred post-surgery typically plays a critical role in evaluating the amputee's ability to ambulate and which type of lower-limb prosthesis would be optimal for the patient. (CCFF ¶¶ 411-17, 430).

These two healthcare professionals, sometimes along with others (*e.g.*, a patient's physiatrist), work initially to determine a patient's K-level by evaluating his or her strength and ability to ambulate. (CCFF ¶¶ 431, 433-39). Healthcare professionals in the United States know that insurers typically do not provide reimbursement to clinics for fitting MPKs on K-0, K-1, or K-2 patients. (CCFF ¶¶ 440-44). Therefore, only amputees identified as K-3 or K-4 ambulators (and sometimes K-2 patients who would become K-3 ambulators with a particular prosthesis) are considered *candidates* for an MPK by their healthcare professionals. (CCFF ¶¶ 445-46, 427, 557).

U.S. insurers also play a role in determining the prosthetic componentry that will be fit on a patient. With respect to prosthetic knees, U.S. 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 ¶¶ 496-514). 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).

105. Important decision criteria for selecting a definitive prosthesis include activities of daily living, health, insurance coverage, vocation. (Schneider, Tr. 4306-4307). The decision of which prosthetic knee to fit depends collaboration between the patient, the prosthetist, the payer, and the physician. (Schneider, Tr. 4306).

Response to Finding No. 105

The proposed finding is unsupported and incomplete. The proposed finding is unsupported in that it relies only on the testimony of Scott Schneider, Vice President of Government, Medical Affairs, and Future Development at Otto Bock, to explain the decision making process of a patient, prosthetist, payer and physician. Mr. Schneider is not a patient, prosthetist, payer, or physician.

The proposed finding is incomplete in that it does not explain the role of each player in deciding which type of prosthetic knee to fit on a patient. In the United States, there are two steps to determine the eligibility of a K-3/K-4 amputee for an MPK. First, a patient's healthcare professionals (*i.e.*, his or her surgeon and/or prosthetist) determine whether an MPK (rather than a mechanical knee) is the best medical option for the patient. (CCFF ¶¶ 392-93, 430-87). Second, the patient's insurance provider determines whether to reimburse a prosthetic clinic for fitting the patient with an MPK (rather than approving only a mechanical knee). (CCFF ¶¶ 394-99, 488-523). If both a patient's medical team and insurer determine an MPK is appropriate, and the patient is comfortable wearing one, the patient will be prescribed an MPK, the prosthetist at his or her clinic will fit the patient with one, and the patient's insurer will reimburse the clinic for the cost of fitting the patient's entire lower-limb prosthesis. (CCFF ¶¶ 392-561).

a. Patients

106. Patients have a significant amount of input into the type of prosthetic components that make up their final prosthetic device. (Doug Smith, Tr. 6010-11).

Response to Finding No. 106

The proposed finding is unclear, unsupported, and misleading. The proposed finding is unclear because Respondent does not explain what is meant by "significant amount of input." The proposed finding is unsupported in that Mr. Smith does not testify that patients have a "significant" amount of input into the prosthetic components that they receive. The proposed finding is

misleading to the extent it suggests that patients who are prescribed MPKs and have coverage for MPKs commonly choose to wear mechanical knees instead. While it is true that 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), the vast majority of K-3/K-4 patients who are prescribed an MPK by medical professionals and have insurance coverage for an MPK receive and wear one, (CCFF ¶¶ 531-37).

107. Patients have discretion to choose between different prosthetic knees that are medically appropriate for them based on financial considerations as well as the fit and features of the prosthetic knee. (Doug Smith, Tr. 6010-11; Sabolich, Tr. 5845; Ell, Tr. 1690; Oros, Tr. 4787).

Response to Finding No. 107

The proposed finding is misleading to the extent it suggests that patients who are prescribed MPKs and have coverage for MPKs commonly choose to wear mechanical knees instead. While it is true that 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), the vast majority of K-3/K-4 patients who are prescribed an MPK by medical professionals and have insurance coverage for an MPK receive and wear one, (CCFF ¶¶ 531-37).

108. Patients that want to use a prosthetic device typically are responsible for a portion of the reimbursement allowable or fee set by their insurance provider or payer. [redacted] Schneider, Tr. 4300). Medicare and private insurance reimbursement typically requires that the patient cover twenty percent of the reimbursement amount unless the insured has secondary coverage. (Senn, Tr. 260). Patients insured by DOD, VA, or WC do not usually have any out-of-pocket costs. (Sabolich, Tr. 5826).

Response to Finding No. 108

The proposed finding is incomplete. Many health insurance companies offer multiple plans with different characteristics, including different provider discounts and patient co-pays.

109. However, patients almost never cover the entire cost of the prosthetic device out of pocket. (Sabolich, Tr. 5821; Schneider, Tr. 4298).

Response to Finding No. 109

Complaint Counsel does not disagree with this proposed finding.

110. A patient's financial obligation, or out-of-pocket cost, for a prosthetic device is not related to the prices that manufacturers charge to clinics for prosthetic components. (Schneider, Tr. 4300). If prosthetic device manufacturers raised prices, it would not impact the amount that amputees pay for prosthetic devices because patients pay a portion of the reimbursement allowable, not a portion of the product's cost. (Carkhuff, Tr. 596-597).

Response to Finding No. 110

As a general matter, Complaint Counsel does not disagree with the proposed finding, but notes that insurance companies offer multiple plans with different characteristics, including different provider discounts and patient co-pays.

111. Choosing between non-MPKs and MPKs for K-3 and K-4 users is very "patient-specific" and is usually determined during product trials where users will try out both non-MPKs and MPKs before choosing. (De Roy, Tr. 3554).

Response to Finding No. 111

The proposed finding is incomplete and misleading to the extent it suggests that MPKs and mechanical knees are economic substitutes for each other or that the choice of whether to fit a specific K-3/K-4 patient with an MPK versus a mechanical knee is affected in any significant way by the Merger. (*See* Response to RPFF ¶ 393).

This proposed finding is incomplete and misleading to the extent it implies that the medical determination of whether a prosthetist will fit a patient with an MPK or mechanical knee is only or primarily focused on the experience a patient has during product trials. 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). This assessment considers the patient's "[c]ognitive capabilities," "[w]hat their life situation is," "what they intend to do for their future activities," whether the patient is "somebody who's going to be active near or in water" (because "[c]omputers and water don't mix well"), and the patients "whole daily life." (Ford (POA) Tr. 992-995).

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). A prosthestist will not recommend an MPK to a patient for whom it would not be appropriate based on their health, work, or lifestyle. (*See* CCFF ¶¶ 543-55). To describe this merely as a result of a patient looking at different options during product trials is misleading to the extent it suggests the patient is the primary decision maker in the process once his or her K-level has been determined, as discussed in Complaint Counsel's Response to RPFF ¶ 393.

112. Most users' insurance providers only provide reimbursement for one prosthetic knee at a time. (Senn, Tr. 182). Patients typically use a prosthetic knee until its needs to be replaced or until the user can receive reimbursement for a new prosthetic knee. (Senn, Tr. 181).

Response to Finding No. 112

The proposed finding is unsupported and incorrect. The proposed finding is unsupported because it discusses "most users' insurance providers," but only cites to the testimony of one witness who does not work at an insurance company. Additionally, the cited testimony does not reference reimbursement at all. (Senn (COPC) Tr. 182). The proposed finding is incorrect because

Mr. Senn explains that patients may receive multiple prosthetic knees at the same time if a patient begins on a K2 level mechanical knee, progresses to a K3 level, and becomes eligible for an MPK. (Senn (COPC) Tr. 182).

b. Prosthetists

113. Manufacturers of prosthetic devices consider prosthetic clinics to be their primary customers. (De Roy, Tr. 3538). Manufacturers of prosthetic components typically sell their products to prosthetic clinics, who then fit prosthetic devices on amputee patients. (Blatchford, Tr. 2128; Schneider, Tr. 4308; Oros, Tr. 4782). Amputee patients do not purchase prosthetic components directly from manufacturers. (Schneider, Tr. 4308). Prosthetic clinics can be independent entities, networks of clinics, or may be affiliated with a hospital. There are approximately 3,400 prosthetic clinics in the United States. [redacted]

Response to Finding No. 113

Complaint Counsel has no specific response.

114. Prosthetic clinics employ prosthetists, who can be certified by the American Board for Certification in Orthotics, Prosthetics, and Pedorthics to make and fit prostheses and manage comprehensive patient care of amputees. (Senn, Tr. 178). There are approximately 6,500 certified prosthetists in the United States. (PX05153A (Asar, Dep. at 77-78)).

Response to Finding No. 114

Complaint Counsel has no specific response.

115. The prosthetist begins the consultation by talking with the patient, understanding their goals, activities of daily living, and history. (Sabolich, Tr. 5833; Oros, Tr. 4785). During the initial evaluation, the prosthetist also does functional level testing in order to determine the patient's K-Level. (Sabolich, Tr. 5833; Oros, Tr. 4785). The treating physician must corroborate the prosthetist's K-Level assessment. [redacted] Oros, Tr. 4784-85; (PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 21)).

Response to Finding No. 115

Complaint Counsel has no specific response.

116. Prosthetists are educated and trained to evaluate patients to determine their potential mobility level, or K-Level classification, and fit them with a prosthesis. (Sabolich, Tr.

5838). Prosthetists can be certified if they have passed a national examination. (PX05149 (Brandt, Dep. at 97-98)). Some states require that prosthetists be licensed. (PX05149 (Brandt, Dep. at 97-98)).

Response to Finding No. 116

Complaint Counsel has no specific response.

117. After prosthetists determine a patient's K-Level, prosthetists have discretion to choose between different prosthetic knees that are appropriate for that K-Level based on financial considerations of the prosthetic clinic and the patient as well as based on myriad other factors, including the patient's mobility level, weight, vocation, among other things. (Sabolich, Tr. 5834 (testifying that there are a hundred knees to choose from and after the consultation he narrows the selection down to a few different options) (Oros, Tr. 4785)).

Response to Finding No. 117

The proposed finding is unclear, unsupported, incomplete, and misleading. It is unclear to the extent it refers to "appropriate," "financial considerations," and "myriad other factors." The proposed finding is unsupported because none of the referenced testimony of Mr. Sabolich or Mr. Oros refers to financial considerations of either the clinic or the patient. It is incomplete because it does not explain the entire process patients, prosthetists, surgeons, clinics, and insurers go through in order to determine which particular knee to fit on a particular patient. (*See* Response to RPFF ¶ 393).

The proposed finding is misleading to the extent it suggests that the relative profits earned by clinics affect the decisions of prosthetists or clinics in prescribing and fitting a particular patient with an MPK or a mechanical knee. The evidence shows that, in reality, clinics do not substitute between MPKs and mechanical knees based on changes in the prices of either MPKs or mechanical knees (and the resulting changes in profits the clinic would earn from selling a mechanical knee rather than an MPK). Clinic customers have testified that, in negotiations with manufacturers for the price of MPKs, MPK prices do not respond to price changes of non-microprocessor knees. (CCFF ¶¶ 597, 599, 713). Clinic customers testified that mechanical knees play no role in their

negotiations with MPK manufacturers—they cannot threaten to switch to mechanical knees to negotiate lower MPK prices. (CCFF ¶¶ 598, 601, 713, 716). For example, Keith Senn, President and COO for Kentucky and Indiana Operations of the Center for Orthotic & Prosthetic Care, 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 ¶ 598).

118. Medicare and private insurance providers require documentation of the patient's mobility level in order to reimburse the prosthetic clinic for prosthetic components. (Senn, Tr. 160).

Response to Finding No. 118

Complaint Counsel has no specific response.

119. It takes prosthetists several weeks to fit a patient with a prosthetic device, and can take several visits. (Senn, Tr. 170-171). Patients frequently make follow-up visits with their prosthetists after they receive their prosthetic device.

Response to Finding No. 119

Complaint Counsel has no specific response.

120. Once the prosthetist and the patient have selected the components that will comprise the patient's definitive prosthesis, the prosthetist prepares a Detailed Written Order, which lists the L-Codes that correspond to the components that the prosthetist intends to use to create the prosthesis. (Sabolich, Tr. 5837; [redacted] The treating physician must sign off on the Detailed Written Order. [redacted]

Response to Finding No. 120

Complaint Counsel has no specific response.

c. Payers

121. Insurance providers play a key role in determining and limiting eligibility for and access to prosthetics products. [redacted]

Response to Finding No. 121

[redacted]

[redacted]

122. The reimbursement amount for prosthetic devices and related services is capped by Medicare. (Schneider, Tr. 4300-4301). Besides Medicare and private insurance, DOD, VA, and WC are the next most common providers of reimbursement for prosthetic devices. (Schneider, Tr. 4296).

Response to Finding No. 122

The proposed finding is unclear and unsupported. The proposed finding is unclear because Respondent does not define "related services" or "is capped." The proposed finding is unsupported because Mr. Schneider did not testify that "the reimbursement amount for prosthetic devices and related services is capped by Medicare." He also said that DoD, the VA, and Worker's Compensation reimburse for prosthetic devices, but did not say they were "the next most common providers." (Schneider (Otto Bock) Tr. 4296).

123. The "Big 5" insurance providers for prosthetic devices in the United States are Medicare, United HealthCare, Kaiser, Cigna, and Aetna. (De Roy, Tr. 3631-3632). Insurers offer hundreds and hundreds of different insurance plans with different coverage criteria for prosthetics devices. (Schneider, Tr. 4307).

Response to Finding No. 123

The proposed finding is unsupported and misleading. The proposed finding is unsupported because, while Mr. Schneider testified that there are "hundreds and hundreds of different plans," he did not testify that each of them had different coverage criteria for prosthetic devices. The proposed finding is misleading to the extent that it implies that there are hundreds of different sets of coverage criteria to get approval for an MPK. While there may be some differences in coverage criteria, there is no evidence in the record that every single insurance plan requires a different set of information in order to cover the cost of an MPK.

124. Payers reimburse for the provision of prosthetic devices based on "L-Codes" which is a system developed by The Centers for Medicare and Medicaid Services ("CMS") but used by private payers as well. (Schneider, Tr. 4291). The prosthetic codes are traditionally L codes, and then it has a four-digit number after it representing a function in the prosthesis. (Schneider, Tr. 4291). A prosthetic component could have multiple functions and therefore use multiple L codes. (Schneider, Tr. 4291).

Response to Finding No. 124

Complaint Counsel has no specific response.

125. A pricing committee sets the fee or allowable for each one of the L-Codes. (Schneider, Tr. 4292). Manufacturers apply for L-Codes and CMS determines whether or not to grant a new L-Code. (Schneider, Tr. 4292). CMS reviews the fee for each L-Code and can decrease or increase the fee associated with L-Codes. (Schneider, Tr. 4292). CMS can also eliminate L-Codes. (Schneider, Tr. 4292). New L-Codes are becoming rare. (Schneider, Tr. 4292**).**

Response to Finding No. 125

Complaint Counsel has no specific response.

126. Public and private insurance payers use this established reimbursement amount to determine how much they will agree to reimburse for a particular L-Code, with the CMS-established rate representing the high-end of the possible reimbursement. (PX05010, (Schneider (Ottobock) IH, at 64-65); PX05002, (Asar (Hanger) IH Tr. at 13); PX05134, Oros (Scheck) Dep. Tr., at 183-184; PX05149, (Brandt (Ability P&O), Dep. at 181).

Response to Finding No. 126

The proposed finding is unclear because it refers to "this established reimbursement amount" without explaining what that means. The proposed finding is unsupported because the cited testimony only discusses private payors. None of the cited testimony discusses the VA, DoD, or Worker's Compensation.

d. Physicians

127. In addition to a prosthetist, the medical team caring for a patient that wants a prosthetic device generally includes a surgeon who performs the amputation surgery and a physiatrist who is a physician with a specialty in rehabilitation. (Doug Smith, Tr. 6003-6004).

Response to Finding No. 127

Complaint Counsel has no specific response.

128. Sometimes, the treating physician is also involved in the evaluation for a definitive prosthesis, if it is a physician familiar with prosthetic components. (Oros, Tr. 4782-83). In this case, the prescription for a prosthetic knee is more detailed, and may specify the category of knee to be fit on the patient. (Doug Smith, Tr. 6006-6007).

Response to Finding No. 128

Complaint Counsel has no specific response.

129. The physician does not prescribe a category of knee to be fit on a patient before speaking with the patient about his or her vocation, activities of daily living, or preferences. (Doug Smith, Tr. 6006, 6007, 6010).

Response to Finding No. 129

Complaint Counsel has no specific response.

130. In order for a prosthetic clinic to begin seeing a patient, a physician (either a surgeon or a physiatrist) must write a referring prescription, which is typically very vague, allows a prosthetist to begin evaluating a patient for a prosthetic device. (Oros, Tr. 4783-4784). Physicians do not prescribe a specific type of knee before the prosthetist has had an initial consultation with the patient. (Oros, Tr. 4786).

Response to Finding No. 130

The proposed finding is unclear, misleading, and contradicted by record evidence. The proposed finding is unclear in that it does not explain what is meant by "very vague." The proposed finding is misleading and contradicted by record evidence to the extent it implies that all prescriptions do not specify the type of knee to be fit on a patient, because in some cases prescriptions do specify the type of prosthetic knee. (*See* Response to RPFF ¶ 103).

III. PRODUCT MARKET

A. Prosthetic Knees Generally

1. Basic Functionality

131. Prosthetic knees attempt to provide users with normal gait function. (Schneider, Tr. 4309).

Response to Finding No. 131

Complaint Counsel does not disagree.

132. A gait cycle consists of two phases: (i) when a lower-limb prosthesis is in contact with the ground, the prosthetic knee is considered to be in the stance phase of the gait cycle; (ii) when a lower-limb prosthesis is in the air, the prosthetic knee is considered to be in the swing phase of the gait cycle. (Schneider, Tr. 4309; Carkhuff, Tr. 342-343).

Response to Finding No. 132

Complaint Counsel does not disagree.

133. In normal ambulation, individuals spend sixty percent of the time in the stance phase of the gait cycle and forty percent in the swing phase. (Schneider, Tr. 4309).

Response to Finding No. 133

Complaint Counsel has no specific response.

134. A prosthetic knee tries to replicate those two phases, swing and stance, and provide the user with as close to normal gait function as possible. (Schneider, Tr. 4309).

Response to Finding No. 134

Complaint Counsel has no specific response.

2. Constant-Friction Knees For K-1 And K-2 Patients

135. A constant friction knee provides a uniform resistance level in both the swing and stance phases of the gait cycle. (Ell, Tr. 1771-1772).

Response to Finding No. 135

Complaint Counsel does not disagree, and adds that constant-friction knees are also known as "friction-brake" mechanical knees. (CCFF ¶ 360).

136. An example of a constant-friction knee for K-1 and/or K-2 users is the Ottobock 3R49, which was submitted at trial as RDX-004. (Schneider, Tr. 4289). The 3R49 is a single-axis, constant friction mechanical knee for K-1-and K-2 patients. (Schneider, Tr. 4289-4290). It has settings for extension and flexion that must be manually adjusted with an Allen wrench. (Schneider, Tr. 4289-4290).

Response to Finding No. 136

Complaint Counsel does not disagree that the Otto Bock 3R49 is a constant-friction knee for K-1 and/or K-2 users and that the 3R49 is a single-axis, constant-friction mechanical knee for K-1 and K-2 patients.

Complaint Counsel has no specific response to Respondent's finding that the Otto Bock 3R49 has settings for extension and flexion that must be manually adjusted with an Allen wrench.

137. K-1 and K-2 knees are often used on new amputees as an initial prosthesis. (Carver, Tr. 2027-28; Sabolich, Tr. 5841).

Response to Finding No. 137

This proposed finding is unclear and unfounded because the testimony cited by Respondent does not support the proposed finding. The proposed finding is unclear because Respondent does not describe what type of "new amputees" may use K-1 or K-2 knees as an initial prosthesis. Complaint Counsel acknowledges that some patients who may ultimately receive an MPK use mechanical knees, of various types, as initial or temporary prostheses before ultimately receiving a prescription for and being fitted with an MPK. The testimony cited by Respondent does not show that such patients "often" receive a K1 or K2 mechanical knee as an initial prosthesis.

138. Freedom recently began selling a constant-friction knee for K-1 and K-2 patients in the United States called the Liberty Knee, which, according to Freedom's marketing and sales executives, does not compete with knees for K-3 and K-4 patients. [redacted] Testerman, Tr. 1250)

Response to Finding No. 138

Complaint Counsel has no specific response.

3. Fluid-Controlled Knees For K-3 And K-4 Patients

139. Fluid-controlled knees use pneumatic, hydraulic, or magnetorheological fluid to provide pre-set or variable resistance levels in the swing and stance phases of the gait cycle, respectively. (Kannenberg, Tr. 1941-1942; 1966-1968; Blatchford, Tr. 2148-2150).

Response to Finding No. 139

The proposed finding is unclear, incorrect, and incomplete. The proposed finding is unclear because Respondent does not explain what "fluid-controlled" means. Technically, prosthetic knees with pneumatic cylinders use air, and thus are not "fluid-controlled." Mechanical knees that use air to regulate the cylinder are known as "pneumatic" knees. (CCFF ¶ 361). The air pressure in the cylinder of a pneumatic mechanical knees regulates the swing of the leg during swing phase and stabilizes the knee in the stance phase of a user's gait. (CCFF ¶ 361). Mechanical knees that use liquids to regulate the cylinder are known as "hydraulic" knees. (CCFF ¶ 362). Magnetorheological technology is unique to Össur's Rheo and Rheo XC, both of which are MPKs, and not used by other MPK manufacturers. (CCFF ¶¶ 901-02). Össur's Rheo and Rheo XC rely on magnetorheological technology to regulate the cylinder used in the MPK; the Rheo's magnetorheologic technology "utilizes electromagnetic force to rapidly alter the viscosity of magnetic fluid in the knee." (CCFF ¶ 901 (citing (PX03099 (Össur) at 02)). The proposed finding is also incomplete because it discusses only the substances contained in cylinders that affect prosthetic knee performance, but does not discuss the presence of a microprocessor and sensors which also affect the performance of prosthetic knees related to both the swing and stance phases of an amputee's gait.

a. Fluid-Controlled Non-MPKs

140. Fluid-controlled knees that do not have microprocessor-control of the swing or stance phases of the knee offer different, pre-set resistance levels for the swing and stance phases of the gait cycle, respectively. (Kannenberg, Tr. 1951).

Response to Finding No. 140

This proposed finding is unclear and unfounded. This proposed finding is unclear because Respondent does not explain what "fluid-controlled" means, (*see* Response to RPFF ¶ 139), or

what "different, pre-set resistance levels for the swing and stance phases of the gait cycle" means. This proposed finding is unfounded because the self-serving testimony of its own executive, Dr. Kannenberg, cited by Respondent discusses only one mechanical knee, Otto Bock's 3R80. (Kannenberg (Otto Bock) Tr. 1951). Thus, it is unclear what, if anything, Respondent's cited testimony conveys about "fluid-controlled knees" generally.

141. Non-MPKs appropriate for K-3 and K-4 patients are different than the knees that are appropriate for K-1 and K-2 patients. (Oros, Tr. 4790).

Response to Finding No. 141

This proposed finding is unclear, misleading, and irrelevant. Complaint Counsel agrees that the various mechanical knees prescribed by medical professionals to the subset of K3 and K4 amputees, who have not been prescribed an MPK, differ in a number of ways from the various prosthetic knee products prescribed to amputees designated generally as K-1 or K-2 level ambulators. The proposed finding is unclear because Respondent does not explain what "Non-MPKs appropriate for K-3 and K-4 patients" means or how the various mechanical knees prescribed to different patients with a K-3 or K-4 ambulation designation are "different" from the various prosthetic knee products worn by patients with a K-1 or K-2 ambulation designation. Because medical professionals prescribe prosthetic knee products based on patient-specific factors—not on general designations of a patient's K-level—the substance of the proposed finding is misleading—and the proposed finding is irrelevant. (*See* CCFF ¶¶ 447-87).

142. Prosthetists can change the resistance levels of the swing and stance phases of sophisticated non-MPKs using tools, such as an Allen wrench or an air pump. (Kannenberg, Tr. 1951; Schneider, Tr. 4327-28).

Response to Finding No. 142

This proposed finding is unclear because Respondent does not explain what "sophisticated non-MPKs" means, what prosthetic knees are categorized as "sophisticated non-MPKs," and what

characteristics make such knees "sophisticated." Dr. Kannenberg's testimony and Mr. Schneider's testimony cited by Respondent never mention the term "sophisticated non-MPKs" nor explain which specific knees are "sophisticated." (Kannenberg (Otto Bock) Tr. 1951; Schneider (Otto Bock) Tr. 4327-28).

143. There are many sophisticated non-MPKs sold in the United States. Some examples include the Össur Mauch, Össur Total Knee, Ottobock 3R80, Ottobock 3R60, Endolite Mercury, Endolite KX06, and Nabtesco Symphony. (Kannenberg, Tr. 1950; Schneider, Tr. 4327; Mattear, Tr. 5542-5543). There are close to 50 different types of sophisticated non-MPKs on the U.S. market for K-3 and K-4 patients. (Schneider, Tr. 4370). Ottobock's Scott Schneider described the 3R60, introduced at trial as RDX-009, as a "super cool knee" with "lots of sophistication." (Schneider, Tr. 4335).

Response to Finding No. 143

This proposed finding is unclear, confusing, irrelevant and unfounded. This proposed finding is unclear because Respondent does not explain what "sophisticated non-MPKs" means and what characteristics make such knees "sophisticated." The only mention of the terms "sophisticated" or "sophistication" anywhere in Respondent's cited testimony is testimony from Scott Schneider confirming that "there's lots of sophistication" in the 3R60 knee from Otto Bock. (Schneider, Tr. 4335). Within the cited testimony, Mr. Schneider does not use the term "sophistication" to describe any knee other than the 3R60.

This proposed finding is unfounded because Respondent's cited testimony does not mention the Endolite Mercury and Endolite KX06. Additionally, the proposed finding that "there are close to 50 different types of sophisticated non-MPKs on the U.S. market for K-3 and K-4 patients" is also unfounded. In cited testimony from Respondent, Respondent Counsel Mr. McConnell asks, "And just to be clear for the record, Mr. Schneider, how many K3/K4 fluid-controlled knees without a microprocessor are available in the U.S.?" Mr. Schneider answers, "Higher than 50, close to 100." (Schneider (Otto Bock) Tr. 4370). Mr. Schneider does not mention

"sophisticated non-MPKs" or provide a definition for the term. In questioning Mr. Schneider, Respondent also does not explain what "fluid-controlled" means. (*See* Response to RPFF ¶ 139).

This proposed finding is confusing and irrelevant because Mr. Schneider's opinion that the 3R60 knee is "super cool" is vague and adds no substantive value to Respondent's arguments.

i. Ottobock Non-MPKs

144. Ottobock makes several Non-MPKs that it recommends for K-3 and K-4 patients, including the 3R106, 3R60, and 3R80. (Solorio, Tr. 1637; De Roy, Tr. 3542).

Response to Finding No. 144

Complaint Counsel has no specific response.

145. The Ottobock 3R80 was introduced at trial as RDX-003. (Schneider, Tr. 4326).

Response to Finding No. 145

Complaint Counsel does not disagree.

146. In the 3R80, the resistances or friction that the knee produces for the stance and swing phase, respectively, can be adjusted manually with turntables and Allen wrenches. (Kannenberg, Tr. 1951; Schneider, Tr. 4327-28). The 3R80 does offer swing and stance control, *i.e.*, it can switch between the pre-set swing and stance resistance levels. (Schneider, Tr. 4326-4327). The 3R80 switches from stance to swing phase without a microprocessor, it uses a mechanical mechanism that is triggered by the position of the knee and weight of the patient. (Schneider, Tr. 4371). The 3R80 does not require the use of an air pump to set the swing phase of the knee. (Schneider, Tr. 4327-4328).

Response to Finding No. 146

This proposed finding is misleading and contradicted by the weight of the evidence insofar as it implies that the 3R80 is a swing and stance controlled knee similar to MPKs such as the Plié 3 and C-Leg 4. To the extent that the 3R80 "switches" between swing and stance resistance levels, this is misleading, because the "switch" is done mechanically. (Schneider (Otto Bock) Tr. 4326-28). The Otto Bock 3R80 does not contain a microprocessor or sensors like the Plié 3 or C-Leg 4, and the fact that the 3R80 requires a switch from swing to stance by using the "position of the knee

and weight of the patient" makes it function very differently from MPKs such as the Plié 3 and C-Leg 4, which use microprocessors to control the function of the knee. Maynard Carkhuff, Chairman of Freedom, testified that the Plié 3 has performance that clinicians love, has great performance in terms of stumble recovery, enables patients to walk more effectively, and prevents patient falls. (CCFF ¶ 1015).

In fact, Freedom positioned the Plié 3 as a superior knee to Otto Bock's C-Leg, and Mr. Carkhuff testified that the Plié 3 is, in fact, superior. (CCFF ¶ 1016). Additionally, the record shows that [redacted] Although the 3R80 "provides swing and stance control to K3 and K4 patients," Mr. Schneider confirms that the 3R80 "does not get the variable resistance control" that an MPK provides. (Schneider (Otto Bock) Tr. 4326-28).

147. The 3R80 offers a stumble recovery feature for K-3 and K-4 patients. (Schneider, Tr. 4337). The 3R80 has a manual locking feature which can lock the knee in one position to

perform a specific exercise. (Solorio, Tr. 1637-38). The 3R80 has adjustment bumpers on the knee to adjust for swing and stance resistance. (Solorio, Tr. 1637-1638). The 3R80 is completely waterproof and corrosion resistant. (Solorio, Tr. 1637-38, 41).

Response to Finding No. 147

This proposed finding is unclear, misleading and incomplete. This proposed finding is unclear and incomplete because Respondent does not explain what "stumble recovery feature" means or what features on the 3R80 give it "stumble recovery." In Respondent's cited testimony, after being asked "does the 3R80…provide stumble – a stumble recovery feature for K3 and K4 patients," Mr. Schneider merely responds with "[i]t does" before Respondent Counsel moves to another topic. (Schneider (Otto Bock) Tr. 4337). This proposed finding is misleading to the extent that it suggest that the 3R80 can provide amputees with the same or similar ability to avoid falls and injuries that MPKs such as the Plie 3 provide. Peer-reviewed research articles have found increased safety and performance of MPKs over mechanical knees. (CCFF ¶ 617). 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).

Complaint Counsel has no specific response to the proposed findings regarding the manual locking features, adjustment bumpers, and the assertion that the 3R80 is waterproof and corrosion resistant.

148. RDX-009 is an Ottobock 3R60. (Schneider, Tr. 4335). It is designed for K-3 and K-4 users in the United States. (Schneider, Tr. 4335). It is a polycentric, five-bar knee that uses hydraulics to provide swing control. It is also adjusted with a small Allen wrench, like the Plié and 3R80. (Schneider, Tr. 4335). The 3R60 is a "super cool knee" with lots of sophistication. (Schneider, Tr. 4335). The mechanics behind the five-bar hydraulic system make the knee "super, super safe." (Schneider, Tr. 4335-4336).

Response to Finding No. 148

This proposed finding is misleading, confusing, irrelevant, and contradicted by the weight of the evidence. Complaint Counsel does not disagree with the finding that RDX-009 is an Otto Bock 3R60 and has no specific response to the finding that the 3R60 is designed for use by certain K-3 and K-4 users in the United States. The proposed finding that the 3R60 is "also adjusted with a small Allen wrench, like the Plie and 3R80" is misleading insofar as it implies that the 3R60 is an appropriate substitute for the Plie because they can be similarly adjusted using "a small Allen wrench." (*See* Response to RPFF ¶ 146).

The proposed finding that the mechanics behind the five-bar hydraulic system make the knee "super, super safe" is confusing because Mr. Schneider's explanation that "the mathematics" associated with the "five bars [that] sends the Vulcan point very distal" does not explain what "the mathematics" means, does not define the "Vulcan point," and does not explain why sending the Vulcan point "very distal" makes a knee "super, super safe." (Schneider (Otto Bock) Tr. 4335-36). Moreover, Mr. Schneider's testimony that Otto Bock's 3R60 mechanical knee is "super, super safe" is vague and misleading to the extent that Respondent uses it to suggest the 3R60 provides the same or similar safety benefits to amputees as MPKs like Otto Bock's C-Leg 4 and Freedom's Plié 3. There is abundant evidence that MPKs provide superior safety benefits over mechanical knees. [redacted] Peer-reviewed research articles have found increased safety and performance of MPKs over mechanical knees. (CCFF ¶ 617). Prosthetic clinics testified that the benefits ascribed to MPKs in these studies are also evident in their own practices. (CCFF ¶ 620). Additionally, this proposed finding

is confusing and irrelevant because Mr. Schneider's opinion that the 3R60 knee is "super cool" is vague and adds no substantive value to Respondent's arguments.

149. The average selling price for the 3R60 is $4,000, and it is reimbursed at $11,000 for a gross margin of $7,000 to the clinic. (Schneider, Tr. 4336-4337).

Response to Finding No. 149

This proposed finding is misleading and unfounded. In Respondent's cited testimony, Mr. Schneider does not mention gross margin for clinics. (Schneider (Otto Bock) Tr. 4336-4337). Respondent does not provide a definition of "gross margin." For each clinic, the gross margin is dependent on more than just the price of the prosthetic knee. It also includes other costs associated with fitting the prosthetic knee as well as cost and reimbursement amounts for other components of a complete lower limb prosthetic, and related costs of fitting the entire prosthetic on a patient. (CCFF ¶¶ 369-371). Based on these differences, the "gross margin" may vary across clinics. There is no evidence in the record on what the specific profit margin is for any specific clinic – or clinics generally – for fitting the 3R60 on patients.

ii. Össur Non-MPKs

150. Össur offers a variety of non-MPKs that have pneumatic and hydraulic control for K-3 and K-4 users. (De Roy, Tr. 3541-3542). Those knees include the Mauch Knee and Total Knee. (De Roy, Tr. 3541-3542). The Mauch Knee Plus and Total Knee 2100 are "beefed up" versions that are more suitable for K-4 patients that need more durable knees. (De Roy, Tr. 3549-3550).

Response to Finding No. 150

Complaint Counsel does not disagree that Össur offers a variety of non-MPKs that have pneumatic and hydraulic control and are used by a subset of K-3 and K-4 amputees, including the Mauch Knee and Total Knee.

Complaint Counsel has no specific response to the proposed finding that the Mauch Knee Plus and Total Knee 2100 are "beefed up" versions that are more suitable for K-4 patients that need more durable knees.

151. Össur offers non-MPKs for K-3 and K-4 users for two reasons: (i) because some patients cannot afford an MPK, and (ii) because some patients prefer the fit and comfort of non-MPKs to MPKs. (De Roy, Tr. 3553-3554).

Response to Finding No. 151

Complaint Counsel does not disagree, and adds that Mr. De Roy testified that it is "more seldom" for patients to prefer the fit and comfort of non-MPKs to MPKs. (De Roy (Össur) Tr. 3553-54). Ossur's view that "some patients cannot afford an MPK" is consistent with other evidence in the record showing that patients who cannot obtain insurance coverage for an MPK typically receive a mechanical knee. (CCFF ¶ 530). Ossur's view that "some patients prefer the fit and comfort of non-MPKs to MPKs" is also consistent with other evidence in the record. (CCFF ¶¶ 538-61) (some patients have a preference for a mechanical knee because they have been wearing a mechanical knee for a long time, but most patients who qualify for an MPK choose an MPK.)

iii. Endolite Non-MPKs

152. Endolite offers an extensive range of K-3 and K-4 non-MPKs, including the Mercury and the KX06. (De Roy, Tr. 3542). All of the non-MPKs sold by Endolite in the United States are fluid-controlled and suitable for K-3 and K-4 amputees. (Blatchford, Tr. 2213).

Response to Finding No. 152

This proposed finding is confusing, incomplete, and misleading because Respondent does not explain what "fluid-controlled" means, (*see* Response to RPFF ¶ 139), does not explain what "suitable" means, and does not explain what makes "all of the non-MPKs sold by Endolite in the United States" "suitable for K-3 and K-4 amputees." The proposed finding is misleading to the extent that, by stating Endolite's Mercury and KX06 mechanical knees are "suitable for K3/K4

amputees," Respondent implies that healthcare professionals and insurers view these mechanical knee products as medically appropriate to prescribe to all K-3/K-4 amputees. There is a large body of evidence showing that medical professional and insurers collectively determine when an MPK is medically appropriate, and for those patients, mechanical knees are not substitutes. (*See* Response to RPFF ¶ 241).

153. The Mercury is a high-quality hydraulic knee offers swing and stance control without a microprocessor. (RX-0814; Blatchford, Tr. 2237-2238).

Response to Finding No. 153

This proposed finding is confusing and misleading insofar as it implies that the Mercury has swing and stance control features and capabilities like the Plie and C-Leg. A large body of evidence shows that MPKs like the Plie and C-Leg, which use a microprocessor and sensors to control the swing and stance functionality of the knee, provide superior performance, and health, safety, and quality of life benefits that mechanical knees, like the Mercury, cannot match, (CCFF ¶¶ 617-700). This proposed finding is confusing because Respondent does not explain what "high-quality" means. In the cited testimony, there is no definition of "high-quality" or list of characteristics that makes a knee "high-quality." (Blatchford (Endolite) Tr. 2237-2238). The KX06 uses the same the same hydraulic cylinder as the Mercury, but it utilizes a very robust, four-bar linkage for more active K-3 and K-4 patients. (RX-0814; Blatchford (Endolite) Tr. 2238-39).

154. The KX06, due to its four-bar technology, is also more appropriate than Endolite's Orion 3 for K-3 or K-4 amputees with a longer residual limb. (Blatchford, Tr. 2238-2239; 2246).

Response to Finding No. 154

Complaint Counsel has no specific response.

155. [redacted]

Response to Finding No. 155

Complaint Counsel has no specific response.

156. Both the Mercury and KX06 knees have a lever on the back of the hydraulic cylinder to put the knee in free swing mode for certain activities, including cycling. (Blatchford, Tr. 2239). Endolite's MPKs, on the other hand, use a microprocessor to change the way the knee reacts during the gait cycle, rather than a switch. (Blatchford, Tr. 2240). Generally, if you are a runner or a cycler, you would want the Mercury or KX06 and not an MPK. (Blatchford, Tr. 2241; 2249-2250).

Response to Finding No. 156

This proposed finding is misleading and incomplete insofar as it implies that "generally," a patient who sometimes runs or cycles will *always* prefer the Mercury or KX06 and not an MPK. In Respondent's cited testimony, Mr. Blatchford specifies that "if [a patient] wanted to go running" or participate in competitive sports events, then the patient would "probably" want the Mercury or KX06. (Blatchford (Endolite) Tr. 2241; 2249-2250). However, Mr. Blatchford adds that "what will quite often happen is that amputees will actually have two prostheses, their sports leg for running and cycling, whatever, and their day-to-day leg, which doesn't support those functions." (Blatchford (Endolite) Tr. 2241; *see also* 2249-50). While non-MPKs such as the Mercury and KX06 may be preferred by some patients *during* moments of rigorous physical activities such as running or cycling, they are not *always* preferred by patients who partake in these activities, and even those patients who use a mechanical knee for certain activities also use an MPK for daily living. Evidence shows that when patients own both an MPK and a mechanical knee used for certain activities, they typically use insurance to cover the more expensive MPK and do not view their MPK and mechanical knee as substitutes for the same uses, (*See* PX05105 (Fillauer (Fillauer) Dep. at 95-97; Blatchford (Endolite) Tr. 2241), rather the MPK and mechanical knee are complementary products that serve different purposes in these amputees' lives.

157. Endolite's ESK variable knee control offers swing control both, and has an option to come either with or without a microprocessor. (RX-0814; Blatchford, Tr. 2242-2243). The

PSPC version utilizes pneumatic swing control without a microprocessor, and the Smart IP version utilizes a microprocessor for swing control. (RX-0814; Blatchford, Tr. 2242-2243). The stance phase in all versions of the ESK Variable Knee is not fluid controlled. (Blatchford, Tr. 2243).

Response to Finding No. 157

This proposed finding is confusing and incomplete because Respondent does not explain what "fluid controlled" means (*see* Response to RPFF ¶ 139) and the phrase "offers swing control both" does not make sense.

158. Endolite's non-MPKs have a position sensor that monitor when load is applied to the knee to switch between swing and stance phase. (Blatchford, Tr. 2113-2114).

Response to Finding No. 158

Complaint Counsel has no specific response.

159. If a K-3 or K-4 patient exceeds 275 pounds in body weight, Endolite would recommend an Endolite non-MPK over an Endolite MPK for that patient. (Blatchford, Tr. 2216-2217).

Response to Finding No. 159

Complaint Counsel has no specific response.

160. Endolite does not recommend any of its knees for K-1 or K-2 patients, because of reimbursement issues in the United States and because the hydraulic cylinder in Endolite's knees require amputees to walk at a reasonable speed to properly function. (Blatchford, Tr. 2248-2249; [redacted]

Response to Finding No. 160

This proposed finding is misleading because Mr. Blatchford testifies that "for a more active K2, the Orion3 functionally speaking would work." (Blatchford (Endolite) Tr. 2248-49). Although Mr. Blatchford acknowledges that insurance will oftentimes not provide reimbursement for the Orion 3 MPK to K-2 patients, Mr. Blatchford never states that "Endolite does not recommend any of its knees," including the Orion 3, for K-2 patients.

iv. Nabtesco's Non-MPKs

161. Nabtesco manufactures Symphony non-MPK for K-3 and K-4 patients. (Mattear, Tr. 5568, 5577; RX-0345).

Response to Finding No. 161

This proposed finding is unfounded and contradicted by the evidence that is cited by Respondent. Complaint Counsel does not disagree that Nabtesco manufactures the Symphony knee. However, the cited testimony from Mr. Mattear does not mention K-Levels (Mattear (Proteor Inc.) Tr. 5568, 5577) and the document cited by Respondent classifies the "Symphony knee + DynaStar foot" as "the complete solution for K2-K3 amputees." (RX-0345 at 004). The document does not mention K-4 patients in connection with the Symphony knee.

162. They Symphony knee utilizes six-bar technology, is considered very sophisticated, and took a lot of engineering to develop. (Mattear, Tr. 5573-5574).

Response to Finding No. 162

This proposed finding is confusing, misleading, vague, and unfounded. This proposed finding is confusing because Respondent does not explain what "very sophisticated" means. In the cited testimony, Respondent Counsel does not provide context or clarity for the definition of "sophisticated." (Mattear (Proteor Inc.) Tr. 5573-74). This proposed finding is misleading and unfounded because Mr. Mattear never characterizes the Symphony knee as "very sophisticated." (Mattear (Proteor Inc.) Tr. 5573-5574). Mr. Mattear testifies about one feature of the Symphony knee, stating that the "geometrics of the knee are sophisticated" but does discuss how the geometics of the Symphony knee are important, if at all, for its functionality and makes no comparison of performance or sophistication of the Symphony knee to any other product, MPK or mechanical knee. (Mattear (Proteor Inc.) Tr. 5573-5574). This proposed finding is vague because Respondent and the cited testimony from Mr. Mattear do not explain what "a lot of engineering" means or what processes are involved in "a lot of engineering."

163. The Symphony utilizes p-MRS technology that uses geometrics and proprietary technology to detect different gait phases of the knee and adapt the stability accordingly. (Mattear, Tr. 5574; RX-0897; Mattear, Tr. 5580-5582). It has a hydraulic cylinder and allows for manually-adjusted extension and flexion adjustments. (Mattear, Tr. 5576). It has excellent flexion of 170 degrees offering greater range of motion than other K-3 and K-4 knees on the market. (Mattear, Tr. 5577).

Response to Finding No. 163

Complaint Counsel has no specific response.

b. Fluid-controlled knees with a microprocessor that controls only the switch between swing and stance phase

164. A fluid-controlled knee with a microprocessor-controlled switch ("MP-Switch") uses sensors and a microprocessor to switch the prosthetic knee between stance and swing phase. (Kannenberg, Tr. 1954). The stance and swing phases otherwise offer a predetermined resistance level set by the prosthetist or the patient. (Kannenberg, Tr. 1955).

Response to Finding No. 164

This proposed finding is confusing and misleading insofar as it implies that a knee, such as the Plié, which "uses sensors and a microprocessor to switch the prosthetic knee between stance and swing phase," is not a true swing and stance controlled MPK like the C-Leg 4. The Plié is marketed by Freedom as a swing and stance MPK, Freedom recommends that customers seek reimbursement for the Plié under L-Code 5856, which is for microprocessor swing and stance knees, and the Plié is reimbursed as a swing and stance MPK, under L-Code 5856. (CCFF ¶ 884). In fact, Freedom positioned the Plié 3 as a superior knee to Otto Bock's C-Leg, and Maynard Carkhuff, Chairman of Freedom, testified that the Plié 3 is, in fact, superior. (CCFF ¶ 1016). Freedom publicly stated in a "Fact Sheet" vs the C-Leg 4 that "Both Plié 3 and C-Leg 4 have swing and stance control" and "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 ¶ 1104).

The proposed finding is also misleading to the extent it suggests there is a category of knee recognized in the market as a "microprocessor-controlled switch" and that Plié 3 is categorized as such a knee. Respondent only cites the self-serving testimony of its own executive for the existence of a separate category of prosthetic knee referred to as a "microprocessor-controlled switch" knee. Numerous sources recognize the Plié 3 as simply a swing and stance microprocessor controlled knee in the ordinary course of business—no one refers to it as a "MP-Switch" knee. Respondent itself describes the Plié 3 as a swing and stance MPK (not a MP-Switch knee). (CCFF ¶ 884). Other MPK manufacturers simply identify Plié 3 as an MPK, not a MP-Switch knee. (CCFF ¶¶ 742-766). Clinic customers describe Plié 3 as simply an MPK, not a MP-Switch knee. (CCFF ¶¶ 562-828) . Insurance companies reimburse clinics for fitting a Plié 3 as a swing and stance MPK, not a MP-Switch knee. (CCFF ¶ 884). This proposed finding is also confusing because Respondent does not explain what "fluid-controlled" means (*see* Response to RPFF ¶ 139).

165. There is no L-Code that describes the MP-Switch function. (Schneider, Tr. 4324).

Response to Finding No. 165

Complaint Counsel does not disagree that no L-Code describes Respondent's made-for-litigation term "MP-Switch function." This proposed finding is misleading because Respondent uses the term "MP-Switch function" as a purported categorization of prosthetic knees, when the narrow definition of "MP-Switch" set by Respondents in RPFF ¶ 164 is arbitrary, not recognized by industry leaders and participants, and a blatant attempt by Respondent to artificially create a category that groups together the Plie 3 with mechanical knees. This proposed finding is also misleading insofar as it implies that the Plie 3 is not a true swing and stance MPK that competes with the C-Leg 4. There is no testimony from any prosthetist or manufacturer that uses the term "MP-Switch" or categorizes prosthetic knees using Respondent's narrow definition in RPFF ¶ 164.

(Tr. 143-5894). This proposed finding is misleading to the extent it suggests there is a category of knee recognized in the market as a "microprocessor-controlled switch" and that Plié 3 is categorized as such a knee. Respondent only cites the self-serving testimony from its own executive for this proposed finding, but numerous sources recognize the Plie 3 as a swing and stance microprocessor controlled knee in the ordinary course of business—no one refers to it as a "MP-Switch" knee. Respondent itself describes the Plié 3 as a swing and stance MPK (not a MP-Switch knee). The Plié is marketed by Freedom as a swing and stance MPK, Freedom recommends that customers seek reimbursement for the Plié under L-Code 5856, which is for microprocessor swing and stance knees, and the Plié is reimbursed as a swing and stance MPK, under L-Code 5856. (CCFF ¶ 884). Other MPK manufacturers simply identify Plie 3 as an MPK, not a MP-Switch knee. (CCFF ¶¶ 742-766). Clinic customers describe Plie 3 as simply an MPK, not a MP-Switch knee. (CCFF ¶¶ 562-828). Insurance companies reimburse clinics for fitting a Plié 3 as a swing and stance MPK, not a MP-Switch knee. (CCFF ¶ 884).

166. Ottobock sells a MP-Switch knee the 3E80, in markets outside of the United States. (Kannenberg, Tr. 1954; Solorio, Tr. 1638).

Response to Finding No. 166

This proposed finding is confusing and misleading because Respondent uses the term "MP-Switch function" as a categorization of prosthetic knees, when the narrow definition of "MP-Switch" set by Respondents in RPFF ¶ 164 is arbitrary, not recognized by industry leaders and participants, and a blatant attempt by Respondent to artificially create a category that groups together the Plié 3 with mechanical knees. (*See* Response to RPFF ¶ 165). In the cited testimony, Dr. Kannenberg and Mr. Solorio do not use or define the term "MP-Switch."

167. The only MP-Switch knee sold in the United States is the Freedom Plié. (Kannenberg, Tr. 1954).

Response to Finding No. 167

This proposed finding is confusing and misleading because Respondent uses the term "MP-Switch function" as a categorization of prosthetic knees, when the narrow definition of "MP-Switch" set by Respondents in RPFF ¶ 164 is arbitrary, not recognized by industry leaders and participants, and a blatant attempt by Respondent to artificially create a category that groups together the Plié 3 with mechanical knees. (*See* Response to RPFF ¶ 165). In the cited testimony, Dr. Kannenberg does not use or define the term "MP-Switch." This proposed finding is misleading to the extent it suggests there is a category of knee recognized in the market as a "microprocessor-controlled switch" and that Plié 3 is categorized as such a knee. Respondent only cites self-serving testimony from its own executive for this proposed finding, but numerous sources recognize the Plié 3 as a swing and stance microprocessor controlled knee in the ordinary course of business—no one refers to it as a "MP-Switch" knee. Respondent itself describes the Plié 3 as a swing and stance MPK (not a MP-Switch knee). The Plié is marketed by Freedom as a swing and stance MPK, Freedom recommends that customers seek reimbursement for the Plié under L-Code 5856, which is for microprocessor swing and stance knees, and the Plié is reimbursed as a swing and stance MPK, under L-Code 5856. (CCFF ¶ 884). Other MPK manufacturers simply identify Plié 3 as an MPK, not a MP-Switch knee. (CCFF ¶¶ 742-766). Clinic customers describe Plié 3 as simply an MPK, not a MP-Switch knee. (CCFF ¶¶ 562-828). Insurance companies reimburse clinics for fitting a Plié 3 as a swing and stance MPK, not a MP-Switch knee. (CCFF ¶ 884).

i. Freedom's Plié

168. The microprocessor in the Plié 3 switches the knee from a fixed stance phase resistance and a fixed swing phase resistance, but it cannot vary the resistance throughout the gait cycle. (Carkhuff, Tr. 335; Schneider, Tr. 4310, 4320).

Response to Finding No. 168

This proposed finding is misleading insofar as it implies that the Plié 3 is not a true swing and stance controlled microprocessor knee that competes with the C-Leg 4. The Plié is marketed by Freedom as a swing and stance MPK, Freedom recommends that customers seek reimbursement for the Plié under L-Code 5856, which is for microprocessor swing and stance knees, and the Plié is reimbursed as a swing and stance MPK, under L-Code 5856. (CCFF ¶ 884).

169. A Plié 3 was introduced as a demonstrative exhibit at trial, identified by PXD0001. (Schneider, Tr. 4311).

Response to Finding No. 169

Complaint Counsel does not disagree.

170. The resistance levels in swing and stance are not variable and not modified by a microprocessor; they are pre-set. (Schneider, Tr. 4310).

Response to Finding No. 170

This proposed finding is misleading insofar as it implies that the Plié 3 is not a true swing and stance controlled microprocessor knee that competes with the C-Leg 4. The Plié is marketed by Freedom as a swing and stance MPK, Freedom recommends that customers seek reimbursement for the Plié under L-Code 5856, which is for microprocessor swing and stance knees, and the Plié is reimbursed as a swing and stance MPK, under L-Code 5856. (CCFF ¶ 884).

171. [redacted]

Response to Finding No. 171

[redacted]

[redacted]

172. The stance flexion of the on the Plié 3 is set by use of a four-millimeter Allen wrench, very similar to the way the resistance is set on the Ottobock 3R80. (Schneider, Tr. 4311, Kannenberg, Tr. 1953). The microprocessor in the Plié 3 cannot vary the stance resistance. (Schneider, Tr. 4311).

Response to Finding No. 172

This proposed finding is misleading insofar as it implies that the Plie 3 is not a true swing and stance controlled microprocessor knee that competes with the C-Leg 4. The Plié is marketed by Freedom as a swing and stance MPK, Freedom recommends that customers seek reimbursement for the Plié under L-Code 5856, which is for microprocessor swing and stance knees, and the Plié is reimbursed as a swing and stance MPK, under L-Code 5856. (CCFF ¶ 884).

173. There are two adjustments on the Plié 3 for the swing phase of the knee. (Schneider, Tr. 4313). One of them is the hydraulic unit with is preset with an Allen wrench. (Schneider, Tr. 4313). The other adjustment is made on the pneumatic cylinder, by inserting a pump that comes with the Plié 3, which is similar to a bicycle pump. (Schneider, Tr. 4313). The bicycle pump that comes with the Plié 3 was introduced as a demonstrative at trial at RDX-008. (Schneider, Tr. 4311).

Response to Finding No. 173

This proposed finding is inaccurate, unfounded, and misleading. This proposed finding is inaccurate and unfounded insofar as it labels the demonstrative as a "bicycle pump," when the cited testimony from Respondent never establishes the demonstrative as a "bicycle pump." (Schneider (Otto Bock) Tr. 4311, 4313). This proposed finding is also misleading insofar as it implies that the Plie 3 is not a true swing and stance controlled microprocessor knee that competes with the C-Leg 4. The Plié is marketed by Freedom as a swing and stance MPK, Freedom recommends that customers seek reimbursement for the Plié under L-Code 5856, which is for

microprocessor swing and stance knees, and the Plié is reimbursed as a swing and stance MPK, under L-Code 5856. (CCFF ¶ 884).

c. Fluid-controlled knees with a microprocessor that controls and moderates the resistance in the swing phase only

174. A fluid-controlled knee with a microprocessor-controlled swing phase only ("MP-Swing") uses sensors and a microprocessor to switch the prosthetic knee between stance and swing phase and to provide variable resistance control in the swing phase of the knee. (Kannenberg, Tr. 1955).

Response to Finding No. 174

This proposed finding is confusing and incomplete because Respondent does not explain what "fluid controlled" means (*see* Response to RPFF ¶ 139). In the cited testimony by Respondent, Dr. Kannenberg does not use the term "fluid-controlled knee." (Kannenberg (Otto Bock) Tr. 1955).

175. The resistance in the swing phase of the knee is set to a predetermined level by the prosthetist. (Kannenberg, Tr. 1955).

Response to Finding No. 175

Complaint Counsel has no specific response.

176. The SmartIP sold by Endolite in the United States is an example of a MP-Swing knee. (Blatchford, Tr. 2142). The SmartIP was developed in the late 1980's-early 1990's with microprocessor-controlled swing technology licensed from Nabtesco. (Blatchford, Tr. 2141-2142).

Response to Finding No. 176

Complaint Counsel has no specific response.

177. The SmartIP uses a microprocessor to control the resistance in the swing phase but not the stance phase. (Blatchford, Tr. 2142). "It means that an amputee would – that the swing side of his gait would be controlled very nicely by the knee, but the stance side is not microprocessor-controlled, so you don't get the benefit of improved stumble control, reduced falls, and so on. (Blatchford, Tr. 2143). MP-swing only knees are typically fit on patients that are very physically active. (Kannenberg, Tr. 1956).

Response to Finding No. 177

Complaint Counsel has no specific response.

178. Nabtesco manufactures the Hybrid, an MP-Swing-Only and hydraulic stance control knee for K-3 and K-4 patients. (Mattear, Tr. 5568; 5594-5597; RX-0345 at 003).

Response to Finding No. 178

Complaint Counsel has no specific response.

179. The Hybrid knee offers a unique battery that can last for a year without requiring recharge, which is one reason users chose the Hybrid knee. (Mattear, Tr. 5596-5597).

Response to Finding No. 179

Complaint Counsel has no specific response.

180. The Endolite SmartIP and Hybrid knee are reimbursed with code L5857 for swing-only microprocessor control, not L5856 for swing and stance microprocessor control. (Schneider, Tr. 4351; Mattear, Tr. 5595).

Response to Finding No. 180

This proposed finding is unfounded because the cited testimony does not mention reimbursement or L-Code 5857 for the Hybrid knee. (Schneider (Otto Bock) Tr. 4351; Mattear (Proteor Inc.) Tr. 5595).

d. Fluid-controlled knees with a microprocessor that controls and moderates the resistance in the stance phase only

181. The Compact and Kenevo sold by Ottobock in the United States are examples of MP-Stance knees. (Schneider, Tr. 4324). Ottobock's Kenevo and Compact use a microprocessor to control the stance phase of the knee, but the swing phase is set manually. (Schneider, Tr. 4324; [redacted]

Response to Finding No. 181

Complaint Counsel has no specific response.

182. The Kenevo was launched in 2015. (Schneider, Tr. 4344; Solorio, Tr. 1634). Its design targets K-1 and K-2 users, but Medicare and most private payers do not reimburse the MPKs for K-1 and K-2 patients. (Schneider, Tr. 4344-4345; Solorio, Tr. 1634).

Response to Finding No. 182

Complaint Counsel does not disagree that the Kenevo was launched in 2015. Complaint Counsel has no specific response to the proposed finding that the Keveno targets K-1 and K-2 users, but Medicare and most private payers do not reimburse the MPKs for K-1 and K-2 patients.

183. The Kenevo was designed for a patient who does not vary their cadence and take small shuffly steps. (Solorio, Tr. 1634). The Kenevo can recognize if a patient is walking with a cane or walker, and can adjust accordingly. (Solorio, Tr. 1634). The Kenevo has special functions to help with essential movements like sitting and standing and can be programmed for a different range of stance stability based on what a particular low-mobility patient needs. (Solorio, Tr. 1634).

Response to Finding No. 183

Complaint Counsel has no specific response.

184. Ottobock does not consider the pricing of any other knees when setting the price of the Kenevo. (Schneider, Tr. 4346).

Response to Finding No. 184

Complaint Counsel has no specific response.

185. The functionality of the Kenevo is "far superior" to the Plié (Schneider, Tr. 4346).

Response to Finding No. 185

This proposed finding is unfounded, misleading, and contrary to the evidence that the Plié 3 is the closest competitor to the C-Leg 4. Respondent only cites to the self-serving testimony of its own executive for this proposed finding, but various clinic customers have testified that they like the Plié 3 for their patients. (CCFF ¶ 1023). Maynard Carkhuff, Chairman of Freedom, testified that the Plié 3 has performance that clinicians love, has great performance in terms of stumble recovery, enables patients to walk more effectively, and prevents patient falls. (CCFF ¶ 1015).

186. The Compact was released in 2004. (Schneider, Tr. 4348). The Compact was designed for high K-2 to low K-3 patients and is marketed as a "light C-Leg." (Schneider, Tr. 4349, Solorio, Tr. 1634).

Response to Finding No. 186

Complaint Counsel has no specific response.

187. The Compact is the predicate device for L5858. (Schneider, Tr. 4350). The Compact cannot be billed under L5856. (Kannenberg, Tr. 1999).

Response to Finding No. 187

Complaint Counsel has no specific response.

188. MP-Stance knees, such as the Kenevo and Compact, are reimbursed under the base L-Code L5858 for stance-only microprocessor control, not L5856 for swing and stance microprocessor control. (Schneider, Tr. 4350).

Response to Finding No. 188

Complaint Counsel has no specific response.

e. Fluid-controlled knees with a microprocessor that controls and moderates the resistance in both the swing and stance phases

189. The applicable base L-Code for a fluid-controlled knee with a microprocessor-controlled swing and stance phase control ("MP-Swing-and-Stance") knee is L5856, which covers "Addition to lower extremity prosthesis, endoskeletal knee-shin system, microprocessor control feature, swing and stance phase, includes electronic sensor(s), any type." (JX01, ¶ 24; Schneider, Tr. 4350).

Response to Finding No. 189

This proposed finding is confusing and incomplete because Respondent does not explain what "fluid-controlled" means (*see* Response to RPFF ¶ 139). Complaint Counsel does not disagree that L-Code 5856 covers "Addition to lower extremity prosthesis, endoskeletal knee-shin system, microprocessor control feature, swing and stance phase, includes electronic sensor(s), any type."

190. Examples of MP-Swing-and-Stance knees sold in the United States include Ottobock's C-Leg, Össur's Rheo, Endolite's Orion, Nabtesco's Allux, and DAW's Stealth Knee. (Kannenberg, Tr. 1961-1962; Schneider, Tr. 4322, 4367; [redacted]

Response to Finding No. 190

This proposed finding is misleading, unfounded, and contrary to the evidence insofar as it implies that the Plié 3 is not a true swing and stance controlled microprocessor knee that competes with the C-Leg 4. The Plié is marketed by Freedom as a swing and stance MPK, Freedom recommends that customers seek reimbursement for the Plié under L-Code 5856, which is for microprocessor swing and stance knees, and the Plié is reimbursed as a swing and stance MPK, under L-Code 5856. (CCFF ¶ 884).

Additionally, this proposed finding is misleading, unfounded, and contrary to the evidence because it implies that the Allux and Stealth Knee are close substitutes for the C-Leg 4. [redacted]

i. Ottobock's MP-Swing-and-Stance Knees

191. The C-Leg is the predicate device for L-Code L5856, and that code did not exist when Ottobock developed the C-Leg. (Schneider, Tr. 4294, 4299-4300).

Response to Finding No. 191

Complaint Counsel has no specific response.

192. Ottobock released the C-Leg 4 in 2015. (Schneider, Tr. 4342). Ottobock's C-Leg 4 meets the definition of MPK as defined by Complaint Counsel in the Complaint. (Schneider, Tr. 4309-4310). It monitors the entire gait cycle and adjusts the valves for resistance in order to provide real-time adjustability in all phases of the gait, swing and stance. (Schneider, Tr. 4310, 4342-4343).

Response to Finding No. 192

Complaint Counsel has no specific response.

193. The C-Leg's microprocessor controls and modifies the C-Leg's resistance in the swing and stance phases of the knee through sensors in the knee and with C-Soft software for the C-Leg. (Schneider, Tr. 4319-4320). The microprocessor in the C-Leg gives variable controls within the parameters set by C-Soft, and it takes into consideration all of the information that's coming from the sensors in real time. (Schneider, Tr. 4320). It is continually adjusting the variability of resistance in both stance and in swing phase. (Schneider, Tr. 4320).

Response to Finding No. 193

Complaint Counsel has no specific response.

194. The C-Leg's microprocessor is able to process rule sets that take environmental conditions and put the leg in the right place to enable people to ambulate in a more safe manner. (Schneider, Tr. 4321-4322).

Response to Finding No. 194

Complaint Counsel has no specific response.

195. The C-Leg's microprocessor can adjust the resistances in the hydraulic unit from step to step and also within once step, if necessary. (Kannenberg, Tr. 1846-47; 1963). It is continually adjusting the variability of resistance in both stance and in swing phase. (Schneider, Tr. 4320). The C-Leg 4 does not have screws or bezels to adjust resistance manually; instead the prosthetist adjusts settings via software. (Kannenberg, Tr. 1963)

Response to Finding No. 195

Complaint Counsel has no specific response.

196. The C-Leg 4 is designed for a user that varies their cadence, navigates different terrains, and navigates stairs and ramps. (Solorio, Tr. 1634-35). It allows a patient to walk backwards, and has a feature called intuitive stance that provides relief for the rest of a patient's body if they have to stand for long periods of time. (Solorio, Tr. 1635). The C-Leg 4 has programmable additional modes that allow for particular activities, such as pushups. (Solorio, Tr. 1635).

Response to Finding No. 196

Complaint Counsel has no specific response.

197. The C-Leg 4 has an IP-67 rating which means that it can be submerged up to a meter for 30 minutes. (Solorio, Tr. 1641). Prosthetic knees with an IP-67 rating are not designed to be repeatedly submerged or be in corrosive environments like chlorinated water or salt water. (Solorio, Tr. 1641).

Response to Finding No. 197

Complaint Counsel has no specific response.

ii. Össur's MP-Swing-and-Stance Knees

198. Össur recommends its Rheo for all K-3 patients and some K-4 patients. (De Roy, Tr. 3579-3580).

Response to Finding No. 198

Complaint Counsel has no specific response.

199. Össur's Rheo uses MR technology. (De Roy, Tr. 3577; Schneider, Tr. 4398-4399). Magnetic particles in an oil are kept in a cylinder between blades. The knee creates a magnetic field that aligns the magnetic particles within that fluid between the blades building bridges and providing variable resistance to the swing and stance phases of the knee. (De Roy, Tr. 3577).

Response to Finding No. 199

Complaint Counsel has no specific response.

200. MR technology in the Rheo offers variable resistance control in both the swing and stance phases of the knee. (De Roy, Tr. 3639). Users of the Rheo do not need to use Allen wrenches and/or air pumps to control the swing and stance phase resistance of thee knees. (De Roy, Tr. 3639).

Response to Finding No. 200

Complaint Counsel has no specific response.

201. Össur's Rheo is technologically sophisticated and uses a microprocessor and sensors to adjust magnetorheological fluid to control the way the knee swings and locks during stance phase. (Blatchford, Tr. 2148-2149).

Response to Finding No. 201

This proposed finding is confusing and unfounded because Respondent does not explain what "technologically sophisticated" means or what attributes make a prosthetic knee "technologically sophisticated." In the cited testimony, Mr. Blatchford never uses the term "technologically sophisticated" or explains what the term means. (Blatchford (Endolite) Tr. 2148-2149).

202. The Rheo knee transitions between functions and all different modes automatically through the intelligence of the knee, *i.e.*, there is no need to switch the modes manually. (De Roy, Tr. 3579).

Response to Finding No. 202

Complaint Counsel has no specific response.

203. The Rheo Knee is weatherproof. (De Roy, Tr. 3581). It cannot be submerged in water but can be exposed to rain or water from a hose or pouring a cup of coffee on it. (De Roy, Tr. 3582).

Response to Finding No. 203

Complaint Counsel has no specific response.

iii. Endolite's MP-Swing-and-Stance Knees

204. The original Orion knee was launched in 2010, and the Orion 2 was launched in 2014. (Blatchford, Tr. 2109-2110). Endolite launched the Orion 3 in the United States in September 2016. (Blatchford, Tr. 2109). The Orion 3 is a new model of MPK, not just an upgrade of the Orion 2. (Blatchford, Tr. 2110).

Response to Finding No. 204

Complaint Counsel has no specific response.

205. Orion 3 is an MPK that offers MPK control of both the swing and stance phases of the gait cycle. (PX03176-09; Blatchford, Tr. 2215-2216). Orion 3 is able to make adjustments to the friction level of the knee while the knee is either in swing or stance phase. (PX03176-09; Blatchford, Tr. 2215-2216). The microprocessor in the Orion 3 is directing and controlling those adjustments to the swing and stance phase of the knee. (PX03176-09; Blatchford, Tr. 2215-2216). The friction levels in the swing and stance phases, respectively, of the knee are not set manually; they are variable based on sensors in the microprocessor. (PX03176-09; Blatchford, Tr. 2215-2216).

Response to Finding No. 205

Complaint Counsel has no specific response.

206. Orion 3 uses a hybrid cylinder that has two chambers. (Blatchford, Tr. 2134). The pneumatic chamber controls the resistance level in the swing phase of the knee whereas the hydraulic chamber controls the resistance level in the stance phase of the knee. (Blatchford, Tr. 2134-2135). The hydraulic cylinder is the part that would lock under load to make it safe, and the pneumatic cylinder is the part that varies the resistances as it swings to make it react to the user as he or she walks. (Blatchford, Tr. 2108-2109). The pneumatic chamber does not need to be refilled like Freedom's Plié with the use of an air pump. (Blatchford, Tr. 2135).

Response to Finding No. 206

Complaint Counsel has no specific response.

207. The Orion 3 uses several sensors that determine when to change the resistance levels in the hydraulic and pneumatic chambers depending on how fast the amputee is walking and can lock the knee when the patient is stationary. (Blatchford, Tr. 2111). The Orion 3 is also able to detect if a user is walking down a ramp or up a ramp and whether the user is going upstairs or downstairs and can adjust the resistances in the knee accordingly. (Blatchford, Tr. 2111).

Response to Finding No. 207

Complaint Counsel has no specific response.

208. The sensors in the Orion 3 are able to analyze changes "virtually instantaneously" at about one fiftieth of a second. (Blatchford, Tr. 2112). What is important to the performance of the knee is not so much how fast the processor is but how fast the mechanism can react to it. (Blatchford, Tr. 2112). "Analyzing the sensor information is a lot quicker than the mechanism reacting to it once you tell the mechanism to do something." (Blatchford, Tr. 2112).

Response to Finding No. 208

This proposed finding is misleading because it takes the testimony of a single witness and concludes that "what is important to the performance of the knee is not so much how fast the processor is but how fast the mechanism can react to it." (Blatchford (Endolite) Tr. 2112).

iv. Nabtesco's MP-Swing-and-Stance Knee

209. The Allux is the only four-bar, MP-Swing-and-Stance Knee on the market in the United States. (Mattear, Tr. 5601; Schneider, Tr. 4352). The final version of the Allux was launched on June 1, 2017. (RX-0346; Mattear, Tr. 5598-5599; 5775). On June 1, 2017, Nabtesco launched the full-release model of the Allux in the United States; before June 1, 2017 Allux was just a beta model. (Mattear, Tr. 5598-5599; 5775-5776).

Response to Finding No. 209

Complaint Counsel has no specific response.

210. Allux's four-bar technology utilizes propriety Nabtesco technology, including a dual safety system. (Mattear, Tr. 5602). The Allux offers multiaxial, polycentric design. (De Roy, Tr. 3595).

Response to Finding No. 210

Complaint Counsel has no specific response.

211. According to Freedom's Chairman, "Nabtesco positions [Allux] as the ultimate safety knee as it uses a very safe mechanical geometry and MPC controlled hydraulic swing and stance control." (RX-0268; Carkhuff, Tr. 127). The four-bar technology offers the user greater toe clearance and lowers the tendency that the user will stumble or fall. (Mattear, Tr. 5602-5603; Ferris, Tr. 2357).

Response to Finding No. 211

Complaint Counsel has no specific response.

212. The Allux's battery length is four days, which is longer than its primary competitors. (Mattear, Tr. 5603). [redacted] The Allux has an internal battery that only takes 3 hours to charge, and it also offers a backup battery for emergencies. (Mattear, Tr. 5621-5622).

Response to Finding No. 212

Complaint Counsel has no specific response other than to note that the term "primary competitors" is undefined and unclear.

213. The Allux also comes with a remote control that allows the user to toggle between different preset modes. (Mattear, Tr. 5604-5605).

Response to Finding No. 213

Complaint Counsel has no specific response.

214. Nabtesco recommends and markets the Allux for K-3 and K-4 users. (Mattear, Tr. 5607-5608; [redacted]

Response to Finding No. 214

Complaint Counsel has no specific response.

v. DAW's MP-Swing-and-Stance Knee

215. [redacted]

Response to Finding No. 215

[redacted]

216. [redacted]

Response to Finding No. 216

[redacted]

vi. High-End MP-Swing-and-Stance knees

217. The most technologically and functionally advanced MP-Swing-and-Stance knees are considered to be very high-end MPKs ("High-End MPKs"). (Senn, Tr. 200-202). They are characterized by enhanced technological features and functionality, such as being IP68

rated for dustproofness and waterpoofness, walk to run, and advanced rule sets. (Schneider, Tr. 4297-4298; [redacted] Solorio, Tr. 1635; Oros, Tr. 4794).

Response to Finding No. 217

Complaint Counsel has no specific response.

218. The Genium and X3 are "High-end" MPKs sold by Ottobock. (Solorio, Tr. 1635-36).

Response to Finding No. 218

Complaint Counsel has no specific response.

219. The Genium has a different rule set than the C-Leg and is designed for a higher activity K-3 patient into the K-4 level. (Solorio, Tr. 1635). The Genium has a feature called optimized physiological gait which is a different rule set for controlling swing and stance and allows for the most natural walking experience. (Solorio, Tr. 1635). The Genium has a walk-to-run feature. (Solorio, Tr. 1635-36).

Response to Finding No. 219

This proposed finding is unclear because Respondent does not explain what "different rule set" means. In the cited testimony, Ms. Solorio does not provide a definition for "different rule set" or explain what is the base "rule set" for the Genium and C-Leg. (Solorio (Otto Bock) Tr. 1635-36).

220. The X3 has all of the features of the Genium, but it is fully corrosion and water resistant, and has a dedicated running mode. (Solorio, Tr. 1636). The X3 has an IP-68 rating. (Solorio, Tr. 1642)

Response to Finding No. 220

Complaint Counsel has no specific response.

221. High-End MPKs are also significantly more costly than other MP-Swing-and-Stance knees. High-End MPKs are typically two to three times the cost of other MP-Swing-and-Stance knees. (Senn, Tr. 200-202).

Response to Finding No. 221

This proposed finding is unclear because Respondent does not explain what "more costly" means or what "two to three times the cost" refers (i.e., it is unclear whether Respondent is referring to manufacturers' sales price to clinics or the reimbursement amount provided by

insurance providers to clinics). It is also unclear because Respondent does not define "other MP-Swing-and-Stance knees." Complaint Counsel agrees that so-called high-end MPKs such as Otto Bock's Genium and X3 and Össur's Rheo XC are significantly more expensive in terms of average sales price to clinics than Otto Bock's C-Leg 4, Freedom's Plie 3, Össur's Rheo, and Endolite's Orion MPKs.

222. Össur characterizes its Rheo XC as a "step up" from the Rheo. (De Roy, Tr. 3532). The Rheo XC offers greater functionality than the Rheo. Rheo XC offers additional features like walk to run, greater efficiency on stairs. (De Roy, Tr. 3578-3579). The features are automatic, i.e., no switch is involved. (De Roy, Tr. 3579). Rheo XC also offers ability to ride a bike. (De Roy, Tr. 3579).

Response to Finding No. 222

Complaint Counsel has no specific response.

223. Össur targets first-time users with the Rheo XC. (De Roy, Tr. 3583). Medicare and most private payers do not provide additional reimbursement for the Rheo XC relative to the Rheo. (De Roy, Tr. 3583-3584). WC and VA provide additional reimbursement for the Rheo XC relative to the Rheo. (De Roy, Tr. 3583-3584).

Response to Finding No. 223

This proposed finding is unclear because Respondent does not explain what it means by "first-time users." Respondent's use of the acronyms "WC" and "VA" is also confusing and ambiguous. To provide additional clarity for the Court, Complaint Counsel notes that evidence in the record shows that, while Medicare does not reimburse clinics for the fitting of a Rheo XC, the Department of Veterans Affairs, some private payers, and worker's compensation plans do reimburse clinics for the fitting of a Rheo XC. (CCFF ¶ 900).

224. The Genium and X3 are the Rheo XC's main competitors. (De Roy, Tr. 3584). The Rheo XC is $9,000 to $10,000 more expensive than the Rheo. (De Roy, Tr. 3584).

Response to Finding No. 224

This proposed finding, as stated, is unclear because Respondent does not explain what "$9,000 to $10,000 more expensive" means, including whether those amounts refer to differences

in the list prices, average sales prices to clinics, or reimbursement amounts provided by insurance providers to clinics. Based on Mr. DeRoy's testimony cited by Respondent, the $9,000 to $10,000 difference between the Rheo XC and the Rheo refers to only the list prices of those products. To provide additional clarity to the Court, evidence in the record shows that [redacted]

225. [redacted]

Response to Finding No. 225

Complaint Counsel has no specific response.

226. Ottobock does not consider the prices of any other products when setting the price of the X3, because "it's in a league of its own." (Schneider, Tr. 4339).

Response to Finding No. 226

Complaint Counsel has no specific response, but notes that the only support provided for this purported fact that Otto Bock does not look at the prices of any other products when setting the price of the X3 is the self-serving testimony of one of its executives.

227. According to Ottobock, the only product that competes with the Genium is the X3, and Ottobock does not consider the prices of other knees when setting the price of the Genium. (Schneider, Tr. 4341-4342).

Response to Finding No. 227

Complaint Counsel has no specific response, but notes that the only support provided for this purported fact that Otto Bock does not look at the prices of any other products when setting the price of the Genium is the self-serving testimony of one of its executives.

228. High-End MPKs are not reimbursed by Medicare and are typically not reimbursed by private insurers for their enhanced technological features. (Senn, Tr. 201-204; [redacted] DOD, VA, and WC have historically been more likely to reimburse High-

End MPKs for their enhanced technological features. (Senn, Tr. 201-204; [redacted]

Response to Finding No. 228

Complaint Counsel has no specific response.

vii. Powered MPKs

229. The Power Knee is a powered microprocessor-controlled device. (De Roy, Tr. 3576). It is motorized and lifts a user's knee for them. (De Roy, Tr. 3584-3585). Both MPKs and non-MPKs have swing and stance control that is triggered by the position of the knee, whereas, the Power Knee can actually generate the swing phase automatically, which decreases the energy expenditure required by the patient. (De Roy, Tr. 3585).

Response to Finding No. 229

This proposed finding is confusing, misleading and unsupported because the phrase "[b]oth MPKs and non-MPKs have swing and stance control that is triggered by the position of the knee" is vague and contrary to the evidence that non-MPKs do not have "swing and stance control" that is found in MPKs such as the Plie 3 and C-Leg 4. In the cited testimony, Mr. De Roy does not mention "swing and stance control" for any knee other than the Power Knee. (De Roy, Tr. 3584-85). Glenn Choi, President of mechanical knee manufacturer ST&G, testified that the benefits of having an MPK are that it "[p]rovides stability, safety, and better resistance and adjustments for the patient during gait cycle." (CCFF ¶ 700). Unlike a constant friction mechanical knee, "a microprocessor knee changes in real time constantly throughout the entire gait cycle, both swing and stance, providing variable resistance and stability based on various input or load being applied to the knee during different phase of the gait cycle." (CCFF ¶ 700).

230. Össur recommends the Power Knee for K-3 patients (De Roy, Tr. 3585). The Power Knee has received PDAC verification from Medicare, so there have been instances where Medicare has reimbursed the Power Knee. (De Roy, Tr. 3585). Private insurers reimburse for the Power Knee on a case-by-case basis. (De Roy, Tr. 3585). The DOD and VA have provided reimbursement for the Power Knee. (De Roy, Tr. 3586).

Response to Finding No. 230

This proposed finding is misleading and unsupported insofar as it implies that PDAC verification is necessary for Medicare to provide reimbursement for a prosthetic knee. The evidence shows that PDAC verification of prosthetic devices is not required, and with respect to MPKs, only Otto Bock's C-Leg and Compact and Össur's Rheo and Power Knee have received PDAC verification. (CCFF ¶ 3019). [redacted] **(*See* CCFF ¶ 3035).**

231. No other prosthetic knee competes with the Power Knee. (De Roy, Tr. 3586). According to Össur's former head of prosthetics in the United States, "[t]here's no real comparable technology on the market today [to the Power Knee]." (De Roy, Tr. 3586).

Response to Finding No. 231

Complaint Counsel has no specific response.

232. [redacted]

Response to Finding No. 232

Complaint Counsel has no specific response.

233. The Össur Power Knee is leading prosthetic knee innovation, because it is the only powered knee on the market in the United States. (Doug Smith, Tr. 5995).

Response to Finding No. 233

This proposed finding is misleading, unclear, and unsupported. This proposed finding is unclear and confusing because Respondent does not explain what "leading prosthetic knee innovation" means, and the cited testimony from Mr. Smith does not mention the phrase "leading prosthetic knee innovation" or explain what innovations have been introduced. (Smith (retired) Tr. 5995-96). This proposed finding is misleading and unsupported because when Respondent asks Mr. Smith which manufacturers "have driven that innovation that you've spoken about," Mr. Smith first mentions Otto Bock, not Össur. (Smith (retired) Tr. 5995-96). This proposed finding

is further confusing, misleading, and unsupported insofar as it implies that *because* the Power Knee is the only powered knee on the market in the United States, *therefore* the Power Knee is leading prosthetic knee innovation. The cited testimony does not establish this causal relationship or that the Power Knee is leading innovation. (Smith (retired) Tr. 5995-96).

234. Endolite's Chairman does not believe that Endolite sells any product that competes with the Power Knee because it is unique in that it is the only knee to provide power during the swing phase to assist the amputee. (Blatchford, Tr. 2151-2152).

Response to Finding No. 234

Complaint Counsel has no specific response.

f. Integrated microprocessor-controlled leg systems

235. A fluid-controlled knee and foot integrated together and controlled by microprocessors ("Integrated Leg System") combine a MP-Swing-and-Stance knee with a microprocessor-controlled ankle. (Blatchford, Tr. 2110). The sensors and microprocessor in the knee is able to communicate with the sensors and microprocessor in the ankle. Endolite's Linx and Össur's Symbionic are Integrated Leg Systems. (Blatchford, Tr. 2110; [redacted]

Response to Finding No. 235

This proposed finding is unclear because Respondent does not explain what "fluid-controlled" means. (*See* Response to RPFF ¶ 139). The cited testimony does not mention "fluid-controlled" or give context to the meaning of "fluid-controlled." (Blatchford (Endolite) Tr. 2110; [redacted]

236. The Linx has better situational awareness than the Orion 3 because it has a control system that integrates data from the microprocessor control in the foot as well. (Blatchford, Tr. 2138). The Linx won the Gold Medal Award in Rehab and Assistive Technology Products at the 2017 Medical Design Excellence Awards. (RX-01069).

Response to Finding No. 236

This proposed finding is unclear because it does not define or explain the term "situational awareness." Otherwise, Complaint Counsel has no specific response.

237. [redacted]

Response to Finding No. 237

Complaint Counsel has no specific response.

238. Össur also sells the Symbionic Leg. (De Roy, Tr. 3576). It is a combination of the Rheo and a Proprio ankle. (De Roy, Tr. 3576).

Response to Finding No. 238

Complaint Counsel has no specific response.

239. [redacted]

Response to Finding No. 239

Complaint Counsel has no specific response.

B. Reimbursement

1. Reimbursement For Prosthetic Knees In The United States Is Dictated By Patient's K-Level Classification

a. Reimbursement generally

240. CMS coverage determinations are based on K-Level classification. (Schneider, Tr. 4287); (Ell, Tr. 1684).

Response to Finding No. 240

The proposed finding is unclear, incomplete, misleading, unfounded, and contradicted by a large body of evidence to the extent Respondent attempts to imply that CMS (*i.e.*, Medicare) determines whether to provide insurance coverage for an MPK based solely on "K-Level classification." The proposed finding is unclear because Respondent does not define what it means by the term "CMS coverage determinations." The testimony cited by Respondent from Mr. Schneider, an Otto Bock executive, states only that, "CMS had created the K level situation to try to create a segmentation by activity," and then includes a partial discussion of how CMS defines

some, but not all, of the K-levels. (Schneider (Otto Bock) Tr. 4287). In the testimony cited by Respondent from Mr. Ell, the owner and Chief Prosthetist at Mid-Missouri Orthotics and Prosthetics, he describes how patients' K-Level designations "make them a *candidate* for a particular prosthetic component" through CMS, but he in no way supports an assertion that CMS makes final determinations for which prosthetic knee a specific patient should receive coverage based solely on that patient's K-level. (Ell (Mid-Missouri) Tr. 1684). In fact, elsewhere in his trial testimony, Mr. Ell testified that, a mechanical knee is "not a substitution" for an MPK because "[i]t does not provide the same level of stability and inherent security or efficiency in gait pattern or decrease in energy expenditure" as an MPK. (Ell (Mid-Missouri) Tr. 1722). Mr. Ell also testified that more K-3 patients are fit with MPKs, as opposed to mechanical knees, at his clinic "[b]ecause my physicians that I work with generally deem [mechanical knees] less appropriate than microprocessor-controlled knees." (Ell (Mid-Misourri) Tr. 1725).

A large body of evidence shows that U.S. insurers, including Medicare, 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, (*See* CCFF ¶¶ 496-514), and that this medical necessity determination is based on more than just a patient's K-level, (*See* 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. (*See* CCFF ¶¶ 515-19). This evidence includes physicians' notes, narrative justifications of medical necessity from the prosthetist, and/or completed PAVET forms (or the like). (*See* 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. (*See* CCFF ¶¶ 520-22). As a result, the U.S. healthcare system sorts K3/K4 amputees into two buckets: those with an MPK prescription and insurance coverage for an MPK, and those who do not. (*See* CCFF ¶¶ 530-61).

CMS considers a patient's K-Level as only one of several factors when deciding whether to reimburse a prosthetic device for a particular patient. (*See, e.g.*, CCFF ¶¶ 312-18, 445-46). Dr. Kannenberg, Otto Bock's Executive Medical Director, testified that, in justifying medical necessity, *the focus should be on what functionality the microprocessor knee would provide that is not provided by a mechanical knee*. (CCFF ¶ 499). This is equally true under both Medicare and private insurance coverage requirements. (CCFF ¶ 499). In addition, Dr. Kannenberg contributed to Otto Bock's Microprocessor Knees Physician's Documentation Guide for Medicare, dated May 2017. (CCFF ¶ 506). This documentation guide states that, "[m]edical necessity for a microprocessor knee is based on the beneficiary's 'potential' functional ability. Potential functional ability is based on the reasonable expectation of the ordering physician and prosthetist, considering factors including, but not limited to:" "[t]he beneficiary's past history," "[t]he beneficiary's current condition[,]" and "[t]he beneficiary's desire to ambulate." (CCFF ¶ 506).

241. Mark Ford testified that the prosthetics market is an insurance-dictated market, and the most important person in the equation is the insurance company. (Ford Tr. 920).

Response to Finding No. 241

The proposed finding is unclear, incomplete, and contradicted by the weight of the evidence to the extent that it implies that insurance companies are the only (or most) important entity in determining how patients are prescribed and fit with MPKs, instead of mechanical knees, and how clinics are reimbursed for MPKs. The finding is unclear because Respondent does not define or explain the terms "insurance-dictated market" or "equation" and those terms are not used

in the trial testimony cited by Respondent. Further, the finding is unclear because Respondent does not explain what it means by the "prosthetics market" or how, if at all, it might be significant if such a "market" were an "insurance-dictated market." In the portion of his trial testimony that Respondent cites, Mr. Ford, the President and Managing Partner of Prosthetic and Orthotic Associates, answered the Court's question "who makes the final decision" as to what knee a patient receives by stating that it was the "person with the checkbook, the insurance company." (Ford (POA) Tr. 920). It is unclear how that testimony supports Respondent's proposed finding that, therefore, insurance companies are the "most important person in the equation" or "that the prosthetics market is an insurance-dictated market."

A large body of evidence shows that several different players in the U.S. healthcare system collectively determine whether it is medically appropriate to prescribe and reimburse the fitting of an MPK on a particular amputee. (*See* CCFF ¶¶ 400-29). The interplay among surgeons, prosthetists, patients, and insurers determines whether a given patient receives an MPK or a mechanical knee—with decisions driven primarily by the medical ethics of healthcare professionals, preferences of patients for the feel of different prosthetic knees, and reimbursement regulations established by insurers. (*See* CCFF ¶¶ 392-561). The evidence shows that this decision is based on what healthcare professionals determine is medically best for the patient and justifiable to the patient's insurer. (*See* CCFF ¶¶ 392-523). The process by which healthcare professionals and insurers, respectively, prescribe and cover MPKs determines which specific K3/K4 amputees receive MPKs, and ultimately it is a process that is largely unaffected by the Merger. In the United States, there are two steps to determine the eligibility of a K3/K4 amputee for an MPK. First, a patient's healthcare professionals (*i.e.*, his or her surgeon and/or prosthetist) determine whether an MPK (rather than a mechanical knee) is the best medical option for the patient. (*See* CCFF ¶¶

392-93, 430-87). Second, the patient's insurance provider determines whether to reimburse a prosthetic clinic for fitting the patient with an MPK (rather than approving only a mechanical knee). (*See* CCFF ¶¶ 394-99, 488-523). If both a patient's medical team and insurer determine an MPK is appropriate, and the patient is comfortable wearing one, the patient will be prescribed an MPK, the prosthetist at his or her clinic will fit the patient with one, and the patient's insurer will reimburse the clinic for the cost of fitting the patient's entire lower-limb prosthesis. (*See* CCFF ¶¶ 392-561).

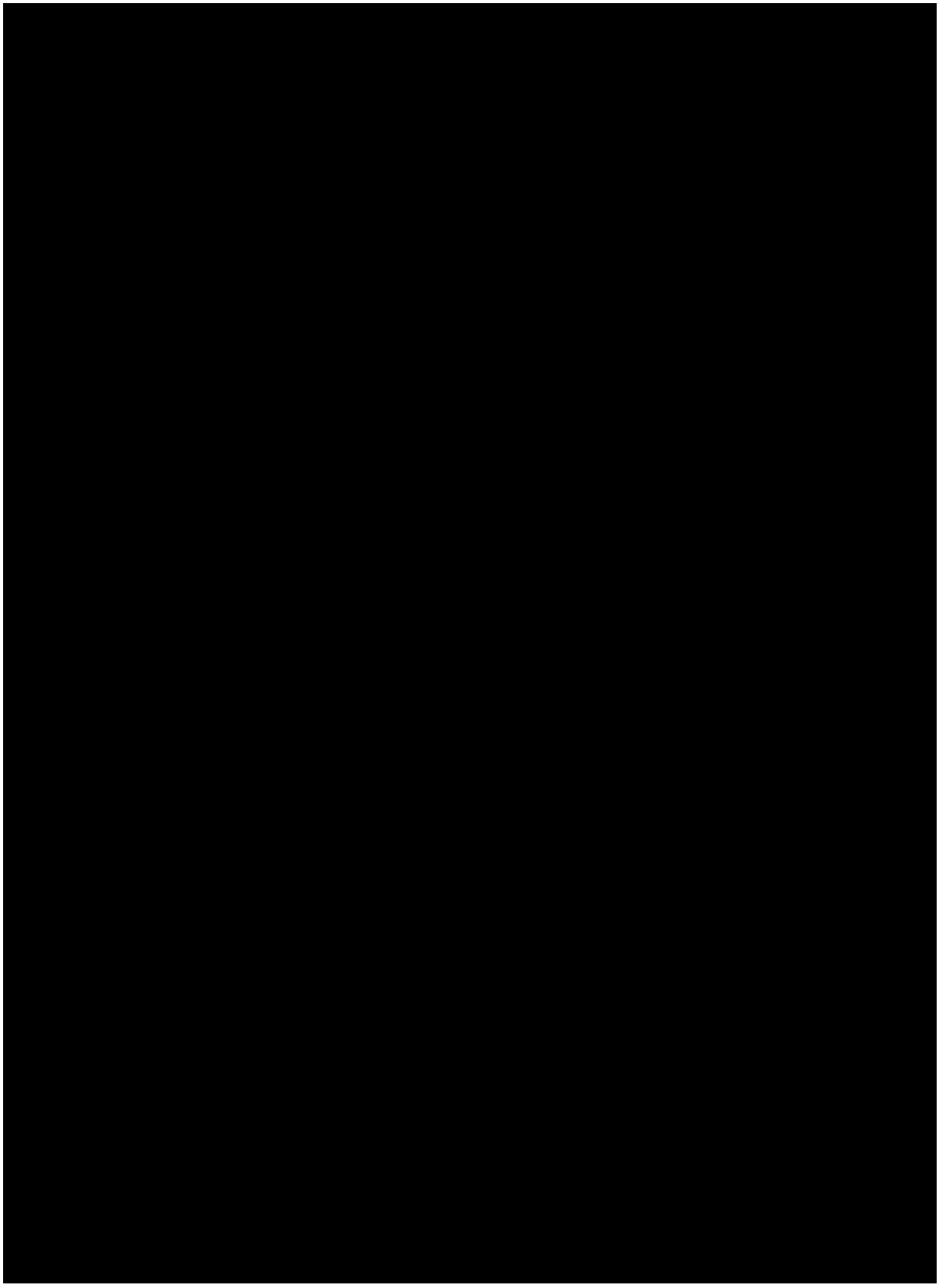
Complaint Counsel agrees that insurance companies play an important role in determining which patients ultimately receive an MPK, but the record is not clear that insurance companies are more important than other industry participants such as prosthetists. They are all important.

242. Prosthetic manufacturers classify and market their products by the K-Level patients they are appropriate, and reimbursable, for. [redacted]

Response to Finding No. 242

[redacted]

[redacted]



[redacted]

243. The reimbursement system, and the K-Level classification system, affects what products are available to patients; for instances, there are instances in which a patient would benefit from an MPK, but it is not covered by insurance. (Ell, Tr. 1788)

Response to Finding No. 243

The proposed finding is unsupported, unclear, and misleading. In the cited testimony, Mr. Ell does not testify about CMS's K-Level system. (*See* Ell (Mid-Missouri) Tr. 1788). Respondent's example that "there are instances in which a patient would benefit from an MPK, but it is not covered by insurance" is vague and misleading because it provides no context for the reasons why an insurance provider may deny coverage for an MPK in the example. Complaint Counsel agrees that insurers refuse to reimburse clinics who seek to fit, for example, a K-2 patient with a product that the insurer has deemed appropriate only for higher K-level patients. (*See* CCFF ¶¶ 440-42, 444). For example, insurers typically reimburse clinics for MPKs only when they are fit on K-3 or K4 patients. (*See* CCFF ¶¶ 445-46). Complaint Counsel does not disagree that, before fitting an MPK on a patient, insurers typically require medical professionals and clinics to determine, as an initial matter, that a patient ambulates at least at the K3 level before the insurer will reimburse the clinic. (*See* CCFF ¶¶ 446).

That being said, Respondent's statement that, "[t]he reimbursement system, and the K-Level classification system, affects what products are available to patients" is vague and misleading to the extent that it implies insurers or healthcare professionals make the final decision on whether to fit an MPK on a patient based on K-level. In reality, 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 (a patient's K-level simply makes her a *candidate* for an MPK). (*See* CCFF ¶¶ 447-87). It is the differences in these individualized factors that determine which subset of K3/K4 patients receive MPKs and which receive mechanical knees. (*See* CCFF ¶¶ 447-87). Complaint Counsel does not disagree that some patients who would otherwise benefit from an MPK cannot meet the "medical necessity" requirements provided by insurance companies. (*See, e.g.*, CCFF ¶¶ 496-523).

244. Some clinicians believe that [redacted]

Response to Finding No. 244

[redacted]

245. K-Level 0 is described by CMS as Nonambulatory: "Does not have the ability or potential to ambulate or transfer safely with or without assistance and a prosthesis does not enhance quality of life or mobility." (JX01, ¶ 19).

Response to Finding No. 245

Complaint Counsel does not disagree. (*See* CCFF ¶ 314).

246. K-Level 1 is described by CMS as a Household Ambulator: "Has the ability or potential to use a prosthesis for transfers or ambulation on level surfaces at fixed cadence." (JX01, ¶ 20).

Response to Finding No. 246

Complaint Counsel does not disagree. (*See* CCFF ¶ 315).

247. K-Level 2 is described by CMS as a Limited Community Ambulator: "Has the ability or potential for ambulation with the ability to traverse low-level environmental barriers such as curbs, stairs, or uneven surfaces." (JX01, ¶ 21).

Response to Finding No. 247

Complaint Counsel does not disagree. (*See* CCFF ¶ 316).

248. K-Level 3 is described by CMS as an Unlimited Community Ambulator: "Has the ability or potential for ambulation with variable cadence. Typical of the community ambulator who has the ability to traverse most environmental barriers and may have vocational, therapeutic, or exercise activity that demands prosthetic utilization beyond simple locomotion." (JX01, ¶ 22).

Response to Finding No. 248

Complaint Counsel does not disagree. (*See* CCFF ¶ 317).

249. K-Level 4 is described by CMS as Very Active: "Has the ability or potential for prosthetic ambulation that exceeds the basic ambulation skills, exhibiting high impact, stress, or energy levels, typical of the prosthetic demands of the child, active adult, or athlete." (JX01, ¶ 23)

Response to Finding No. 249

Complaint Counsel does not disagree. (*See* CCFF ¶ 318).

b. K-0 patients cannot receive reimbursement for a prosthetic knee

250. If the prosthetist and physician conclude that a patient is classified as a K-0 patient, Medicare and private insurers in the United States will not provide reimbursement to a prosthetic clinic for a prosthetic knee for that patient. (Schneider, Tr. 4287).

Response to Finding No. 250

Complaint Counsel does not disagree with the proposed finding to the extent it suggests that clinics will typically not receive reimbursement from insurers to fit prosthetic knees on K-0 patients and thus those patients will typically not receive a prosthetic knee. However, the cited testimony does not fully establish this finding because Mr. Schneider's testimony simply states, in relevant part, that "[t]he first level is K0. This level will not receive a prosthesis." (Schneider (Otto Bock) Tr. 4287). Mr. Schneider does not testify about the practices of insurance companies and Medicare related to a K-0 patient.

c. K-1 and K-2 patients can receive reimbursement for a constant friction knee but not a fluid-controlled knee

251. If the prosthetist and physician classify a patient as either K-1 or K-2, that patient will be eligible for a constant friction knee to be reimbursed by Medicare and/or private insurance. (Senn, Tr. 253). A patient classified as K-1 or K-2 is not eligible for reimbursement by Medicare and most private insurance for a sophisticated non-MPK. (Schneider, Tr. 4288).

Response to Finding No. 251

The proposed finding is unsupported, unclear, and misleading to the extent it suggests insurance companies and Medicare only reimburse clinics for the fitting of a constant-friction knee for K-1 and K-2 patients. In the cited portion, Mr. Senn simply replied "Okay" when asked "And for a K2 limited community ambulator, you can bill for a constant-friction knee; right?" (Senn (COPC) Tr. 253). Further, Mr. Senn responded that he was not familiar with constant-friction knees in a subsequent question. (Senn (COPC) Tr. 253). With respect to the second sentence, the proposed finding is unclear and misleading because it does not define "sophisticated non-MPK."

In the portion of his testimony that Respondent cites, Mr. Schneider simply testified, in relevant part, that "CMS has policy coverage criteria, and K1 and K2 cannot use a fluid control or electronic-controlled knee for reimbursement." (Schneider (Otto Bock) Tr. 4288). Mr. Schneider does not use the phrase "sophisticated non-MPK," which is a misleading and unclear phrase that is unsupported in the cited testimony.

Further, as defined in its own Post-Trial Brief, Respondent has defined "Sophisticated Non-MPKs" as "knees [that] utilize hydraulic and/or pneumatic controls for the swing and/or stance phases of the knee." (Respondent's Post-Trial Reply Brief at 27). [redacted]

252. Freedom's Chairman and former CEO testified that although K-2 patients may benefit medically from using a prosthetic knee that contains a microprocessor, due to reimbursement constraints dictated by insurance providers, K-2 patients are not fit with MPKs in the United States. (Carkhuff, Tr. 614-615).

Response to Finding No. 252

Complaint Counsel generally does not disagree, but adds that evidence, including testimony from Mr. Carkhuff, indicates that some K-2 patients who could become K-3 ambulators if they wore an MPK are fit with MPKs and the clinics that fit them receive reimbursement from insurers. (*See* PX05007 (Carkhuff (Freedom) IHT at 41)).

253. Ottobock is working to expand coverage for MPKs to K-2 patients since 2006; however, Ottobock's Vice President of Government, Medical Affairs, and Future Development does not expect that to happen for at least five to ten years. (Schneider, Tr. 4308, 4532; Kannenberg, Tr. 1995-1996). Ottobock's head of reimbursement, Dr. Kannenberg, also believes that it will take at least five to ten years for K-2 patients to receive reimbursement for MPKs. (Kannenberg, Tr. 1995-1996).

Response to Finding No. 253

Complaint Counsel has no specific response.

d. K-3 and K-4 patients can receive reimbursement for a fluid-controlled knee

254. A prosthetist and physician must classify a patient as either K-3 or K-4 in order for the patient to be eligible to receive reimbursement from Medicare and/or private insurance for a sophisticated non-MPK. (Senn, Tr. 253-254).

Response to Finding No. 254

The proposed finding is unsupported, unclear, and misleading. The finding is unclear and unsupported because Respondent has failed to define "sophisticated non-MPK" and the cited testimony does not use this phrase. Further, the proposed finding is unsupported because the witness cited—Mr. Keith Senn from the Center for Prosthetic and Orthotic Care—did not testify about reimbursement requirements for Medicare or private insurance companies and simply agreed that "according to Medicare, the knees that are suitable for a K3 patient are fluid-controlled knees, non-microprocessor or microprocessor-controlled." (Senn (COPC) Tr. 253-54). In the portion cited by Respondent, Mr. Senn testified that he is not even familiar with fluid-controlled knees. (Senn (COPC) Tr. 254). At no point in the cited testimony did Mr. Senn testify about the

reimbursement policies of any insurance provider, let alone any reimbursement restrictions related to patients who are not K-3 or K-4 patients.

The proposed finding is misleading because Respondent has assigned its own ambiguous, and largely unsupported terminology for a "sophisticated non-MPK" to a witness who neither used the term nor testified about the products allegedly grouped in this ambiguous category created by Respondent.

To the extent Respondent intends to suggest insurance companies place restrictions on which mechanical knees they will reimburse a clinic for fitting on K-3 and K-4 patients (as well as patients with other K-level designations), based on each patient's individual needs, Complaint Counsel does not disagree. The portion of the record cited by Respondent, however, does not support its vaguely worded proposed finding and Complaint Counsel is unaware of other evidence in the record supporting its finding as stated.

255. A prosthetist and physician must classify a patient as either K-3 or K-4 in order for the patient to be eligible to receive reimbursement from Medicare and/or private insurance for an MPK; Medicare will not pay for an MPK for K-1 or K-2 patient. (Senn, Tr. 176, 179).

Response to Finding No. 255

The proposed finding is unclear and unsupported because the testimony cited does not address the reimbursement requirements used by private insurance companies for the fitting of MPKs. To the extent this finding suggests that insurers typically require, as a first step in determining whether a patient is a candidate for an MPK, a finding by medical professionals that a patient ambulates at the K-3 or K-4 level (or could with the assistance of an MPK), Complaint Counsel does not disagree. [redacted]

[redacted]

256. Medicare reimburses MPKs for only K-3 and K-4 level patients. (Schneider, Tr. 4307). Private insurers will typically reimburse MPKs for only K-3 and K-4 level patients as well. (Schneider, Tr. 4308).

Response to Finding No. 256

Complaint Counsel does not disagree, and adds that some patients who are K-2 with the potential of becoming K-3 may receive coverage for an MPK. (*See* PX05007 (Carkhuff (Freedom) IHT at 41)).

257. A patient must be classified as either K-3 or K-4 to be eligible for an MPK. U.S. reimbursement requires that a patient be K-3 or K-4 to receive an MPK. (De Roy, Tr. 3630).

Response to Finding No. 257

The proposed finding is unclear and unsupported. The proposed finding is unclear and vague because Respondent does not define the terms "eligible," "U.S. reimbursement," or "receive" and it is unsupported because the cited testimony does not use any of this terminology.

[redacted]

[redacted]

258. Blatchford believes that the Orion 3 is suitable for all K-3 amputees. (Blatchford, Tr. 2139-2140). Endolite does not recommend the Orion 3 for K-1 or K-2 patients because the reimbursement for those products is not there yet in the United States. (Blatchford, Tr. 2140)

Response to Finding No. 258

Complaint Counsel does not disagree.

2. Reimbursement Is Limited By L-Codes

259. The amount of reimbursement that a particular prosthetic device is eligible for under Medicare depends upon whether it has certain characteristics, which correspond with "L-Codes" established by CMS, and L-Codes determine the maximum amount that will be reimbursed to a prosthetic clinic for a prosthetic component. [redacted]

Response to Finding No. 259

[redacted]

260. An L-Code is an alphanumeric code system that was set up by Medicare. (Schneider, Tr. 4291). The prosthetic codes are traditionally L codes, and then it has a four-digit number after it representing a function in the prosthesis. (Schneider, Tr. 4291). A prosthesis could have multiple functions and therefore use multiple L codes. (Schneider, Tr. 4291).

Response to Finding No. 260

Complaint Counsel does not disagree.

261. CMS sets the L-Codes and has another committee that sets the fee or allowable for each one of the L-Codes. (Schneider, Tr. 4292). Manufacturers apply for L-Codes and CMS determines whether or not to grant a new L-Code. (Schneider, Tr. 4292). Medicare reviews the fee for each L-Code and can decrease or increase the fee associated with L-Codes. (Schneider, Tr. 4292). CMS can also eliminate L-Codes. (Schneider, Tr. 4292). There are very few L-Codes added anymore. (Schneider, Tr. 4292).

Response to Finding No. 261

Complaint Counsel does not disagree.

262. Most insurers have adopted Medicare's L-Code-based reimbursement system. (Senn, Tr. 202). Reimbursement rates are set by stacking L-Codes based on product functionality. (De Roy, Tr. 3558).

Response to Finding No. 262

Complaint Counsel does not disagree.

263. Prosthetists works with a physician to determine the best prosthetic device for the user and will code the prosthetic device with L-Codes and seek reimbursement for those L-Codes. (Schneider, Tr. 4290-4291). Tracy Ell stated that after a prescription is provided to the clinic, then his clinic assigns L-Codes to the devices that they intend to provide, and create a Detailed Written Order with L-Codes that the physician must sign off on. (Ell, Tr. 1695).

Response to Finding No. 263

Complaint Counsel has no specific response.

264. L-Codes are based on manufacturer recommendations. (Kannenberg, Tr. 1970). There is no obligation for manufacturers to have L-Codes independently verified. (Kannenberg, Tr. 1970).

Response to Finding No. 264

The proposed finding is unclear, misleading, and unsupported. The finding is unclear because Respondent does not define what it means for L-Codes to be "based" on manufacturer

recommendations and the cited testimony does not use this language. The finding is unsupported because, in the cited portion, Dr. Kannenberg only references the L-codes recommended by manufacturers but does not testify about the significance of these recommendations.

Complaint Counsel does not disagree that "[t]here is no obligation for manufacturers to have L-Codes independently verified." [redacted]

265. Over the last ten years, Medicare reimbursement for prosthetic products has actually gone down. (Schneider, Tr. 4298). There have only been six new L-Codes issued in the last ten years. (Schneider, Tr. 4298). It is very difficult to get new codes and increased fees from CMS. (Schneider, Tr. 4298-4299).

Response to Finding No. 265

The proposed finding is misleading and unsupported to the extent it suggests "[o]ver the last ten years, Medicare reimbursement for prosthetic products has actually gone down." The testimony of Mr. Schneider cited by Respondent states: "They've gone down. Both the reimbursement has not equaled cost of living increases. It is extremely difficult. I believe there's been six new codes over the last decade that have been awarded." (Schneider (Otto Bock) Tr. 4298). Mr. Schneider's testimony is ambiguous, leaving it unclear whether reimbursement amounts for prosthetics have gone down or up at a different rate than cost of living increases. Without more clarity, Mr. Schneider's testimony does not support the proposed finding as written.

Complaint Counsel has no specific response to the rest of the proposed finding.

266. [redacted]

Response to Finding No. 266

[redacted]

3. Reimbursement Is Intended To Cover All Costs Associated With Product Acquisition, Fitting, And Servicing

267. CMS intends for the L-Code fee to cover the clinic's cost in acquiring the prosthetic device as well as all services and costs related to fitting and servicing that device. (Schneider, Tr. 4295).

Response to Finding No. 267

The proposed finding is unsupported at least in part. Mr. Schneider did not testify about the intention for CMS L-Code fees to cover "the clinic's cost in acquiring the prosthetic device," as the finding suggests, and he has no basis to testify about the intentions of CMS as an employee of Respondent. His testimony also makes clear that a clinic may "be able to charge a nominal fee

for service" when "there's something that happens that is unnatural or unexpected." (Schneider (Otto Bock) Tr. 4295). [redacted]

268. L-Codes cover all costs, including acquisition cost and all fitting and servicing costs. (De Roy, Tr. 3559). "So the L code is supposed to cover the device they purchase, the efforts required to put the device in place and the basic teaching of the user on how to utilize the device and then some service aspects as well following, following that procedure." (De Roy, Tr. 3559). CMS intends for the L-Code fee to cover the clinic's cost in acquiring the prosthetic device as well as all services and costs related to fitting and servicing that device. (Schneider, Tr. 4295).

Response to Finding No. 268

Complaint Counsel has no specific response to the first two sentences of the proposed finding. The proposed finding is unsupported, at least in part, as it relates to the third sentence. (*See* Response to RPFF ¶ 267).

269. Reimbursement for a particular prosthetic device is intended to cover not only the cost of acquiring the prosthesis but also the prosthetist's labor and overhead. (Senn, Tr. 200-201). The L-Code system reimburses for the entire patient care episode. (Ford, Tr. 977-978) [redacted]

Response to Finding No. 269

[redacted]

270. Costs that are not separately reimbursed include the cost of marketing, administrative costs, costs associated with the work performed by a clinic's certified prosthetists, costs associated with the technical staff building the leg, overhead costs, human resources, payroll, facility costs, and other operational costs. (Senn, Tr. 257).

Response to Finding No. 270

The proposed finding is misleading and unsupported. In the relevant testimony from the cited portion, Mr. Senn responded to the question "Could you give us some detail about what other

costs your clinic incurs when it fits an MPK knee on a patient." In this portion, Mr. Senn did not testify about what his clinic receives in reimbursement or how these services relate to the reimbursement his clinic receives. (Senn (COPC) Tr. 257). The proposed finding is misleading and unsupported insofar as Respondent relies on Mr. Senn's testimony as support for its finding.

Complaint Counsel does not disagree to the extent there are no L-Codes for other parts of the prosthetic fitting process, including services related to the fitting and fabrication of the device or related support. (*See* CCFF ¶ 384).

271. Clinics incur significant costs, in addition to the cost of a prosthesis, that are not separately reimbursable. (Senn, Tr. 256).

Response to Finding No. 271

Complaint Counsel has no specific response other than to highlight that the proposed finding is unclear because Respondent has not defined "significant" and this phrase was not used in the portion of testimony that Respondent cites. (*See* Senn (COPC) Tr. 256).

272. Clinics have significant overhead costs that reduce profitability, including [redacted]

Response to Finding No. 272

[redacted]

[redacted]

i. Costs related to fitting and serving MPKs are greater than costs related to fitting and servicing non-MPKs

273. The additional costs (besides the cost of the prosthesis) of fitting a patient with an MPK are significantly more than the additional costs of fitting a patient with a non-MPK. (Senn, Tr. 258). Those costs include programming of the knee and the follow-up and potential follow-up programming costs. (Senn, Tr. 258). In addition, it is more difficult and time-consuming to fit an MPK on a patient than a non-MPK. (Senn, Tr. 258).

Response to Finding No. 273

The proposed finding is unclear, misleading, and unsupported. The proposed finding is unclear because Respondent has failed to explain the "costs" associated with "programming of the knee" and "the follow-up and potential follow-up programming costs." Although Mr. Senn testified in the cited portion that the "[p]rogramming of the knee and the follow-up and potentially follow-up programming" are additional "cost" and "time" involved in the fitting of an MPK, neither Mr. Senn nor Respondent explained what this "cost" means or whether the total amount of costs, beyond the price of the prosthethic, incurred by clinics fitting an MPK are "significantly more" than the "additional costs of fitting a patient with a" mechanical knee. (Senn (COPC) Tr. 258). Mr. Senn, in the cited portion, never testified that any additional costs associated with fitting an MPK that he references are "significantly more" than costs related to fitting a mechanical knee. In the relevant portion, Mr. Senn simply responded "Correct" when asked "It's more difficult and time-consuming to fit an MPK on a patient than a non-MPK mechanical knee; right?" (Senn (COPC) Tr. 258). Further, the proposed finding is misleading because it cites only Mr. Senn's testimony to suggest that *all clinics* incur an additional cost when fitting an MPK versus fitting a

non-MPK. Mr. Senn lacks foundation to testify about the costs incurred by all clinics, and Respondent did not ask Mr. Senn if *all clinics* incur greater costs when fitting an MPK as opposed to non-MPK on a patient. (Senn (COPC) Tr. 258).

Complaint Counsel does not disagree that, at least for some patients, it may be more difficult and time-consuming to fit an MPK than a non-MPK, although any differences in cost or time required for such fittings vary by the individual characteristics of the patient and clinic.

274. Patients require several follow-up visits after being fitted with an MPK. (Oros, Tr. 4787-4788). A patient will typically require at least three follow up visits in the first year, and as many as 24 visits. (Oros, Tr. 4787).

Response to Finding No. 274

The proposed finding is misleading and unsupported. The finding is misleading and unsupported because, in the relevant portion of the cited testimony, Respondent asked Mr. Oros questions generally about the follow-up care provided to "above-the-knee amputees" who have been fit with a "prosthetic leg" at Scheck & Siress. (Oros (Scheck & Siress) Tr. 4787). None of Respondent's questions in the cited testimony relate solely to the follow-up care provided to patients who have been fit with an MPK (as opposed to a mechanical knee) as part of their complete lower-limb prosthesis. (Oros (Sheck & Siress) Tr. 4787). Further, the proposed finding is unsupported because Respondent has used Mr. Oros's testimony about the follow-up care provided at Scheck & Siress to support an inference that *all* "patients require several follow-up visits after being fitted with an MPK" and "[a] patient will typically require at least three follow up visits in the first year, and as many as 24 visits."

Complaint Counsel does not disagree that, following the fitting of a prosthesis, the prosthetist will continue to provide follow-up care as necessary for the patient. (*See* CCFF ¶¶ 354-55), which will typically involve multiple visits by the patient to the clinic that fit the patient's lower-limb prosthesis.

275. Accounting for these additional costs, which are greater for an MPK than a non-MPK, and which are not separately reimbursed, it is possible that fitting an MPK on a patient would cause the clinic to break even and not make a profit. [redacted]

Response to Finding No. 275

[redacted]

[redacted]

ii. Private insurers provide reimbursement at or below the fees set by CMS

276. "Private insurers definitely reimburse below Medicare." (Schneider, Tr. 4295). Freedom's former CEO testified that whereas in much of healthcare, Medicare is the lowest standard of reimbursement, in the O&P industry, it is the highest level of reimbursement and private carriers will negotiate off Medicare rates for discounts of 20 to 40 percent. (Carkhuff, Tr. 594).

Response to Finding No. 276

The proposed finding is unsupported and against the weight of the evidence. The proposed finding is against the weight of the evidence because numerous clinics testified that private insurers reimburse them much more than "discounts of 20 to 40 percent" off Medicare rates. [redacted] Respondent also cites to a portion of Scott Sabolich's trial testimony, the owner of Scott Sabolich Prosthetic and Research, in which Mr. Sabolich testified that "my average discount off of Medicare is about 10 to 12 percent" for private insurers. (*See* RPFF ¶ 278 (citing Sabolich (Sabolich Prosthetics and Research) Tr. 5827)).

Further, the proposed finding is misleading and unsupported because Respondent has relied on two of Respondent's executives—Scott Schneider and Maynard Carkhuff—to support a fact

that neither has the foundation to address. Neither Scott Schneider nor Maynard Carkhuff can speak to the reimbursement rates negotiated between prosthetic clinics and private insurance carriers.

277. Typically, private insures discount off of Medicare by 20 to 40 percent. (Schneider, Tr. 4296). Private insurers will many times actually discount their reimbursement off of Medicare's fees by 20 or 30 percent, or maybe more. (Testerman, Tr. 1260-1261).

Response to Finding No. 277

The proposed finding is unsupported, unclear, and against the weight of the evidence. The proposed finding is against the weight of the evidence because numerous clinics testified that private insurers provide discounts off of Medicare much lower than "20 to 40 percent."

[redacted]

Respondent also acknowledges that Paul Weott, the owner of the Orthotic and Prosthetic Center, testified that his clinic receives up to 10% below the Medicare amount from private insurers. (*See* RPFF ¶ 278). Respondent also cites to a portion of the trial testimony of Scott Sabolich, the owner of Scott Sabolich Prosthetic and Research, in which Mr. Sabolich testified that "my average discount off of Medicare is about 10 to 12 percent" for private insurers. (*See* RPFF ¶ 278 (citing Sabolich (Sabolich Prosthetics and Research) Tr. 5827)).

Finally, the proposed finding is misleading and unsupported because Respondent has relied on two of Respondent's executives—Scott Schneider and Mark Testerman—to support a fact that neither has the foundation to address. Neither Scott Schneider nor Maynard Carkhuff can testify with personal knowledge about the reimbursement rates negotiated between prosthetic clinics and private insurance carriers. Mr. Testerman even acknowledged in the cited portion of his testimony

that he has only a "general understanding" of "how private insurance reimburses for prosthetic devices compared to Medicare." (Testerman (Freedom) Tr. 1260).

278. Many private insurance providers reimburse at amounts discounted off of the amount set by the CMS L-Code. The discounted rate ranges from around 67% up to 96% of the Medicare allowance. [redacted]**;** (Sabolich, Tr. 5827) (testifying that United Healthcare is the lowest reimburser for prosthetics in the United States.); (Senn, Tr. 261-262) (testifying that Anthem, a large insurer, only reimburses COPC at 75% of Medicare, or $15,000); ((PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 30-31)(Commercial health plans' allowable amounts are generally 10% to 40% below Medicare's.).

Response to Finding No. 278

[redacted]

279. [redacted]

Response to Finding No. 279

[redacted]

[redacted]

280. [redacted]

Response to Finding No. 280

Complaint Counsel has no specific response.

281. The percentage of patients on Medicare varies by clinic. (Sabolich, Tr. 5822) (testifying that 68 percent of SSPR's patients are Medicare patients); (Schneider, Tr. 4290) (testifying that Medicare represents about 30 percent of the payer mix, and most all users of prosthetic devices have some type of insurance); [redacted] (Senn, Tr. 259-260) (Private insurance reimbursement is the biggest percentage of COPC's clinics' reimbursement at more than 30 percent).

Response to Finding No. 281

Complaint Counsel has no specific response.

282. [redacted]

Response to Finding No. 282

Complaint Counsel has no specific response.

283. [redacted]

Response to Finding No. 283

Complaint Counsel does not disagree.

284. The discounted fees paid by private insurers are also intended to cover the cost of the prosthetic device and all costs related to fitting and servicing the device. (Schneider, Tr. 4296).

Response to Finding No. 284

The proposed finding is misleading, unsupported, and unclear. The proposed finding is unclear and misleading because Respondent does not define "discounted fees" or "all costs related to fitting and servicing the device." The proposed finding is unsupported because Mr. Schneider does not have the proper foundation to address the reimbursement policies negotiated between clinics and private insurers and Respondent offers no testimony from a clinic or a private health insurance company. Further, in the cited portion, Mr. Schneider did not testify about what private insurers "*intended* to cover."

285. Freedom's Vice President of National and Key Accounts noted: "There's so much going on right now as it relates to reimbursement that they're discussing whether it's these private payers and the discounts associated with that. It puts pressure on them, puts pressure on their patients. The patients are feeling the struggles through their practitioners associated with large deductibles, with a lot of out-of-pocket costs, and that puts pressure on the decision-making process sometimes of a prosthetist or the key accounts that I'm calling on." (Testerman, Tr. 1261).

Response to Finding No. 285

Complaint Counsel has no specific response.

286. Because of the lower reimbursement rate, margins on a prosthesis reimbursed by private insurance are far less than margins on prostheses reimbursed through Medicare. (Schneider, Tr. 4302).

Response to Finding No. 286

The proposed finding is unclear, unsupported, and misleading. The proposed finding is unclear and misleading because Respondent has not defined "far less" and the language itself is

conclusory and vague. The proposed finding is unsupported because Respondent only cites Mr. Schneider who explained that his prior experience with "managing margins on prosthetic devices" occurred in the 1980's and 1990's when he worked at a prosthetics and orthotics clinic. Further, Mr. Schneider does not have adequate foundation to testify about the differences in margins earned by clinics from the fitting of a prosthesis on a Medicare patient versus a patient covered by private insurance. As Respondent acknowledges in its own Proposed Findings of Fact, some private insurers reimburse clinics up to 96% of the amount Medicare provides. (*See* RPFF ¶ 278). Respondent does not provide any detail in this proposed finding, or elsewhere in its proposed findings, about the percentage of its MPK sales that are made to clinics that are reimbursed by Medicare or private plans at different discount rates off of Medicare's rates.

287. [redacted]

Response to Finding No. 287

Complaint Counsel has no specific response.

4. Costs Related To Reimbursement Audits

288. A RAC audit is a Recovery Audit Contractor audit, commissioned by CMS. (Ford Tr. 973). A RAC audit is a look back at claims to audit whether Medicare compliance was met for that patient care episode. (Brandt, Tr. 3764; Ford Tr. 973; Asar, Tr. 1545).

Response to Finding No. 288

The proposed finding is unclear because it fails to define the terms "look back," "to audit," "Medicare compliance," and "the patient care episode."

Complaint Counsel does not disagree that, during a RAC audit, a payer typically reviews a patient file from a prosthetic clinic associated with a particular insurance reimbursement claim to ensure the patient file contains the proper documentation. (*See* CCFF ¶ 386).

289. If a prosthetic device is subjected to a RAC audit and the claim is denied, Medicare recoups the full reimbursement amount from the prosthetic clinic. (Senn, Tr. 258-259; Ford, Tr. 973-974; Sabolich, Tr. 5828). During RAC audit, Medicare immediately claws back the reimbursement amount, and that is a cost to the clinic. (Brandt, Tr. 3764-3765; Schneider, Tr. 4381; Ford, Tr. 973-974).

Response to Finding No. 289

The proposed finding is unclear and misleading. The proposed finding is unclear because Respondent has not defined the terms "claws back" or "cost to the clinic." Further, the proposed finding is misleading because Respondent states that "[d]uring [a] RAC audit, Medicare *immediately* claws back the reimbursement amount." Mr. Schneider's testimony is the only citation that uses the word "immediate" and he explained that "there would be an immediate clawback from a RAC auditor if – if they felt the product was dispensed and billed incorrectly." (Schneider (Otto Bock) Tr. 4381). Complaint Counsel does not disagree that, following a RAC audit, a payer may recoup the insurance reimbursement payment to the prosthetic clinic if the patient's file does not contain the proper documentation. (*See* CCFF ¶ 386).

290. The various types of audits, including preauthorization and RAC audits, are important factors in a prosthetist's knee selection. (Blatchford, Tr. 2259).

Response to Finding No. 290

The proposed finding is unclear, unsupported, misleading, and contrary to the weight of the evidence. The proposed finding is unclear because Respondent did not define "preauthorization," "important," and "knee selection." The vagueness of these words render the proposed finding misleading because neither the testimony cited nor the proposed finding indicates their meaning or significance. This proposed finding is unsupported to the extent it draws a broad conlcusion about how prosthetists select knees, while citing only to the testimony of one person, Stephen Blatchford of Endolite, who is not, himself, a prosthetist, physician, or clinician. Further, the proposed finding is unsupported because Mr. Blatchford did not testify that the "various types

of audits, including preauthorization and RAC audits, are *important* factors." Mr. Blatchford, on a page not included in Respondent's citation, testified that "the various hoops that a clinic must go through in order to get reimbursement" would be a factor, which he described as "the various types of audits that are out there, preauthorization audits, RAC audits, and all of the emphasis that is placed by the reimbursement system on making sure that your documentation is 100 percent right." (Blatchford (Endolite) Tr. 2258-59). Notably, Mr. Blatchford subsequently testified, in a response to a question from the Court, that he is only familiar with RAC audits "[t]o a limited extent." (Blatchford (Endolite) Tr. 2859).

This proposed finding is also misleading and contrary to the weight of the evidence to the extent it implies that concern about RAC audits is an "important" factor in determining whether to fit a particular patient with an MPK or mechanical knee. (*See* CCFF ¶¶ 2994-3006). For example, Mr. Sabolich, who was called at trial by Respondent, testified during his deposition 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 (citing PX05132 (Sabolich (Scott Sabolich Prosthetics) Dep. at 219-20))).

[redacted]

The proposed finding is misleading to the extent it implies that RAC audits create reimbursement risks for prosthetic clinics, such that they switch patients to mechanical knees from

MPKs. RAC audits existed before the Merger and have continued after the Merger. The Merger has not changed anything about the way payers conduct RAC audits. (CCFF ¶ 2977). The record is clear that prosthetic clinics have not reduced their purchases of MPKs in response to RAC audits. (CCFF ¶ 2994). 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 ¶ 2995). 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 ¶ 2996). Jeffrey Brandt, CEO of Ability Prosthetics and Orthotics, testified that the risk of a RAC audit has not affected the number of MPKs, including Freedom Pliés, that Ability Prosthetics & Orthotics ("Ability") fits on patients. (CCFF ¶ 2997). Michael Bright, a certified prosthetist and owner of North Bay Prosthetics, testified that North Bay has not stopped fitting MPKs in response to RAC audits. (CCFF ¶ 2999). If an MPK was medically appropriate for a patient, Mr. Bright would not fit the patient with a mechanical knee just for fear of a RAC audit. (CCFF ¶ 2999). There are many more examples of prosthetic clinics testifying in this case that they would not switch patients from MPKs to mechanical knees in the face of RAC audits. (CCFF ¶¶ 3000-06).

291. If an MPK is audited, Medicare will recoup its payment to the clinic pending appeal, which can take years. (Senn, Tr. 258; Schneider, Tr. 4381). The prosthetic clinic may appeal the denial of the claim, [redacted] but the appeals process typically takes several years and has several levels of appellate review. (Senn, Tr. 258; [redacted] The prosthetic clinic cannot receive reimbursement until the claim is approved. (Senn, Tr. 258). During the appeals process, the clinic has to front the money for the MPK, which is another potentially significant cost of prescribing an MPK over a non-MPK. (Senn, Tr. 258-259).

Response to Finding No. 291

The proposed finding is unclear, misleading, contrary to the weight of the evidence, and unsupported. The proposed finding is misleading because, as written, Respondent suggests that

Medicare will "recoup its payment to the clinic pending appeal" if an MPK *simply* "is audited." Complaint Counsel does not disagree that payers will recoup its payment if a clinic *fails* a RAC audit. (*See* CCFF ¶ 2974). The finding is also misleading because, as written, the proposed finding seems to suggest "[t]he prosthetic clinic cannot receive reimbursement" for any prosthesis "until the claim is approved." Complaint Counsel does not disagree to the extent a clinic that fails a RAC audit will not receive reimbursement for the prosthetis under appeal until the appeal is approved. The proposed finding is unclear because Respondent has not defined the terms "several levels of appellate review," "front the money," or "significant cost."

The proposed finding is misleading to the extent it implies that RAC audits create reimbursement risks for prosthetic clinics, such that they switch patients to mechanical knees from MPKs. (*See* Response to RPFF ¶ 290). First, RAC audits existed before the Merger and have continued after the Merger. The Merger has not changed anything about the way payers conduct RAC audits. (CCFF ¶ 2977). [redacted] Maynard Carkhuff, Chairman of Freedom, testified that since 2012, prosthetic clinics have improved their ability to document and receive reimbursement for MPKs, to varying degrees. (CCFF ¶ 2980). [redacted]

The record is clear that prosthetic clinics have not reduced their purchases of MPKs in response to RAC audits. (CCFF ¶ 2994). 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 ¶ 2995). 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 ¶ 2996). Jeffrey Brandt, CEO of Ability Prosthetics and Orthotics, testified that the risk of a RAC audit has not affected the number of MPKs, including Freedom Pliés, that Ability Prosthetics & Orthotics ("Ability") fits on patients. (CCFF ¶ 2997). Michael Bright, a certified prosthetist and owner of North Bay Prosthetics, testified that North Bay has not stopped fitting MPKs in response to RAC audits. (CCFF ¶ 2999). If an MPK was medically appropriate for a patient, Mr. Bright would not fit the patient with a mechanical knee just for fear of a RAC audit. (CCFF ¶ 2999). There are many more examples of prosthetic clinics testifying in this case that they would not switch patients from MPKs to mechanical knees in the face of RAC audits. (CCFF ¶¶ 3000-06).

292. During the time that an appeal is pending, many times the amputee goes without a knee. (Brandt, Tr. 3754).

Response to Finding No. 292

The proposed finding is misleading, unclear, unsupported, and against the weight of the evidence. The proposed finding is misleading and unsupported because Respondent has relied solely on the testimony of Jeff Brandt, the CEO of Ability Prosthetics & Orthotics, about his experience at his clinic to generalize about the procedure for *all clinics* when appealing a RAC audit. Complaint Counsel is unaware of any other testimony from a clinic customer that supports this alleged fact. The proposed finding is unclear because, as written, the finding does not adequately explain whether the patient would not have *any* knee while an appeal is pending or whether the patient would "go without" the specific knee under appeal. Complaint Counsel does not disagree to the extent that Mr. Brandt testified that many times patients *in his experience* at his clinic have not used a knee during the appeals process and add that Mr. Brandt also testified that

the clinic always asks patients if they would like to appeal a RAC audit decision. (Brandt (Ability) Tr. 3754).

The proposed finding is also against the weight of the evidence as highlighted in Respondent's own Proposed Findings of Facts. Respondent's proposed Findings of Fact 293 reads [redacted] Regardless of the truth of this proposed fact, Respondent has acknowledged in this proposed fact that a RAC audit occurs *after* a patient has been fit with an MPK. Thus, to the extent this fact is true, a patient has already been fit with an MPK before the RAC audit begins. Respondent has provided no evidence, either in Proposed Finding of Fact 292 or 293, that a prosthetic clinic will recover the actual MPK from the patient in the event of a failed RAC audit, which suggests that the patient will have the device during the pendency of any appeals process for a failed RAC audit.

The proposed finding is also against the weight of the evidence as highlighted in Respondent's own Proposed Findings of Facts. Respondent's proposed Findings of Fact 293 reads "Thus, the threat of RAC audits poses a risk to business because it is an examination of documentation *after the delivery of the device*, and the payment for the prosthesis is recovered or recouped." Regardless of the truth of this proposed fact, Respondent has acknowledged in this proposed fact that a RAC audit occurs *after* a patient has been fit with an MPK. Thus, to the extent this fact is true, a patient has already been fit with an MPK before the RAC audit begins. Respondent has provided no evidence, either in Proposed Finding of Fact 292 or 293, that a prosthetic clinic will recover the actual MPK from the patient in the event of a failed RAC audit,

which suggests that the patient will have the device during the pendency of any appeals process for a failed RAC audit.

293. [redacted]

Response to Finding No. 293

[redacted]

[redacted]

[redacted]

294. RAC audits are a frequent occurrence. (Senn, Tr. 210-211) At COPC, RAC audits occur monthly. (Senn, Tr. 210-211).

Response to Finding No. 294

The proposed finding is unclear, misleading, unsupported, and contradicted by other evidence. The proposed finding is unclear because Respondent has not defined the term "frequent occurrence" and that term does not appear in the portion of Mr. Senn's testimony cited by Respondents. Further, the proposed finding is misleading and unsupported because Respondent has used the term "frequent occurrence" without defining the term and without any support. The proposed finding is also unsupported because Respondent relies on questions asked of Mr. Senn

about the frequency of RAC audits at *his clinic*. (*See* Senn (COPC) Tr. 210-11). In the relevant portion of the cited testimony, Mr. Senn was asked "How often do your clinics undergo RAC audits?" to which he replied, "Monthly." (Senn (COPC) Tr. 210-11). Respondent has used this testimony to support an assertion that "RAC audits are a frequent occurrence" for *all clinics*.

The proposed finding is contradicted by the evidence because the record shows that RAC audits started to intensify in 2011, (*see* CCFF ¶¶ 389, 2976), and since then U.S. prosthetic clinics have improved the processes they use to document patient need for MPKs, including ensuring that physician records are complete. (*see* CCFF ¶¶ 2979-2993; *see also* Responses to RPFF ¶¶ 290-91, 302). Complaint Counsel does not disagree that Mr. Senn testified that RAC audits occur monthly at COPC.

295. [redacted]

Response to Finding No. 295

[redacted]

[redacted]

296. [redacted] Ferris, Tr. 2309-2310)

Response to Finding No. 296

[redacted]

[redacted]

297. Scott Sabolich believes that RAC audits came about because "prosthetists started improperly billing Medicare and never getting caught, and Medicare had to crack down" but that caused a "horrible effect for all prosthetists," in that "through 2010 to 2016, Medicare introduced RAC auditing and post-payment audits to where [the clinic] would build the prosthesis, [the clinic would] do it properly, [the clinic would] then get audited two years later when the trail has gone cold, and if every I wasn't dotted and T crossed, [the clinic would] be committing, quote-unquote, fraud." (Sabolich, Tr. 5829).

Response to Finding No. 297

Complaint Counsel has no specific response.

298. Scott Sabolich believes that RAC audits make Medicare unfriendly to prosthetists to work with because they can claw back reimbursement in such a way that would cripple a prosthetist's facility to go in two years later and have to pay back 20 C-Legs all at once. (Sabolich, Tr. 5831)

Response to Finding No. 298

The proposed finding is unsupported because Mr. Sabolich lacks the personal knowledge to speak generally about how a failed RAC audit would "cripple a prosthetist's facility," other than his own.

299. Third party payers also have stringent documentation requirements to obtain reimbursement. [redacted]

Response to Finding No. 299

[redacted]

[redacted]

300. The risk of RAC audits causes clinics to take measures to make sure that they will pass such audits. (Senn, Tr. 211) (testifying that COPC provides guidance to its clinics for how to handle RAC audits).

Response to Finding No. 300

Complaint Counsel does not disagree and adds that clinics have testified that they have already put in place procedures that ensure they consistently obtain all necessary paperwork to ensure reimbursement from insurers for the MPKs they buy, (*see* CCFF ¶¶ 2979-86), and MPK manufacturers provide services to clinics to help them meet insurance requirements and successfully obtain reimbursement, (*see* CCFF ¶¶ 2987-93). Based on the procedures and assistance from manufacturers, clinics are able to meet insurers requirements effectively and avoid failing RAC audits. (*See, e.g.*, CCFF 2987-88).

301. For instance, SSPR changed the way it does business based on RAC audits, and retooled and redid its structures so that SSPR is more audit proof than it was before. (Sabolich, Tr. 5830-31).

Response to Finding No. 301

Complaint Counsel does not disagree.

302. The risk of audit impacts the prosthetists selection of prosthetic devices for patients, and, in particular, it makes prosthetists less likely to provide MPKs. (Sabolich, Tr. 5851-52) (testifying that he believes that the threat of RAC audits scare a lot of prosthetists away from MPKs); (Senn, Tr., 232) (testifying that he spends more of his time focused on managing costs related to prosthetic knees than feet because of "[t]he cost factor and the risk of audit.")

Response to Finding No. 302

The proposed finding is misleading, unsupported, directly contradicted by evidence, and against the weight of the evidence. The proposed finding is misleading and unsupported because

Respondent only cites to two witnesses whose testimony provides no support for its wildly unsubstantiated claim. In the cited portion of his testimony, Mr. Sabolich simply states that he "*believe[s]* the macro influence of Medicare hunting [clinics] down post payment scares a lot of prosthetists away from MPKs nowadays." (Sabolich (Sabolich Prosthetics and Research) Tr. 5851-52). Mr. Sabolich did not provide any evidence to support his belief and Respondent never established that Mr. Sabolich had personal knowledge of what effect the risk of an audit generally, or specifically for an MPK, has on the operations of any clinic other than his own. Interestingly, Mr. Sabolich opined that his clinic fits more MPKs than most clinics (*See* Sabolich (Sabolich Prosthetics and Research) Tr. 5851-52), so he does not appear to be scared of fitting MPKs on patients because of some nebulous threat of an audit. He simply states, with no established personal knowledge, that he believes *other* prosthetic clinics are allegedly less likely to provide MPKs. (Sabolich (Sabolich Prosthetics and Research) Tr. 5851-52).

Further, Mr. Sabolich used vague, imprecise language about the "macro influence of Medicare" and a "fear" that only "*relate[s]* to RAC and other government audits." (Sabolich (Sabolich Prosthetics and Research) Tr. 5851-52). During his deposition, Mr. Sabolich even 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." (*See* CCFF ¶ 3003 (citing PX05132 (Sabolich (Scott Sabolich Prosthetics) Dep. at 219-220)). Respondent has presented no evidence in this case that any clinic is making immoral decisions or decisions that are not in the best interest of patients by fitting them with mechanical knees when the best medical choice for the patient is an MPK, simply because of the threat of a possible audit for the MPK. (*See* CCFF ¶¶ 430-87).

Respondent's reliance on Mr. Senn's testimony also does not support its unsupported assertion. In the cited portion, Mr. Senn simply testified that he "spend[s] more of [his] time focused on knees as opposed to feet" because "[t]he cost factor and the risk of audit." (Senn (COPC) Tr. 232). Mr. Senn did not testify that he is less likely to provide MPKs because of the risk of a RAC audit, or even that the risk of RAC audits has *any* impact on the selection of prosthetic devices for patients. In fact, Mr. Senn even explicitly testified that he has *not* instructed his clinics to avoid fitting any specific MPKs due to the risk of RAC audits. (Senn (COPC) Tr. 212-13).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent it implies that RAC audits create reimbursement risks for prosthetic clinics, such that they switch patients to mechanical knees from MPKs. (*See* Response to RPFF ¶ 290). First, RAC audits existed before the Merger and have continued after the Merger. The Merger has not changed anything about the way payers conduct RAC audits. (CCFF ¶ 2977). [redacted] Maynard Carkhuff, Chairman of Freedom, testified that since 2012, prosthetic clinics have improved their ability to document and receive reimbursement for MPKs, to varying degrees. (CCFF ¶ 2979). [redacted]

303. There is a much higher risk of a RAC audit with an MPK than a non-MPK, which is an additional cost unique to MPKs. (Senn, Tr. 258). [redacted]

Response to Finding No. 303

[redacted]

[redacted]

304. Some clinicians believe that payers often try to deny reimbursement for MPKs. (Ell, Tr. 1786).

Response to Finding No. 304

Complaint Counsel has no specific response other than to note that Respondent has only provided the testimony of one clinic representative to support an assertion that "*some* clinicians believe…."

305. Defects in documentation can result in denial of payment. Sabolich's clinic had issues with the MPKs that were audited, because of timing issues between the creation and sign off by the physician on a Detailed Written Order. (Sabolich, Tr. 5830). If there were any L-Code changes on the Detailed Written Order, the physician would have to approve it before the patient receives the device, or else that was considered fraud. (Sabolich, Tr. 5830).

Response to Finding No. 305

Complaint Counsel has no specific response other than to add that Mr. Sabolich and other clinics testified that they have procedures in place to make sure they obtain all required

documentation and meet insurers' medical necessity requirements when fitting MPKs. (*See* Response to RPFF ¶¶ 290-91, 300, 302; *see also* CCFF ¶¶ 2979-86; 3002).

306. Audits may occur even after a prosthesis is delivered to the patient. In 2014, SSPR's Dallas facility got hit with a RAC audit, where 20 MPKs that had already been delivered to patients were audited. (Sabolich, Tr. 5829).

Response to Finding No. 306

Complaint Counsel has no specific response.

5. PDAC Verification Is Important To Clinics Concerned With The Risk Of Audits

307. [redacted]

Response to Finding No. 307

[redacted]

[redacted]

[redacted]

308. [redacted]

Response to Finding No. 308

[redacted]

309. The C-Leg 4 and Össur Rheo are PDAC verified for L5856, *i.e.*, CMS has confirmed their functionality conforms to the L-Code for microprocessor-controlled swing and stance. (Schneider, Tr. 4381-4382, 4294; Kannenberg, Tr. 2000).

Response to Finding No. 309

Complaint Counsel does not disagree and adds that Össur received PDAC verification for the Rheo in December 2017. (*See* CCFF ¶¶ 3019, 3021). Prior to that time, Össur sold its Rheo MPKs without PDAC verification. (*See* CCFF ¶¶ 939-45, 964).

310. The Plié 3 has not been submitted for PDAC verification. (Schneider, Tr. 4381-82). Ottobock's C-Leg is PDAC verified. (De Roy, Tr. 3646-3648).

Response to Finding No. 310

Complaint Counsel has no specific response other than to add that Endolite's Orion MPK is not PDAC verified either and Össur's Rheo MPKs were not PDAC verified until December 2017 (Össur sold all of its Rheo MPKs prior to December 2017 with no PDAC verification). (*See* CCFF ¶¶ 939-45, 964, 3019, 3021-3022).

311. [redacted]

Response to Finding No. 311

[redacted]

6. Reimbursement Constrains Pricing of Prosthetics Devices

312. Freedom, Ottobock, Össur, and Endolite all set prices based primarily on the available reimbursement amount dictated by the recommended L-Codes. (Carkhuff, Tr. 594; [redacted] Schneider, Tr. 4302-4303; Blatchford, Tr. 2124; De Roy, Tr. 3557-3558).

Response to Finding No. 312

The proposed finding is misleading, unclear, incomplete, unsupported and against the weight of the evidence. The proposed finding is incomplete because Respondent has simply stated that manufacturers "set prices," without explaining what product's prices are "based primarily on the available reimbursement amount." The manufactures listed in the proposed finding sell a large variety of products, including both prosthetics and non-prosthetic products. In addition, if Respondent intended to imply that prices for prosthetic devices are set based solely or that the final dollar value charged to clinics is established by looking only at insurance reimbursement rates, the proposed finding is also unclear and inaccurate. Respondent has not defined "based primarily," *none* of the cited testimony uses that language, and an overwhelming body of evidence, discussed further below, contradicts that assertion.

Further, Respondent's use of the word "price" fails to account for the distinction between a sales price and a list price, which makes the proposed finding vague. Although MPK manufacturers publish list prices, the sales price each clinic actually pays is individually negotiated and is almost always well below the published list price for a given product. (CCFF ¶ 570). Regardless of its oversight, both the sales price and list price are determined by competition in the prosthetics market. Respondent's documents reflect the significance of competition with other manufactures for determining a list price. [redacted]

[redacted] With respect to sales price, clinics often use a competitor's MPK prices to negotiate lower prices. (CCFF ¶¶ 582-84, 587). According to Mr. Carkhuff, Freedom's Chairman, [redacted] (CCFF ¶ 584). Clinics also regularly play MPK manufacturers, including Otto Bock and Freedom, off each other to negotiate lower MPK prices, (CCFF ¶¶ 587, 590-93, 595-96), because the ability to switch to competing MPKs provides clinics bargaining leverage, which they use to negotiate the lowest prices possible. (CCFF ¶¶ 588, 590-93, 595-96).

The proposed finding is also unsupported. In the cited portion of his testimony, Mr. Schneider testified that Otto Bock "will take a look at how a product is coded, and it *may* have an effect." (Schneider (Otto Bock) Tr. 4302-03)(emphasis added). Mr. Carkhuff was not asked, and did not mention, how Freedom prices its products in the portion of his testimony that Respondent cites. (Carkhuff (Freedom) Tr. 594). Also, Mr. Blatchford simply testified that he "familiarize[s] himself with reimbursement rates for prosthetic knees" in order for him to "understand what it is like for our customer to buy our products and then use them and sell them to their customers, what sort of level of margin they'll actually make and therefore whether it would make sense for them to use our products or not." (Blatchford (Endolite) Tr. 2124). This testimony does not support a finding that Endolite sets prices based *primarily* on the available reimbursement. Finally, in the cited portion of his testimony, Mr. De Roy merely suggests that reimbursement rates are important for determining how Össur positions and prices its mechanical knees. (De Roy (Össur) Tr. 3557-58). At no point in the portion cited by Respondent does Mr. De Roy say, or even imply, that Össur sets its prices for any particular product "based *primarily* on available reimbursement."

313. Reimbursement rates constrain Össur's MPK pricing, affect Össur's product development plans, and influence Össur's product positioning strategy. (De Roy, Tr. 3557-3558).

Response to Finding No. 313

The proposed finding is unsupported and misleading because Respondent has relied on a brief portion of Mr. De Roy's testimony to support a broad, imprecise, and misleading conclusion, as stated. In the relevant portion of the testimony cited, Mr. De Roy answered the question "How are you aware of these reimbursement rates?" by explaining "Through my role as the VP of sales in Americas, so basic knowledge that you have to have, plus marketing as well. So 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). At no point in this answer did Mr. De Roy explicitly say, or merely suggest, "reimbursement rates *constrain* Össur's MPK pricing."

Importantly, citing to this portion of Mr. De Roy's testimony is unclear and potentially unsupported to the extent Respondent uses this portion to suggest anything about Össur's practices related to MPK prices. In the questions immediately preceding this exchange, Complaint Counsel asked Mr. De Roy if he is familiar with the reimbursement rates for MPKs *and* mechanical knees. His answer to the question "How are you aware of *these* reimbursement rates?" may refer to prices for MPKs, mechanical knees, or both.

Complaint Counsel does not disagree with the concept that reimbursement rates could theoretically constrain a manufacturer's sales price for an MPK if it tried to sell an MPK to a clinic at a price set above the level that the clinic could earn a profit on the entire lower-limb prosthesis fit on a patient. This is simply a theoretical concept though, because in the real world clinics negotiate prices directly with MPK manufacturers and play different MPKs off each other to obtain prices that are significantly below the reimbursement rates they receive from insurers. (*See* CCFF ¶¶ 581-606). Therefore, the real constraint on MPK prices today is the price and quality of

substitute competing MPKs, not reimbursement rates. (*See* PX06001A (Scott Morton Report) at ¶¶ 36-38, 119-35).

314. [redacted]

Response to Finding No. 314

[redacted]

[redacted]

[redacted]

[redacted]

315. Ottobock relies on the product coding and reimbursement allowable associated with those codes when it sets prices for prosthetic products in the United States. (Schneider, Tr. 4302-4303). Ottobock sets its prices according to the fee schedule set by Medicare and private insurers. (Schneider, Tr. 4303).

Response to Finding No. 315

The proposed finding is unsupported. The proposed finding is unsupported because Respondent relies entirely on a portion of Mr. Schneider's testimony that does not support its assertions. Mr. Schneider, in the portion cited by Respondent, testified that Otto Bock "will take a look at how a product is coded, and it *may have an effect*." (Schneider (Otto Bock) Tr. 4302) (emphasis added). Further, Mr. Schneider, Respondent's own executive, at no point in the cited portion testified that Otto Bock "relies" on the product coding and reimbursement amount to set its prices for prosthetic products or that Otto Bock "sets" its prices according to Medicare and private insurers' fee schedules.

With respect to fee schedules, Mr. Schneider simply testified that Otto Bock "feel[s] that quality of the product and the functionality of the product and the patient outcome also pays dividends and is a cost savings, so [Otto Bock] look[s] at the reimbursement of those products and tr[ies] to price accordingly to that fee schedule." (Schneider (Otto Bock) Tr. 4303). Respondent posed its question to Mr. Schneider based only on how Otto Bock prices the products that it "takes

the *Medicare* reimbursement amount into account." (Schneider (Otto Bock) Tr. 4303) (emphasis added). To the extent Respondent could even support a proposed finding that Otto Bock considers Medicare's fee schedule when setting its prices, Respondent's reference to private payer's fee schedules is completely unsupported.

The proposed finding is against the weight of the evidence because the record is replete with evidence that Otto Bock (and every other MPK manufacturer) determines its MPK sales prices based primarily on the prices and terms offered by other MPK manufacturers for each clinic. (*See* Responses to RPFF ¶¶ 312, 314).

316. Endolite pays keen attention to reimbursement rates and customer margins when setting prices. (Blatchford, Tr. 2124).

Response to Finding No. 316

The proposed finding is unsupported and misleading. The proposed finding is unsupported because Mr. Blatchford never uses the word "keen," or anything remotely similar, in the portion of his testimony that Respondent cites. In the portion of his testimony cited by Respondent, Mr. Blatchford simply testified that he "familiarize[s] himself with reimbursement rates for prosthetic knees" in order for him to "understand what it is like for our customer to buy our products and then use them and sell them to their customers, what sort of level of margin they'll actually make and therefore whether it would make sense for them to use our products or not." (Blatchford (Endolite) Tr. 2124). Without additional evidence, the proposed finding is misleading because it asserts Endolite "pays keen attention" with only this quote as support.

317. Endolite looks at three factors when considering price points for its MPKs. (Blatchford, Tr. 2122). First, it considers what margin Endolite needs to make in order to be profitable. (Blatchford, Tr. 2122). Next, it tries to "understand how the price of our products compares with the reimbursement that our customers would get, so whether they would make money if they use our products." (Blatchford, Tr. 2122). Third, Endolite compares the pricing and positioning of its MPKs against other competitors' prices and positions. (Blatchford, Tr. 2122).

Response to Finding No. 317

The proposed finding is misleading and unsupported because Respondent has relied entirely on Mr. Blatchford's answer to the question of why he believes it is "important for [him] to be familiar with the prices that Endolite charges for prosthetic knees?" (Blatchford (Endolite) Tr. 2121-22). This question does not ask Mr. Blatchford what factors *Endolite* looks at "when considering price points for its MPKs." Instead, Mr. Blatchford was merely asked about his personal opinion and why, in his position, he needs to know about Endolite's prices. Mr. Blatchford notably begins his answer by explaining "Because so that I can understand – well, so that I can understand a number of factors that arise from the price level." (Blatchford (Endolite) Tr. 2122). Further, the proposed finding is misleading to the extent it lists the "three factors" as an exhaustive list or that it implies that there is different level of importance for each factor based on the order in which they are listed in the proposed finding. As the question demonstrates, Mr. Blatchford was never asked to provide an exhaustive list of the "factors" that Endolite "looks at" to "consider[ ] price points for its MPKs."

Complaint Counsel does not disagree that Endolite compares the pricing and positioning of its MPKs against other competitors' prices and positions. (*See* Response to RPFF ¶ 312). There is an overwhelming amount of evidence in this case that MPK prices are set in negotiations with clinics and that clinics use the ability to switch (or threaten to switch) to different MPK suppliers to obtain the lowest MPK prices possible. (*See* CCFF ¶¶ 581-606).

318. The reimbursement system constrains prices because the manufacturer knows how much Medicare pays for a device, and their prices are based on what the L Code is going to pay the clinic for the device, and is not based on what it costs them to build the knee or foot or liner. The acquisition price of a device reflects a profit margin that the manufacturer and prosthetist can both live with. (Sabolich, Tr. 5831); [redacted]

Response to Finding No. 318

The proposed finding is misleading, unsupported, unclear, and incomplete. The proposed finding is unsupported because Respondent relies entirely on the testimony of two prosthetic *clinics* to make a specific assertion about how prosthetic *manufacturers* choose to price their products. In the portion of his testimony that Respondent cites, Respondent asked Mr. Sabolich: "Based on your many years of experience in this industry, do *you believe* that the third-party reimbursement system in the United States constrains the ability of prosthetic device manufacturers to raise prices on prosthetic devices, including microprocessor knees?" (Sabolich (Sabolich Prosthetic and Research) Tr. 5831-32 (emphasis added)). [redacted]

Respondent proceeds to offer Mr. Sabolich's answer stating his opinion about why *he believes* the reimbursement system constrains the ability of prosthetic device manufacturers to raise prices as a proposed finding about the *entire prosthetic industry*. Further, Mr. Sabolich's answer is confusing and does not adequately support Respondent's proposed finding. Mr. Sabolich answered in response:

> Well, if Medicare is telling us what we can charge, then what the manufacturer charges for the knee is completely not based on what it costs them to build the knee or foot or liner. It's based on what the L code is going to pay us for the device, therefore developing a profit margin that the manufacturers and the prosthetists can both live with.

(Sabolich (Sabolich Prosthetic and Research) Tr. 5831-32)

The proposed finding is also unclear and misleading because Respondent has not defined "live with" or what it means for "a profit margin that the manufacturer and prosthetist can both live with." As written, the use of "profit margin" may refer to the profit margin earned by the

prosthetist, the manufacturer, or both. To the extent the proposed finding refers to the profit margin earned by both the manufacturer and prosthetist, Mr. Sabolich lacks foundation to know the motivations of prosthetic manufacturers during pricing negotiations and Respondent has not supported an assertion that prosthetic manufacturers use the prosthetist's profit margins to determine pricing.

In addition, the proposed finding is unclear and misleading because Respondent has not defined "them" when asserting "and their prices are based on what the L Code is going to pay the clinic for the device, is not based on what it costs *them* to build the knee or foot or liner." This finding is unclear because "them" may refer to the prosthetistic clinic who fabricates a device or the manufacturer, which creates a material distinction.

Complaint Counsel does not disagree with the concept that reimbursement rates could theoretically constrain a manufacturer's sales price for an MPK if it tried to sell an MPK to a clinic at a price set above the level that the clinic could earn a profit on the entire lower-limb prosthesis fit on a patient. This is simply a theoretical concept though, because in the real world clinics negotiate prices directly with MPK manufacturers and play different MPKs off each other to obtain prices that are significantly below the reimbursement rates they receive from insurers. (*See* CCFF ¶¶ 581-606). Therefore, the real constraint on MPK prices today is the price and quality of substitute competing MPKs, not reimbursement rates. (*See* PX06001A (Scott Morton Report) at ¶¶ 36-38, 119-35). Evidence clearly shows that MPK prices could be increased significantly to many customers and clinics would still be able to profitably fit patients with lower-limb prostheses using MPKs based on current reimbursement amounts for such lower-limb prostheses. (*See,* e.g., CCFF ¶¶ 822-28).

319. Likewise, the L-Code system affects products that manufacturers bring to market. [redacted] De Roy, Tr. 3557-3558).

Response to Finding No. 319

Complaint Counsel has no specific response.

320. [redacted]

Response to Finding No. 320

Complaint Counsel has no specific response.

321. There have only been six new L-Codes issued in the last ten years. (Schneider, Tr. 4298). It is very difficult to get new codes and increased fees from CMS. (Schneider, Tr. 4298-4299).

Response to Finding No. 321

Complaint Counsel has no specific response, but notes that Respondent relied on a quote from Mr. Schneider who said "I *believe* there's been six new codes over the last decade that have been awarded." (Schneider (Otto Bock) Tr. 4298) (emphasis added).

322. [redacted]

Response to Finding No. 322

Complaint Counsel has no specific response.

323. Manufacturers are cognizant of the restraints of the reimbursement system. [redacted]

Response to Finding No. 323

[redacted]

[redacted]

7. Reimbursement For Prosthetic Knees Has Been Declining Over The Last Decade

324. Maynard Carkhuff testified that Medicare reimbursement for prosthetic devices has stayed relatively flat and has not kept up with the Consumer Price Index. (Carkhuff, Tr. 596).

Response to Finding No. 324

Complaint Counsel has no specific response.

325. Reimbursement amounts for MPKs from insurance and Medicare have gone down over the last several years while clinic costs have gone up. (Senn, Tr. 259).

Response to Finding No. 325

The proposed finding is misleading and unsupported because Respondent relies entirely on testimony from Keith Senn discussing only the costs of *his clinic* and misconstrues his testimony. In the portion of his testimony that Respondent cites, Mr. Senn agreed with Respondent's question that "Reimbursements for MPKs from insurance and Medicare have gone down over the last several years while your costs have gone up; isn't that right?" (Senn (COPC) Tr. 259). Mr. Senn, however, elaborated that "I would agree that Medicare *has not decreased*, but it's definitely not much of an increase." (Senn (COPC) Tr. 259) (emphasis added). Although he testified that reimbursement from private insurers has decreased, the proposed finding is unsupported as it relates to reimbursement amounts for MPKs from Medicare and only relates to private insurance used by patients at his clinic, not all private insurance nationwide. Further, with respect to Respondent's assertion that "clinic costs have gone up," Mr. Senn clearly only testified about *his*

own clinic and would have no foundation to testify about the clinic costs *of all clinics* as the finding suggests.

326. Over the last ten years, Medicare reimbursement for prosthetic products has actually gone down. (Schneider, Tr. 4298). Medicare has not increased its reimbursement schedule to keep up with inflation. (Senn, Tr. 260).

Response to Finding No. 326

The proposed finding is misleading and unsupported to the extent it suggests "[o]ver the last ten years, Medicare reimbursement for prosthetic products has actually gone down." The testimony of Mr. Schneider cited by Respondent states: "They've gone down. Both the reimbursement has not equaled cost of living increases. It is extremely difficult. I believe there's been six new codes over the last decade that have been awarded." (Schneider (Otto Bock) Tr. 4298). Mr. Schneider's testimony is ambiguous, leaving it unclear whether reimbursement amounts for prosthetics have gone down or up at a different rate than cost of living increases. Without more clarity, Mr. Schneider's testimony does not support the proposed finding as written. (*See* Response to RPFF ¶ 265).

The proposed finding is also unclear, misleading, and incomplete to the extent it suggests "Medicare has not increased its reimbursement schedule to keep up with inflation" because Respondent has no defined "reimbursement schedule." A "reimbursement schedule" could imply the amount reimbursed under each L-Code or the number of L-Codes, which is a material distinction. Without more clarity, the proposed finding is incomplete and misleading.

327. [redacted]

Response to Finding No. 327

[redacted]

[redacted]

328. While reimbursement amounts are staying flat or decreasing, clinics are facing significant reimbursement pressure from smaller allowables, audits, and preauthorizations and the costs associated with those things. (Schneider, Tr. 4301)

Response to Finding No. 328

The proposed finding is unclear, misleading, and unsupported because Respondent has relied entirely on a portion of Scott Schneider's self-serving testimony to support an assertion that "*clinics* are facing significant reimbursement pressure . . ." Mr. Schneider is an Otto Bock executive who lacks sufficient foundation to speak about the "reimbursement pressure" that prosthetic clinics currently face and whatever "costs" are "associated with those things." Further, the proposed finding is unclear and misleading because Respondent has not defined "allowables" or the "costs associated with those things." Without more information, the term "allowables" may

refer to either the number of L-Codes billable for particular devices or the amount billable for each L-Code, which is a material distinction. Respondent's use of the term "costs associated with those things" is misleading without quantifying these costs or explaining what are the associated "cost."

Respondent's assertion that "reimbursement amounts are staying flat or decreasing" is also misleading and unclear. By asserting that reimbursement amounts are both "staying flat" and "decreasing," Respondent could be suggesting that the reimbursement amount for *some products* is staying flat, while the amounts for other products are decreasing, or that the reimbursement amounts altogether are "staying flat" or "decreasing." If the latter, than the assertion is incomplete without more information, but regardless the assertion is unclear.

329. The terms of reimbursement are dictated by the insurers, and clinicians have little leverage to demand higher reimbursement. [redacted]

Response to Finding No. 329

[redacted]

[redacted]

[redacted]

330. [redacted] OPC has contracts with over 200 different payers. (Senn, Tr. 199).

Response to Finding No. 330

[redacted]

8. Reimbursement Is Manufacturer And Brand Agnostic

331. Medicare's reimbursement is based entirely on the L-Codes that a prosthesis is eligible for. In other words, prosthesis with the same L-Codes will be reimbursed the same, even if they are from different manufacturers, and even if the manufacturer's price to the clinic was different. (Senn, Tr. 203; 204; Schneider, Tr. 4352).

Response to Finding No. 331

Complaint Counsel has no specific response.

332. Indeed, clinics may not even specify the brand of MPK it is fitting on a patent when it applies for reimbursement from Medicare, since it is not required by Medicare. (Senn, Tr. 202; Kannenberg, Tr. 1871-1872, 1933-1934).

Response to Finding No. 332

Complaint Counsel has no specific response.

333. [redacted]

Response to Finding No. 333

Complaint Counsel has no specific response.

334. Because reimbursement is based entirely on L-Code, a prosthetist benefits financially by selecting the MPK that costs the clinic the least amount of money to obtain from the manufacturer. (Senn, Tr. 204). "And since, generally, Medicare gives [COPC] the same amount of money for an L code regardless of the price or regardless of the brand or manufacturer, financially, it's a benefit to [COPC] to provide to the patient the MPK that costs [COPC] the least amount of money." (Senn, Tr. 204).

Response to Finding No. 334

Complaint Counsel does not disagree with this proposed finding and adds that this is why Mr. Senn also testified he benefitted significantly from the head-to-head MPK price competition between Freedom and Otto Bock pre-Merger. For example, Keith Senn testified that he increased his purchases of Freedom's Plié due to "[t]he competitive pricing that we received from them." (CCFF ¶ 1150). [redacted]

[redacted]

C. Any Relevant Product Market Is Broader Than Only MPKs

1. Sophisticated K-3 And K-4 Knees Are Functionally Interchangeable With MPKs And The Plié 3 In Particular

335. The hydraulic controls allow an amputee to walk at a variable cadence, and therefore, from a clinical standpoint, any sophisticated prosthetic knee with a hydraulic or pneumatic system –whether microprocessor-controlled or not – is clinically appropriate for a K-3 and K-4 amputee. (Oros, Tr. 4791; [redacted].

Response to Finding No. 335

[redacted]

[redacted]

[redacted]

336. There is overlap in the technology of non-MPKs and MPKs that are appropriate for K-3 patients; many MPKs and non-MPKs hydraulically controlled cylinder, and in an MPK the microprocessor aspect is controlling that hydraulically controlled cylinder, so the microprocessor is an enhancement to existing hydraulic technology. (Oros, Tr. 4791-4793; Doug Smith, Tr. 5991-5992, 5994 (the microprocessor just "adds one more little level of control."); [redacted] Ford Tr. 1052; [redacted]

Response to Finding No. 336

[redacted]

[redacted]

[redacted]

337. Prosthetists and physicians do not divide the world up into non-MPKs and MPKs. They do not think of the fitting selection process as a non-MPK vs. MPK determination, but instead consider various features and functions that a particular prosthetic knee can provide to a patient. (Doug Smith, Tr. 6007-6008; PX05166 (Watson (Fourroux) Dep. at 148-149)).

Response to Finding No. 337

This proposed finding is unclear, misleading, incorrect, and against the weight of the evidence to the extent it implies that prosthetists and physicians do not determine that MPKs are medically superior to mechanical knees for many K3 and K4 patients. First of all, it is unclear what Respondent means by "divide up the world into non-MPKs and MPKs"—no evidence cited by Respondent explains or provides meaningful context about what that statement means or how it is relevant to the case. Respondent does not provide any citation for that sentence, and no other witness—including the two following the second sentence—used the phrase "divide the world up into non-MPKs and MPKs."

The testimony of Dr. Smith cited by Respondent supports nothing more than the proposition that "active adults" are the only "candidates" for MPKs under the current reimbursement system and medical professionals consider individualized factors, such as the activities in which an amputee wishes to engage, in determining whether an MPK or mechanical knee is medically optimal for a patient. (Smith (Retired) Tr. 6007-6008). This testimony does not support Respondent's proposed finding to the extent it implies that prosthetists and physicians do not determine, based on individualized factors, that MPKs are medically superior to mechanical knees for many K3 and K4 patients. In addition, Dr. Smith acknowledged at trial that he is not familiar with the MPK products currently available on the market, nor with the features or

functionality of those MPKs. (CCFF ¶¶ 3394-3399). Additionally, Dr. Smith's laboratory received substantial funding from Otto Bock over a multi-year period to study the C-Leg and to record videos demonstrating how to conduct amputations. (CCFF ¶ 3391).

It is unclear how, if at all, the testimony of Mr. Watson cited by Respondent is relevant to any issue in this case, and the substance of Mr. Watson's testimony cited by Respondent does not support Respondent's proposed finding. On the deposition pages cited by Respondent, Mr. Watson testifies that the "relevance of microprocessor versus non-microprocessor . . . all come down to function." (PX05166 (Watson (Fourroux) Dep. at 148-149)). In answering questions directly before those cited by Respondent, Mr. Watson testified that "When you asked does a microprocessor company compete with a mechanical knee company, I think those are two different sales strategies," and he explained that "I don't think that they are competing for a patient. Because they have no direct contact with patients unless it is web based." (PX05166 (Watson (Fourroux) Dep. at 146-147)). This testimony indicates that Mr. Watson views the functionality and marketing of MPKs and mechanical knees as significantly different, and it confirms that clinics, and not patients, are the primary customers of MPK manufacturers. When Respondent counsel asked Mr. Watson, "So from Fourroux's perspective, you don't divide the world up into mechanical knees and microprocessor knees?" Complaint Counsel objected to the form of the question as vague (an objection it maintains), and Mr. Watson's answered, "I wouldn't know where to begin." (PX05166 (Watson (Fourroux) Dep. at 148)). None of this testimony supports Respondent's proposed finding. In addition, Mr. Watson is the President of Fourroux, and, in that role, is no longer involved in the care of patients; nor is he responsible for overseeing Fourroux's clinicians when they are fitting patients with prosthetic devices. (PX05166 (Watson (Fourroux) Dep. at 21, 23-24)). Mr. Watson did not testify at trial.

338. Össur's Mauch Knee and the Freedom Plié require similar manual adjustments for swing and stance control. (De Roy, Tr. 3652). Maynard Carkhuff testified that the Mauch knee controls swing and stance of the knee in a similar way to the Plié. (Carkhuff, Tr. 619-20).

Response to Finding No. 338

This proposed finding is unclear, incomplete, misleading, and, to the extent Respondent attempts to imply that Össur's Mauch Knee and Freedom's Plié are significant substitutes for each other, contradicted by a large body of evidence. Neither the proposed finding, nor Respondent's cited testimony, describe what "similar manual adjustments" means or what the significance is, if any, of common adjustments made to the Mauch Knee and the Plié. Mr. De Roy of Össur, cited by Respondent, testified that the mechanism in the Plié 3 is "a different mechanism altogether" from that in Össur's Mauch Knee, indicating that the existence of any "manual adjustments" made to both knees is not particularly significant to the design or functionality of the two products. (De Roy (Össur) Tr. 3652).

To the extent this proposed finding relies on the testimony of Mr. Carkhuff, this finding is misleading and incomplete. Mr. Carkhuff testified at length on the very pages of the trial transcript cited by Respondent about the functionality that the microprocessor in the Plié 3 provides when controlling the swing and stance of the knee, a component that the Mauch Knee lacks. Specifically, Mr. Carkhuff testified that "the primary difference [between the Mauch Knee and the Plié] is that we use a microprocessor to control and trigger release of the stance phase upon what we call toe off, and then the hydraulic resumes control of the knee and extends it out in front of the patient." (Carkhuff (Freedom) Tr. 620). Mr. Carkhuff explained that the microprocessor in the Plié 3 (which the Mauch Knee lacks) "is always sort of evaluating an array of sensors that are providing feedback to determine exactly when we should release the knee." Moreover, "another very important aspect of a microprocessor is that if anything that – any movement that is detected outside a specific range of activities is detected, then the microprocessor will very quickly switch the hydraulics back into

stance so that it would help provide stumble recovery." (Carkhuff (Freedom) Tr. 620-621). Thus, the very testimony cited by Respondent to support its finding contradicts the proposition that Plié 3 functions in a similar way as the Mauch Knee.

To the extent Respondent is attempting to suggest in this proposed finding that Freedom's Plié 3 MPK and Össur's mechanical Mauch Knee are substitutes because of some undefined similarities, this conclusion is unfounded and contrary to the evidence. In fact, the record shows that [redacted]

Additionally, [redacted] This evidence shows that K3 mechanical knees like Össur's Mauch Knee, Otto Bock's 3R80, and College Park's Capital Hydraulic Knee do not compete significantly with MPKs like Freedom's Plié 3.

339. Össur recommends using a non-MPK to K-3 and K-4 patients that want to run a marathon. (De Roy, Tr. 3580).

Response to Finding No. 339

Complaint Counsel does not disagree that Ossur recommends some K-3/K-4 amputees use a non-MPK for certain activities, however, the proposed finding is misleading to the extent Respondent attempts to imply that non-MPKs and MPKs are substitutes for each other for patients who engage in running marathons or other activities during which they may prefer to use a non-MPK. While non-MPKs may be preferred by some K3/K4 patients *during* moments of rigorous physical activities such as running or cycling, they are not *always* preferred by patients who partake in these activities, and even those patients who use a mechanical knee for certain activities also use an MPK for daily living. (*See* PX05105 (Fillauer (Fillauer) Dep. at 95-97); Blatchford (Endolite) Tr. 2241). Thus, even when patients own both an MPK and a mechanical knee, they do not view their MPK and mechanical knee as substitutes for the same activities. Rather, the MPK and mechanical knee are complementary products that serve different purposes in these amputees' lives.

340. Maynard Carkhuff testified that there are some pretty sophisticated non-microprocessor fluid-controlled knees, such as the Mauch knee, and other knees that have unique geometric designs that would benefit K-3 and K-4 patients. (Carkhuff, Tr. 618-619).

Response to Finding No. 340

The proposed finding is unclear and misleading. The proposed finding is unclear because the terms "pretty sophisticated" and "unique geometric designs" are undefined, and their relevance is not specified in either the finding or the cited testimony. This proposed finding is also vague because it fails to define the "benefit[s]" that the "pretty sophisticated non-microprocessor fluid-controlled knees . . . and other knees that have unique geometric designs" offer to K-3 and K-4 patients.

The proposed finding is misleading to the extent Respondent attempts to imply that the benefits offered by the mechanical Mauch Knee and unspecified other non-MPKs make them substitutes for MPKs. Such an assertion is not supported by the cited testimony of Mr. Carkhuff who stated only that there exist non-MPKs that are "suitable" or "appropriate" for K-3 amputees. (Carkhuff (Freedom) Tr. 618-619). To the extent Respondent is attempting to suggest that Össur's mechanical Mauch Knee and other mechanical knees, on one hand, are substitutes for Freedom's Plié 3, Otto Bock's C-Leg 4 and other MPKs, such an assertion is unfounded and contrary to the evidence. [redacted]

[redacted]

341. Maynard Carkhuff testified that the primary difference between the Plié and sophisticated non-MPK hydraulic knees is that the Plié uses a microprocessor to control and trigger the switch between swing and stance phase. (Carkhuff, Tr. 620).

Response to Finding No. 341

This proposed finding is incomplete and misleading. This proposed finding is incomplete to the extent it suggests that Mr. Carkhuff minimized the differences between the Plié and non-MPK hydraulic knees. As noted in Complaint Counsel's Response to Proposed Finding 338, Mr. Carkhuff gave extensive testimony about the advantages of the Plié over the Mauch Knee by virtue of the inclusion of a microprocessor. These advantages include not only the way microprocessor controls the swing and stance phase of the Plié 3, but also the stumble recovery functionality that the microprocessor enables. (Carkhuff (Freedom) Tr. 620-621).

[redacted]

342. Maynard Carkhuff testified that many more K-3 and K-4 patients are fit with non-MPKs than are fit with MPKs. (Carkhuff, Tr. 621).

Response to Finding No. 342

Complaint counsel does not disagree that Mr. Carkhuff testified as described in this proposed finding. This proposed finding is vague to the extent that Mr. Carkhuff did not clarify what he meant by "many more".

This proposed finding is inconsistent with the weight of the evidence, and with Respondent's Proposed Finding No. 345, which states that "The number of K-3 and K-4 users fit with a non-MPK is about equal to the number fit with an MPK each year in the United States." The record in this case demonstrates that approximately half of amputees designated as K-3 or K-4 are fit with MPKs. (*See* RPFF ¶ 345; *see also* Sabolich (Scott Sabolich Prosthetics) Tr. 5887 (60-70 percent of K3 amputees fit by Sabolich clinics receive an MPK)).

343. Sophisticated non-MPKs compete with MPKs for K-3 and K-4 users in the United States, as both are medically appropriate for K-3 and K-4 users. (Schneider, Tr. 4329; Blatchford, Tr. 2254).

Response to Finding No. 343

This proposed finding is unclear, unfounded, misleading, incorrect, and contrary to the weight of the evidence to the extent it implies that so-called "sophisticated non-MPKs" compete

with MPKs for *all* K-3 and K-4 amputees because specific non-MPKs may be medically appropriate for *some particular* K-3/K-4 amputees.

First, it is unclear what is meant by "medically appropriate" in this proposed finding: the phrase is undefined, and does not appear in the cited portions of the trial record. Moreover, nothing in the proposed findings establishes what specific products are "sophisticated non-MPKs" or that so-called "sophisticated non-MPKs" are "medically appropriate" for specific K-3 and K-4 amputees for whom MPKs are also "medically appropriate." Neither Mr. Schneider nor Mr. Blatchford, in the cited portions of their testimony, addressed whether any particular type of prosthetic is "medically appropriate" for any particular amputee. (Schneider (Otto Bock) Tr. 4329; Blatchford (Endolite) Tr. 2254). Mr. Blatchford testified only that "non-MPKs" are "suitable for K3 patients." (Blatchford (Endolite) Tr. 2254). Mr. Blatchford did not explain what he meant by "suitable" and, as he is not a prosthetist or physician, would not have foundation to speak to what products would be "medically appropriate" for particular amputees.

This finding notably cites to no ordinary course documents, nor to testimony from any independent prosthetist, physician, or clinician, establishing that any non-MPKs are medically appropriate for the same K-3 or K-4 patients for whom an MPK would be medically appropriate. This proposed finding is misleading and contrary to the weight of the evidence which shows that some K-3 and K-4 patients benefit medically from having a *microprocessor-controlled* knee system and others can be medically treated effectively using only a *mechanically* controlled system. [redacted] 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 ¶¶ 461-487).

This proposed finding similarly cites to no ordinary course documents demonstrating competition between MPKs and non-MPKs, nor does it cite to the testimony of any independent prosthetist, physician, clinician, or clinic owner to support the proposition that non-MPKs compete with MPKs. Indeed, the weight of the evidence is to the contrary, demonstrating that MPKs and mechanical knees do not compete closely with each other. (*See generally* CC's Post-Trial Brief

at 22-45). [redacted] For example, a 2015 Freedom presentation titled "Microprocessor Controlled Knees" includes slides titled "What makes MPC Knees different?" listing such benefits as "Increases stability and confidence," "Reduces cognitive burden because of stumble recovery feature," "Studies have shown that MPC knees can elevate some user's functional abilities (K-level) compared to conventional knees," "Studies also suggest that [MPKs] actually are responsible for variable cadence achievement," "Stability can reduce fear of falling," "Studies show 88.1% increase in confidence," "Studies also show 88.4% improvement of gait agility compared to non-MPK's," "Reported that MPC knees can decrease frequency of falls by as much as 64%," and "Amputees no longer have to watch every step." (CCFF ¶ 671).

[redacted]

Respondent's actions and analyses in the ordinary course of business demonstrate clearly that they view MPKs and mechanical knees as competing in distinct market segments. (*See, e.g.,* CCFF ¶¶ 717-741). Both Otto Bock and Freedom frequently developed market share analyses featuring only MPK competitors. (*See, e.g.,* CCFF ¶¶ 718, 727). Evidence shows that clinics, insurers, and competing manufacturers similarly view the MPK market as distinct. (*See, e.g.,* CCFF ¶¶ 742-766). Össur's Executive Vice President of Research and Development, Kim Peter

Vivianne De Roy, testified that MPKs and mechanical knees "don't really compete for the same population." He described the patient population for an MPK as "people with access to certain funds," and explained that "[i]f they have access to a microprocessor knee, they'll buy a microprocessor knee." Patients who do not have access to an MPK will buy a mechanical knee. (CCFF ¶ 753).

Additionally, this finding is unfounded to the extent it relies on the cited testimony of Mr. Schneider and Mr. Blatchford to establish that "sophisticated non-MPKs" broadly compete with MPKs for K-3 and K-4 users. In the cited testimony, Mr. Schneider, a biased witness who works for Respondent, testified only that three specific non-MPKs (the Mercury Knee, Mauch Knee, and the 3R80) compete with MPKs. (Schneider (Otto Bock) Tr. 4329). Additionally, the cited testimony from Mr. Blatchford says nothing about whether any "non-MPKs compete with MPKs." Indeed, Mr. Blatchford's testimony demonstrates precisely the opposite. He testified that, when analyzing competition for Endolite's MPK, the Orion 3, "[w]e only look at other MPKs" "[b]ecause we don't think that non-MPKs compete with the Orion." (Blatchford (Endolite) Tr. 2143).

344. Clinicians have reported that non-MPKs have become increasingly safe, stable and functional. (PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 24)).

Response to Finding No. 344

This proposed finding is unfounded to the extent it purports to draw conclusions about what "Clinicians have reported" based on the testimony of a single clinic owner about his own experience with mechanical knees. (PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 24)). Complaint counsel has no specific response regarding the veracity of the assertion that non-MPKs have become "increasingly safe, stable and functional." This proposed finding is also confusing to the extent that it does not define "increasingly safe, stable and functional."

This proposed finding is inaccurate and misleading insofar as it implies that non-MPKs offer comparable safety and functionality to MPKs. The weight of the evidence in the record establishes that MPKs provide superior safety and functionality to non-MPKs. (*See* Response to RPFF ¶ 336 (discussing the extensive evidentiary record demonstrating the benefits of MPKs relative to mechanical knees)). In fact, Mr. Weott himself testified that, while mechanical knees have become safer, more stable, and more functional over the past thirty years, "when [MPKs] came into play however many years ago that was, all they did was enhance the evolution of that and take it to another level." (PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 24)).

345. The number of K-3 and K-4 users fit with a non-MPK is about equal to the number fit with an MPK each year in the United States. (Schneider, Tr. 4329; Oros, Tr. 4792; [redacted]

Response to Finding No. 345

[redacted]

346. For K-3 and K-4 patients in the United States, about 55% of Endolite's sales are attributable to non-MPKs and 45% are attributable to MPKs. (Blatchford, Tr. 2254-2256).

Response to Finding No. 346

Complaint counsel does not disagree, subject to the clarification that the percentages in the proposed finding are of Endolite's *prosthetic knee* sales to K-3 and K-4 patients in the United States (rather than of all Endolite sales in the U.S.). (Blatchford (Endolite) Tr. 2254-2256).

347. Manufacturers recognize that non-MPKs have certain technical advantages over MPKs, including durability in multiple environments, less required maintenance, and lack of a need to charge the Knee. (Solorio, Tr. 1640; Blatchford, Tr. 2260-2261; Kannenberg, Tr. 1985; Schneider, Tr. 4332-4333).

Response to Finding No. 347

This proposed finding is incomplete and unfounded to the extent that it purports to speak for "manufacturers" generally, while citing to testimony from employees of just two companies—Otto Bock and Endolite. This proposed finding is also overbroad to the extent it speaks in generalities about all non-MPKs and all MPKs.

[redacted]

Respondent's cited testimony is not to the contrary. For example, Otto Bock's Cali Solorio testified that a customer might prefer Otto Bock's 3R80 non-MPK over the C-Leg 4 if they "work in construction or work on farms where they're going to be beating the knee up all the time and they don't want to – they don't have a way to charge the knee while they're out working for long jobs or they might be people who do a lot of outdoor activities where they don't want to have to bring a charger with them and try to find charging." (Solorio (Otto Bock) Tr. 1640). Similarly, Otto Bock's Andreas Kannenberg testified that "there are mechanical knees that are waterproof. You can go fishing with them. The 3R80, for instance, is a saltwaterproof knee joint, so you can fish in a bay all day and the knee still works. I wouldn't recommend to do that with any microprocessor knee except the X3." (Kannenberg (Otto Bock) Tr. 1985). Otto Bock's Scott Schneider echoed this: "[I]f the patient's occupation or their livelihood or their hobbies include heavy water use, in or around, then that would be a good indication for a mechanical knee." (Schneider (Otto Bock) Tr. 4332). For some individuals, the patient's specific needs and the

characteristics of certatin mechanical knees make them the medically appropriate prosthetic knee for that patient. MPKs are not substitutes for such patients.

348. In fact, the majority of knees offered by Endolite for moderately active to more active users are sophisticated knees that are user-controlled, rather than microprocessor-controlled. (Blatchford, Tr. 2254)

Response to Finding No. 348

The proposed finding is vague and confusing because the terms "the majority of knees offered by Endolite" could refer to either the number of knees sold by Endolite, or the number of different models of knee on sale by Endolite. Mr. Blatchford testified, at the cited portion of the trial record, that Endolite sells three different kinds of non-MPKs to the K-3 population. (Blatchford (Endolite) Tr. 2254). It is unclear from the cited portion of Mr. Blatchford's testimony whether this is greater than the number of MPKs sold by Endolite. To the extent that "the majority of knees offered by Endolite" refers to the number of knees actually sold, then it is correct that Mr. Blatchford testified (albeit not at the cited page), that roughly 55% of knees Endolite sells to K-3 amputees in the U.S. are non-MPKs. (Blatchford (Endolite) Tr. 2256; *see also* Response to RPFF ¶ 346). This finding is also vague because the term "moderately active to more active users" is undefined in the Proposed Finding and in the cited testimony.

In any event, this proposed finding is irrelevant. The number or percentage of non-MPK knees that Endolite sells is irrelevant to the question of whether such mechanical knees compete with MPKs. Complaint counsel does not disagree that some K-3 and K-4 amputees in the U.S. are fit with mechanical knees. [redacted]

[redacted]

[redacted]

349. Prosthetists recognize that non-MPKs have certain technical advantages over MPKs, including less service failures, lighter weight, greater flexion, greater water resistance, and lack of necessity to charge the knee. (Ell, Tr. 1723, 1783, 1785; Sabolich, Tr. 5848-49 ("I can give you a C-Leg 4 and give you stability at heal strike that you can't get in your mechanical knee, but I am going to . . . give you a lot more weight than you want. Or I can give you a lightweight knee that has a manual lock, that's stable, but doesn't have the stumble recovery like the C-Leg, so everything is a little different.")).

Response to Finding No. 349

This proposed finding is incomplete and unfounded to the extent that it purports to speak for "prosthetists" generally, while citing to testimony from just two individuals: Tracy Ell of Mid-Missouri, and Scott Sabolich of Scott Sabolich Prosthetics. This proposed finding is also overbroad to the extent it speaks in generalities about all non-MPKs and all MPKs. This proposed finding is also vague and unfounded to the extent it refers to "certain technical advantages" of non-MPKs, and suggests that there exist more such advantages than are listed. The existence of other "technical advantages," if any, of non-MPKs is unsupported by the cited testimony.

Complaint counsel does not dispute that some non-MPKs possess the characteristics identified in this proposed finding. [redacted] Respondents' cited testimony is not to the contrary. For example, Mr. Ell was asked in which circumstances a K-3 patient might use a mechanical knee rather than an MPK. He responded that "If the available microprocessor knees were not rated as fully submersible and they were doing activities that were going to be submersed greater than the allotted time for the

available knees." (Ell (Mid-Missouri) Tr. 1723). For such a patient, an MPK would simply not be an option, and therefore MPKs and mechanical knees would not be substitutes for that patient. Mr. Ell also testified that an MPK would not be an option for a K-3 patient who did not meet the medical necessity requirements for an MPK; this patient would instead receive a mechanical knee (and an MPK would not be a substitute). (Ell (Mid-Missouri) Tr. 1723-1724).

a. No clinical studies show any benefits of the Plié 3 relative to Sophisticated Non-MPKs.

350. There is no evidence that the Freedom Plié 3 provides K-3 or K-4 patients with significant health, safety, and quality-of-life benefits over Sophisticated non-MPKs. (Schneider, Tr. 4361).

Response to Finding No. 350

This proposed finding is unfounded, unclear, incorrect, and against the weight of the evidence. This proposed finding is unfounded to the extent that its sweeping categorization regarding the Plié is premised only on a single piece of self-serving testimony from a single source—Otto Bock executive Scott Schneider. This proposed finding is vague to the extent the phrases "significant health, safety, and quality-of-life benefits" and "Sophisticated non-MPKs" are undefined in either the proposed finding or the cited testimony.

This proposed finding is incorrect in stating there is "no evidence that the Freedom Plié 3 provides K-3 or K-4 patients with significant health, safety, and quality-of-life benefits over" mechanical knees. In fact, there is substantial evidence to the contrary and the proposed finding is against the weight of that evidence, which establishes the benefits of the Plié over mechanical knees. For example, Maynard Carkhuff, former CEO and current Chairman of Freedom, testified that Freedom markets its Plié MPK as improving the stability of stance of amputees while ascending or descending stairs, relative to mechanical knees. (CCFF ¶ 657). In materials on

Freedom's website for use by customers seeking reimbursement for the Plié, Freedom includes a "Microprocessor Knee Literature Review" collecting research establishing the benefits of MPKs over mechanical knees, and citing to various MPK studies. (CCFF ¶ 671). [redacted]

- [redacted]

[redacted]

[redacted]

351. There is no evidence that the Plié 3 allows amputees to maneuver through obstacles and over uneven terrain better than non-MPK, fluid-controlled knees. (Schneider, Tr. 4361-4362).

Response to Finding No. 351

This proposed finding is unfounded, vague, incorrect, and against the weight of the evidence. This proposed finding is unfounded to the extent that its sweeping categorization regarding the Plié is premised only on a single piece of self-serving testimony from a single source—Otto Bock executive Scott Schneider. This proposed finding is vague to the extent the

phrase "maneuver through obstacles and over uneven terrain better" is undefined in the proposed finding and the cited testimony.

This proposed finding is incorrect in stating there is "no evidence that the Plié 3 allows amputees to maneuver through obstacles and over uneven terrain better than non-MPK, fluid-controlled knees." In fact there is substantial evidence to the contrary and the proposed finding is against the weight of that evidence, which establishes the benefits of the Plie over mechanical knees. (*See* Response to RPFF ¶ 350 (collecting evidence of the benefits of the Plié over non-MPKs). The Plié 3 Summary of Evidence [redacted] Similarly, the "Microprocessor Knee Literature Review" posted on Freedom's website for use of customers in seeking reimbursement for the Plié notes that "research has been able to show that the [MPK] user feels more stable on stairs, inclines, and uneven terrain, while reducing the cognitive demand required for walking." (CCFF ¶ 672).

352. There is no evidence that the Plié 3 reduces falls relative to Sophisticated non-MPKs. (Schneider, Tr. 4362).

Response to Finding No. 352

This proposed finding is unfounded, vague, incorrect, and against the weight of the evidence. This proposed finding is unfounded to the extent that its sweeping categorization regarding the Plié is premised only on a single piece of self-serving testimony from a single source—Otto Bock executive Scott Schneider. This proposed finding is vague to the extent the

phrases "reduces falls" and "Sophisticated non-MPKs" are undefined in either the proposed finding or the cited testimony.

This proposed finding is incorrect in stating there is "no evidence that the Plié 3 reduces falls relative to" mechanical knees. In fact there is substantial evidence to the contrary and the proposed finding is against the weight of that evidence, which establishes the benefits of the Plié over mechanical knees. (*See* Response to RPFF ¶ 350 (collecting evidence of the benefits of the Plié over non-MPKs). [redacted] Additionally, the 2015 Freedom presentation titled "Microprocessor Controlled Knees" including slides titled "What makes MPC Knees different?" lists as benefits of MPKs that "Stability can reduce fear of falling," and "Reported that MPC knees can decrease frequency of falls by as much as 64%." (CCFF ¶ 671). Similarly, the "Microprocessor Knee Literature Review" posted on Freedom's website for use of customers in seeking reimbursement for the Plié notes that research demonstrates that "the user experiences less stumbles and falls while expressing a higher level of satisfaction and stability with MPKs." (CCFF ¶ 672).

353. Freedom's Plié 3 does not use an internal computer to monitor each phase of the amputee's walking pattern and change the resistance therein. (Schneider, Tr. 4362).

Response to Finding No. 353

This proposed finding is unclear, misleading, and against the weight of the evidence. This proposed finding is unfounded to the extent that its sweeping categorization regarding the Plié is premised only on a single piece of self-serving testimony from a single source—Otto Bock executive Scott Schneider. This proposed finding is vague to the extent the phrase "monitor each

phase of the amputee's walking pattern" is undefined in either the proposed finding or the cited testimony.

This proposed finding is misleading and against the weight of the evidence to the extent it seeks to portray the Plié 3 as not being a true microprocessor knee that competes directly with Otto Bock's C-Leg in the U.S. MPK market. [redacted] For example, in Freedom's publicly available "Fact Sheet," it addressed "Ottobock Claims vs. Reality," clearly explaining 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." (PX08008 (Freedom) at 001). [redacted]

[redacted]

This proposed finding is misleading to the extent that it seeks to obscure the extent to which the Plié and the C-Leg compete in the relevant market. [redacted] Numerous individuals – including prosthetistis, clinicians, and competitors, as well as employees of Respondent, have testified that the Plié is sold as a microprocessor knee, and competes directly with the C-Leg for sales, notwithstanding any differences in the functionality of the Plie and C-Leg. For example, [redacted]

[redacted] No document in the record analyzes any market or market segment for "MP-Switch" knees because this is not a concept that existed in the ordinary course of business at Otto Bock or Freedom before Respondent Counsel came up with the label for these proceedings.

354. The Freedom Plié 3 does not use a series of sensors which help patients walk with a much more stable and efficient gait that more loosely resembles natural walking pattern. (Schneider, Tr. 4362).

Response to Finding No. 354

This proposed finding is unclear, misleading, against the weight of the evidence, and irrelevant. This proposed finding is unfounded to the extent that its sweeping categorization regarding the Plié is premised only on a single piece of self-serving testimony from a single source—Otto Bock executive Scott Schneider. This proposed finding is vague to the extent the phrases "use a series of sensors" and "help patients walk" are undefined in either the proposed finding or the cited testimony.

This proposed finding is incorrect in suggesting that the Plié does not enable patients to "walk with a much more stable and efficient gait" relative to mechanical knees. [redacted]

[redacted]

355. There is no evidence that the Freedom Plié 3 enables patients to easily navigate ramps, stairs and nearly every type of challenging surface even walking backwards. (Schneider, Tr. 4362).

Response to Finding No. 355

This proposed finding is unclear, misleading, against the weight of the evidence, and irrelevant. This proposed finding is unfounded to the extent that its sweeping categorization regarding the Plié is premised only on a single piece of self-serving testimony from a single source—Otto Bock executive Scott Schneider. This proposed finding is vague to the extent the phrases "enables patients to easily navigate" and "nearly every type of challenging surface" are undefined in either the proposed finding or the cited testimony.

This proposed finding is incorrect in suggesting that the Plié does not enable patients to more easily "navigate ramps, stairs and nearly every type of challenging surface". [redacted] Similarly, the "Microprocessor Knee Literature Review" posted on Freedom's website for use of customers in seeking reimbursement for the Plié notes that "research has been able to show that the [MPK] user feels more stable on stairs, inclines, and uneven terrain, while reducing the cognitive demand required for walking." (CCFF ¶ 672).

356. PX01548 reflects Ottobock's evidence-based conclusion that the Plié 3 lacks microprocessor-controlled swing and stance variable control; therefore, Freedom should

not recommend L5856 for the Plié. (Schneider, Tr. 4373). Ottobock did not create documents like PX01548 for Össur and Endolite because the Rheo and Orion 3 are properly recommended as L5856. (Schneider, Tr. 4373-4374).

Response to Finding No. 356

This proposed finding is unfounded, vague, misleading, and against the weight of the evidence. It is unfounded to the extent that it relies exclusively on the self-serving testimony of Otto Bock executive Scott Schneider to say what functionality is possessed by the MPKs of Freedom, Össur, and Endolite.

This proposed finding is also vague to the extent the term "evidence-based conclusion" is undefined. While PX01548 cites to certain studies, the substance and validity of those studies is not reflected in the cited testimony by Mr. Schneider. It is also vague to the extent the term "swing and stance variable control" is undefined.

[redacted] For several years, Otto Bock has attempted to undermine the Plié with allegation that the Plié 3 is not a microprocessor-controlled swing and stance knee, but Freedom has successfully rebutted these claims in the marketplace. For example, in Freedom's publicly available "Fact Sheet," it addressed "Ottobock Claims vs. Reality," clearly explaining 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 ¶¶ 994-995). [redacted] For example, Freedom's Eric Ferris testified that "We do actually have swing and stance functionality in our knee." (CCFF ¶ 3064). [redacted]

[redacted]

357. "Results of a more recent study of the Plié 3 presented at the ISPO World Congress revealed that these differences still exist between the current versions of Plié and the C-Leg." (PX01548; Schneider, Tr. 4375).

Response to Finding No. 357

This proposed finding is incomplete, unfounded, irrelevant, and misleading. This proposed finding is incomplete because it contains a quote from a draft Otto Bock document referring to a study, which is not itself cited or quoted directly. It is also incomplete and misleading to the extent it refers only to unspecified "differences" between the Plié and C-Leg. It is irrelevant that there exist "differences" between the Plié and C-Leg – this fact, in and of itself, has no bearing on the extent to which the two MPKs compete.

This proposed finding is also unfounded to the extent it cites to the testimony of Otto Bock's Scott Schneider. Asked about the quoted language in PX01548, Mr. Schneider testified only that this was his "understanding," absent any testimony about the basis for that "understanding" or its significance. (Schneider (Otto Bock) Tr. 4375). While Mr. Schneider testified that this letter was written by Kimberly Hanson and Andreas Kannenberg, who reported directly or indirectly to Mr. Schneider, Mr. Schneider did not testify that he had any personal involvement in the drafting of the letter, or in reviewing the studies it cited. (Schneider (Otto Bock) Tr. 4372-4375).

358. Dr. Doug Smith testified that his clinical study on the benefits of C-Leg, PX00855, cannot support the conclusion that the Plié 3 provides clinical benefits to K-3 patients, and it would be misleading or fraudulent to say that it could. (Doug Smith, Tr. 6032).

Response to Finding No. 358

This proposed finding is misleading and incomplete. Dr. Smith testified that his 2009 study (PX00855) could not support conclusions about the benefits of the Plié 3 because "The Plié 3 was not tested, so that would be misleading or fraudulent to say this study is about the Plié 3. It wasn't. It wasn't even invented then." (Smith (Retired) Tr. 6032). Notably, the C-Leg 4 also was not even invented then. The C-Leg 3 may not have been either. (PX05010 (Schneider (Otto Bock) IHT at 100 (the C-Leg 3 was launched in approximately 2008 or 2009)). Thus, by Dr. Smith's logic, this article should not be relied upon by Otto Bock to promote the C-Leg 4. However, Otto Bock did, in fact, rely on this study to support the C-Leg 4. (*See, e.g.,* PX01620 (Otto Bock) at 001 (attaching "papers on the safety of the C-leg" including the Hafner and Smith study); PX01480 (Otto Bock) at 001-003, 030-046 (advocacy for expansion of MPK coverage to K2 patients, including the Hafner and Smith study); PX00848 (Otto Bock) at 001-002, 023-039 (Otto Bock emails to Select Health, seeking an update to Select Health's coverage policies, attaching studies including the Hafner and Smith study)).

Moreover, this finding is misleading and inconsistent with the weight of the evidence to the extent it suggests that studies of the C-Leg or other MPKs cannot be used to support the benefits of the Plié over mechanical knees. (*See e.g.,* PX05150 (Kannenberg (Otto Bock) Dep. at 85-86) (prosthetists submit C-Leg studies to support coverage of all MPKs; insurers do not question whether the MPK being fit is the same as that in the studies provided)). Freedom regularly recommends that clinics rely on MPK studies in seeking reimbursement for the Plié. (*See, e.g.,* PX08009 (Freedom) at 017-018 (Microprocessor Knee Literature Review, included as part of Plié reimbursement recommendations on Freedom's website); PX01194 (Freedom) at 003-010 (Plié 3

Summary of Evidence, prepared by Ability P&O for Freedom, citing to numerous studies conducted with the C-Leg to support the clinical benefits of the Plié)).

359. [redacted]

Response to Finding No. 359

[redacted]

[redacted]

360. [redacted]

Response to Finding No. 360

[redacted]

361. [redacted]

Response to Finding No. 361

[redacted]

[redacted]

362. One hundred percent of clinical trials that showed benefits of microprocessor knees over non-microprocessor knees were done with Ottobock MPKs. (Kannenberg, Tr. 1843-44).

Response to Finding No. 362

[redacted]

363. Dr. Kannenberg is not aware of a single study that shows the benefit of microprocessor knees made by manufacturers other than Ottobock. (Kannenberg, Tr. 1843-44).

Response to Finding No. 363

This proposed finding is unsupported and incomplete. Dr. Kannenberg testified that ninety five percent of MPK studies have been done with Otto Bock MPKs, and that he is not aware of a study comparing MPKs to non-MPKs which did not use Otto Bock MPKs. (Kannenberg (Otto Bock) Tr. 1843-1844).

[redacted]

i. The Rand Study

364. PX08004 is a study referred to throughout the record as the RAND Study. [redacted]

Response to Finding No. 364

[redacted]

365. [redacted]

Response to Finding No. 365

[redacted]

366. [redacted]

Response to Finding No. 366

[redacted]

367. [redacted]

Response to Finding No. 367

[redacted]

368. The RAND study is not a clinical study because it does not rely on new clinical data, it relies on previously published data. [redacted] Kauffman, Tr. 877; Kannenberg, Tr. 1935)**.**

Response to Finding No. 368

[redacted]

[redacted]

[redacted]

369. The RAND study does not study Plié or any studies that study Plié (Kauffman, Tr. 878: 8-12; Kannenberg, Tr. 1937; [redacted]).

Response to Finding No. 369

[redacted]

370. [redacted]

Response to Finding No. 370

[redacted]

[redacted]

371. Vinit Asar's knowledge of the benefits of MPKs comes only from the RAND study. (Asar, Tr. 1339)

Response to Finding No. 371

This proposed finding is incomplete and incorrect. Mr. Asar, the CEO of Hanger (which fits both MPKs and non-MPKs through its clinics), was asked if he was "aware of any differences between microprocessor knees and mechanical knees." He testified that he was aware of the differences, and indicated that he was familiar with the RAND Study, which "actually demonstrate[d] that a microprocessor knee is effective and prevents falls better than any other lower limb prosthetic device." (Asar (Hanger) Tr. 1338-39). Mr. Asar further noted that "when you read studies like that, it's hard to refute that the microprocessor knees are more beneficial." (Asar (Hanger) Tr. 1339). Notably, the question did not relate to Mr. Asar's knowledge of the benefits of MPKs generally, but only to his knowledge of differences between MPKs and mechanical knees. Moreover, Mr. Asar never testified that his knowledge was based *only* on the RAND study.

ii. Dr. Kauffman has never published a study showing the Plié 3 to be safer or more beneficial for K-3 and K-4 patients than Sophisticated Non-MPKs

372. PX08010, PX08011, PX08029 are studies authored by Dr. Kenton Kauffman, and all three were conducted on the same set of 15 patients. (Kauffman Tr. 879-885).

Response to Finding No. 372

This proposed finding is misleading to the extent it implies that the three studies appearing at PX08010, PX08011, and PX08029 did not draw independent conclusions regarding the benefits of MPKs relative to mechanical knees, or that these conclusions were somehow invalid because they relied on the same patients or data.

373. PX08010 does not study the Plié. (Kauffman Tr. 879-885).

Response to Finding No. 373

Complaint counsel has no specific response.

374. PX08011 does not study the Plié. (Kauffman Tr. 879-885).

Response to Finding No. 374

Complaint counsel has no specific response.

375. PX08029 does not study the Plié. (Kauffman Tr. 879-885).

Response to Finding No. 375

Complaint counsel has no specific response.

376. PX08016 is a study authored by Dr. Kenton Kauffman, and is a literature review of 18 studies. (Kauffman Tr. 879-885).

Response to Finding No. 376

Complaint Counsel does not disagree, though notes that the authorship of PX08016 by Dr. Kaufman is not established or discussed on the cited pages of the transcript.

377. All 18 studies reviewed by PX08016 study the C-Leg, and do not study the Plié, and the conclusions can only apply to the C-Leg. (Kauffman Tr. 885:10-886:15).

Response to Finding No. 377

This proposed finding is unfounded, misleading, and contrary to the evidence. While Dr. Kaufman testified that the 18 studies considered in the literature review reflected at PX08016 all "analyzed" or "relate to" the C-Leg, he did not testify that the conclusions apply only to the C-Leg. (Kaufman (Mayo Clinic) Tr. 885-86).

This proposed fact is misleading and inconsistent with the weight of the evidence to the extent it suggests that studies of the C-Leg cannot be used to support the benefits of the Plié over mechanical knees. (*See* Response to RPFF ¶ 358.) Moreover, when asked by Respondent at his deposition what the purpose of an MPK was for a patient, Dr. Kaufman testified it "is to adjust the resistance so that they have better control and stumble and fall less," and he testified that both the Plié 3 and C-Leg 4 do this. (PX05160 (Kaufman (Mayo Clinic) Dep. at 150-51).

378. PX00849-22 is a study titled Gait and Balance of Transfemoral Amputees using passive mechanical and microprocessor controlled prosthetic knees, and is a secondary analysis of a study done with the C-Leg, and the conclusions can only apply to the C-Leg. (Kannenberg, Tr. 1852-53).

Response to Finding No. 378

This proposed finding is unsupported, misleading, and contrary to the evidence. It relies soley upon the self-serving testimony of Otto Bock executive Andreas Kannenberg to describe the study appearing at PX00849-022 and to explain its applicability. Dr. Kaufman was questioned about this same study (appearing at PX08010) at trial and he neither testified that it was a "secondary analysis" nor that its conclusions applied only to the C-Leg. (Kaufman (Mayo Clinic) Tr. 855-58, 878-80). Instead, Dr. Kaufman testified that PX08010 was "results of an initial study we did;" "a comparison between microprocessor and non-microprocessor knees." (Kaufman (Mayo Clinic) Tr. 855-856). The overall findings of the study were that patients "have improved function, both their gait and their balance, when using a microprocessor knee" rather than a mechanical knee. (Kaufman (Mayo Clinic) Tr. 858).

This proposed fact is misleading and inconsistent with the weight of the evidence to the extent it suggests that studies such as PX00849-022 cannot be used to support the benefits of the Plié over mechanical knees. (*See* Response to RPFF ¶ 358.)

379. PX00849-27 is a study titled Gait Asymmetry of Transfemoral Amputees using Mechanical and Microprocessor-Controlled knees and is a secondary analysis of a C-Leg study, and the conclusions can only apply to the C-Leg. (Kannenberg, Tr. 1854).

Response to Finding No. 379

The proposed fact misleading and inconsistent with the weight of the evidence to the extent it suggests that clinical studies such as PX00849-027 cannot be used to support the benefits of the Plié over mechanical knees. (*See* Response to RPFF ¶ 358). This proposed finding is also unfounded as it relies solely upon the self-serving testimony of Otto Bock executive Andreas Kannenberg to describe the study appearing at PX00849-027.

iii. The FastK2 Study is immaterial given the current reimbursement system

380. One study cited by Complaint Counsel compares the Freedom Plié 3 to K-2 mechanical knees like the Ottobock 3R49, and not Sophisticated Non-MPKs like the Ottobock 3R80 (the FastK2 Study). (Kauffman, Tr. 889; [redacted]

Response to Finding No. 380

[redacted]

[redacted]

381. The FastK2 Study does not show that the Freedom Plié 3 has any clinical benefits relative to Sophisticated, Non-MPKs. [redacted]

Response to Finding No. 381

[redacted]

b. Industry Participants Do Not Consider Freedom Plié 3 To Be An MP-Swing-and-Stance Knee

382. Freedom's Plié 3 does not meet Complaint Counsel's definition of microprocessor knee as alleged in the Complaint. (Schneider, Tr. 4310).

Response to Finding No. 382

[redacted]

[redacted]

[redacted]

383. Competitor knee manufacturers consider the Plié 3 to be a hybrid knee which functions more like a non-MPK and is "a knee that utilizes some of the mechanical characteristics, such as hydraulics or pneumatics, in combination with a microprocessor, where some of the tasks are microprocessor-controlled, some of the tasks are hydraulic or pneumatic-controlled." (DeRoy, Tr. 3665; Schneider, Tr. 4324).

Response to Finding No. 383

[redacted]

[redacted]

384. Össur distinguishes the Plié and other hybrid knees from "a device that is fully microprocessor-controlled like the Rheo Knee." (DeRoy, Tr. 3665).

Response to Finding No. 384

[redacted]

385. Keith Senn of COPC's definition of an MPK as "a knee with a computer chip that monitors the patient's gait and analyzes their gait to assist them in walking and stumble recovery" excludes the Plié 3. (Senn, Tr. 172; Carkhuff, Tr. 335;

Response to Finding No. 385

[redacted]

386. Orthotics and Prosthetics Center's owner describes Plié 3 as having a mechanical stance feature that is "not electronically reading the space in time where the knee is." (PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 64, 66)).

Response to Finding No. 386

This proposed finding is unsupported in that, while Mr. Weott gave the quoted testimony, he also testified that he was "uneducated in that area of how [Plies] work." (PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 66)).

This proposed finding is misleading and against the weight of the evidence to the extent it seeks to portray the Plié 3 as not being a true microprocessor knee that competes directly with Otto Bock's C-Leg in the U.S. MPK market. (*See* Responses to RPFF ¶¶ 353, 382).

387. Tracy Ell's definition of an MPK as "generally any knee that utilizes a computer to control the resistances throughout swing or stance or both that increases the inherent stability of the bending of the knee" excludes the Plié 3 (Ell, Tr. 1678; Carkhuff, Tr. 335; [redacted]

Response to Finding No. 387

[redacted]

[redacted]

This proposed finding is misleading and against the weight of the evidence to the extent it seeks to portray the Plié 3 as not being a true microprocessor knee that competes directly with Otto Bock's C-Leg in the U.S. MPK market. (*See* Responses to RPFF ¶¶ 353, 382).

388. William Carver described a mechanical knee as something that can be tuned to one set of setting that match what the patient needs most of the time, versus a microprocessor knee that can vary those fixed settings, but the Plié 3 offers fixed settings. (Carver, Tr. 2019; Carkhuff, Tr. 335; [redacted]

Response to Finding No. 388

[redacted]

[redacted]

389. Blatchford defines an MPK as having "a microprocessor control system, and the control system will, generally speaking, control valves that affect the resistance the knee has to

> motion and the resistance the knee has to – well, and also enables the knee to lock under load. And because its controlled by a computer system, it means – and has a number of sensors in the knee, it means that it has a good understanding of what the amputee is doing at the time and therefore can react in real time as the amputee walks or as he stands." (Blatchford, Tr. 2104-2109). Blatchford noted that his definition of an MPK only applies to Endolite's MPKs. (Blatchford, Tr. 2109).

Response to Finding No. 389

This proposed finding is incorrect, unsupported, misleading, and against the weight of the evidence. Mr. Blatchford's description of an MPK, as quoted by Respondent, appears on page 2104 of the trial transcript; it is unclear why additional pages are cited. Additionally, Mr. Blatchford's statement on page 2109 limited his "last comments" to Endolite's MPKs, the Orion 3 and the Linx. Mr. Blatchford's testimony described some of the functionality in an Endolite MPK, but did not provide adefinition of what any MPK that competes with Endolite's MPKs must have. (*See* Blatchford (Endolite) Tr. 2104-09).

To the extent this proposed finding suggests that the Plié is not a true MPK because it does not fall within the bounds of Mr. Blatchford's definition, it is unsupported by the cited testimony, misleading, and against the weight of the evidence. (*See* Responses to RPFF ¶¶ 353, 382). In particular, Mr. Blatchford explicitly testified that he considers the Plié 3 to be a microprocessor-controlled swing and stance phase knee "[b]ecause it has a microprocessor in it which activates a valve which affects the way it reacts to patients." (PX05144 (Blatchford (Endolite) Dep. at 74)).

390. [redacted]

Response to Finding No. 390

[redacted]

391.

Response to Finding No. 391

2. Users Substitute Between All Fluid-Controlled Knees Based On Functionality And Cost

392. The patient has significant input into which knee they get. (Sabolich, Tr. 5845; Doug Smith, Tr. 6010). Even if an MPK would clinically benefit a patient, the patient absolutely has a choice not to get one, based on their lifestyle. (Doug Smith, Tr. 6010; Senn, Tr. 263).

Response to Finding No. 392

[redacted]

393. Patients, physicians, and prosthetists frequently weigh the pros and cons with a of a microprocessor knee versus a non-microprocessor knee. (Doug Smith, Tr. 6007; Ford, Tr. 1055).

Response to Finding No. 393

[redacted]

[redacted]

[redacted]

[redacted]

394. Prosthetists narrow down the available knees to the patient to the ones that are appropriate for their functional level classification, and weigh the pros and cons with the patient. (Sabolich, Tr. 5845-46; Ford, Tr. 992-995).

Response to Finding No. 394

[redacted]

[redacted] As noted by Mr. Ford, this assessment considers the patient's "[c]ognitive capabilities," "[w]hat their life situation is," "what they intend to do for their future activities," whether the patient is "somebody who's going to be active near or in water" (because "[c]omputers and water don't mix well)," and the patients "whole daily life." (Ford (POA) Tr. 992-995).

[redacted]

[redacted]

395. Prosthetists allow patients to trial various knees, including both non-MPKs and MPKs. (Ell, Tr. 1690; Oros, Tr. 4786)

Response to Finding No. 395

This proposed finding is unsupported. The cited testimony of Mr. Ell of Mid-Missouri is irrelevant, making no mention whatsoever of patient knee trials. Instead, Mr. Ell testified that, if a patient's prescription allows for multiple types of prosthetic, he will present options to the patient at an in-clinic discussion. (Ell (Mid-Missouri) Tr. 1690). Mr. Oros agreed that Scheck & Siress patients sometimes try on different knees and weigh the pros and cons of the choices with which they are presented. (Oros (Scheck & Siress) 4786). However, nothing in this testimony suggests that the patients trial both MPK and non-MPK prostheses.

Complaint Counsel does not disagree with the general proposition that prosthetists allow patients to test knees prior to purchase—indeed, Otto Bock's Andreas Kannenberg testified that Freedom's willingness to provide Plié units for extended trial fittings gave it a competitive advantage, forcing Otto Bock to consider matching the practice. (PX05150 (Kannenberg (Otto Bock) Dep. at 180-82; PX01481 (Otto Bock) at 002). However, there is no testimony in the record concerning patients choosing between MPKs and non-MPKs on the basis of a trial.

This proposed finding is also misleading to the extent it suggests that MPKs and mechanical knees are economic substitutes for each other or that the choice of whether to fit a specific K-3/K-4 patient with an MPK versus a mechanical knee is affected in any significant way by the Merger. (*See* Response to RPFF ¶ 393).

396. When selecting between an MPK and non-MPK, where there is simply no clear right or wrong choice, it comes down to the preference of the patient or the prosthetist. (Sabolich, Tr. 5851; Oros, Tr. 4787; Senn, Tr. 263).

Response to Finding No. 396

[redacted] Nowhere in the record is there evidence that there are a significant number of amputees for whom "there is simply no clear right or wrong choice." This makes sense given the extensive factual record demonstrating the medical benefits of MPKs compared to mechanical knees, *see* Response to RPFF ¶ 336, [redacted]

This proposed fact also misstates Mr. Sabolich's testimony. Asked if "it just comes down to the preference of the patient" when "there simply is no clear right or wrong choice," Mr. Sabolich responded that frequently it ends up being a question of prosthetist preference, not patient preference, with the "patients sort of tak[ing] a back seat." (Sabolich (Scott Sabolich Laboratories) Tr. 5851). The cited testimony of Mr. Senn is also not on point. Mr. Senn was not asked about a situation where "there simply is no clear right or wrong choice" between an MPK and non-MPK. Instead, he testified that there may be some patients who simply do not want an MPK, including because they can't handle charging the knee, or don't have the mental capability to operate it.

(Senn (COPC) Tr. 263). For these patients, it would appear that there very much is a "clear right or wrong choice."

This proposed finding is also misleading to the extent it suggests that MPKs and mechanical knees are economic substitutes for each other or that the choice of whether to fit a specific K3/K4 patient with an MPK versus a mechanical knee is affected in any significant way by the Merger. (*See* Response to RPFF ¶ 393).

397. [redacted]

Response to Finding No. 397

[redacted]

[redacted]

398. Similarly situated K-3 patients come to different decisions about whether to get fit with a non-MPK or an MPK, because the same patient can find positive attributes in a fluid-controlled non-MPK and other positive attributes in an MPK, and also find negative attributes in both. (Sabolich, Tr. 5849-5850; Oros, Tr. 4793).

Response to Finding No. 398

This proposed finding is unclear, unsupported, and misleading. The proposed finding is unclear because Respondent does not define what "similarly situated" means. To the extent Respondent uses the term "similarly situated" to mean anyone who is a "K-3 patient[]", as it appears to do, this proposed finding is misleading, incorrect (in that it misunderstands how the U.S. prosthetics industry works), and irrelevant to any issue in this case. Respondent's reference to patients coming "to different decisions" is also unclear as Respondent does not explain how it views decisions made by medical professionals to prescribe an MPK or mechanical knee or how the "different decisions" of patients might affect prescription decisions by medical professionals (or insurers in deciding whether to reimburse clinics for fitting an MPK or mechanical knee for a particular patient).

[redacted] 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). No evidence cited by Respondent shows that any set of patients labelled as "similarly situated" in the cited testimony account for all of these factors considered by medical professionals in determining whether to prescribe a particular K-3/K-4 patient with an MPK or mechanical knee, rendering this proposed finding confusing and irrelevant.

In the evidence cited by Respondent, Mr. Oros testified that similarly situated K-3 patients (without defining "similarly situated") come to different decisions about whether to get fitted with an MPK or a non-MPK. (Oros (Scheck & Siress) Tr. 4793). However, he did not testify whether this was a common occurrence, noting only that, overall, fewer than half of Scheck & Siress' K-3 patients are fit with MPKs. (Oros (Scheck & Siress) Tr. 4792). He never describes how many of the patients treated at his clinic are "similarly situated." Based on his testimony it appears that "similarly situated" means nothing more than all people classified as K-3, which as discussed above renders his testimony irrelevant to any issue in this case.

Mr. Sabolich testified that K-3 patients can find MPKs and non-MPKs to have both pros and cons. (Sabolich (Scott Sabolich Laboratories) Tr. 5849-50 ("Q. So can the same K3 patient find positive attributes in a fluid-controlled non-MPK and other positive attributes in a microprocessor knee and also find negative attributes in both? A. Of course.")) He did not,

however, testify that "similarly situated" patients (accounting for all of the factors discussed above), faced with these pros and cons, come to different decisions about whether to be fit with an MPK or non-MPK.

[redacted] Finally, 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).

This proposed finding is also misleading to the extent it suggests that MPKs and mechanical knees are economic substitutes for each other or that the choice of whether to fit a specific K-3/K-4 patient with an MPK versus a mechanical knee is affected in any significant way by the Merger. (*See* Response to RPFF ¶ 393).

399. Some K-3 and K-4 amputees prefer the voluntary control of a non-MPK to the computerized control of an MPK. (Schneider, Tr. 4406).

Response to Finding No. 399

This proposed finding is unfounded and misleading. Mr. Schneider—an Otto Bock executive—was asked how often prosthetists, physicians, or patients opt for non-MPKs even when they could receive an MPK. He responded that this happened "[o]ften," including because "some transfemoral amputees like Christine [sic] like to have more control over their prostheses. And she's very strong. She has lots of – if you look at her Instagram and – she's lifting weights all the time. She wants control of her prosthesis, and therefore she opts to use the 3R80 over her X3." (Schneider (Otto Bock) Tr. 4405-06). Notably, Mr. Schneider's example refers only to a single individual.

Notwithstanding the foregoing, Complaint Counsel agrees that in some instances, some K-3/K-4 patients may prefer the voluntary control offered by a non-MPK, particularly where they regularly engage in athletic activities such as running, (*see* CCFF ¶¶ 551-53), or where they are accustomed to wearing a mechanical knee, (*see* CCFF ¶¶ 559-61). For these patients, mechanical knees and MPKs are not close substitutes and nothing about the Merger is likely to change decisions by these patients to prefer mechanical knees when engaging in certain activities. If the Merger results in higher prices to clinics that fit these patients with a prosthesis, the record is clear

that patients are not switched from MPKs to mechanical knees based on the prices paid by clinics for those two classes of products. (CCFF ¶¶ 525-29). This proposed finding is misleading to the extent it suggests that MPKs and mechanical knees are economic substitutes for each other or that the choice of whether to fit a specific K-3/K-4 patient with an MPK versus a mechanical knee is affected in any significant way by the Merger. (*See* Response to RPFF ¶ 393).

400. Patients who value the robustness that a mechanical knee can provide might choose the Ottobock 3R80 over the Ottobock C-Leg 4. (Solorio, Tr. 1640; Sabolich, Tr. 5850).

Response to Finding No. 400

This proposed finding is incomplete, misleading, and (in part) irrelevant. Ms. Solorio testified that Otto Bock sells the 3R80 to amputees "who work in construction or work on farms where they're going to be beating the knee up all the time and they don't want to – they don't have a way to charge the knee while they're out working for long jobs. . . . So that could be a reason why you would choose a mechanical knee over a microprocessor knee, the charging or the robustness that a mechanical knee really can offer if you have a high-impact lifestyle or a job . . . where it's going to get banged around a lot. . . ." (Solorio (Otto Bock) Tr. 1640). This proposed finding is misleading to the extent that it suggests that these customers merely "value the robustness" of mechanical knees and "choose" them over MPKs. The patients described by Mr. Solorio *need* a mechanical knee to perform their jobs. Lifestyle issues like the one described by Ms. Solorio are considered in the decision by medical professionals about whether to prescribe an MPK or a mechanical knee to a specific K-3/K-4 patient. (CCFF ¶¶ 461-87). [redacted]

This proposed finding is also irrelevant to the extent it cites to the testimony of Mr. Sabolich. The cited portion of Mr. Sabolich's testimony is wholly unrelated to the proposed

finding, except to the extent that Mr. Sabolich stated that "not every K3 gets an MPK." (Sabolich (Scott Sabolich Laboratories) Tr. 5850). Mr. Sabolich testified that a patient may "do very well with a 3R60 or another four-bar or six-bar knee" if they are a "long transfemoral, maybe even a knee disartic" noting that a C-Leg would "make [their] knee stick out" and they might not "need the stumble recovery the C-Leg provides." (Scott Sabolich Laboratories) Tr. 5850). This testimony is unrelated to a patient potentially "choos[ing]" a 3R80 on the basis of "robustness," and it does nothing to shed light on what the medically appropriate knee would be for that patient.

This proposed finding is also misleading to the extent it suggests that MPKs and mechanical knees are economic substitutes for each other or that the choice of whether to fit a specific K-3/K-4 patient with an MPK versus a mechanical knee is affected in any significant way by the Merger. (*See* Response to RPFF ¶ 393).

401. Sophisticated non-MPKs cost a patient less out of pocket than MPKs, which influences patient choice. (Ell, Tr. 1784; [redacted]

Response to Finding No. 401

This proposed finding is vague, unfounded, and misleading. This proposed finding is vague to the extent that the term "Sophisticated non-MPKs" does not appear in any of the cited testimony or the cited document, and is not defined in the proposed finding. Mr. Ell testified only that "mechanical knees have a lower copay" than MPKs – his testimony was not restricted to so-called "Sophisticated MPKs." (Ell (Mid-Missouri) Tr. 1784). [redacted]

This proposed finding is unfounded to the extent it relies on the testimony of Mr. Ell to claim that relative copays "influence[] patient choice" between MPKs and mechanical knees. Mr. Ell only testified that there was a difference in co-pay levels—a fact with which Complaint Counsel does not disagree. (Ell (Mid-Missouri) Tr. 1784). He did not testify that these co-pay differentials ever caused patients to choose a mechanical knee over an MPK. Notably, the significant price differences between mechanical knees and MPKs (and the attendant difference in patient copays) demonstrate that the two categories of knee are not reasonable substitutes, or in the same relevant product market. (*See* CC Post-Trial Brief at 36-37).

[redacted]

This proposed finding is also misleading to the extent it suggests that MPKs and mechanical knees are economic substitutes for each other or that the choice of whether to fit a

specific K-3/K-4 patient with an MPK versus a mechanical knee is affected in any significant way by the Merger. (*See* Response to RPFF ¶ 393).

402. Dr. Doug Smith testified that if a patient told him that they did not want to have to charge their knee, he would not prescribe them an MPK even if the patient would benefit clinically from an MPK. (Doug Smith, Tr. 6010).

Response to Finding No. 402

Complaint Counsel has no specific response.

403. If a physician prescribes a particular knee, the physician only does so after discussing with the patient about their preferences and what their life is like. (Doug Smith, Tr. 6006-6007, 6010 (testifying that if a patient told him they did not want to have to charge their knee, he would not prescribe them an MPK even if the patient would benefit clinically from an MPK).

Response to Finding No. 403

Complaint Counsel has no specific response.

404. Even if a patient is a good candidate for an MPK, sometimes they do not chose an MPK because of their lifestyle. (Doug Smith, Tr. 6007-6008).

Response to Finding No. 404

This proposed finding is incomplete and misleading. While Dr. Smith referred to patients identifying the "best choice for them" between a microprocessor knee and a non-microprocessor knee, it is clear from his full response that this is more properly characterized as a process of discussing with the patient whether the individual has lifestyle factors which would render an MPK an unacceptable option. (Smith (Retired) Tr. 6007-09). Dr. Smith specifically mentions patients who "live in a rural area and they like to put on waders and go in fly-fishing and they like to camp overnight where they don't have a plug". (Smith (Retired) Tr. 6007-08). For such a patient, "I would tell them your microprocessor – this microprocessor knee probably wouldn't fit that lifestyle." (Smith (Retired) Tr. 6008). Mr. Smith additionally gave as an example a transfemoral amputee working on a fishing boat, who would necessarily elect to be fit with a mechanical knee

"because you don't want it to short out. You don't want it to run out of power." (Smith (Retired) Tr. 6008). [redacted]

This proposed finding is also misleading to the extent it suggests that MPKs and mechanical knees are economic substitutes for each other or that the choice of whether to fit a specific K-3/K-4 patient with an MPK versus a mechanical knee is affected in any significant way by the Merger. (*See* Response to RPFF ¶ 393).

405. Many patients have less frustration with a mechanical knee than an MPK. (Doug Smith, Tr. 6010-11).

Response to Finding No. 405

This proposed finding is unclear, unsupported, and misleading to the extent it refers to "many patients" and "frustration," and to the extent it seeks to generalize about the frustration caused by *all* MPKs versus *all* mechanical knees. Dr. Smith testified that patients "have a choice" between an MPK and a mechanical knee based on "what their activities are and what their level of tech frustration may be. . . . There is definitely less frustration [with a mechanical knee] of the battery running out or forgetting to charge it or worry about it's – I'm going to break it or get it wet." (Smith (Retired) Tr. 6010-11). Notably, Dr. Smith was referring narrowly to "tech frustration" or "frustration of the battery running out," unlike this proposed finding which speaks in broader terms. Nor did Dr. Smith testify that "[m]any" patients have this frustration. Complaint Counsel has no specific response to whether, as a general matter, some patients may experience less frustration with some mechanical knees than with some MPKs. However, this proposed finding is misleading to the extent it suggests that MPKs and mechanical knees are

economic substitutes for each other or that the choice of whether to fit a specific K-3/K-4 patient with an MPK versus a mechanical knee is affected in any significant way by the Merger. (*See* Response to RPFF ¶ 393).

406. Össur's Sophisticated Non-MPKs are medically appropriate for K-3 patients and can support their activities for daily living. (De Roy, Tr. 3644).

Response to Finding No. 406

This proposed finding is inaccurate, unclear, and misleading. This proposed finding is inaccurate and unclear to the extent the phrase "Sophisticated Non-MPKs" is undefined and does not appear in the cited testimony. Mr. De Roy agreed that (1) Össur sells more mechanical knees to active users than it does MPKs; (2) There are several mechanical knee options that may be medically appropriate for K-3 amputees; and (3) There are mechanical knees that can support the daily activities of some K-3 patients. (De Roy (Össur) Tr. 3644). Mr. De Roy never characterized any mechanical knees – made by Össur or otherwise – as "sophisticated."

Additionally, this proposed finding is misleading and contrary to the weight of the evidence to the extent it suggests that any mechanical knees are "medically appropriate" for *all* K-3 patients or that mechanical knees are economic substitutes for MPKs. [redacted]

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). [redacted]

[redacted] U.S. prosthetic clinics need to go into the marketplace to purchase MPKs to fit on patients who want and would benefit medically from an MPK. Patients are not switched from MPKs to mechanical knees based on the prices paid by clinics for those two classes of products. (CCFF ¶¶ 525-29). Clinics cannot simply provide a mechanical knee to patients who would benefit medically from an MPK. (CCFF ¶ 524).

3. Prosthetists Substitute Among All Sophisticated Knees Appropriate For K-3 And K-4 Patients Based On Margin Between Reimbursement And Costs

407. Prosthetists consider margins more than price to determine profitability. (Schneider, Tr. 4356).

Response to Finding No. 407

This proposed finding is unsupported, unclear, and confusing. This proposed finding is unsupported to the extent it purports to speak for all prosthetists while relying solely on the self-serving testimony of an Otto Bock executive who has not practiced at a prosthetics clinic since the 1990s. Additionally, the proposed finding is unclear to the extent "margins" and "profitability" are undefined. Further, this proposed finding is unclear and confusing to the extent it suggests that

price and margins are independent. As a matter of simple economics, if the price charged to a clinic for a product goes up then, all else being equal, the clinic's profit margin on the fitting of that product will go down.

408. Many factors impact a prosthetist's knee selection. (Blatchford, Tr. 2258). Insurance coverage is a really important factor. (Blatchford, Tr. 2258). The various types of audits, including preauthorization and RAC audits, is another important factor in a prosthetist's knee selection. (Blatchford, Tr. 2259). Prosthetists also consider their margins when selecting a knee for a K-3 or K-4 patient. (Blatchford, Tr. 2259-2260). Durability, environmental considerations, and vocation also impact prosthetists' knee selection. (Blatchford, Tr. 2260-2261).

Response to Finding No. 408

This proposed finding is unsupported, unclear, and misleading. This proposed finding is unsupported to the extent it draws broad conlcusions about how prosthetists select knees, while citing only to the testimony of one person, Stephen Blatchford of Endolite, who is not, himself, a prosthetist, physician, or clinician.

[redacted]

[redacted]

[redacted]

The U.S. healthcare system sorts K-3/K-4 amputees into two buckets: those with an MPK prescription and insurance coverage, and those who only have access to or prefer a mechanical knee. (CCFF ¶¶ 530-61). U.S. prosthetic clinics need to go into the marketplace to purchase MPKs to fit on patients who want and would benefit medically from an MPK. Patients are not switched from MPKs to mechanical knees based on the prices paid by clinics for those two classes of products. (CCFF ¶¶ 525-29). Clinics cannot simply provide a mechanical knee to patients who would benefit medically from an MPK. (CCFF ¶ 524).

This proposed finding is misleading and contrary to the weight of the evidence to the extent it implies that concern about RAC audits is an "important" factor in determining whether to fit a particular patient with an MPK or mechanical knee. (*See* CCFF ¶¶ 2994-3006). For example, Mr. Sabolich, who was called at trial by Respondent, testified during his deposition 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 (citing PX05132 (Sabolich (Scott Sabolich Prosthetics) Dep. at 219-20)). Moreover, while Mr. Blatchford testified that prosthetists factor in "the various types of audits that are out there" in recommending a knee, he separately testified that [redacted]

This proposed finding is also unclear to the extent the term "margins" is undefined, and misleading and contrary to the weight of the evidence to the extent it suggests that margins are a significant factor in prosthetists' and clinics' selection between MPKs and non-MPKs for K-3 and K-4 amputees. [redacted]

409. The gross margin is the allowable reimbursement for a prosthetic less costs like the acquisition cost, staff involved in delivery of care, and technical services. [redacted]

Response to Finding No. 409

[redacted]

[redacted]

410. Because of factors such as patients not paying their copay to insurers not paying reimbursement, clinics often fail to collect the full reimbursable amount for prosthetics. [redacted]

Response to Finding No. 410

[redacted]

411. Patients sometimes fail to satisfy their portion of the cost for a prosthesis. [redacted] **;** (Senn, Tr. 260) **(**testifying that there is a pretty good risk that COPC is not going to be able to collect the full Medicare copay associated with MPKs; in fact, more often than not COPC does not collect he Medicare copay in full).

Response to Finding No. 411

Complaint Counsel has no specific response.

412. [redacted] The amount that Medicare reimburses for a particular prosthetic varies by state. [redacted]

Response to Finding No. 412

Complaint Counsel does not disagree.

413. The same risk exists with private insurance because patient copays are often not collected in full for MPKs. (Senn, Tr. 261)

Response to Finding No. 413

This proposed finding is unclear to the extent that "[t]he same risk" is undefined. To the extent this proposed finding refers to the risk to a clinic that some patients with private insurance may not pay their full copayment or coinsurance obligation, Complaint Counsel has no specific response. This proposed finding is also unclear to the extent "exists" is ambiguous as to frequency; nothing in the proposed finding or the cited testimony indicates how often patients fail to satisfy their copayment obligations.

414. [redacted]

Response to Finding No. 414

Complaint Counsel has no specific response.

415. Because the additional costs for fitting an MPK are higher than a non-MPK, providing an MPK results in a lower margin and lower profitability. [redacted]

Response to Finding No. 415

[redacted]

[redacted]

[redacted]

[redacted]

416. The costs associated with fitting MPKs are higher than the costs associated with fitting Sophisticated non-MPKs. (Ford, Tr. 1062-1063; Doug Smith, Tr. 6011; PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 108-109); (PX05151 (Patton (Prosthetic Solutions), Dep. at 75, 93). Patients return to the prosthetist less for follow-up visits with a mechanical knee than with a microprocessor knee. (Doug Smith, Tr. 6011). There are higher costs associated with higher-technology products like MPKs. (Schneider, Tr. 4356-57).

Response to Finding No. 416

This proposed finding is unclear, unsupported, and misleading. This proposed finding is unclear and unsupported to the extent it refers to "Sophisticated non-MPKs." The term "Sophisticated non-MPKs" is undefined, and does not appear in any of the cited testimony. Additionally, the term "costs associated with fitting" is vague, undefined, and broader than the cited testimony.

Mr. Ford testified only that there are increased costs in fitting an MPK "because of a lag in getting reimbursed." (Ford (POA) Tr. 1062-63). Mr. Smith testified only that "[t]here's definitely less return to the prosthetist with a mechanical knee than a microprocessor knee"; he did not testify that this substantially increased costs to the clinic. (Smith (Retired) Tr. 6010-11). Mr. Weott similarly testified that "[y]ou're probably going to add a few visits with a microprocessor because [clinics] like to be reassured everything is working right and tweaks and adjustments and – because

you can actually go on the computer and change settings." (PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 108-09)). However, Mr. Weott also testified that maintenance costs for MPKs and mechanical knees are "about the same." (PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 109)).

The testimony of Otto Bock executive Mr. Schneider cited in this proposed finding adds little value. Mr. Schneider (testifying about his experience as a prosthetist in the 1980s and 1990s) noted that "if the patient has to come back often, that eats into my margin. And that costs me more in transactional costs. And higher-technology products may give a greater benefit, but they also come at a greater expense, and that's – that's difficult weighing." (Schneider (Otto Bock) Tr. 4356-57). Mr. Schneider did not specify that he was talking about MPKs, nor did he specify any additional "expense" of "higher-technology products" other than patients potentially needing to "come back often." The cited testimony thus only supports the proposition that MPKs may be more expensive to fit than mechanical knees (rather than "Sophisticated Non-MPKs") because of "a lag in getting reimbursed" and the unquantified cost of additional follow-up appointments.

The proposed finding is also misleading to the extent it suggests that the relative profits earned by clinics affect the decisions of prosthetists or clinics in prescribing and fitting a particular patient with an MPK or a mechanical knee. [redacted]

417. Maynard Carkhuff testified that while prosthetists only fit what they consider to be appropriate technology, they may fit a non-MPK even if an MPK may be more appropriate, if the reimbursement may be questionable, so price becomes an issue between products that are both medically appropriate. (Carkhuff, Tr. 625-26)

Response to Finding No. 417

This proposed finding is unsupported, unclear, and misleading. This proposed finding is unsupported to the extent it seeks to describe what prosthetists generally consider in fitting an amputee, citing only to the self-serving testimony of a single Respondent executive (Mr. Carkhuff) who is not himself a prosthetist or clinician.

This proposed finding is unclear to the extent the phrase "reimbursement may be questionable" is undefined in either the proposed finding or the cited testimony. [redacted]

The proposed finding is misleading to the extent it suggests that the relative prices of MPKs and mechanical knees or the profits earned by clinics for these two classes of products affect the decisions of prosthetists or clinics in prescribing and fitting a particular patient with an MPK or a mechanical knee. [redacted]

418. Prosthetic clinics have slim margins and tight operating conditions. [redacted] Senn, Tr. 262; [redacted] PX05140 (Weott (Orthotic Prosthetic Center), Dep. at 26-27)).

Response to Finding No. 418

This proposed finding is unclear, unsupported, and misleading. This proposed finding is unclear to the extent the phrases "slim margins" and "tight operating conditions" are undefinied and ambiguous.

This proposed finding is unclear and unsupported to the extent it relies on the testimony of [redacted] Mr. Senn of COPC, and Mr. Weott of Orthotic Prosthetic Center. The citation to pages 1386-1384 of the transcript is incorrect in form and substance. [redacted] Mr. Senn testified only that COPC's margins would be tight on a hypothetical MPK covered by Anthem or by Medicare. (Senn (COPC) Tr. 261-62). He did not testify that clinic margins are "tight" generally, and specifically limited his testimony to "that particular product." (Senn (COPC) Tr. 262). Similarly, Mr. Weott testified only that "there's a lot of people that are on microprocessors that we make a very small margin on just because they need that particular knee. . . ." (PX05140 (Weott (Orthotic Prosthetic Center), Dep. at 26-27). [redacted]

The proposed finding is misleading to the extent it suggests that the relative profits earned by clinics affect the decisions of prosthetists or clinics in prescribing and fitting a particular patient with an MPK or a mechanical knee. [redacted]

[redacted]

419. With some low-paying private insurance contracts, Prosthetic clinics sometimes lose money or break even on certain fittings. (PX05140 (Weott (Orthotic Prosthetic Center), Dep. at 31)).

Response to Finding No. 419

This proposed finding is unclear, unsupported, and irrelevant. This proposed finding is unclear to the extent the phrases "insurance contracts" and "certain fittings" are undefined. This proposed finding is also unsupported and irrelevant to the extent it relies on the testimony of only a single clinician, regarding an unspecified number of fittings under an unspecified number of "bad contracts."

[redacted]

[redacted]

[redacted]

a. Margins on other lower-limb prosthetic components besides the knee cannot overcome lost margin on the knee.

420. Margins on lower-limb prosthetic components besides the knee are usually the same regardless of whether an MPK or non-MPK is selected. (De Roy, Tr. 3560-3561). "I would say that it's the same difference as just looking at the individual components because typically a K-3 knee will be used with a K-3 foot will be used with a socket, components, and a liner, and those are going to be identical in most cases between a mechanical or a microprocessor-controlled knee, so I would say that the margin difference is going to be the same between a microprocessor leg and a mechanical leg for that matter." (De Roy, Tr. 3561).

Response to Finding No. 420

Complaint counsel has no specific response.

421. With the reimbursement that clinics receive from third-party payers, clinics must cover their costs, including labor, materials, and G&A. (Ell, Tr. 1795-96; [redacted] PX05135 (Weber (Prosthetic & Orthotic Care), Dep. at 44)).

Response to Finding No. 421

Complaint counsel has no specific response.

422. [redacted] Roughly half of the overall reimbursement amount from a lower-limb prosthesis comes from the MPK. (Senn, Tr. 200).

Response to Finding No. 422

This proposed finding is incomplete, unsupported, and inaccurate to the extent it suggests that the prosthetic knee—regardless of type—is a significant percentage of the reimbursement for the overall prosthetic. [redacted]

[redacted] This is consistent with the other cited testimony from Mr. Senn, where he testified that Medicare reimburses approximately $45,000 for a total lower

limb system including an MPK, of which $20,000 - $25,000 is for the MPK itself. (Senn (COPC) Tr. 199-200).

423. Because of those additional costs, a clinic needs a margin of at least $10,000 between the cost of the knee and the reimbursement amount to cover all of the other costs associated with fitting a prosthetic knee; otherwise it will not be profitable. (Senn, Tr. 257-258). The difference between the reimbursement and the cost of the knee, in order for COPC to operate profitably, needs to be about $10,000 to cover all of those other costs. (Senn, Tr. 257-258).

Response to Finding No. 423

This proposed finding is incomplete, unsupported, and inaccurate to the extent it speaks generally about costs, profits, and margins from fitting a prosthetic knee. Mr. Senn's testimony was limited to the context of fitting an MPK at his clinic. (Senn (COPC) Tr. 257-58). Additionally, this proposed fact is inconsistent with Mr. Senn's deposition testimony that COPC needed to *average* a $10,000 difference between the reimbursement level and the price of an MPK, rather than needing a $10,000 differential on each and every MPK fit. (PX05128 (Senn (COPC) Dep. at 79-80)).

424. If the knee costs $10,000 and COPC needs a $10,000 margin to cover its other costs, then COPC is not going to be able to profitably provide a $10,000 knee to an Anthem-insured patient. (Senn, Tr. 261-263). The same is true for other private insurers and even Medicare. (Senn, Tr. 262).

Response to Finding No. 424

This proposed finding is unsupported, irrelevant, and misleading. This proposed finding is unsupported to the extent that it suggests that COPC (or any other clinic) could not profitably sell an MPK to a patient with Medicare coverage. Under the hypothetical posed by Respondent, wherin Medicare reimbursed $20,000 for an MPK costing COPC $10,000, Mr. Senn testified only that margins are "[p]robably" getting pretty tight. (Senn (COPC) Tr. 261-62). Importantly, the hypothetical discussed in this testimony is far from the reality of reimbursement levels for MPKs.

[redacted]

[redacted] Given that, in reality, Medicare reimbursement is far higher than $20,000 (roughly $8,600 more) the testimony cited by Respondent is irrelevant, because under the actual reimbursement rates Mr. Senn's clinic and other clinics clearly earn significant profits fitting MPKs. This proposed finding is also unsupported to the extent that it suggests that COPC (or any other clinic) could not profitably sell an MPK to a patient with non-Anthem private insurance.

[redacted]

425. Prosthetists and clinic management admit that if they were losing money on an MPK, they would consider selling non-MPKs to patients because the clinic needs to make a profit in order to stay in business. (Senn, Tr. 263, [redacted] Ford, Tr. 933; PX05151 (Patton (Prosthetic Solutions), Dep. at 76-78)).

Response to Finding No. 425

This proposed finding is misleading, confusing, and incomplete. Complaint Counsel does not disagree that clinics may decide not to fit a patient with a prosthetic limb if fitting the entire prosthetic limb would cause it to lose money. [redacted]

[redacted]

This proposed finding is also incomplete to the extent that it relies on the testimony of Mr. Ford. Mr. Ford testified that it is "very seldom" that it would be unprofitable to fit a patient with an MPK, and, in those instances, they recommend that the patient consider changing their insurance or going to a different provider (who may have a more favorable reimbursement contract) before they will recommend the "last resort" of changing the treatment plan. (Ford (POA) Tr. 931-35).

426. Prosthetists admit that fitting products at a loss is not sustainable. (Ell, Tr. 1790).

Response to Finding No. 426

This proposed finding is unsupported and misleading. This proposed finding is unsupported to the extent it relies solely on the testimony of one individual to represent what "[p]rosthetists admit." This proposed finding is also unsupported and misleading to the extent it refers to "fitting products at a loss." Mr. Ell testified only that it was "inoperable" for his clinic to provide an MPK if its cost exceeded Mid-Missouri's reimbursement. (Ell (Mid-Missouri) Tr. 1790). Mr. Ell did not discuss fitting "products" generally. [redacted] Complaint Counsel does not disagree that clinics may decide not to fit a patient with a prosthetic limb if fitting the entire prosthetic limb would cause it to lose money. [redacted]

427. Individual prosthetists are also sensitive to the overall profitability of Prosthetic clinics, because their individual compensation is tied to clinic profitability. (Ford, Tr. 928; Senn, Tr. 215, 219; [redacted]

Response to Finding No. 427

This proposed finding is unclear, misleading, and unsupported. This proposed finding is unclear because Respondent does not define what "sensitive to the overall profitability of Prosthetic clinics" means. [redacted]

The proposed finding is misleading, however, to the extent it suggests that the relative profits earned by clinics affect the decisions of prosthetists or clinics in prescribing and fitting a particular patient with an MPK *or a mechanical knee*. [redacted]

Clinic customers have testified that, in negotiations with manufacturers for the price of MPKs, MPK prices do not respond to price changes of non-microprocessor knees. (CCFF ¶¶ 597, 599, 713). [redacted] For example, Keith Senn, President and COO for Kentucky of the Center for Orthotic & Prosthetic Care, 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 ¶ 598).

[redacted] Prosthetists testified that the choice between fitting a patient with an MPK or a mechanical knee (if insurance coverage were available for both products) is a *clinical decision* and not based on the relative prices a clinic pays for MPKs and mechanical knees. (CCFF ¶ 529). For example, when asked if his prosthetists would stop fitting patients with MPKs if the price of MPKs went up by $1,500, [redacted] In fact, Dr. Argue, Respondent's economic expert, could not identify any clinic customers that have switched from fitting MPKs to mechanical knees in response to pricing in the past. (CCFF ¶ 715).

428. [redacted]

Response to Finding No. 428

[redacted]

429. Some clinics must follow particular internal procedures before fitting MPKs to make sure the clinic is compliant with reimbursement requirements, and that the patient's eligibility for an MPK as a K-3 users is documented in case Medicare audits the claim, which Medicare regularly does. (Senn, Tr. 170).

Response to Finding No. 429

This proposed finding is misleading, incorrect, and unsupported. The proposed finding is misleading and incorrect to the extent it suggests that a "patient's eligibility for an MPK" involves only a determination that the patient ambulates at a "K-3 level" to be "compliant" with the medical necessity "reimbursement requirements" of Medicare and other insurers. [redacted]

[redacted]

This proposed finding is also unsupported by the cited testimony to the extent it states that Medicare "regularly" audits MPK reimbursement claims. Mr. Senn testified only that COPC follows certain documentation procedures "so that if Medicare audits the claim, as they do, then we have a proper documentation in place to get – to be paid." (Senn (COPC) Tr. 170). [redacted]

[redacted]

430. At least one Clinic has admitted that it fits a lower percentage of patients with private insurance with MPK than their overall population. (Ford, Tr. 1059-1060).

Response to Finding No. 430

This proposed finding is irrelevant to the extent it does not suggest a reason why more MPKs are fit, proportionately, to patients with Medicare at POA. This proposed finding is misleading to the extent it suggests that the disparity (which is not significant) is due to price or margin considerations, rather than, for example, differences in the population of patients who have Medicare rather than private insurance.

431. Vinit Asar testified that if private insurance stopped reimbursing for MPKs, then they would consider fitting MPKs on only Medicare patients, and not on private insurance patients. (Asar, Tr. 1548).

Response to Finding No. 431

The proposed finding is incomplete. Mr. Asar testified that if all private payors stopped reimbursing for MPKs, Hanger would "have to go and work through the private payors" and have a discussion, as well as "talk to the manufacturers to say, hey, what else can we do in terms of the price of the product." (Asar (Hanger) Tr. 1548-49). He testified that not fitting MPKs would be the "worst case." (Asar (Hanger) Tr. 1549).

This proposed finding is based on an absurd hypothetical as there is no evidence in the record that private payers would ever stop reimbursing for MPKs (or have ever considered doing so), which renders the proposed finding completely irrelevant to any issue in this case.

432. Carkhuff also confirmed that prosthetists are "[v]ery much" concerned about their margins, because "[p]atient care facilities operate on relatively thin margins, and there is a lot of time that's spent on fabricating and aligning these products and doing a lot of follow-up and programming of the products. … [T]here's always a lot of questions about whether they will get reimbursed and how many months it will take." (Carkhuff Tr. 623).

Response to Finding No. 432

Complaint Counsel does not disagree that prosthetics clinics are concerned about profitability. [redacted]

433. Dr. Argue has created a "Model of Clinic Profitability" which demonstrates that a sufficient number of clinics would switch some patients to non-MPKs in the face of a price increase, which confirms that non-MPKs should be included in the relevant market. (Argue, Tr. 6174).

Response to Finding No. 433

The proposed finding is unclear, unsupported, incorrect, improperly conclusory, and misleading. The proposed finding is unclear because Respondent does not explain what it means by "demonstrates that a sufficient number of clinics would switch *some* patients to non-MPKs in the face of a price increase." The testimony cited by Respondent does not include any description or reference that suggests Dr. Argue's model demonstrates, or even attempts to demonstrate, that a "sufficient number" of clinics or patients would switch from MPKs (or any other type of product) to non-MPKs in the face of a "price increase" for MPKs (or any other product), such that any particular result to occur.

This proposed finding is unsupported because testimony cited by Respondent merely describes at a high level what Dr. Argue's model includes, and that, in Dr. Argue's words, he is "attempting to determine whether a price increase in MPKs would cause the clinic to lose money on those MPKs when we take into account the reimbursement and all of the various costs that are attributable to them." (Argue Tr. 6174-75). Nowhere in the cited testimony does Dr. Argue state any conclusion about whether a "sufficient number of clinics would switch some patients to non-MPKs" or what, if anything, the model purports to say about the inclusion or exclusion of non-MPKs in the relevant market. Moreover, Responent does not explain the relevance or importance of "some" patients switching to non-MPKs (and Dr. Argue never even references "some patients" in his testimony). In addition to being wholly unsupported by the cited testimony, the proposed finding, as written, is completely incomprehensible, rendering it meaningless and irrelevant. Respondent simply makes a bald assertion that Dr. Argue's model somehow "demonstrates that a sufficient number of clinics would switch some patients" with no basis or explanation about what that means, and then improperly concludes, again with no basis, that this somehow "confirms that non-MPKs should be included in the relevant market." Lacking any support for this conclusory statement, Respondent's proposed finding should be disregarded.

This proposed finding is unsupported, improperly conclusory, and misleading to the extent it attempts to imply that Dr. Argue's "Model of Clinic Profitability" "confirms that non-MPKs should be included in the relevant market." Based on the testimony cited by Respondent, as well as the rest of the record, it is clear that Dr. Argue's model was not designed to estimate or quantify how many clinics or patients would switch from MPKs to non-MPKs in response to a price increase on any particular MPK or whether a hypothetical monopolist would lose a specific

number of MPK sales to manufacturers of non-MPKs in response to a price increase on one or more MPKs.

[redacted]

[redacted] Dr. Scott Morton concluded that 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). [redacted] Notably, Dr. Argue himself concludes that "I do not have sufficient information from each clinic to determine whether a 5% price increase in MPKs would make that product unprofitable for the clinic." (RX-1049 at 25 (¶ 43) (Argue Report)).

434. Dr. Argue used the following inputs in his "Model of Clinic Profitability": the reimbursement that the clinic receives, the cost that it has to pay for the knee, non-billable cost (costs not associated with acquiring the knee), and then the resulting profit. (Argue, Tr. 6174).

Response to Finding No. 434

The proposed finding is incomplete and misleading because Resondent provides no detail about the specific inputs included in Dr. Argue's model and record evidence shows that the inputs used in Dr. Argue's model are deeply flawed. [redacted]

[redacted] Dr. Argue also incorrectly and unreasonably assumes in his model that non-billable costs are fixed. (*See* PX06001 at 24-25 (¶ 31) (Morton Report)). [redacted]

435. Through this model, Dr. Argue determined that costs associated with MPKs were such that a price increase on MPKs would cause clinics to lose money on fitting some patients with MPKs, specifically patients with private insurance reimbursing well-below the Medicare rate. (Argue, Tr. 6174).

Response to Finding No. 435

The proposed finding is unclear, unsupported, and incorrect. The proposed finding is unclear because Respondent does not define or explain what it means by "costs associated with MPKs" or "some patients." This proposed finding is unsupported by the cited testimony because Dr. Argue testified only that his model was "attempting to determine whether a price increase in MPKs would cause the clinic to lose money on those MPKs when we take into account the reimbursement and all of the various costs that are attributable to them." Nowhere in Respondent's cited testimony does Dr. Argue describe any conclusion or determination he made or the basis for such conclusion or determination.

[redacted]

Dr. Scott Morton concluded that 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).

[redacted] Notably, Dr. Argue himself concludes that "I do not have sufficient information from each clinic to determine whether a 5% price increase in MPKs would make that product unprofitable for the clinic." (RX-1049 at 25 (¶ 43) (Argue Report)).

This proposed finding is also unsupported, improperly conclusory, and misleading to the extent it attempts to imply that Dr. Argue's "Model of Clinic Profitability" shows that non-MPKs should be included in the relevant market. Based on the testimony cited by Respondent, as well as the rest of the record, it is clear that Dr. Argue's model was not designed to estimate or quantify how many clinics or patients would switch from MPKs to non-MPKs in response to a price increase on any particular MPK or whether a hypothetical monopolist would lose a specific number of MPK sales to manufacturers of non-MPKs in response to a price increase on one or more MPKs.

436. Based on the economic reality confirmed by prosthetists that they would not fit MPKs if they lost money on those fittings, Dr. Argue concluded that based on his model and based on the small critical loss number applicable in this case, about 6%, that clinicians would switch patients in sufficient numbers to non-MPKs defeat a SSNIP in the proposed MPK market. (Argue, Tr. 6177).

Response to Finding No. 436

This proposed finding is unclear, unsupported by the cited testimony, incorrect, based on a flawed expert analysis by Dr. Argue, improperly conclusory, and contradicted by overwhelming evidence in the record. The proposed finding is unclear because Respondent does not define or explain the meaning of the phrase "economic reality confirmed by prosthetists." In the cited

testimony, Dr. Argue did not testify about "the economic reality confirmed by prosthetists that they would not fit MPKs if they lost money on those fittings."

The proposed finding is incorrect because the underlying facts that (1) there is "small critical loss number applicable in this case, about 6%" and (2) "clinicians would switch patients in sufficient numbers to non-MPKs defeat a SSNIP" are based on a flawed analysis by Dr. Argue. Dr. Argue, Respondent's economic expert, conducted an incomplete critical loss analysis that used problematic assumptions, (*see, e.g.*, CCFF ¶¶ 2937-2938), and was designed to answer a question different than the one asked by the hypothetical monopolist test in the Merger Guidelines, (CCFF ¶¶ 2940-2941). But the single biggest, and ultimately fatal, flaw with Dr. Argue's analysis is that he did not perform a necessary step in his critical loss analysis: estimating the *predicted loss* from a SSNIP on MPKs. According to the Merger Guidelines, critical loss analysis involves an analysis of whether "the predicted loss is less than the critical loss." (CCFF ¶ 2942). "The 'critical loss' is defined as the number of lost unit sales that would leave profits unchanged." (CCFF ¶ 2942). "The 'predicted loss' is defined as the number of unit sales that the hypothetical monopolist is predicted to lose due to the price increase." (CCFF ¶ 2942). The evidence is clear that [redacted] This is a fatal flaw in his work and it is the reason he has to jump to the conclusion, with no economic analysis, that "clinicians would switch patients in sufficient numbers" to defeat a SSNIP, which the evidence shows is not the case.

The proposed finding is improperly conclusory because there is no evidence in the record suggesting that "clinicians would switch patients in sufficient numbers to non-MPKs defeat a SSNIP" in any candidate market proposed by Respondent or Complaint Counsel. Dr. Argue performed no expert analysis that shows how many, if any, clinicians would switch patients from

MPKs to non-MPKs in response to a SSNIP in any candidate relevant market. On the contrary,

Other evidence supports the conclusion that a hypothetical monopolist of MPKs sold to U.S. clinics could profitably impose a SSNIP in accordance with the hypothetical monopolist test set out in the Merger Guidelines. The hypothetical monopolist test asks if a hypothetical profit-maximizing firm were the only seller of a set of products in a candidate market, would that firm likely be able to impose a SSNIP profitably on at least one product sold by the merging firms. (CCFF ¶¶ 771-73). The applicable question is whether a hypothetical monopolist, owning all (or some subset) of the MPKs in the marketplace, could profitably impose a SSNIP on all—or even just Freedom's Plié or one of Otto Bock's MPKs—because if it could, MPKs would constitute a relevant product market.

To inform her analysis, and as prescribed by the Merger Guidelines, Dr. Scott Morton conducted a *complete* critical loss analysis to test the profitability of imposing a SSNIP on either

Freedom's Plié or one of Otto Bock's MPKs. (*See* CCFF ¶¶ 772-73) (Critical loss analysis asks "whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits.")). [redacted] This analysis shows that Respondent's proposed finding is unfounded in asserting that "clinicians would switch patients in sufficient numbers to non-MPKs defeat a SSNIP."

[redacted] Therefore, if a hypothetical monopolist tried to impose a SSNIP on one of Respondent's MPKs, it would be profitable to do so, because clinics would not switch to mechanical knees to defeat it. [redacted]

[redacted]

The cited testimony does not provide any support for the proposition that, if MPK profits generally were decreased, then there would be a switch to non-MPKs, rather than a switch from more expensive MPKs (like the C-Leg) to less expensive MPKs (like the Plié). [redacted] To the extent this conclusion relies on Dr. Argue's "Model of Clinic Profitability," it is misleading to the extent that model is unreliable, fatally flawed, and inconsistent with the evidence. (*See* Response to RPFF ¶ 433).

437. In fact, Dr. Argue concluded, based on his review of the evidence, and application of his Model of Clinic Profitability, clinics can earn little to no margin on MPKs fit on patients with private insurance. (Argue, Tr. 6163-6171). Conversely, Dr. Argue concluded that Sophisticated Non-MPKs almost always earn the clinic some margin. (Argue, Tr. 6163-6171).

Response to Finding No. 437

This proposed finding is unsupported by the cited testimony, unclear, misleading, and contradicted by a large body of record evidence. The proposed finding is unsupported by the cited testimony because, although Dr. Argue describes the critical loss test that he performs in his expert report, it contains no testimony about the profit margins earned by clinics when fitting MPKs, nor does it contain any testimony about profit margins of clinics when fitting non-MPKs.

This proposed fact is unclear to the extent that "little to no margin" is undefined. There is no indication in the cited testimony of what percentage of MPKs are sold with profits sufficiently small such that they would be eliminated by any particular price increase.

To the extent this proposed finding suggests that some clinics earn "little to no margin on MPKs fit on patients with private insurance," or that clinics would not be able to profitably fit MPKs if MPK prices went up as a result of the Merger, it is misleading and contrary to the weight of the evidence. Though Medicare and other third-party private payers reimburse prosthetic clinics the same fixed dollar amount for all MPKs, including the Plié 3 and C-Leg 4, (CCFF ¶¶ 382-83, 748-49, 3039-3040),

[redacted]

[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]

To the extent this conclusion relies on Dr. Argue's "Model of Clinic Profitability," it is unsupported because that model is unreliable, fatally flawed, and inconsistent with the evidence. (*See* Response to RPFF ¶ 433).

b. RAC audits encourage clinics to substitute Sophisticated Non-MPKs for MPKS

438. Medicare auditors tend to target high-cost items like MPKs for audit even though the financial risk to the clinic is not just the payment received for the MPK but for the entire prosthetic limb. (PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 85, 103-105)).

Response to Finding No. 438

The proposed finding is unsupported, unclear, misleading, and contrary to the weight of the evidence. This proposed finding is unsupported to the extent that it relies on the testimony of a single clinician who did not even appear at trial. It is unclear to the extent the terms "target," "high-cost items like MPKs," and "financial risk," are undefined and do not appear in the cited testimony.

[redacted]

Respondent acknowledges that RAC audits existed before the Merger and have continued after the Merger, and 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, (*see* CCFF ¶¶ 964, 966). RAC audits started to intensify in 2011, (CCFF ¶¶ 389-390), [redacted] Clinic testimony shows that prosthetic clinics have not reduced their purchases of MPKs in response to RAC audits. (*See* CCFF ¶¶ 2994-3005; Response to RPFF ¶ 302). [redacted] Thus, any suggestion by Respondent that RAC audits will prevent Respondent from raising MPK prices post-Merger is unfounded because [redacted] and 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.

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).

439. RAC audits change how clinics do business, in terms of their documentation and approach to fitting process. (Ford, Tr. 972, Brandt, Tr. 3767; Asar, Tr. [redacted] PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 39, 106-107); PX05135 (Weber (Prosthetic & Orthotic Care), Dep. at 30, 38)).

Response to Finding No. 439

The proposed finding is unclear, unsupported by the testimony cited by Respondent, misleading, and contrary to the weight of the evidence. This proposed finding is unclear to the extent "change how clinics do business" and "approach to fitting process" are undefined and extremely broad.

[redacted] *see also* CCFF ¶¶ 2987-93 (manufacturers have also begun offering services to prosthetic clinics to assist them in preparing for, and responding to, audits)). This is exemplified by the testimony of Mr. Ford that POA has created a 27-point

checklist system to ensure that all claims, not just for prosthetics, have information regarding "medical history," "evaluations of the patient . . . from as simple as height and weight to comorbidities, ongoing health issue," and "things like activity level, activities that they want to be able to do in the future, their physical health. . . ." (Ford (POA) Tr. 972-74). Notably however, Mr. Ford also testified that, today, concern about RAC audits does not cause POA to shift patients from MPKs to mechanical knees; with the checklist in place, POA is able to guarantee that it is fitting MPKs only to those patients who are eligible. (Ford (POA) Tr. 976-77).

Similarly, Mr. Brandt testified that the threat of a RAC audit has not had any effect on the number of MPKs that Ability fits on its patients. (Brandt (Ability) Tr. 3768). While Ability has procedures in place to make sure that its clinical notes and physician notes are thorough, these policies were adopted *before* RAC audits became prevalent. (Brandt (Ability) Tr. 3766-67 ("So for us, RAC audits launched a period not only – kind of concurrently we were already working on advancing that documentation on our own. . . .")).

Mr. Asar of Hanger testified that, in response to RAC audits, Hanger [redacted]

[redacted] However, Mr. Weott also testified that, despite the increase of RAC audits in the past five to six years, Orthotic and Prosthetic Centers has *increased* the number of MPKs it has fit on patients each year. (PX05140 (Weott (Orthotic and Prosthetic Centers) Dep. at 121–122)).

Mr. Weber testified that, when CMS changed its claim and audit policies around 2011, Prosthetic & Orthotic Care had to change how it organized and filed the paperwork for Medicare reimbursement. (PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 28)). However, Mr. Weber confirmed that CMS' shift in policy had no negative impact on Prosthetic & Orthotic Care's purchase of MPKs. (PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 26) ("It wasn't an impact from P&O Care's perspective on the purchase of the components. It was an impact on the clinical documentation, the procedure by which we would submit a claim.")).

This proposed finding is misleading and contrary to the weight of the evidence to the extent it implies that "RAC audits encourage clinics to substitute [mechanical knees] for MPKs" (as Respondent's section heading suggests). [redacted] Respondent acknowledges that RAC audits existed before the Merger and have continued after the Merger, and 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, (*see* CCFF ¶¶ 964, 966). RAC audits started to intensify in 2011, (CCFF ¶¶ 389-90), [redacted]

[redacted] Clinic testimony shows that prosthetic clinics have not reduced their purchases of MPKs in response to RAC audits. (*See* CCFF ¶¶ 2994-3005; Response to RPFF ¶ 302). [redacted] Thus, any suggestion by Respondent that RAC audits will prevent Respondent from raising MPK prices post-Merger is unfounded because [redacted] and 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.

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)).

440. [redacted]

Response to Finding No. 440

[redacted]

[redacted]

[redacted]

441. When RAC audits are more frequent, customers have tendency to select more non-MPKs to avoid the potential big repayment associated with a RAC audit. (De Roy, Tr. 3567). If a RAC audit disallows a payment, the clinic takes the loss, not the manufacturer. (De Roy, Tr. 3567).

Response to Finding No. 441

The proposed finding is unsupported by the cited testimony, incorrect, misleading and contrary to the weight of the evidence. This proposed finding is unsupported, incorrect and misleading. It relies solely on the testimony of one individual – Mr. De Roy of Ossur – who testified only that there was a "temporary reduced appetite for microprocessor knees at that time [2011-2012]". (De Roy (Ossur) Tr. 3566). He did not testify to any lasting impact on MPK sales, and in fact stated that, "I don't believe there's any substantial impact on RAC audits – from RAC audits on the business today." (De Roy (Ossur) Tr. 3567). Mr. De Roy further testified that the

number of MPKs that Ossur sold in the 2011-2012 period was "a lot lower" than it sells today, proving that Ossur's MPKs sales have been on the rise even while RAC audits have occurred. (De Roy (Ossur) Tr. 3567).

This proposed finding is unclear and unsupported to the extent it references a time "[w]hen RAC audits are more frequent." Mr. De Roy did not provide any testimony about what happens "when RAC audits are more frequent," nor did he suggest when this period of more frequent audits might have been, noting only that fewer MPKs were "allowed" by Medicare in the 2011-2012 time frame. (De Roy (Ossur) Tr. 3566).

This proposed finding is misleading and contrary to the weight of the evidence to the extent it implies that "RAC audits encourage clinics to substitute [mechanical knees] for MPKs" (as Respondent's section heading suggests). [redacted] Respondent acknowledges that RAC audits existed before the Merger and have continued after the Merger, and 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, (*see* CCFF ¶¶ 964, 966). RAC audits started to intensify in 2011, (CCFF ¶¶ 389-390), [redacted] Clinic testimony shows that prosthetic clinics have not reduced their purchases of MPKs in response to RAC audits. (*See* CCFF ¶¶ 2994-3005; Response to RPFF ¶ 302). Manufacturers, including Ossur, have not observed a substantial decline in MPK sales due to RAC audits. (*See* CCFF ¶¶ 3006-09). Thus, any suggestion by Respondent that RAC audits will prevent Respondent from raising MPK prices post-Merger is unfounded because RAC audits existed before the Merger

[redacted] and 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.

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).

442. [redacted]

Response to Finding No. 442

[redacted]

[redacted]

[redacted]

443. Hanger identifies reimbursement issues and RAC audits as risk factors it faces in the prosthetics industry within its 10-K. (Asar, Tr. 1543).

Response to Finding No. 443

This proposed finding is unsupported, misleading, and contrary to the weight of the evidence. Hanger's 2016 10-K does not specifically mention RAC audits, or audits of any kind. (*See* RX-0341 (Hanger)). Mr. Asar was asked by Respondent about a line in its 10-K stating that "We depend on reimbursements by third party payors, as well as payments by individuals, which could lead to delays and uncertainties in the reimbursement process." (Asar (Hanger) Tr. 1542). Mr. Asar testified that this could relate to "the reimbursement we get from the Cignas and the Aetnas of the world that, you know, it could – they could delay their payments to us, they could ask for more documentation, or they couldn't pay us." (Asar (Hanger) Tr. 1543). RAC audits could be included "but again, the [RAC] audits aren't third party payors, the [RAC] audits are really from CMS." (Asar (Hanger) Tr. 1543).

This proposed finding is misleading and contrary to the weight of the evidence to the extent it implies that "RAC audits encourage clinics to substitute [mechanical knees] for MPKs" (as Respondent's section heading suggests). [redacted] Respondent acknowledges that RAC audits existed before the Merger and have continued after the Merger, and 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, (*see* CCFF ¶¶ 964, 966). RAC audits started to intensify in 2011, (CCFF ¶¶ 389-90), [redacted] Clinic testimony shows that prosthetic clinics have not reduced their purchases of MPKs in response to RAC audits. (*See* CCFF ¶¶ 2994-3005; Response to RPFF ¶ 302). Manufacturers, including Ossur, have not observed a substantial decline in MPK sales due to RAC audits. (*See* CCFF ¶¶ 3006-09). Thus, any suggestion by Respondent that RAC audits will prevent Respondent from raising MPK prices post-Merger is unfounded because RAC audits existed before the Merger [redacted] and 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.

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).

444. In 2014, Hanger had $82 million in disallowed revenue as a result of audits. (Asar, Tr. 1552). In 2016, despite improving the paperwork process for reimbursement, Hanger had $49 million in disallowed revenue as a result of audits. (Asar, Tr. 1552).

Response to Finding No. 444

[redacted]

[redacted]

445. If a doctor determines that a patient is eligible for an MPK, the patient could still receive a less sophisticated knee if that was their choice. (Kannenberg, Tr. 1944).

Response to Finding No. 445

This proposed finding is incomplete and misleading to the extent it suggests that K3 or K4 amputees frequently make a "choice" to be fit with a mechanical knee rather than an MPK. (*See* Response to RPFF ¶ 392, discussing how prosthetists take patient preferences into account, and showing that this does not indicate that MPKs and non-MPKs are substitutes). This proposed finding is also incomplete and misleading to the extent it suggests that MPKs and mechanical knees are economic substitutes for each other or that the choice of whether to fit a specific K3/K4

patient with an MPK versus a mechanical knee is affected in any significant way by the Merger. (*See* Response to RPFF ¶ 393).

This proposed finding is also unclear to the extent it uses the phrases "eligible for an MPK" and "less sophisticated knee," which are undefined and do not appear in the cited testimony from Otto Bock executive Andreas Kannenberg.

c. There is no evidence that all users of MPKs wear MPKs out of medical necessity

446. "Medical necessity justification" are criteria that have been established by insurance companies to determine eligibility for an MPK. (Kannenberg, Tr. 1833).

Response to Finding No. 446

The proposed finding is unclear because Respondent does not define "medical necessity justification" or explain what "criteria" means**.** [redacted] To the extent that Respondent's definition of "medical necessity justification" and

"criteria" are consistent with this evidence, Complaint Counsel does not disagree with the proposed finding.

447. Dr. Kannenberg testified that his understanding of the term "medical necessity" from a physician standpoint is different than is used in the prosthetics field relating to insurance coverage eligibility. (Kannenberg, Tr. 1939).

Response to Finding No. 447

This proposed finding is unclear, incomplete, cites the wrong page of the the trial transcript (it should be Tr. 1938), and irrelevant to the extent that the cited testimony does not specify what the purported differences are between Dr. Kannenberg's understanding of "medical necessity" and how that term is used in conjunction with insurance coverage eligibility.

To the extent Respondent suggests that insurers have a specific set of criteria to determine whether an MPK is medically necessary over a mechanical knee, while medical professionals may perform a similar, but somewhat different, evaluation to determine whether an MPK is medically appropriate for a patient, rather than a mechanical knee, the proposed finding is unclear and incomplete. [redacted]

[redacted]

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). [redacted]

The process by which healthcare professionals and insurers, respectively, prescribe and cover MPKs determines which specific K-3/K-4 amputees receive MPKs, and ultimately it is a process that is largely unaffected by the Merger. In the United States, there are two steps to determine the eligibility of a K-3/K-4 amputee for an MPK. [redacted]

[redacted]

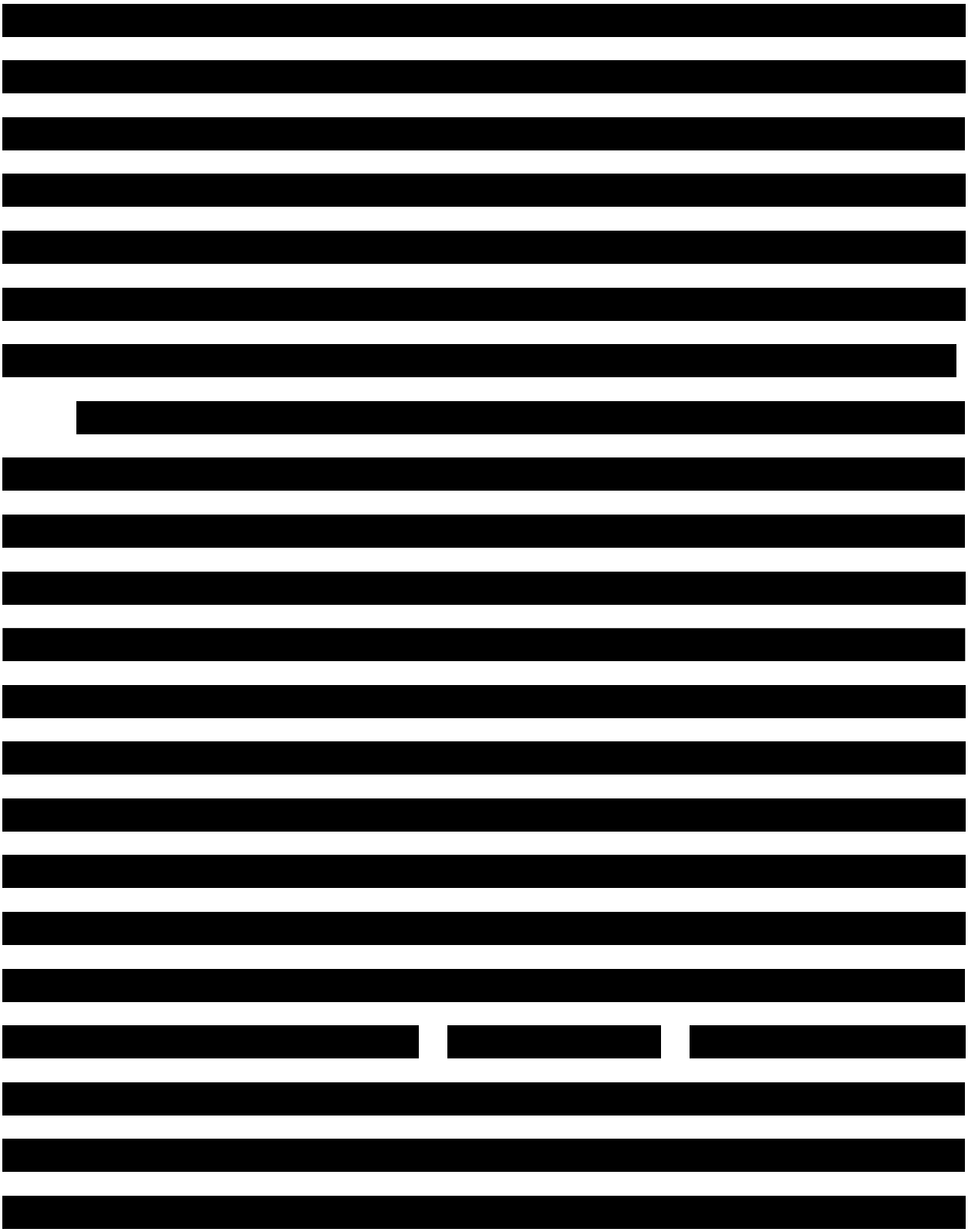
448. Medical necessity refers to eligibility for a particular device. For example, CMS deems MPKs to be "medically necessary" for K-3 and K-4 patients. This means that MPKs are available to that patient population, but does not mean that every eligible patient must get an MPK. (Schneider, Tr. 4405; Kannenberg, Tr. 1944).

Response to Finding No. 448

The proposed finding is unclear, incorrect, unsupported, misleading, and contradicted by overwhelming evidence to the extent it implies that MPKs are "medically necessary" for all K-3 and K-4 patients. This proposed finding is unclear because Respondent does not explain what it means by "MPKs are available to that patient population" and it is unsupported by the cited testimony because it states that "[m]edical necessity refers to eligibility for a particular device," even though neither the testimony of Mr. Schneider nor Dr. Kannenberg make such a reference.

The proposed fact is incorrect and unsupported to the extent it states that "CMS deems MPKs to be 'medically necessary' for K-3 and K-4 patients." This fact was not addressed by either Mr. Schneider or Dr. Kannenberg in the cited testimony, and is misleading and contrary to the weight of the evidence which shows that there is no blanket determination that MPKs are medically necessary for all patient's based on their *K-level designations*.

Record evidence clearly shows that the process by which healthcare professionals and insurers, respectively, prescribe and cover MPKs determines which *specific* K-3/K-4 amputees receive MPKs. In the United States, there are two steps to determine the eligibility of a *particular* K-3/K-4 amputee for an MPK. [redacted]



[redacted]

That does not mean every K-3/K-4 amputee receives, or from a medical perspective should receive, an MPK. [redacted]

[redacted] Finally, 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).

Ultimately, the Merger does not affect which K-3/K-4 amputees are likely to be prescribed or receive reimbursement for MPKs in the future. [redacted] U.S. prosthetic clinics need to go into the marketplace to purchase MPKs to fit on patients who want and would benefit medically from an MPK. [redacted]

449. There are instances where a non-MPK and an MPK are both medically appropriate for the same patient. [redacted]

Response to Finding No. 449

This proposed fact is unclear, incomplete, and misleading. The proposed finding is unclear because Respondent does not define what it means by the phrase "a non-MPK and an MPK are both medically appropriate for the same patient." To the extent that Respondent means the same patient may wear a mechanical knee for certain limited activities, such as fishing or running a marathon, but an MPK for the rest of his or her daily activities, Complaint Counsel does not disagree that this type of situation occurs from time to time. (*See* Response to RPFF ¶ 339). The record is clear, however, that MPKs and mechanical knees are *not substitutes for the same activities* for such patients. (*See* CCFF ¶¶ 543-46, 551-53, 555). [redacted]

[redacted]

The proposed finding is incomplete and misleading to the extent that it suggests that the way insurance companies determine a patient (and his or her clinic) can obtain coverage for an MPK leads to the conclusion that MPKs and mechanical knees are meaningful substitutes for one another. [redacted] Thus, if a patient and his or clinic are approved for coverage for an MPK it is *because* there is documented proof the MPK will provide benefits that a *mechanical knee cannot match*.

[redacted]

[redacted] Complaint Counsel does not disagree that 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, again, for these patients, MPKs are not functional substitutes for the patient (or economic substitutes from the perspective of clinics buying knees for these patients), because these patients simply have a strong preference for mechanical knees.

450. A patient could be clinically indicated for an MPK but an insurance company may nevertheless deny coverage. (Brandt, Tr. 3752).

Response to Finding No. 450

The proposed finding is unclear to the extent that "clinically indicated" is undefined. To the extent that "clinically indicated" means that an MPK has been determined to be medically appropriate for a given amputee by his or her doctor and prosthetists, Complaint Counsel does not disagree that an insurance company may nevertheless deny coverage. This could occur for several reasons. [redacted] Second, the patient's insurance policy may not cover MPKs at all, even for those patients for whom they are deemed medically appropriate by a doctor or prosthetist. (*See, e.g.*, CCFF ¶ 541). [redacted]

[redacted]

451. Both MPKs and sophisticated non-MPKs are medically appropriate for patients with K-3 or K-4 mobility levels. (Sabolich, Tr. 5855).

Response to Finding No. 451

This proposed finding is unclear, unsupported, misleading and contradicted by the weight of the evidence. In the testimony cited by Respondent, Mr. Sabolich provided no testimony about what technologies are "medically appropriate" for any particular patient or patient population. Mr. Sabolich was asked simply about "non-MPK[s]," and not about "sophisticated non-MPKs," a term that is unclear and undefined. In the cited testimony, he was asked, "[I]f a patient is designated through the functional testing as K3, can medical necessity be established for reimbursement purposes for either a non-MPK or for an MPK?" Mr. Sabolich responded merely that, "If they're a functional level 3, they *could* have a non-MPK or an MPK. *It's based on their need*." (Sabolich (Scott Sabolich Research) Tr. 5855 (*emphasis added*)). Mr. Sabolich did not testify that MPKs and non-MPKs *are* medically necessary, but rather that either technology *can potentially be shown to be* medically necessary for a K3 amputee, "based on their need." Thus, Respondent's use of this testimony is misleading. [redacted]

Record evidence clearly shows that the process by which healthcare professionals and insurers, respectively, prescribe and cover MPKs determines which *specific* K-3/K-4 amputees receive MPKs (MPKs are not medically appropriate for *every person deemed a K-3 or K-4 level ambulator*). In the United States, there are two steps to determine the eligibility of a *particular* K-

3/K-4 amputee for an MPK. [redacted]

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 ¶¶ 461-487). [redacted]

[redacted]

Those patients

typically wear a mechanical knee when engaging in such activities. [redacted] Finally, 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 ¶¶ 559-561).

Ultimately, the Merger does not affect which K-3/K-4 amputees are likely to be prescribed or receive reimbursement for MPKs in the future. [redacted] U.S. prosthetic clinics need to go into the marketplace to purchase MPKs to fit on patients who want and would benefit medically from an MPK. [redacted]

452. Letters of medical necessity are about coverage determinations and eligibility; they are not about clinical determinations. (Doug Smith, Tr. 6016-17).

Response to Finding No. 452

This proposed finding is unclear to the extent that term "[l]etters of medical necessity" is undefined. To the extent "[l]etters of medical necessity" refers to submissions made by clinics to insurers seeking reimbursement for fitting a prosthetic device on a patient, Complaint Counsel does not disagree that such "letters" are separate from the prosthetist's or physician's determination that the device in question is medically appropriate for the patient. Complaint Counsel adds, however, that the factors considered by a prosthetist or physician in assessing whether a device is medically appropriate may overlap with the factors which demonstrate that a

particular device is a medical necessity. For example, in the MPK context, an MPK may be a medically appropriate treatment, in part, because a K-3 patient suffers stumbles and falls with their mechanical knee. [redacted]

453. Most patients' providers do not require a letter of medical necessity to justify their prosthetic device. (Doug Smith, Tr. 6014-6015). Dr. Smith testified that most of the time he does not have to write a letter of medical necessity for either an MPK or a non-MPK. (Doug Smith, Tr. 6014-6015).

Response to Finding No. 453

This proposed finding is unsupported, unclear, and irrelevant. It is unclear to the extent that "letter of medical necessity" is never defined in the testimony of Dr. Smith (despite his being asked to define the term). (Smith (Retired) Tr. 6012-6013). This proposed finding is unsupported to the extent that Dr. Smith did not testify that "[m]ost patients' providers do not require a letter of medical necessity," but rather that for "many cover carriers, you can prescribe a leg, and most of the time a letter is never needed." (Smith (Retired) Tr. 6014). Dr. Smith did not testify that there are insurers that never require letters of medical necessity for prosthetic legs, but rather that many carriers do not require them for the majority of knees they cover. Moreover, the proposed finding focuses on the "letters" setting out the medical necessity justifications required by insurers to cover a particular prosthetic, but nothing in Mr. Smith's testimony, or the record generally, suggests that insurer requirements for reimbursement do not apply if no letter is submitted. Some

insurers, including Medicare, require that clinics have documentation supporting medical necessity justifications available upon request, even if a "letter" setting out those justifications is not submitted with an initial claim seeking reimbursement. (*See* Oros (Scheck & Siress) Tr. 4882-4883). [redacted]

454. When selecting prosthetic components for patients, no one thing is perfect or absolute, and there advantages and disadvantages to each option, and is not the same as a life-and-death situation. (Doug Smith, Tr. 6004-05).

Response to Finding No. 454

The proposed finding is wholly unclear based on several ambiguous and unexplained terms and phrases, including "prosthetic components," "no one thing is perfect or absolute," "advantages and disadvantages," and "not the same thing as a life-and-death situation." The ultimate effect of Respondent stringing together so many nebulous and unexplained terms and phrases is to render the proposed finding incomprehensible and thus meaningless.

455. Dr. Doug Smith testified that he has prescribed an MPK for a patient and had a prosthetist refuse to fit that patient with an MPK. (Doug Smith, Tr. 6012).

Response to Finding No. 455

This proposed finding is unclear and irrelevant. Dr. Smith provided no context related to for the time (or times) that a prosthetist refused to fit a patient with an MPK, (Smith (Retired) Tr. 6012), and the fact that it may have occurred is, on its own, of no relevance to any issue in this case.

456. Medical necessity is a spectrum, and does not mean the same in all medical scenarios. (Doug Smith, Tr. 6012). On one end of the medical necessity spectrum is an urgent and emergent medical condition, like if a patient's appendix is about to burst. In this scenario, the physician does not ask for permission from an insurance carrier, because it is clear the patient needs to go to the OR and have his or her appendix taken out. (Doug Smith, Tr. 6012-13). The next level on the medical necessity spectrum, according to Dr. Doug Smith, is a medical condition that is not emergent, and the physician decides on a treatment plan that the insurance carrier questions. In that scenario, the physician might have a conversation with the insurance carrier to explain his or her reasoning of the wisdom of that treatment plan. (Doug Smith, Tr. 6013). When it gets to the level of part A versus part B, they can manage with either of them, but one might be a benefit to the person in that they might be able to do a little better on uneven surfaces, they might be able to do better on stairs, so in that sense the term medical necessity is still used, even though it's very different than a life-and-death situation. (Doug Smith, Tr. 6016).

Response to Finding No. 456

The proposed finding is unclear and irrelevant. The proposed finding is extremely unclear. By stringing together numerous phrases and statements that are facially ambiguous, with no explanation of what any of them mean, Respondent creates a proposed finding that is incomprehensible and in many places clearly irrelevant (*e.g., see* discussion of appendix being taken out). This proposed finding is irrelevant to the extent it refers to "medical scenarios" other than the fitting of a prosthetic knee to a transfemoral amputee. To the extent the proposed finding implies anything about how medical professionals or insurers determine whether in a MPK is medically appropriate or meets medical necessity requirements for a particular K-3/K-4 patient, it is unclear and misleading. (*See* Responses to RPFF ¶¶ 447-449).

457. If a patient is classified as K-3, then medical necessity can be established for either an MPK or non-MPK. (Sabolich, Tr. 5855; [redacted]

Response to Finding No. 457

This proposed fact is unclear, incorrect, misleading, and contrary to the weight of the evidence. The proposed finding is unclear because Respondent does not explain what it means by "medical necessity *can* be established," To the extent Respondent means simply that the *potential* exists that, after a fact and patient-specific evaluation by medical professionals and insurance

companies, an MPK may be the prescribed and reimbursed for a particular K-3 patient, then Complaint Counsel does not disagree, because K-3 patients are *candidates* for MPKs in the United States (while K-0, K-1, and K-2 patients typically are not candidates for MPKs). To the extent the proposed finding implies anything about *how* medical professionals or insurers determine whether in a MPK is medically appropriate or meets medical necessity requirements for a *particular* K-3/K-4 patient, it is unclear and misleading. (*See* Response to RPFF ¶¶ 447-449). To the extent it implies that an MPK is medically appropriate or medically necessary for *every person deemed a K-3 (or K-4) level ambulator,* the proposed finding is incorrect and contradicted by overwhelming evidence.

Record evidence clearly shows that the process by which healthcare professionals and insurers, respectively, prescribe and cover MPKs determines which *specific* K-3/K-4 amputees receive MPKs (MPKs are not medically appropriate for *every person deemed a K-3 or K-4 level ambulator*). In the United States, there are two steps to determine the eligibility of a *particular* K-3/K-4 amputee for an MPK. [redacted]

[redacted]

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 ¶¶ 461-487). [redacted]

[redacted]

That does not mean every K-3/K-4 amputee receives, or from a medical perspective should receive, an MPK. [redacted] Those patients typically wear a mechanical knee when engaging in such activities. [redacted] Finally, 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 ¶¶ 559-561).

Ultimately, the Merger does not affect which K-3/K-4 amputees are likely to be prescribed or receive reimbursement for MPKs in the future. [redacted] U.S.

prosthetic clinics need to go into the marketplace to purchase MPKs to fit on patients who want and would benefit medically from an MPK. [redacted]

458. Clinicians at times obtain "medical necessity" documentation after the prosthetist and patient have already decided on the type of knee the patient will receive. [redacted]

Response to Finding No. 458

Complaint Counsel has no specific response given the focus of the proposed finding on "documentation."

459. If insurance determines that an MPK is "medically necessary" for that patient as defined by that plan, the prosthetist, physician, or patient can still decide to use a non-MPK. (Schneider, Tr. 4405). This happens often. "The medical necessity is just setting a ceiling to the availability, so medical necessity is usually something that you need to make as a threshold for the coverage criteria which says is the top that you could go. But that does not stop you from going down below." (Schneider, Tr. 4405).

Response to Finding No. 459

The proposed finding is unsupported, misleading, and contradicted by the weight of the evidence. The proposed finding is unsupported because Respondent cites only the self-serving testimony of Otto Bock executive Scott Schneider for the assertion that patients for whom an MPK is medically necessary "often" are fit with non-MPKs. [redacted]

The proposed finding is also misleading because it misunderstands how the process of justifying the "medical necessity" of an MPK works. [redacted]

[redacted] Therefore, it would not make sense to go through the process of gathering and documenting evidence showing the benefits of an MPK over a mechanical knee, and submitting it to the insurer and gaining approval for coverage to fit an MPK, if the clinic, medical professionals, or patient did not want an MPK. While it is theoretically possible that this could happen, there is no evidence in the record, other than Mr. Schneider's self-serving testimony, that this happens with any frequency. It would be a significant waste of time and energy for everyone involved if this happened regularly.

Notwithstanding the foregoing, Complaint Counsel does not disagree that eligibility for an MPK does not necessitate that the patient be fit with one. (*See* Response to RPFF ¶ 448 (discussing reasons why an MPK might not be a suitable option for an amputee otherwise qualified to be fit with one)). This proposed finding is incomplete and misleading to the extent it suggests that K-3 amputees frequently make a choice to be fit with a mechanical knee rather than an MPK, and to the extent it suggests that MPKs and mechanical knees are economic substitutes for each other or that the choice of whether to fit a specific K-3 patient with an MPK versus a mechanical knee is affected in any significant way by the Merger. (*See* Response to RPFF ¶ 392 (discussing how prosthetists take patient preferences into account, and noting that this does not indicate that MPKs and non-MPKs are substitutes)).

460. Dr. Doug Smith has had patients that are fit with an MPK, wear an MPK for a while, and later decide that they prefer a mechanical knee. (Doug Smith, Tr. 6011).

Response to Finding No. 460

This proposed finding is unclear, incomplete, misleading, and contradicted by the weight of the evidence to the extent it suggests that patients, with any regularity, opt for a mechanical knee over an MPK based solely on the fit or feel of an MPK. The proposed finding is unclear because Respondent does not describe or provide an context for the basis on which some patients "later decide that they prefer a mechanical knee." In the testimony cited by Respondent, Dr. Smith testified that patients switch from MPKs to mechanical knees for a variety of reasons, including realizing that MPKs are not compatible for the patient's vocation or lifestyle, for instance because they are not as durable as some mechanical knees, or require charging. (Smith (Retired) Tr. 6011-6012). [redacted] Those patients typically wear a mechanical knee when engaging in such activities. [redacted]

[redacted]

4. Manufacturers develop, manufacture, and sell non-MPKs and MPKs in the same fashion

461. Blatchford has been personally involved in the development of Endolite's MPKs and non-MPKs. (Blatchford, Tr. 2105). Blatchford uses the same formal five-stage process to develop its MPKs and non-MPKs. Blatchford, Tr. (2105-2107).

Response to Finding No. 461

Complaint Counsel has no specific response.

462. Freedom has a Product Approval Committee that is involved in the development and approval of Freedom's R&D projects; there is no committee specifically designated for the development of MPKs. (Carkhuff, Tr. 298; [redacted] Prince, Tr. 2680).

Response to Finding No. 462

Complaint Counsel has no specific response.

463. Endolite's sales force sell Endolite's whole product line. (Blatchford, Tr. 2129). Endolite utilizes a sales force and clinical team to promote its products in the United States. (Blatchford, Tr. 2130-2131).

Response to Finding No. 463

The proposed finding is misleading to the extent that it implies that sales personnel must have the same skill set to sell MPKs as to sell mechanical knees. [redacted]

[redacted] According to Mark Ford, President of Prosthetic and Orthotic Associates, information that he receives from MPK manufacturers' sales forces "is very helpful because it's going to optimize the performance of those components for that specific patient." (CCFF ¶ 1701). Clinic customers also require other specialized non-sales services from MPK vendors, (CCFF ¶ 847), and technical support to assist with troubleshooting of MPKs, which customers describe as "very important." (CCFF ¶ 1711-1712, 1714). If sales personnel have the skills to sell MPKs, they could also sell mechanical knees, but the reverse is not true.

In order to provide the requisite support and education that clinics demand, successful manufacturers employ direct sales models to sell their MPKs in the United States. (CCFF ¶ 1676 (Össur executive testifying that a direct sales force is "absolutely necessary" to sell MPKs to U.S. clinics); 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)).

[redacted] Indeed, Otto Bock's sales representatives visit Hanger's clinics, Otto Bock's largest customer, more than 2,000 times per year. (CCFF ¶¶ 869, 1423, 1689).

[redacted]

[redacted]

464. Össur's total U.S. sales force is roughly fifty people, including representatives and clinicians. (De Roy, Tr. 3539; 3568). Össur's direct sales force sells both MPKs and non-MPKs. (De Roy, Tr. 3570).

Response to Finding No. 464

[redacted] While Össur allows distributors to sell mechanical knees, Össur only sells MPKs directly through its sales force because "[MPKs] are more complicated to fit" and "require more education." (De Roy (Össur) Tr. 3569-3570).

Complaint Counsel has no specific response to the proposed finding that Össur's total U.S. sales force is roughly fifty people.

465. Each of Ottobock's prosthetic sales reps sells Ottobock's full suite of prosthetic components. (Solorio, Tr. 1639).

Response to Finding No. 465

[redacted]

466. Freedom's sales reps sell Freedom's feet, knees, and ankles. (Testerman, Tr. 1118). The job of Freedom's sales reps is to talk about features and benefits of Freedom's products and sell how Freedom's products are differentiated versus the competition. (Testerman, Tr. 1117-1118).

Response to Finding No. 466

Complaint Counsel has no specific response.

467. Freedom's sales reps help with the fitting process for all of Freedom's products, including the Plié 3. (Testerman, Tr. 1118-1119). Freedom's sales representatives assist clinics and patients with troubleshooting issues with Freedom products. (Testerman, Tr. 1119). Freedom's sales reps try to convert any competitive product, not just MPKs, to Plié sales. (Testerman, Tr. 1132).

Response to Finding No. 467

This proposed finding is unsupported and contradicted by other evidence insofar as it implies that Freedom views the Plie 3 as competing significantly with non-MPK products or that Freedom has successfully converted non-MPK business into Plie 3 sales. The third sentence of the proposed finding cites only to page 1132 of the trial transcript. The complete relevant testimony of Mr. Testerman on that page is as follows:

> So let's talk a little bit more about Freedom's Plié 3 specifically. Now, with respect to the Plié 3, you designed sales initiatives to go after MPKs?
> A. Part of my role as VP of national and key accounts is to participate with the SMC to try to determine best strategies to take Plié 3 and other Freedom products versus the competition.
> Q. And this includes strategies against the C-Leg 4?
> A. This would include strategies versus the C-Leg 4, any other microprocessor knee, Rheo -- the Rheo or Orion, Linxus (phonetic). We don't discriminate about who we try to go after for market share.

(Testerman (Freedom) Tr. 1131-1132)

Nowhere in the Mr. Testerman's testimony does he suggest that Freedom converts any competitive products other than MPKs into Plie sales. In fact, he only discusses Freedom's Plie 3 strategies related to other MPKs, including the C-Leg 4, Rheo, and Orion. He makes no reference to any mechanical knee. Thus, the third sentence of the proposed finding is unsupported. Elsewhere in his trial testimony, Mr. Testerman testified that when Freedom sets of the price of the Plié 3, Freedom is "looking at trying to take share from all other microprocessor knees, we

look at pricing of the Plié 3 versus those knees"—he agreed that he does not look to pricing of mechanical knees. (CPFF ¶ 735).

468. It is important for Freedom's sales reps to understand what competitive knees, whether MPKs or non-MPKs, are being used at Freedom's key accounts so Freedom can develop a strategy to switch those customers to Plié 3. (Testerman, Tr. 1132-1133 ("There's multiple factors that go into the decision-making process in an office, is my understanding. And if you've seen one facility, you've seen one facility in the way in which they make a decision as far as what MPK they're going to put on a particular patient. If you're a large key account – I'll give you an example – COPC, they have a nice procedure that they go through to determine what prosthetic they're going to put on that particular patient. If you went to one that was less sophisticated like, say, a Yankee Bionics, then it's going to be a completely different process to try to determine what, call it, an MPK or an ankle is going to be put on that particular patient. So I just go back to what I said, that there's no real just A or B. There's A through Z as far as the decision-making process for what prosthesis is going to go on a patient, in my opinion.")).

Response to Finding No. 468

This proposed finding is unsupported and contradicted by other evidence insofar as it implies that Freedom views the Plie 3 as competing significantly with non-MPK products or that Freedom has successfully converted non-MPK business into Plie 3 sales (it is also unclear in several respects). The first sentence of the proposed finding cites only to pages 1132 and 1133 of the trial transcript. The only relevant testimony of Mr. Testerman on those pages, related to which products the Plie 3 competes with, is as follows:

> [Q.] So let's talk a little bit more about Freedom's Plié 3 specifically. Now, with respect to the Plié 3, you designed sales initiatives to go after MPKs?
> A. Part of my role as VP of national and key accounts is to participate with the SMC to try to determine best strategies to take Plié 3 and other Freedom products versus the competition.
> Q. And this includes strategies against the C-Leg 4?
> A. This would include strategies versus the C-Leg 4, any other microprocessor knee, Rheo -- the Rheo or Orion, Linxus (phonetic). We don't discriminate about who we try to go after for market share.

(Testerman (Freedom) Tr. 1131-1132).

Nowhere in the Mr. Testerman's testimony does he suggest that Freedom converts any competitive products other than MPKs into Plie sales. In fact, he only discusses Freedom's Plie 3 strategies related to other MPKs, including the C-Leg 4, Rheo, and Orion. He makes no reference to any mechanical knee. Thus, the first sentence of the proposed finding is unsupported. Elsewhere in his trial testimony, Mr. Testerman testified that when Freedom sets of the price of the Plié 3, Freedom is "looking at trying to take share from all other microprocessor knees, we look at pricing of the Plié 3 versus those knees"—he agreed that he does not look to pricing of mechanical knees. (CPFF ¶ 735).

This proposed finding is also unclear. Respondent does not define or explain several phrases, including what it means by "multiple factors," "facility," "nice procedure," "less sophisticated," "completely different process," "A or B," and "A through Z." This testimony from Mr. Testerman also falls outside of Respondent's citation. (Testerman (Freedom) Tr. 1134-1135).

5. Market Participants Recognize Competition By K-Level Classification

a. Competition defined by K-Level classification

469. [redacted]

Response to Finding No. 469

[redacted]

[redacted]

[redacted]

[redacted]

470. Ottobock considers C-Leg 4 to compete with all K-3 and K-4 non-MPKs and MPKs that are available to most K-3 and K-4 patients. (Schneider, Tr. 4343).

Response to Finding No. 470

The proposed finding is unclear and contrary to the weight of the evidence. The proposed finding is unclear because Respondent has not explained what knees are "available to most K-3 and K-4 patients."

The proposed finding is contrary to the weight of the evidence because the record is clear that Otto Bock considers MPKs as constituting a separate market from mechanical knees and does not view mechanical knees as competing significantly against its MPK products. Otto Bock's ordinary course documents show that it only looks at the prices of other MPKs when determining its own MPK prices. [redacted]

Otto Bock consistently characterizes the market that its microprocessor knee, the C-Leg, competes in, as a microprocessor knee market. (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 ¶ 967). [redacted] These Otto Bock ordinary course U.S. MPK market share analyses make their way to the highest levels of the company. [redacted]

471. According to Schneider, Sophisticated, Non-MPKs compete with MPKs for K-3 and K-4 users in the United States. (Schneider, Tr. 4329).

Response to Finding No. 471

The proposed finding is unclear, unsupported, and contrary to the weight of the evidence. The proposed finding is unclear because Respondent has not defined the term "Sophisticated [] Non-MPK" and this phrase is not used in the portion of Scott Schneider's testimony cited by Respondent. Without defining this phrase, the proposed finding is unsupported because Respondent attributes Mr. Schneider with using terminology that Respondent Counsel appears to have created solely for litigation.

The proposed finding is unsupported and contrary to the weight of the evidence clearly showing that MPKs do not compete with mechanical knees used by some K-3 and K-4 patients. (*See* Responses to RPFF ¶¶ 469-470 above).

[redacted]

Otto Bock consistently characterizes the market that its microprocessor knee, the C-Leg, competes in, as a microprocessor knee market. (CCFF ¶ 717). Similarly, Freedom's CEO at the time of the Merger, David Smith, testified that MPKs and mechanical knees are "completely different products" and distinguished them from each other by explaining "[o]ne is rudimentary and one is sophisticated. One doesn't allow mobility and ambulation and one does." (CCFF ¶ 608).

To support its assertion that mechanical knees compete significantly against MPKs, Respondent offers only the self-serving testimony of its own, biased executive, Mr. Schneider, which is overwhelmed by evidence contradicting his testimony and establishing that mechanical knees do not, in fact, compete significantly with MPKs in the United States.

472. Maynard Carkhuff testified that Freedom competes for sales to clinics with all prosthetic knees that are suitable for K-3 and K-4 patients, and there are hundreds of brands of such knees on the market. (Carkhuff, Tr. 618).

Response to Finding No. 472

The proposed finding is unclear, misleading, and contrary to the weight of the evidence. The proposed finding is unclear because Respondent has not defined "brands" or identified the "hundreds of brands" with which Freedom purportedly competes. The proposed finding is also unclear because Respondent did not define "suitable" and the different, possible interpretations of the word may make a material distinction. The proposed finding is misleading, unsupported, and contrary to the weight of the evidence to the extent it suggests that Freedom's Plié 3 MPK, or any MPK, competes significantly with mechanical knees used by some K-3 and K-4 patients. (*See* Responses to RPFF ¶¶ 469-471 above).

Testimony from other Freedom executives show that Freedom's Plié does not compete against mechanical knees. Freedom's CEO at the time of the Merger, David Smith, testified that MPKs and mechanical knees are "completely different products" and distinguished them from each other by explaining "[o]ne is rudimentary and one is sophisticated. One doesn't allow mobility and ambulation and one does." (CCFF ¶ 608). [redacted] Mark Testerman, Freedom's Vice President of Sales, testified that when Freedom sets the price of the Plié 3, Freedom is "looking at trying to take share form all other microprocessor knees," only "look[s] at pricing of the Plié 3 versus those knees," and does not take into account the pricing of mechanical knees. (CCFF ¶ 735).

Freedom executives have also consistently analyzed the MPK market separate and apart from mechanical knees. [redacted] These MPK-only market share analyses inform important and strategic business decisions at Freedom. [redacted]

[redacted] (CCFF ¶ 736).

473. Maynard Carkhuff testified that many more K-3 and K-4 patients are fit with non-MPKs than are fit with MPKs. (Carkhuff, Tr. 621).

Response to Finding No. 473

The proposed finding is unclear, unsupported, and contradicted by other evidence. The proposed finding is unclear because Respondent has not defined or quantified "many more" patients and the definition of this term may make a material distinction. To the extent Respondent implies that more K-3 and K-4 patients are fit with non-MPKs, as opposed to MPKs, the proposed finding is unsupported because it relies entirely on testimony from Maynard Carkhuff, a Freedom executive, without providing the basis of his personal knowledge for making this claim. The proposed evidence is also contradicted by other evidence such as testimony from Scott Schneider, an Otto Bock executive who served as one of Respondent's trial witnesses, who testified that a "roughly equal" number of K-3 and K-4 patients are fit with mechanical knees and MPKs. (Schneider (Otto Bock) Tr. 4329).

474. Maynard Carkhuff testified that in Freedom's view they compete with every knee manufacturer, because there are so many different knees and a wide variety of patient and prosthetist preferences, so the sales reps have to be aware of what different offices are using to customize the sales pitch. (Carkhuff, Tr. 621).

Response to Finding No. 474

The proposed finding is misleading, unclear, and contrary to the weight of the evidence. The proposed finding is unclear and misleading because Respondent does not define "knee manufacturer" and Mr. Carkhuff did not elaborate on the term during his testimony. Complaint Counsel does not disagree that Mr. Carkhuff testified that Freedom competes with other

manufacturers and that "[t]he C-Leg is the largest, the leading product I would say in the industry." (Carkhuff (Freedom) Tr. 621). Notably, Mr. Carkhuff's testimony was in response to a question asking "Has Freedom ever viewed a particular prosthetic knee as the Plié 3's primary competitor?" (Carkhuff (Freedom) Tr. 621). Complaint Counsel also does not disagree that Mr. Carkhuff testified that sales reps have to be aware of what different offices are using to customize the sales pitch. Complaint Counsel adds that Mr. Carkhuff also testified that "having a full complement of salespeople, however you have the nation configured, visiting customers on a regular basis is important" because "if we're out of sight, we're out of mind." (CCFF ¶ 844).

The proposed finding is contrary to the weight of the evidence to the extent it suggests Freedom's Plié competes with manufacturers of mechanical knees because the record is clear that MPKs do not compete with mechanical knees. (*See* Responses to RPFF ¶¶ 469-72). Also, the proposed finding is contrary to the weight of the evidence to the extent it suggests Freedom views mechanical knees as competing with the Plié. The record is clear that Freedom views MPKs as constituting a separate market from mechanical knees and does not view mechanical knees as competing with the Plié. (*See* Responses to RPFF ¶¶ 469, 472).

475. Blatchford considers its three different non-MPKs sold by Endolite in the United States to all be appropriate for K-3 patients. (Blatchford, Tr. 2254).

Response to Finding No. 475

The proposed finding is unclear and unsupported. The proposed finding is unclear because Respondent has not defined "appropriate" and Mr. Blatchford did not use this word in his testimony. Further, the proposed finding is unsupported to the extent Respondent suggests Endolite's three different mechanical knees are "appropriate for K-3 patients." In the portion of his testimony that Respondent cites, Mr. Blatchford simply testified about Endolite's unit sales of

mechanical knees versus its MPK sales. (Blatchford (Endolite) Tr. 2254). Complaint Counsel does not disagree that Endolite sells its three mechanical knees to K3 patients.

476. [redacted]

Response to Finding No. 476

[redacted]

477. The purpose of PAVET form at Hanger is to verify K-Level to determine eligibility for an MPK or a mechanical knee. (Asar, Tr. 1340).

Response to Finding No. 477

Complaint Counsel has no specific response.

478. The same patient could be a target patient for the Ottobock 3R80 non-microprocessor knee and the C-Leg 4 microprocessor knee. (Solorio, Tr. 1639). The same patient would not be a target patient for both the Ottobock C-Leg 4 and the Ottobock Kenevo, because those knees are designed for different K-Levels. (Solorio, Tr. 1639).

Response to Finding No. 478

The proposed finding is unclear and misleading to the extent it suggests Otto Bock's 3R80, a mechanical knee, competes with its C-Leg 4. The proposed finding is unclear because Respondent does not explain what is meant by the term "same patient" or "target patient."

The proposed finding is misleading and contrary to the evidence to the extent that it suggests that Otto Bock's 3R80 mechanical knee is a meaningful substitute for, or competes for patients who have been prescribed and could receive reimbursement for, a C-Leg 4. The record is clear that Otto Bock considers MPKs as constituting a separate market from mechanical knees and does not view mechanical knees as competing against its MPK products. (*See* Responses to RPFF

¶¶ 470-471). Further, the record is clear that mechanical knees do not compete against MPKs. (*See* Responses to RPFF ¶¶ 469-72).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent it suggests that Otto Bock's 3R80 mechanical knees are "medically appropriate" for *all* K3 patients. [redacted] 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 ¶¶ 461-487). [redacted] U.S. prosthetic clinics need to go into the marketplace to purchase MPKs to fit on patients who want and would benefit medically

from an MPK. [redacted]

[redacted] Thus, patients who would benefit medically from an MPK and receive insurance coverage for an MPK are not the same "target patients" as those who would use Otto Bock's 3R80 non-microprocessor knee.

b. Evidence provided by sellers of MPKs highlight competition with non-MPKs

479. MPK manufacturers recognize that MPKs compete with non-MPKs. (Testerman, Tr. 1264; Schneider, Tr. 4404; [redacted]

Response to Finding No. 479

[redacted]

[redacted]

480. [redacted]

Response to Finding No. 480

[redacted]

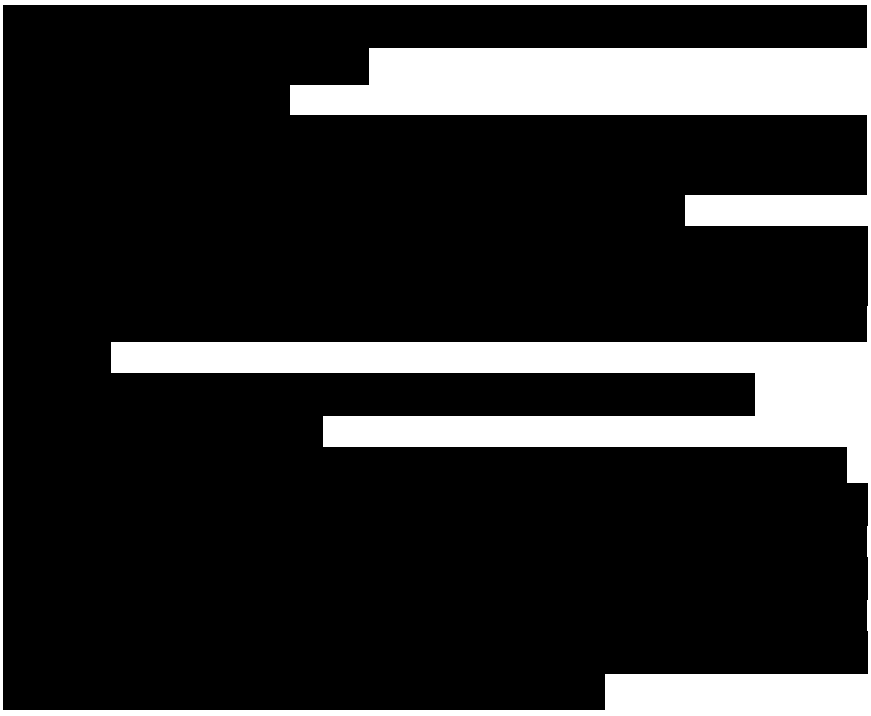
[redacted]

481. [redacted]

[redacted]

Response to Finding No. 481

[redacted]



[redacted]

[redacted]

482. Maynard Carkhuff testified that in Freedom's view they compete with every knee manufacturer, because there are so many different knees and a wide variety of patient and prosthetist preferences, so the sales reps have to be aware of what different offices are using to customize the sales pitch. (Carkhuff, Tr. 621).

Response to Finding No. 482

This proposed finding is duplicative of Respondent's Proposed Finding ¶ 474. (See Response to RFPP ¶ 474).

483. [redacted]

Response to Finding No. 483

[redacted]

484. [redacted]

Response to Finding No. 484

Complaint Counsel has no specific response.

485. [redacted]

Response to Finding No. 485

Complaint Counsel has no specific response.

486. [redacted]

Response to Finding No. 486

Complaint Counsel has no specific response.

487. [redacted]

Response to Finding No. 487

Complaint Counsel has no specific response.

488. Endolite's marketing material groups its non-MPKs and MPKs together under one "Knees" category. (RX-0814; [redacted]

Response to Finding No. 488

Complaint Counsel has no specific response.

489. [redacted]

Response to Finding No. 489

[redacted]

490. RX-0906 is marketing material from Össur that highlights MPKs and non-MPKs for K-3 and K-4 patients. (De Roy, Tr. 3634-3637). Össur markets the OP5, Total Knee, Rheo, Power Knee, Mauch Knee, and Rheo XC for K-3 and K-4 patients in the United States. (De Roy, Tr. 3634-3637). Össur distributes RX-0906 to clinics and patients so they have a clear overview of all of the available knee solutions for their activity level. (De Roy, Tr. 3637-3638).

Response to Finding No. 490

Complaint Counsel has no specific response.

491. Endolite's sales team in the United States meet with prosthetists and tout the benefits of its MPKs versus its non-MPKs because, "speaking economically, if we sell a microprocessor knee, we get more money that if we sell a non-microprocessor knee." (Blatchford, Tr. 2253).

Response to Finding No. 491

The proposed finding is misleading and contrary to the weight of the evidence to the extent it suggests Endolite's MPKs compete against mechanical knees. The record is clear that Endolite does not view mechanical knees as competing with its MPKs. Blatchford'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." (CCFF ¶¶ 602, 756).

[redacted]

Complaint Counsel does not disagree that Endolite uses clinical studies to show the benefits of its MPKs versus its mechanical knees. (*See* CCFF ¶¶ 695-96). [redacted]

492. Blatchford encourages Endolite's sales and marketing groups to highlight the differences between its MPKs and non-MPKs to encourage sales of MPKs. (2117-2121). "Because we think it's important that our customers are aware of those clinical benefits, because we think it will help promote the sale of our microprocessor knee products." (Blatchford, Tr. 2120).

Response to Finding No. 492

Complaint Counsel does not disagree. (*See* CCFF ¶¶ 693-96).

493. Össur attempts to upgrade K-3 and K-4 users from non-MPKs to MPKs. (De Roy, Tr. 3662).

Response to Finding No. 493

[redacted]

494. [redacted]

Response to Finding No. 494

[redacted]

495. Dr. Kauffman testified that clinical studies that are cited by MPK manufacturers in advertising are intended to enable MPKs to better compete against non-MPKs. (Kauffman, Tr. 825; 892-893).

Response to Finding No. 495

The proposed finding is unclear, misleading, and unsupported because Dr. Kaufman never testified that clinical studies cited by MPK manufacturers are "*intended*" to enable MPKs to "better compete" against non-MPKs. The proposed finding is unclear because, as written, Respondent seems to suggest that the authors of clinical studies intend to create their studies simply "to enable MPKs to better compete against non-MPKs." There is no evidence that this is the case. In the portion of his testimony that Respondent cites, Dr. Kaufman simply testified that *manufacturers use* clinical studies to sell more of their MPKs by providing "objective evidence" contained in clinical studies showing the benefits of MPKs over mechanical knees. (Kaufman (Mayo Clinic) Tr. 825, 892-893). Dr. Kaufman also answered affirmatively to Respondent's question "It would be fair to say that your research helps manufacturers of MPKs sell more microprocessor-controlled knees for K3 patients than mechanical knees; correct?" (Kaufman (Mayo Clinic) Tr. 893). This testimony indicates that Dr. Kaufman's research, which is peer reviewed and created to find objective evidence, helps manufacturers sell more MPKs because it in fact establishes, with scientific rigor, significant benefits of MPKs over mechanical knees.

6. High-End MPKs Are In A Separate Product Market

496. Keith Senn testified that "Otto bock has a couple other knees that are considered higher end and I don't have by memory all the codes for those knees, but they have a couple above the C-Leg 4 that are for specific patients." (Senn, Tr. 204:15).

Response to Finding No. 496

Complaint Counsel has no specific response.

497. Mark Testerman believes that the Ottobock X3 and Genium do not compete with the Plié 3. (Testerman, Tr. 1263:11-16).

Response to Finding No. 497

To the extent the proposed finding implies that the Plié 3 does not compete against high-end MPKs, it is incomplete and misleading. On the trial transcript page cited by Respondent, Mr. Testerman was asked, "What microprocessor knees sold by Össur in the United States compete with the Plié 3?" and he answered "Rheo 3. *Rheo XC*." (Testerman, Tr. 1263). In section III(A)(3)(e)(vi) of its Proposed Findings of Fact, titled "High-End MP-Swing-and-Stance knees," Respondent describes the Rheo XC as a high-end knee. (*See* Responses to RPFF ¶¶ 222, 224-225). Thus, the very testimony cited by Respondent supports a conclusion that the Plié 3 competes with knees Respondent characterizes as "high-end."

The proposed finding is also misleading to the extent it implies that a relevant product market must exclude high-end MPKs based solely on competition between Plié 3 and high-end MPKs, particularly since Freedom plans [redacted] In her expert report, Dr. Scott-Mortion, Complaint Counsel's economic expert, states that:

> I understand that the market is evolving, and that its participants are continuously adding features to their microprocessor knees in an effort to win customers from their rivals. One example of this continuing product evolution is Freedom's effort to develop the Quattro. According to one clinic, Freedom has indicated that the Quattro is "functionally similar" to Otto Bock's higher-end Genium "with a price point that's similar to a C-Leg." [redacted]

> Due to these considerations, I focus my analysis in this report on the relevant product market that includes all microprocessor knees sold to prosthetic clinics in the United States. I include higher-functioning products such as the Genium and Rheo XC in the market with the understanding that their current low volume of sales (unlike the case with mechanical knees) is unlikely to bias my conclusions about the significance of current competition between Otto Bock and Freedom in any significant way.

(PX06001 (Scott Morton Expert Report) at 064-65, ¶¶ 82-83).

498. Vinit Asar, CEO of Hanger, referred to Genium and X3 as different and "high-end." (PX05153A (Asar, Dep. at 49); PX05153B (Asar, Dep. at 79); [redacted]

Response to Finding No. 498

Complaint Counsel has no specific response.

499. Össur considers Rheo XC, X3, Genium, Kenevo, Compact, and Sophisticated, No-MPKs to be in a different segment than the Rheo. (De Roy, Tr. 3602-3603).

Response to Finding No. 499

The proposed finding is unclear, misleading, and unsupported. [redacted] The proposed finding is also unclear because Respondent has not defined the term "Sophisticated Non-MPK" and Mr. De Roy did not use this phrase in the testimony cited by Respondent. [redacted]

[redacted]

[redacted] Complaint Counsel agrees that this evidence shows that *K3 mechanical knees* are in a "different segment" than the Rheo and other MPKs. Complaint Counsel adds that Mr. De Roy also testified that MPKs and mechanical knees "don't really compete for the same population" and if patients "have access to a microprocessor knee, they'll buy a microprocessor knee." (*See* CCFF ¶ 753).

500. [redacted]

Response to Finding No. 500

[redacted]

501. The Rheo XC is not reimbursed by Medicare. (De Roy, Tr. 3639).

Response to Finding No. 501

Complaint Counsel does not disagree.

502. Össur considers Rheo XC's closest competitor to be Ottobock Genium. (De Roy, Tr. 3640).

Response to Finding No. 502

Complaint Counsel does not disagree.

503. Cali Solorio testified that generally the type of patient who has insurance coverage for the C-Leg 4 would not have the insurance coverage to qualify them for a Genium or X3. (Solorio, Tr. 1636)

Response to Finding No. 503

Complaint Counsel does not disagree.

504. Genium and X3 are usually sold through WC, VA, or DOD. (Solorio, Tr. 1636-37).

Response to Finding No. 504

Complaint Counsel does not disagree and adds for the sake of clarity that "WC" in this context means workers' compensation insurance.

505. The X3 is Ottobock's most sophisticated MPK. (Schneider, Tr. 4337-4338). It was released on the U.S. market in 2015 as part of a development project with the U.S. Army and Department of Defense. (Schneider, Tr. 4338). The X3 is the only waterproof MPK sold in the United States. (Schneider, Tr. 4338).

Response to Finding No. 505

Complaint Counsel does not disagree with the first two sentences of the proposed finding. The third sentence of the proposed finding is unclear and contrary to the weight of the evidence to the extent that it suggests no other MPKs have the ability to be used in and around water. The proposed finding is unclear because Respondent does not define the term "waterproof," and that term can have several different meanings which are important to understanding the details of the functionality of any particular MPK. Clinic customers have testified that Freedom's Plié 3 MPK, among others, is also waterproof. (*See, e.g.*, CCFF ¶¶ 1020, 1164, 1168). For example, Kim Peter Vivianne De Roy, Össur's Executive Vice President of R&D, testified that "the demand for waterproofing and weatherproofing" within the industry increased after Freedom released the Plié 3 with waterproof features. (CCFF ¶ 1164 (citing De Roy (Össur) Tr. 3597-99) ("I believe Otto Bock actually was the first with the X3, which was a knee that is – primarily was positioned for the military, DoD, initially, and I believe that's when later on the Plié was brought in as a

waterproof solution as well.")). Nevertheless, Complaint Counsel does not disagree that the ability of a user to wear an Otto Bock X3 in the water may differ significantly from the ability of a user to wear a Plié 3 in the water.

506. Ottobock does not consider the prices of any other products when setting the price of the X3, it's in a league of its own. (Schneider, Tr. 4339).

Response to Finding No. 506

The proposed finding is unfounded, incomplete, unclear, and unsupported. The proposed finding is unfounded because it cites only to the self-serving testimony of Mr. Schneider, an Otto Bock executive that Respondent did not establish has personal involvement with, or personal knowledge of, setting the price of the X3 in the United States. The proposed finding is also incomplete and, when the complete testimony of Mr. Schneider is read, the proposed finding becomes inconsistent, confusing, and unsupported. Mr. Schneider's complete relevant testimony on the page cited by Respondent is as follows:

> Q. What knees in the United States does the X3 compete with?
> A. The X3 *competes with all of the K3/K4 knees*, but in my -- it is so far advanced, it's -- it's *in a league of its own*.
> Q. When it comes to pricing Otto Bock's XC [sic] what competitor products does Otto Bock look to?
> A. With the X3, we didn't look at any other products. We -- we set a price based off of other factors. There's no comparison in the market.

(Schneider, Tr. 4339).

Mr. Schneider testified, inconsistently, that the X3 simultanesouly "competes with all of the K3/K4 knees"—consistent only with Respondent's made-for-litigation arguments—and that Otto Bock does not "look at any other products," suggesting Otto Bock prices the product like a monopolist. (Schneider, Tr. 4339). Such inconsistent testimony renders the proposed finding unsupported.

507. Genium is the next most advanced MPK. (Schneider, Tr. 4339-4341). The original Genium was released in 2012, but it had a facelift within the last two years. (Schneider, Tr. 4340). It offers five different modes and a vast array of rule sets that increase performance. (Schneider, Tr. 4340). The only product that competes with the Genium is the X3, but Ottobock does not consider the prices of other knees when setting the price of the Genium. (Schneider, Tr. 4341-4342).

Response to Finding No. 507

The proposed finding is unfounded and unclear. The proposed finding is unfounded because it cites only to the self-serving testimony of Mr. Schneider, an Otto Bock executive that Respondent did not establish has personal involvement with, or personal knowledge of, setting the price of the Genium in the United States. The proposed finding is unclear because, in other testimony cited by Respondent, Mr. Schneider testifies that pricing for Genium is "very similar to the situation with the X3," (Schneider, Tr. 4341), which raises the same issues address in Complaint Counsel's Response to RPFF ¶ 506. (*See* Response to RPFF ¶ 506). The proposed finding is also unclear because Respondent does not explain what it means by the phrase "Genium is the next most advanced MPK" and nothing in the record explains what is meant by "the next most advanced MPK."

508. [redacted]

Response to Finding No. 508

The proposed finding is unclear, misleading, and unsupported. The proposed finding is, in part, unclear and unsupported because Respondent has not defined the term "Sophisticated Non-MPK." [redacted]

[redacted]

[redacted] In its Post-Trial Brief, Respondent defined "Sophisticated Non-MPKs" as "knees [that] utilize hydraulic and/or pneumatic controls for the swing and/or stance phases of the knee." (Respondent's Post-Trial Brief at 27)

[redacted]

509. [redacted]

Response to Finding No. 509

The proposed finding is unclear and contradicted by other evidence in the record. [redacted]

[redacted]

Other evidence in the record, however, shows that Freedom's Quattro will have many features that will be comparable to or better than features of high-end MPKs such as the Genium. For example, [redacted]

Following an in-person evaluation of the Quattro by multiple Otto Bock employees, Scott Schneider on September 19, 2017 circulated to a chart to high-ranking Otto Bock executives that identified "RISKS IF WE DO NOT CONTROL QUATTRO" and included statements that we "will have to put more Genium functions in the C-Leg," "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]" and "Anyone who takes this product will cut in to C-Leg 4 market share. Especially in the US." (CCFF ¶ 1317).

[redacted]

[redacted]

In addition, [redacted]

[redacted]

D. Dr. Argue's Conclusions Regarding Market Definition

510. Dr. Argue concluded that the properly defined market for this analysis should be the market involving all fluid-controlled knees, excluding the very high-end and integrated products. (Argue, Tr. 6144).

Response to Finding No. 510

This proposed finding is confusing, unclear, conclusory, unsupported, and misleading. It is confusing and unclear to the extent nothing in the proposed finding or in the cited testimony explains what "this analysis" refers to. Moreover, this proposed finding is an entirely conclusory statement, which does not address what methodology, if any, was applied by Dr. Argue. To the extent this is an expert conclusion the proposed finding is not contained, as stated, in Dr. Argue's expert report.

This proposed finding is also unclear to the extent "fluid-controlled knees" and "very high-end and integrated products" are undefined in the proposed finding or in the cited testimony. It is unclear from the cited testimony whether Dr. Argue's reference to "all fluid-controlled knees, excluding the very high-end integrated products" is equivalent to Respondent's made-for-litigation term "Sophisticated Non-MPKs." In any event, neither of these terms appear in Dr. Argue's

summary of conclusions, wherein he purports to define the relevant market as including MPKs as well as "K3-level non-MPKs, and K4-level non-MPKs." (RX-1049 (Argue Report) at 6). The unclear and confusing nature of this proposed finding renders it meaningless and irrelevant to the definition of a relevant antitrust product market in this case.

[redacted]

[redacted]

Dr. Argue's conclusion that the relevant market includes non-MPKs is contrary to the weight of the evidence, including the six *Brown Shoe* "practical indicia" First, MPKs have "peculiar characteristics and uses" that clearly distinguish them from mechanical knees. (CCFF ¶¶ 607-700). The microprocessors in MPKs provide unique functionality for amputees who wear them, resulting in significant safety, health, and quality of life benefits mechanical knees cannot match, as demonstrated by a large body of clinical research. (CCFF ¶¶ 617-700). Second, MPKs are used by a distinct subset of K-3 and K-4 amputees that prosthetists have determined are healthy

enough and regularly engage in activities that make wearing an MPK a medical necessity. For this distinct class of end-user, if a prosthetic clinic can obtain insurance reimbursement for an MPK, the patient will almost always receive one instead of a mechanical knee. (CCFF ¶¶ 531-37). Third, manufacturers sell MPKs to clinics at prices that are much higher than mechanical knees, and insurance companies reimburse clinics at rates that are far higher than mechanical knees. (CCFF ¶¶ 701-11). Fourth, in one-on-one negotiations between MPK manufacturers and their clinic customers, MPK prices are sensitive to prices of other MPKs but not mechanical knees. (CCFF ¶¶ 712-16). Clinics play MPK manufacturers off each other to negotiate lower MPK prices, but cannot credibly threaten to substitute mechanical knees for MPKs. (CCFF ¶¶ 712-16). Fifth, industry participants, including Respondent, other MPK manufacturers, mechanical knee manufacturers, prosthetic clinics, and others recognize MPKs as a separate market from those in which mechanical knees are sold (*i.e.*, in the language of *Brown Shoe*, MPKs are an economic entity that is distinct from mechanical knees). (CCFF ¶¶ 717-66). Sixth, MPKs are sold by 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, 1680-81, 1685, 1687, 1692-1705). Collectively, the record evidence supporting these practical indicia establish MPKs as a separate relevant product market for purposes of assessing the Merger's impact on competition.

Moreover, Dr. Argue's conclusion that the relevant market includes non-MPKs is contrary to the hypothetical monopolist test properly conducted by Dr. Fiona Scott Morton. Dr. Scott Morton conducted a critical loss analysis to test the profitability of imposing a SSNIP on either Freedom's Plié or one of Otto Bock's MPKs, as prescribed by the *Merger Guidelines*. (CCFF ¶ 771). To perform the critical loss test, Dr. Scott Morton used Respondent's own margin data and

internal diversion analysis for the Plié 3 and Otto Bock's MPKs, which Otto Bock used to analyze the likely competitive effects of acquiring Freedom. (CCFF ¶¶ 777, 783-86). Through the critical loss analysis, Dr. Scott Morton confirmed that imposing a SSNIP on one of the combined firm's MPKs would, in fact, be profitable. (CCFF ¶¶ 790-91). As a result, Dr. Scott Morton 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).

511. Dr. Argue concluded that very high-end MPKs are more expensive than base-level MPKs and they are not adequately reimbursed by Medicare. (Argue, Tr. 6146). Össur's Power Knee is not in the relevant market defined by Dr. Argue because it is priced much higher than other knees and serves a different purpose. (Argue, Tr. 6156).

Response to Finding No. 511

This proposed finding is improper to the extent it cites only to expert testimony to support factual propositions that should be established by fact witnesses or documents, in contravention of this Court's Order dated October 10, 2018. The following purported facts are unsupported (or inappropriately supported) by the cited expert testimony and should be supported with non-expert testimony: "very high-end MPKs are more expensive than base-level MPKs and they are not adequately reimbursed by Medicare" and "Össur's Power Knee . . . serves a different purpose" than "other knees."

This proposed finding is unclear, confusing, and misleading. This proposed finding is unclear to the extent the term "very high-end MPKs" is undefined. In the cited testimony, Dr. Argue testified that "The high-end MPKs are – there are essentially three of them, the Otto Bock X3, the Otto Bock Genium and the Össur Rheo XC." It is unclear whether "very high-end MPKs" is co-extensive with this list, and whether there exist other "very high-end MPKs." This proposed finding is confusing to the extent it next discusses Össur's Power Knee, which Dr. Argue specifically did not include in his list of "high-end MPKs."

This proposed finding is also unclear to the extent the term "base-level MPKs" is undefined in the cited testimony or in the proposed finding. To the extent this term refers to "all base MPKs that include stance phase and swing phase controlled" as used by Dr. Argue in his report (RX-0149 at ¶ 58), or to "Base knee with L-codes: L5828, L5845, L5848, L5856" as used elsewhere in Dr. Argue's report (RX-0149 at Table 2), this term is still ambiguous. Respondent does not cite to a single ordinary course document which refers to "base MPKs" or "base-level MPKs."

This proposed finding is also unclear to the extent that "more expensive" is undefined, and could refer to list price, purchase price, or reimbursement level. Complaint Counsel does not disagree that the Otto Bock X3, Otto Bock Genium, and Rheo XC have average sales prices several thousand dollars higher than the Otto Bock C-Leg 4 and Freedom Plie 3. (*See* CCFF ¶¶ 878, 880 900).

This proposed finding is unclear to the extent "not adequately reimbursed by Medicare" is undefined in the proposed finding or cited testimony, and is unsupported to the extent that Dr. Argue testified only that these "high-end knees" are "not all covered adequately by Medicare." (Argue Tr. 6146). Neither the proposed finding nor the cited testimony describe Dr. Argue's basis, if any, for concluding that the listed MPKs are "not adequately reimbursed by Medicare." Complaint Counsel does not disagree that typically only patients at the Department of Defense, Veteran's Affairs Administration, and those who receive health benefits paid by some worker's compensation programs have access to insurance reimbursement for the Genium or the X3. (CCFF ¶¶ 877, 881, 900).

This proposed finding is also unclear to the extent the terms "priced much higher than other knees" and "serves a different purpose" are vague and undefined. Dr. Argue does not, in the cited testimony explain what the "different purpose" is that is served by Power Knee relative to "other

knees," nor is the term "other knees" defined or explained in the proposed finding. (Argue Tr. 6155-56). Nor does Dr. Argue explain whether the X3, Genium, or the Rheo X3 "serve[] a different purpose." Complaint Counsel does not disagree that the Power Knee uses a motor to provide power and momentum for the MPK, costs approximately twice as much as the Rheo, and is only reimbursed by payers on a "case-by-case" basis. (CCFF ¶¶ 906-07).

To the extent this proposed finding suggests that there is no competition between "base-level" and "high-end" MPKs, it is inconsistent with evidence in the record. (*See, e.g.*, [redacted]

This proposed finding is irrelevant to the extent it suggests that the inclusion or exclusion of "high-end" MPKs in the relevant market impacts whether the Merger was presumptively anticompetitive. Complaint Counsel's expert, Dr. Scott Morton, [redacted] (CCFF ¶ 959). Dr. Scott Morton concluded that both of these markets passed the hypothetical monopolist test, as a SSNIP could necessarily be imposed on either the Plié or one of Otto Bock's MPKs in each of them. (CCFF ¶ 792). Moreover, Dr. Scott Morton found that the relevant market is highly concernatrated, based on pre-merger market shares and

HHIs, regardless of whether high-end and low-end MPKs are included. (CCFF ¶¶ 964-66). The Merger was presumptively illegal regardless of whether high-end MPKs like the Genium, X3, and Rheo XC are assumed to be in or out of the relevant market.

512. Reimbursement is particular important to the economic analysis of this Acquisition according to Dr. Argue. (Argue, Tr. 6152, 6229-6231). Medicare has created a capitated reimbursement program that is followed by the private insurers as well. (Argue, Tr. 6152, 6229-6231). Dr. Argue considered the fact that suppliers of prosthetic knees have testified that they take reimbursement into account when they are setting prices for prosthetic knees. (Argue, Tr. 6152-6153, 6229-6231).

Response to Finding No. 512

This proposed finding is unclear, misleading, and irrelevant in part. The first sentence is unclear, grammatically incorrect, and irrelevant to the extent it suggests that "Reimbursement is particular important to the economic analysis of this Acquisition" without specifying what about reimbursement is important, in what way it is important, and to what "economic analysis" it is important.

The second sentence of the proposed finding is improper to the extent it cites only to expert testimony to support factual propositions that should be established by fact witnesses or documents, in contravention of this Court's Order dated October 10, 2018. The following purported fact is unsupported (or inappropriately supported) by the cited expert testimony and should be supported with non-expert testimony: "Medicare has created a capitated reimbursement program that is followed by the private insurers as well."

The second sentence is also unclear to the extent that "capitated reimbursement program" is vague, as is "followed by the private insurers as well." Dr. Argue ambiguously testified that "Medicare has set up a capitated reimbursement program where they pay once for the knee, one amount, and that's all." (Argue Tr. 6152). The record demonstrates that a prosthetics clinic is reimbursed for the overall prosthesis (not only the knee), and that the reimbursement amount is

based on all of the applicable L-Codes for the components of that prosthesis. (*See* CCFF ¶¶ 372, 377-84). This includes four or more L-Codes for the MPK component alone. To the extent Dr. Argue's testimony is consistent with these facts, Complaint Counsel does not disagree. Dr. Argue subsequently testified that "Medicare reimbursement is a capitated payment, one payment for all the services that come with the purchase of the knee." (Argue Tr. 6229). Complaint Counsel does not disagree to the extent there are no L-Codes for other parts of the prosthetic fitting process, including services related to the fitting and fabrication of the device or related support. (*See* CCFF ¶ 384). Complaint Counsel has no specific response regarding whether private insurers reimburse separately for other parts of the prosthetic fitting process, including services related to the fitting and fabrication of the device or related support.

The third sentence is unclear to the extent that it is ambiguous what is meant by "Dr. Argue considered the fact that…." Without clarification on what analysis (if any) is impacted by this purported fact, this portion of the finding is irrelevant. This sentence is also unclear to the extent "take reimbursement into account" is undefined and unexplained. This sentence is also unsupported to the extent it purports to describe what manufacturers consider, and intends to establish as a standalone fact to be considered by the Court that "suppliers of prosthetic knees . . . take reimbursement into account when they are setting prices," while citing only to the testimony of Respondent's expert. Using expert testimony for this purpose would be in contravention of this Court's Order dated October 10, 2018.

This proposed finding is misleading and against the weight of the evidence to the extent it suggests that reimbursement constrains the pricing of prosthetic devices, including MPKs. The record is replete with evidence that Otto Bock (and every other MPK manufacturer) determines its

MPK sales prices based primarily on the prices and terms offered by other MPK manufacturers for each clinic. (*See* Responses to RPFF ¶ 312, 314).

Complaint Counsel does not disagree with the concept that reimbursement rates could theoretically constrain a manufacturer's sales price for an MPK if it tried to sell an MPK to a clinic at a price set above the level that the clinic could earn a profit on the entire lower-limb prosthesis fit on a patient. This is simply a theoretical concept though, because in the real world clinics negotiate prices directly with MPK manufacturers and play different MPKs off each other to obtain prices that are significantly below the reimbursement rates they receive from insurers. (*See* CCFF ¶¶ 581-606). Therefore, the real constraint on MPK prices today is the price and quality of substitute competing MPKs, not reimbursement rates. (*See* PX06001A (Scott Morton Report) at ¶¶ 36-38, 119-35). Evidence clearly shows that MPK prices could be increased significantly to many customers and clinics would still be able to profitably fit patients with lower-limb prostheses using MPKs based on current reimbursement amounts for such lower-limb prostheses. (*See, e.g.*, CCFF ¶¶ 822-28).

513. According to Dr. Argue, there is significant evidence in the record regarding the functional interchangeability of MPKs and Sophisticated, Non-MPKs. (Argue, Tr. 6162-6163).

Response to Finding No. 513

This proposed finding is improper, unsupported, conclusory, unclear, misleading and attempts to substitute expert opinion for fact. This proposed finding is improper to the extent it cites only to expert testimony to support factual propositions that should be established by fact witnesses or documents, in contravention of this Court's Order dated October 10, 2018. The following purported fact is unsupported (or inappropriately supported) by the cited expert testimony and should be supported with non-expert testimony: "the functional interchangeability of MPKs and Sophisticated, Non-MPKs," to the extent that the proposed finding suggests that

MPKs and mechanical knees are significant economic or functional substitutes for each other either for clinics that purchase MPKs (and/or mechanical knees) or patients who wear MPKs (and those who wear mechanical knees). The proposed finding is an improper legal conclusion to the extent that it suggests that Dr. Argue's view that "there is significant evidence in the record regarding the *functional interchangeability* of MPKs and Sophisticated, Non-MPKs" is relevant to the Court's determination of whether the totality of the evidence in this case shows that different products are "functionally interchangeable" as that term is used in the case law. This is a legal determination, properly made by the Court, not Respondent's expert witness.

This proposed finding is unsupported because Dr. Argue testified only that "There are a number of sources that talked about the functional interchangeability of – among the fluid-controlled knees, so between the microprocessor version and the non-microprocessor version that there's testimony about them being perfectly – you know, patients performing perfectly well, having excellent results with a fluid-controlled non-microprocessor knee, so that kind of evidence led me to believe that what the – it was consistent with what Professor Scott Morton and I believe to be the next best substitute, or the next place to look I should say." (Argue Tr. 6162-63). Dr. Argue did not testify what the "number of sources" were that he looked at, nor did he testify in the cited testimony about what the "functional interchangeability" between MPKs and non-MPKs includes, other than "patients performing perfectly well, having excellent results" with both technologies. Without more, this proposed finding is little more than conclusory testimony from a non-lay witness.

This proposed finding is also unclear to the extent the phrase "Sophisticated, Non-MPKs" is vague, and does not appear in the cited testimony. To the extent it means "fluid-controlled non-microprocessor knees" (the phrase used by Dr. Argue), or "fluid-controlled knees without an MPK

for K3/K4 patients" (the phrase used by Respondent in the cited portion of the record) it is still ambiguous and unclear.

[redacted]

[redacted]

This proposed finding is also misleading to the extent it suggests that MPKs and mechanical knees are economic substitutes for each other or that the choice of whether to fit a specific K-3/K-4 patient with an MPK versus a mechanical knee is affected in any significant way by the Merger. The record clearly shows that several different players in the U.S. healthcare system collectively determine whether it is medically appropriate to prescribe and reimburse the fitting of an MPK on a particular amputee. (CCFF ¶¶ 400-29). The interplay among surgeons, prosthetists, patients, and insurers determines whether a given patient receives an MPK or a mechanical knee—with decisions driven primarily by the medical ethics of healthcare professionals, preferences of patients for the feel of different prosthetic knees, and reimbursement regulations established by insurers. (CCFF ¶¶ 392-561). The evidence shows that this decision is based on what healthcare professionals determine is medically best for the patient and justifiable to the patient's insurer. (CCFF ¶¶ 392-523).

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).

U.S. 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 mechanical knee. (CCFF ¶¶ 496-514). 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). 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).

In the United States, the vast majority of K-3/K-4 patients who are prescribed an MPK by medical professionals and have insurance coverage for an MPK receive and wear one. (CCFF ¶¶ 531-37). That does not mean every K-3/K-4 amputee receives, or from a medical perspective should receive, an MPK. K-3/K-4 amputees typically wear a mechanical knee when their insurance company denies coverage for an MPK or their medical professionals determine that an MPK is not medically appropriate given an amputee's specific health or lifestyle characteristics. (CCFF ¶¶ 538-55). 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 ¶¶ 543-44, 549, 554-55). Those patients typically wear a mechanical knee when engaging in such activities. In addition, even K-3/K-4 amputees who may become eligible for an MPK are typically fitted with a mechanical knee for their initial and temporary prostheses, worn during the post-surgery recovery process. (CCFF

¶¶ 556-58). Finally, 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).

Ultimately, the Merger does not affect, in any significant way, which K-3/K-4 amputees are likely to be prescribed or receive reimbursement for MPKs in the future. The U.S. healthcare system sorts K-3/K-4 amputees into two buckets: those with an MPK prescription and insurance coverage, and those who only have access to or prefer a mechanical knee. (CCFF ¶¶ 530-61). U.S. prosthetic clinics need to go into the marketplace to purchase MPKs to fit on patients who want and would benefit medically from an MPK. Patients are not switched from MPKs to mechanical knees based on the prices paid by clinics for those two classes of products. (CCFF ¶¶ 525-29). Clinics cannot simply provide a mechanical knee to patients who would benefit medically from an MPK. (CCFF ¶ 524).

514. Dr. Argue also performed a Hypothetical Monopolist Test. (Argue, Tr. 6163-6171). According to the Hypothetical Monopolist Test, if each clinic switched one MPK to a non-MPK every four years in response to a five percent increase by a hypothetical monopolist of MPKs, then the market would Sophisticated, Non-MPKs. (Argue, Tr. 6170). In reviewing the record, Dr. Argue found sufficient customer testimony to support a willingness to switch from an MPK to a Sophisticated non-MPK in the event of a price increase of five to ten percent. (Argue, Tr. 6172-6192).

Response to Finding No. 514

This proposed finding is confusing, unclear, improper, unsupported, and misleading. This proposed finding is confusing and unclear to the extent it suggests that the outcome of Dr. Argue's Hypothetical Monopolist Test is that "then then market would Sophisticated, Non-MPKs." This proposed finding is also unsupported and unclear to the extent it refers to "Sophisticated, Non-MPKs." This phrase does not appear in the cited testimony; Dr. Argue instead refered only to "non-MPK[s]" or to "other fluid-controlled knees".

This portion of the proposed finding is improper to the extent it cites only to expert testimony to support factual propositions that should be established by fact witnesses or

documents, in contravention of this Court's Order dated October 10, 2018. The following purported fact is unsupported (or inappropriately supported) by the cited expert testimony and should be supported with non-expert testimony: "Dr. Argue found sufficient customer testimony to support a willingness to switch from an MPK to a Sophisticated non-MPK in the event of a price increase of five to ten percent," to the extent it attempts to establish as a standalone fact that customers testified that about their "willingness to switch from an MPK to a Sophisticated non-MPK in the event of a price increase of five to ten percent." The proposed finding cites to no customers testifying about this topic. Despite citing to 21 pages of testimony, there is nowhere a statement of which particular customer or customers testified that they would switch patients from MPKs to mechanical knees in the event of a SSNIP. (Argue Tr. 6172-6192). This portion of the proposed finding is also unclear and unsupported to the extent it refers to "Sophisticated non-MPKs." This phrase does not appear anywhere in the 21 pages of cited testimony. Dr. Argue discussed only "non-MPKs" or "other fluid-controlled knees." (*See, e.g.,* Argue Tr. 6178).

Complaint Counsel does not disagree that Dr. Argue performed what he terms a "Hypothetical Monopolist Test," and which he claims demonstrates that a proper relevant market in which to analyze the effects of the merger includes both MPKs and certain mechanical knees. However, as demonstrated by Dr. Scott Morton, and as explained in Complaint Counsel's Post Trial Brief and Findings of Fact, Dr. Argue's hypothetical monopolist test – and in particular, his purported critical loss test – is fatally flawed, misleading, and cannot support his claimed relevant market. (*See* Response to RPFF ¶ 510); (*see generally* CCFF ¶¶ 2936-45).

This proposed finding is misleading and contrary to the weight of the evidence to the extent it suggests that clinic customers would switch patients from MPKs to mechanical knees in the face of a SSNIP. 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, 716). Prosthetists have an ethical obligation to fit patients with products that best meet their medical needs. (CCFF ¶ 524, 814). While clinics and their prosthetists are willing to select among high-quality MPKs that would all meet a patients' medical needs, (CCFF ¶ 574), no clinic customer testified that its prosthetists had ever switched a patient from an MPK to a mechanical knee based solely on price. (CCFF ¶ 526-28, 716). Prosthetists testified that the choice between fitting a patient with an MPK or a mechanical knee (if insurance coverage were available for both products) is a clinical decision and not based on the relative prices a clinic pays for MPKs and mechanical knees. (CCFF ¶ 529). For example, when asked if his prosthetists would stop fitting patients with MPKs if the price of MPKs went up by $1,500, [redacted] (CCFF ¶ 529) In fact, Dr. Argue, could not identify any clinic customers that have switched from fitting MPKs to mechanical knees in response to pricing in the past. (CCFF ¶ 715).

This proposed finding is misleading to the extent it suggests that MPKs and mechanical knees are economic substitutes for each other or that the choice of whether to fit a specific K-3/K-4 patient with an MPK versus a mechanical knee is affected in any significant way by the Merger. (*See* Response to RPFF ¶ 513).

515. Dr. Argue calculated market shares based on units rather than revenues because differentiated products with different price points that are one-for-one substitutes should be measured in units and not revenues under § 5.2 of the *Merger Guidelines*. (Argue, Tr. 6194).

Response to Finding No. 515

This proposed finding is unsupported and contrary to sound economic principles. The proposed finding is unsupported to the extent the cited testimony only makes general reference to § 5.2 of the *Merger Guidelines* without identifying what specific provision in that section supports the proposed finding. This proposed finding is contrary to sound economic principles which hold that that it is more appropriate to calculate market shares by revenue where products in the market are not homogenous— as in this case where MPKs have different features and price points. (*See* CCFF ¶¶ 960-62). Notwithstanding the foregoing, Dr. Scott Morton concluded that the relevant market is highly concentrated and the Merger results in a strong presumption of competitive harm whether market shares are calculated in units sold or dollar revenue. (*See* CCFF ¶ 963).

516. Dr. Argue concluded that clinics and suppliers all consider all base MPKs to be alternatives to one another and the marketplace is characterized by repeated and consistent interbrand switching. [redacted]

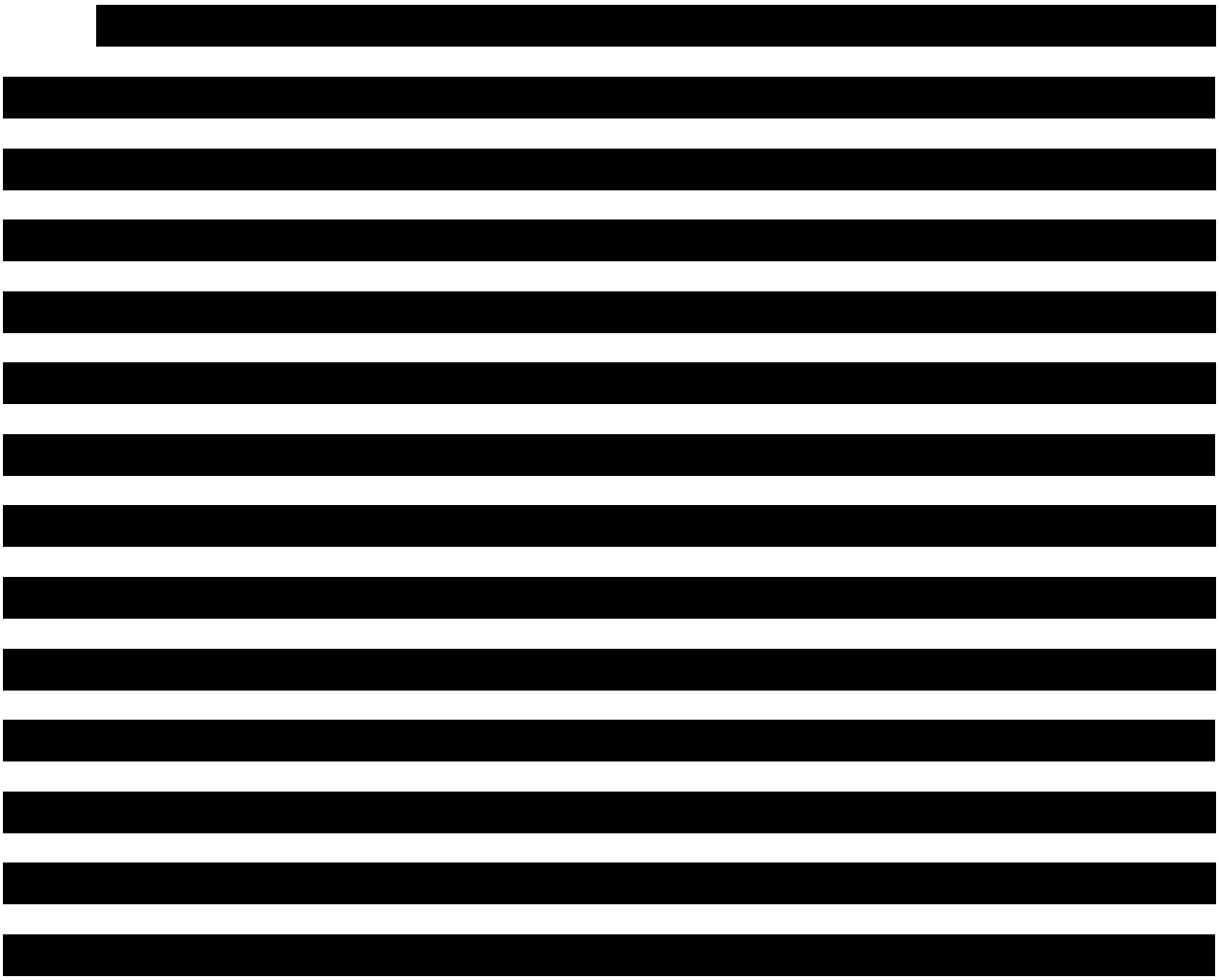
Response to Finding No. 516

This proposed finding is improper to the extent it cites only to expert testimony to support factual propositions that should be established by fact witnesses or documents, in contravention of this Court's Order dated October 10, 2018. The following purported facts are unsupported (or inappropriately supported) by the cited expert testimony and should be supported with non-expert testimony: "clinics and suppliers all consider all base MPKs to be alternatives to one another," and "the marketplace is characterized by repeated and consistent interbrand switching."

This proposed finding is unsupported and unclear to the extent it refers to "base MPKs." This phrase is undefined and does not appear in the nine pages of cited testimony. To the extent this term refers to "all base MPKs that include stance phase and swing phase controlled" as used by Dr. Argue in his report, (RX-1049 (Argue Report) at 034 (¶ 58)), or to "Base knee with L-

codes: L5828, L5845, L5848, L5856" as used elsewhere in Dr. Argue's report, (RX-1049 (Argue Report) at 027, Table 2), this term is still ambiguous. Respondent does not cite to a single ordinary course document that refers to "base MPKs" or "base-level MPKs." Without being able to discern to which knees this proposed finding refers, it is confusing and irrelevant.

This proposed finding is unsupported to the extent it states that "the marketplace is characterized by repeated and consistent interbrand switching." Dr. Argue testified only that switching would occur in response to a price increase – he did not state that the market today is characterized by "repeated and consistent interbrand switching." (Argue Tr. 6215-16).



[redacted]

[redacted]

Notwithstanding the foregoing, Complaint Counsel agrees that the MPKs of Otto Bock, Freedom, Össur, Endolite, Nabtesco, and DAW all compete in the properly defined relevant market.

517. Dr. Argue concluded that the properly defined market for this analysis should be the market involving all fluid-controlled knees, excluding the very high-end and integrated products. (6144).

Response to Finding No. 517

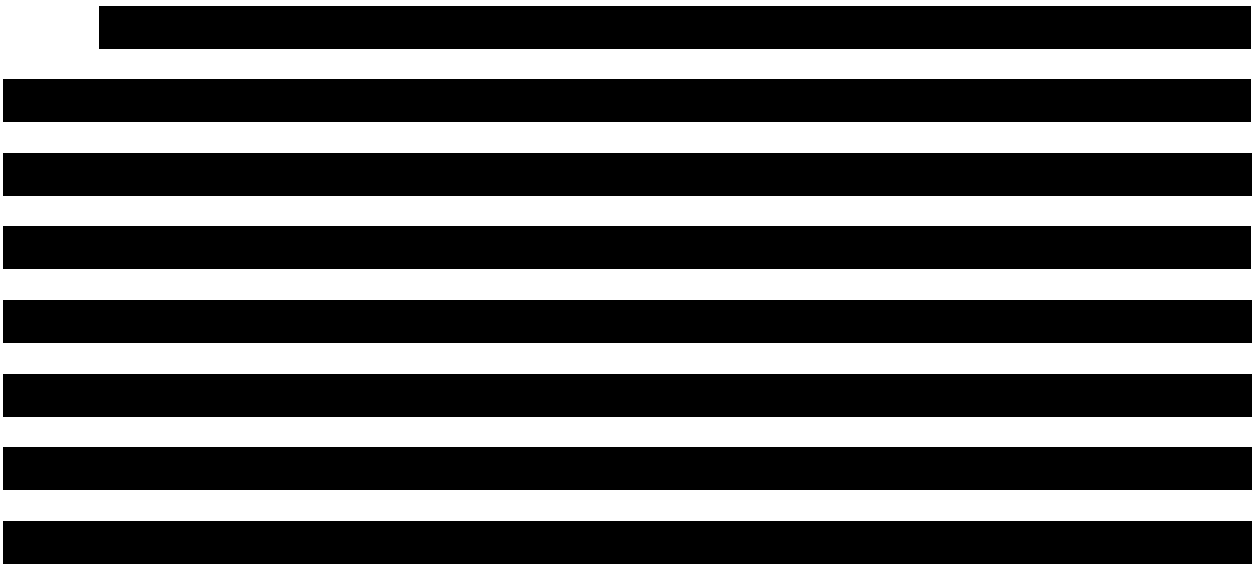
This proposed finding is identical to RFPP ¶ 510. (*See* Response to RFPP ¶ 510.)

518. Dr. Argued concluded that there is essentially no likelihood of adverse competitive effects as a result of the acquisition. (Argue, Tr. 6144).

Response to Finding No. 518

This proposed finding is unclear, unsupported, improperly conclusory, and contrary to the overwhelming weight of the evidence. This proposed finding is unclear to the extent it refers to "essentially" no likelihood of adverse effects. It is unsupported and improperly conclusory expert testimony to the extent the cited testimony makes no reference to any methodology supporting the proposition that harm is unlikely to flow from the Merger. In the cited testimony, Dr. Argue stated nothing more than that he drew this conclusion "based on having reviewed the materials and incorporated my economic training and expertise and the use of the Merger Guidelines…." (Argue Tr. 6144). This is insufficient support for an expert conclusion.

This proposed finding is unsupported to the extent that Dr. Argue's conclusion relates to anticipated effects of the Merger in his incorrectly defined relevant market, which includes both MPKs and mechanical knees. (Argue Tr. 6144-45) ("And in that market I find that there is no limited or no – essentially no likelihood of there being adverse competitive effects. . . .").



[redacted]

519. Dr. Argue concluded that very high-end MPKs are more expensive than base-level MPKs and they are not adequately reimbursed by Medicare. (Argue, Tr. 6146).

Response to Finding No. 519

This proposed finding is identical to the first sentence of RFPP ¶ 511. (*See* Response to RFPP ¶ 511.)

520. Dr. Argue found that Ottobock had a share of 48.6 and Freedom had a share of 6.2 percent in the relevant market. (Argue, Tr. 6147). The combined share was 54.8 percent. (Argue, Tr. 6147).

Response to Finding No. 520

This proposed finding is irrelevant and misleading to the extent it provides market shares in Dr. Argue's improperly defined relevant market. (*See* Response to RPFF ¶ 510). It is also contradicted by the weight of the evidence in this case which proves that MPKs sold to U.S. clinics constitutes a relevant product market in which shares and HHIs should be calculated and the effects of the Merger should be analyzed. (*See* Response to RPFF ¶ 510; CCFF ¶¶ 607-828).

Complaint Counsel's economic expert, Dr. Scott Morton, calculated market shares in both dollars and unit sales for 2015, 2016, and 2017 for the six providers of microprocessor knees in the United States—Otto Bock, Freedom, Össur, Endolite, Nabtesco, and DAW—using sales data provided by these companies. (CCFF ¶ 953). Dr. Scott Morton concluded that the pre-Merger HHIs confirm that the market for microprocessor knees in the United States was already highly concentrated and that the change in HHIs post-Merger established a strong presumption that the Merger will likely enhance market power in the merged firm. (CCFF ¶ 964). This was true for

both the broad MPK market, and for a narrower market excluding high-end and low-end MPKs. (CCFF ¶¶ 965-66).

The market shares calculated by Dr. Scott Morton are highly consistent with Respondent's ordinary course market share estimates. (CCFF ¶¶ 967-80). For example, pre-Merger, in July 2017, Otto Bock executives prepared a memo for Otto Bock's owner, Hans Georg Näder, estimating Otto Bock's and Freedom's shares of the U.S. MPK market to be [redacted] respectively. (CCFF ¶ 971). At trial, Otto Bock's Senior Prosthetics Marketing Manager, Cali Solorio, testified that—based on estimates it generated in November 2017—Otto Bock had a [redacted] percent share of MPKs sold in the United States, Freedom had a [redacted] percent share, Össur had a [redacted] percent share, and Endolite had a [redacted] percent share. (CCFF ¶ 975). Market share analyses of third parties are strikingly similar. (CCFF ¶¶ 981-84).

Even in the market as defined by Dr. Argue, market shares demonstrated that the market pre-merger was highly concentrated. [redacted] (CCFF ¶¶ 986-88). Dr. Argue testified in his deposition that his proposed relevant market is highly concentrated and the Merger raises the presumption of competitive harm. (CCF ¶¶ 987).

521. Dr. Argue concluded that there would be little likelihood of competitive harm arising, in either the market defined by Professor Scott Morton or in the market defined by Dr. Argue as a result of the acquisition because prosthetics clinics have sufficient alternatives to prevent the combined entity from raising prices above competitive levels or producing quality that's below competitive levels. (Argue, Tr. 6148).

Response to Finding No. 521

This proposed finding is unclear, unsupported, improperly conclusory, and contrary to the weight of the evidence. This proposed finding is unclear to the extent it refers to "little likelihood" of "competitive harm" arising from the Merger. It is unsupported and improperly conclusory expert testimony to the extent the cited testimony makes no reference to any methodology supporting the proposition that harm is unlikely to flow from the acquisition. Dr. Argue testified that this conclusion follows "when you go back and evaluate the various pieces that are – of evidence that are relevant for a competitive effects concern" without specifying what those pieces of evidence are, or how they should be analyzed. (Argue, Tr. 6148). This proposed finding is also unclear to the extent "sufficient alternatives" is undefined, either in the proposed finding or in Dr. Argue's testimony, even when he was directly asked "what do you mean by 'sufficient alternatives?'" (Argue, Tr. 6148-49). This proposed finding is also unclear to the extent "prices above competitive levels" and "quality that's below competitive levels" are undefined, and unsupported to the extent Dr. Argue does not offer any methodology with which to evaluate those "competitive levels".

This proposed finding is also contrary to the weight of the evidence to the extent it suggests that MPK customers will be able to defeat a price increase (or quality decrease) on one or more of the merged company's MPKs by turning to "alternatives." First, record evidence, as well as the hypothetical monopolist test conducted by Dr. Scott Morton, demonstrate that customers would not switch patients from MPKs to mechanical knees in the face of a price increase. (*See* CCFF ¶¶ 795-828 (collecting qualitative evidence confirming that customers would not switch to mechanical knees if faced with a 5-10% increase in the price of MPKs); ¶¶ 767-94 (describing the Hypothetical Monopolist Test conducted by Dr. Scott Morton)). Second, evidence shows that expansion of existing competitors will not prevent the merger's anticompetitive effects. (*See*

CCFF ¶¶ 1480-1626). The record demonstrates that new entry would not be timely, likely, or sufficient to constrain the merger's anticompetitive effects. (*See* CCFF ¶¶ 1627-1732). [redacted] (*See* CCFF ¶¶ 1394-1398).

522. Dr. Argue testified that he has no doubt that Plié is not the closest competitor to the C-Leg 4, and he contends that Plié 3 is probably one of the most distant MPK competitors to the C-Leg 4. (Argue, Tr. 6150).

Response to Finding No. 522

This proposed finding is improper, unclear, unsupported, and contrary to the weight of the evidence. This proposed finding is unsupported because the cited testimony does not describe any expert methodology used by Dr. Argue to reach his overarching conclusion about the closeness of competition between the Plie 3 and C-Leg 4.

This proposed finding is unclear to the extent it states that Dr. Argue "has no doubt" that the Plié and C-Leg are not close competitors, and that the Plié is "probably" one of the "most distant" MPK competitors to the C-Leg. These phrases are vague and unsubstantiated by any reference to a methodology or other basis for expert testimony. Dr. Argue merely testified to these conclusory opinions after "having reviewed the record." However, the weight of the evidence in the record clearly demonstrates that the C-Leg and the Plié are, in fact, close competitors.

There is copious evidence in the record that Freedom's Plié MPK and Otto Bock's C-Leg MPK competed intensely and directly with each other before the Merger. (CCFF ¶¶ 1008-1174). The record is also clear that customers have benefited from lower prices for MPKs as a result of the intense competition between the Plié and C-Leg, (CCFF ¶¶ 1141-62), and innovation increased as a result of this head-to-head competition, (CCFF ¶¶ 1163-74). Numerous individuals—including prosthetists, clinicians, and competitors, as well as employees of Respondent—have testified that the Plié is sold as a microprocessor knee, and competes directly with the C-Leg for

sales, notwithstanding any differences in the functionality of the Plié and C-Leg. For example, [redacted] (PX05108 (Yates (Jonesboro) Dep. at 64-65) (*in camera*)), while Mark Ford of P&O Associates testified that "C-Leg and the Plié knees are our clinicians' preference" for MPKs, (Ford (POA) Tr. 937); (*see generally* CCFF ¶¶ 754, 1016, 1056, 1083, 3083-85). Respondent documents and testimony clearly establish that Otto Bock and Freedom viewed the Plié and C-Leg to be direct competitors. *See* CCFF ¶¶ 1016, 3086-88. [redacted] (Ferris (Freedom) Tr. 2409 (*in camera*)).

Moreover, Otto Bock's ordinary course documents consistently identify the Plié as a close competitor. (CCFF ¶ 3088). A prime example of such a document comes from Otto Bock's post-Merger integration planning materials, [redacted] (CCFF ¶ 974). Complaint Counsel adds that nowhere in Otto Bock's analysis does Respondent identify a segment for "MP-Switch" knees—Respondent's made-for-litigation characterization of the Plié 3. (*See* CCFF ¶ 974). No document in the record analyzes any market or market segment for "MP-Switch" knees because this is not a concept that existed in the ordinary course of business at Otto Bock or Freedom before Respondent Counsel came up with the label for these proceedings.

Additionally, ordinary course evidence shows that the diversion from Plié 3 to Otto Bock's MPKs is at least [redacted] (CCFF ¶¶ 1394-99). Dr. Argue uses a diversion rate of [redacted] in his symmetric critical loss analysis, clearly demonstrating his awareness of the high level of substitutability between the C-Leg and the Plié. (*See* CCFF ¶ 782; *see also* CCFF ¶ 1399 [redacted]

523. Buyers in this case are prosthetic and orthotic clinics who purchase prosthetic knees. (6150). Hanger is the largest buyer of prosthetic knees in the United States, and it has the ability on its own to negotiate lower prices from prosthetic knee suppliers because it has sufficient leverage. (Argue, Tr. 6151-6152, [redacted] Hanger is also uniquely positioned to thwart any attempts to raise price because it can and has diverted volume between various suppliers. (Argue, Tr. 6152, [redacted]

Response to Finding No. 523

This proposed finding is unclear, unsupported, and misleading. This proposed finding is unclear to the extent "Buyer" is undefined and ambiguous. Complaint Counsel does not disagree that prosthetic clinics purchase components used in the prostheses, including the prosthetic knee, socket, and liner, and that these clinic customers typically purchase MPKs directly from prosthetic manufacturers. (CCFF ¶¶ 562-63). Complaint Counsel does not disagree that Hanger is the largest buyer of prosthetic knees in the United States.

This proposed finding is unclear and unsupported to the extent the terms "sufficient leverage," "uniquely positioned to thwart any attempts to raise price," are undefined, conclusory, and unsupported by any methodology in the cited testimony. Neither phrase appears in the nine pages of testimony cited by Respondent. Additionally, this proposed finding is unsupported to the

extent it provides no basis, aside from Dr. Argue's unsupported statement, for the proposition that Hanger "has diverted volume between various suppliers." This phrase is similarly absent from the cited testimony. To the extent Respondent is using this proposed finding to establish that as a fact, it is improper because it cites only to expert testimony to support that factual proposition about Hanger "divert[ing] volume between various suppliers," which should be established by fact witnesses or documents, not expert testimony, in contravention of this Court's Order dated October 10, 2018.

The proposed finding is misleading to the extent it implies (1) that Hanger currently has absolute leverage to dictate any price it wants to Respondent or (2) that the Merger does not reduce Hanger's leverage in negotiations with the merged firm, relative to its leverage when negotiating against Otto Bock and Freedom independently, and therefore Hanger will not be harmed by the Merger. Economic theory is clear that a customer's leverage, such as Hanger, remains unaffected by a Merger; only the merging firm's leverage changes. 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. Record evidence shows that prior to the Merger, Hanger's leverage in negotiations with Otto Bock (and Freedom) came, in substantial part, from its ability to shift or credibly threaten to shift sales from Otto Bock to Freedom's Plié 3 (and vice versa). For example, Mr. Carkhuff, Freedom's Chairman, testified that Hanger's ability to threaten to move Plié volume to 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] (CCFF ¶¶ 1154-55). Thus, the record shows that the loss of an independent Freedom will reduce Hanger's negotiating leverage with the merged firm, likely resulting in higher prices. (CCFF ¶ 3103) [redacted]

[redacted]

In addition, [redacted] no evidence indicates that other customers would not be harmed by the Merger and Respondent's increased bargaining leverage created by eliminating an independent Freedom. Even if, hypothetically, a powerful buyer could protect itself, that would not keep Respondent from raising prices to other customers. Evidence shows that [redacted] (CCFF ¶¶ 3109-3110). Where prices are individually negotiated, as is the case here, (CCFF ¶¶ 568-580), smaller buyers would not be protected [redacted]

524. Reimbursement is particular important to the economic analysis of this Acquisition. (6152, 6229-6231). Medicare has created a capitated reimbursement program that is followed by the private insurers as well. (Argue, Tr. 6152, 6229-6231). All suppliers of prosthetic knees have testified that they take reimbursement into account when they are setting prices for prosthetic knees. (Argue, Tr. 6152-6153, 6229-6231).

Response to Finding No. 524

This proposed finding is identical to RFPP ¶ 512. (*See* Response to RFPP ¶ 512).

525. Dr. Argue concluded that the proposed divestiture to Willow Wood would ameliorate any competitive concerns that might arise from the overlap in products between Ottobock and Freedom. (Argue, Tr. 6153).

Response to Finding No. 525

This proposed finding is nothing more than unsupported conjecture citing to no ordinary course documents, lay testimony, or expert methodology. This proposed finding is unclear to the extent it refers to "the overlap in products between Ottobock and Freedom," which is undefined in the cited testimony and the language of the proposed finding. To the extent this refers to the C-

Leg, Plié, and Quattro, Complaint Counsel agrees that these products are functional and economic substitutes, and the C-Leg and Plié actively competed in the U.S. MPK market prior to the Merger.

[redacted]

[redacted]

526. Össur's Power Knee is not in the relevant market defined by Dr. Argue because it is priced much higher than other knees and serves a different purpose. (Argue, Tr. 6156).

Response to Finding No. 526

This proposed finding is identical to the second sentence of RFPP ¶ 511. (*See* Response to RFPP ¶ 511).

527. Economic theory and economic formulae can be "nice shortcuts," but they cannot substitute for analysis of the real world evidence in the record. (Argue, Tr. 6157).

Response to Finding No. 527

This proposed finding is confusing, unclear, unsupported, and irrelevant. Moreover, it contains no actual facts, or even opinions.

This proposed fact is confusing and unclear to the extent it refers to "nice shortcuts" without giving any indication what Dr. Argue meant by that statement. Nor is there any way of assessing which particular "[e]conomic theor[ies]" or "economic formulae" Dr. Argue considers to be merely "nice shortcuts." This proposed fact is also unclear to the extent it refers to only unspecified "analysis" of the evidentiary record. As stated, the proposed finding is not relevant to any issue in this case.

Notwithstanding the foregoing, Complaint Counsel agrees that economic theory and economic formulae are most probative when they are consistent with the evidentiary record. And indeed, in this case, Complaint Counsel and its economic expert, Dr. Scott Morton, have engaged in an extensive analysis of the documents, data, and testimony produced in the course of this litigation. It is in analyzing that evidence—in tandem with the application of sound economic principles—that Dr. Scott Morton reached the conclusions and opinions contained within her report, including that: the relevant market for assessing the effects of the Merger is the sale of MPKs to U.S. prosthetics clinics; Otto Bock and Freedom were close competitors in the MPK market, which benefited consumers through that competition; the acquisition significantly increased concentration in the already highly-concentrated MPK market; and that potentially mitigating factors [redacted] are unlikely to prevent or offset the likely anticompetitive harms from the merger. (*See* PX06001 at 6-8 (¶ 12) (Scott Morton Report)). By contrast, Dr. Argue's assertions are often wholly unsupported or

contradicted by the weight of the evidence in the record. (*See, e.g.*, Responses to RFPP ¶¶ 510, 513, 514, 516, 518, 520)).

528. According to Dr. Argue, there is significant evidence in the record regarding the functional interchangeability of MPKs and Sophisticated, Non-MPKs. (Argue, Tr. 6162-6163).

Response to Finding No. 528

This proposed finding is identical to RFPP ¶ 513. (*See* Response to RFPP ¶ 513).

529. Dr. Argue also performed a Hypothetical Monopolist Test. (Argue, Tr. 6163-6171). According to the Hypothetical Monopolist Test, if each clinic switched one MPK to a non-MPK every four years in response to a five percent increase by a hypothetical monopolist of MPKs, then the market would Sophisticated, Non-MPKs. (Argue, Tr. 6170). In reviewing the record, Dr. Argue found sufficient customer testimony to support a willingness to switch from an MPK to a Sophisticated non-MPK in the event of a price increase of five to ten percent. (Argue, Tr. 6172-6192).

Response to Finding No. 529

This proposed finding is identical to RFPP ¶ 514. (*See* Response to RFPP ¶ 514).

530. Dr. Argue calculated market shares based on units rather than revenues because differentiated products with different price points that are one-for-one substitutes should be measured in units and not revenues under § 5.2 of the *Merger Guidelines*. (Argue, Tr. 6194).

Response to Finding No. 530

This proposed finding is identical to RFPP ¶ 515. (*See* Response to RFPP ¶ 515).

531. Dr. Argue concluded that clinics and suppliers all consider all base MPKs to be alternatives to one another and the marketplace is characterized by repeated and consistent interbrand switching. (Argue, Tr. 6209-6217).

Response to Finding No. 531

This proposed finding is identical to RFPP ¶ 516. (*See* Response to RFPP ¶ 516).

532. The closeness of competition between the products of the merging parties is critical to anticompetitive effects analysis under the *Merger Guidelines*. (Argue, Tr. 6217-6219).

Response to Finding No. 532

This proposed finding is unclear, unsupported, and misleading. It is unclear to the extent it is ambiguous whether it refers to merger analysis and "merging parties" generally, or whether it

refers specifically to the analysis of the acquisition of Freedom by Otto Bock. Regardless, Complaint Counsel agrees both that, as a general matter, it is important to analyze the closeness of competition between merging parties and, specifically that it is important to analyze the closeness of competition between Freedom and Otto Bock in the MPK market in order to assess the likely competitive effects of the merger. That being said, Freedom and Otto Bock need not be each other's closest competitor for the Merger to result in anticompetitive harm. As the Commentary on the Horizontal Merger Guidelines (2006) states, "A merger may produce significant unilateral effects even though a non-merging product is the 'closest' substitute for every merging product . . . ." (PX08051 (Commentary) at -033).

This proposed finding is also unclear and unsupported to the extent that "critical to anticompetitive effects analysis" is vague, and does not appear in the cited testimony, wherein Dr. Argue testified only that closeness of competition was "relevant and it's brought up in the Merger Guidelines." (Argue Tr. 6218).

To the extent this proposed finding suggests that the C-Leg and Plié are not, in fact, close competitors, it is misleading and contrary to the weight of the evidence. There is copious evidence in the record that Freedom's Plié MPK and Otto Bock's C-Leg MPK competed intensely and directly with each other before the Merger. (CCFF ¶¶ 1008-1174). The record is also clear that customers have benefited from lower prices for MPKs as a result of the intense competition between the Plié and C-Leg, (CCFF ¶¶ 1141-62), and innovation increased as a result of this head-to-head competition, (CCFF ¶¶ 1163-74). Numerous individuals—including prosthetists, clinicians, and competitors, as well as employees of Respondent—have testified that the Plié is sold as a microprocessor knee, and competes directly with the C-Leg for sales, notwithstanding any differences in the functionality of the Plié and C-Leg. For example, [redacted]

[redacted] (PX05108 (Yates (Jonesboro) Dep. at 64-65) (*in camera*)), while Mark Ford of P&O Associates testified that "C-Legs and the Plié knees are our clinicians' preference" for MPKs, (Ford (POA) Tr. 937); (*see generally* CCFF ¶¶ 754, 1016, 1056, 1082-83, 3083-85). Respondent documents and testimony clearly establish that Otto Bock and Freedom viewed the Plié and C-Leg to be direct competitors. (*See* CCFF ¶¶ 1016, 1043-44, 3086-88). [redacted] (Ferris (Freedom) Tr. 2409 (*in camera*)).

Moreover, evidence from Respondent consistently views the Plié as a close competitor. (CCFF ¶¶ 1011-1073, 1313-1318, 3088). A prime example of such a document comes from Otto Bock's post-Merger integration planning materials, [redacted] (PX01302 (Otto Bock) at 074 (*in camera*); *see also* CCFF ¶ 974). Complaint Counsel adds that nowhere in Otto Bock's analysis does Respondent identify a segment for "MP-Switch" knees—Respondent's made-for-litigation characterization of the Plié 3. (*See* CCFF ¶ 974). No document in the record analyzes any market or market segment for "MP-Switch" knees because this is not a concept that existed in the ordinary course of business at Otto Bock or Freedom before Respondent Counsel came up with the label for these proceedings.

Extensive evidence shows that Otto Bock and Plié compete more closely with each other than either competes with the next-largest MPK manufacturer in the United States, Össur. For example, 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 Rheo's technology unfavorably, making them less likely to use the Rheo. (*See, e.g.*, CCFF ¶¶ 1483-91; CCFF ¶ 1489 (stating that Keith Senn, COPC's President of the Kentucky and Indiana offices, testified that COPC purchased fewer Rheo MPKs than Plié and C-Leg MPKs, from January 2017 to November 2017, because "the practitioners do not like the Rheo knee and the – the functions or the capability of that knee they do not feel compare to the Freedom and Ottobock knees at this time.")). Many customers have safety and reliability concerns about Össur's MPK technology. (CCFF ¶¶ 1493-1516).

In addition, Respondent's own documents demonstrate that Freedom was a much greater threat to Otto Bock's MPK business than Össur. [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). [redacted] (CCFF ¶¶ 1409-10) (*in camera*).

533. Dr. Argue concluded that Ottobock and Freedom are not close competitors. (Argue, Tr. 6220). The Plié is functionally inferior to the C-Leg and at the end of its product lifecycle. (Argue, Tr. 6220-6223). There are many other products that have been introduced to the market since the Plié 3 in 2014, including the Össur Rheo, Endolite Orion 3, and Nabtesco Allux that function more similarly to the C-Leg 4 than the Plié 3 does. (Argue, Tr. 6220-6223). Dr. Argue stated that Freedom markets and prices its Plié differently than Ottobock markets and prices the C-Leg. (Argue, Tr. 6224-6226). Clinics and MPK suppliers also consider the Plié 3 and C-Leg to be not particularly close competitors. (Argue, Tr. 6226-6228).

Response to Finding No. 533

Each sentence of this proposed finding is improper to the extent it cites only to expert testimony to support factual propositions that should be established by fact witnesses or documents, in contravention of this Court's Order dated October 10, 2018. The following purported facts are unsupported (or inappropriately supported) by the cited expert testimony and should be supported with non-expert testimony: "Plié is functionally inferior to the C-Leg," "Plie is . . . at the end of its product lifecycle," "many other products that have been introduced to the market since the Plié 3 in 2014, including the Össur Rheo, Endolite Orion 3, and Nabtesco Allux that function more similarly to the C-Leg 4 than the Plié 3 does," "Clinics and MPK suppliers also consider the Plié 3 and C-Leg to be not particularly close competitors."

The first sentence is unclear to the extent "close competitors" is vague and undefined. This sentence is also contrary to the overwhelming weight of the evidence demonstrating that Otto Bock

and Freedom—and the C-Leg and the Plié—are, in fact, close competitors in the relevant MPK market. (*See* Response to RPFF ¶ 532).

The second sentence is unclear, unsupported, irrelevant in part, and contrary to the weight of the evidence. It is unclear and unsupported to the extent the phrase "functionally inferior" is undefined and does not appear in the cited testimony. This sentence is contrary to the weight of the evidence to the extent it suggests that the Plié 3 is not a true MPK and that it is not functionally comparable to the C-Leg. 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, (*see* CCFF ¶¶ 1016, 1056, 1083). For example, Eric Ferris, Freedom's Vice President of Marketing and Product Development, testified that [redacted] (Ferris (Freedom) Tr. 2351, 2382 (*in camera*))). Freedom documents and testimony clearly establish that the company views the Plié to be a swing and stance MPK, and recommends that customers seek reimbursement for it as such. (*See* CCFF ¶¶ 3064-67, 3069-72). For example, in Freedom's publicly available "Fact Sheet," it addressed "Ottobock Claims vs. Reality," clearly explaining 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; PX08008 (Freedom) at 001). Documents and testimony further demonstrate that market participants—including prosthetists and competing prosthetics makers—consider the Plié to be an MPK, and insurers reimburse the Plié as a swing and stance MPK. (CCFF ¶¶ 3072-80; *see also* CCFF ¶¶ 3067-3070, 3074-3078, 3082) (clinics receive the same reimbursement for the Plié as they do for the C-Leg and both are

reimbursed under L-Code 5856). This is confirmed by Respondent's other proposed findings. (*See, e.g.,* RPFF ¶ 783 [redacted]

The third sentence of this proposed finding is unclear, unsupported, misleading and contrary to the weight of the evidence. It is unclear and unsupported to the extent it refers to "many other products that have been introduced to the market," which suggests, without support, that there may be other, unenumerated products. This sentence is also unclear and unsupported to the extent it states that the Rheo, Orion 3, Allux and "other products" are more functionally similar to the C-Leg 4 than is the Plié 3. It is unclear what is meant by "function more similarly," and this phrase was not used by Dr. Argue, who testified only that the Rheo, Orion, and Allux have "upgraded to new platforms since or to newer technology since the Plié 3 came out." (Argue Tr. 6222). Dr. Argue notably did not state in the cited testimony that these three knees are more functionally similar to the C-Leg than is the Plié, and Respondent cites to no ordinary course documents or testimony in support of this claim. Evidence in the record demonstrates that, to the contrary, the Plié is regarded as functionally very similar to the C-Leg, and more of viable substitute than are other MPKs. (*See* Response to RFPP ¶ 516). For example, [redacted] (CCFF ¶ 998).

Extensive evidence shows that Otto Bock and Plié compete more closely with each other than either competes with the next-largest MPK manufacuter in the United States, Össur. For example, 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 Rheo's technology unfavorably, making them less likely to use the Rheo. (*See, e.g.*, CCFF ¶¶ 1483-91; CCFF ¶ 1489 (stating that Keith Senn, COPC's President of the Kentucky and Indiana offices, testified that COPC purchased fewer Rheo MPKs than Plié and C-Leg MPKs, from January 2017 to November 2017, because "the practitioners do not like the Rheo knee and the – the functions or the capability of that knee they do not feel compare to the Freedom and Ottobock knees at this time.")). Many customers have safety and reliability concerns about Össur's MPK technology. (CCFF ¶¶ 1493-1516).

In addition, Respondent's own documents demonstrate that Freedom was a much greater threat to Otto Bock's MPK business than Össur. [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]

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.

Extensive evidence shows that Otto Bock and Plié compete more closely with each other than either does with Endolite's MPK. Despite being a 20-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 ¶914, ¶ 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, Endolite also has failed to price aggressively against its competitors, particularly Freedom. (CCFF ¶ 1541). [redacted] (Blatchford (Endolite) Tr. 2165) (*in camera*).

Neither Nabtesco nor DAW sell MPKs that compete closely with Respondent's MPKs. Both companies have [redacted] Many of Otto Bock and Freedom's clinic customers have never even heard of Nabtesco's MPKs, (CCFF ¶¶ 1593-98), including the [redacted] (CCFF ¶ 1591). Even those that have heard of Nabtesco testified that they would not fit a Nabtesco MPK on a patient. (CCFF ¶¶1599-1603). It is no wonder that [redacted] with Freedom's Director of Field Sales and Clinical Training even describing the Nabtesco Allux as a "piece of crap." (CCFF ¶¶ 1572-73, 1585, 1604). [redacted] (CCFF ¶ 1615). 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).

The fourth sentence of this proposed finding is unclear, unsupported, and irrelevant. To the extent it asserts that Freedom markets and prices the Plié "differently" than Otto Bock markets and prices the C-Leg, this proposed finding is ambiguous and undefined in the proposed finding. Dr. Argue testified, without substantiation, that the C-Leg is marketed as a "high quality, premium, kind of the gold standard of MPKs," while the Plié 3 "was marketed as, you know – 'penetration pricing' was the expression that was used to indicate that they were going to be discounting, trying to keep – stay in the low end of the pricing." (Argue Tr. 6225). Nowhere in this testimony did Dr. Argue reference any ordinary course document, lay testimony, or economic analysis that leads him to this conclusion.

The fifth sentence of this proposed finding is unclear and contrary to the weight of the evidence to the extent it states that the Plié and the C-Leg are "not particularly close competitors" in the eyes of industry participants. To the contrary, the weight of the evidence shows that industry participants—including clinics, competing manufacturers, and Respondent itself—viewed the Plié and C-Leg as functionally similar, and in direct competition. (*See* Response to RFPP ¶ 522).

534. [redacted]

Response to Finding No. 534

This proposed finding is unclear, unsupported, misleading, and contrary to the weight of the evidence. This proposed finding purports to draw broad conclusion about the potential competitive impact of the Quattro MPK while citing to no ordinary course documents or lay testimony, but instead only to the unsupported testimony of Dr. Argue, which describes no economic analysis he performed to reach is broad conclusion. [redacted]

[redacted]

To the extent this proposed finding suggests that the Quattro MPK would not have had a pro-competitive impact on the U.S. MPK market but-for the merger, it is misleading and contrary to the weight of the evidence. The record clearly demonstrates that the Merger eliminated competition from Freedom's Quattro, which was poised to launch and target Otto Bock's C-Leg 4 in the near future.

At the time of the Merger, [redacted] (CCFF ¶¶ 1176-77), and at the time of the Merger, [redacted] (CCFF ¶¶ 1207-09). Freedom executives and engineers nicknamed Quattro the "C-Leg 4 killer," [redacted] (CCFF ¶¶ 1230, 1232-36, 1380-83). As Freedom's Quattro Project Leader, Dr. Prince, testified, [redacted] (CCFF ¶¶ 1238-39, 1241-42, 1248-49). Absent the Merger, Quattro would have significantly intensified competition in the near future, providing consumers the choice of a new, high-quality MPK, and likely causing a price war

as Freedom and Otto Bock battled to steal and protect share. Absent a remedy, the Merger will prevent this intensification of competition from ever occurring.

[redacted] *see also* (CCFF ¶¶ 1299-1302). Mr. Carkhuff, Freedom's Chairman, testified at trial that only two months before Otto Bock acquired it, [redacted] (CCFF ¶ 1237). Evidence gathered by the development team after the Merger confirmed that Quattro was, in fact, going to be a better MPK than C-Leg 4 in several ways. [redacted]

Not only was Quattro likely to be higher quality than C-Leg 4, [redacted] (CCFF ¶¶ 1271-72, 1274-75). Freedom's CEO, David Smith, [redacted] and Freedom's investment banker expressed to several of Freedom's board members that Quattro "was going to be a blockbuster." (CCFF ¶¶ 1283, 1285). [redacted] (CCFF ¶ 1274) (May 2017 interim PAC Phase C presentation [redacted] and even higher revenue projections); [redacted] (CCFF ¶¶ 1272, 1275). At trial, Dr. Prince testified [redacted] (CCFF ¶ 1261).

Before and after the Merger [redacted] (Arbogast (Willow Wood) Tr. 5113 (*in camera*)), and another, [redacted] (CCFF ¶¶ 1224, 1225 (*in camera*)).

535. [redacted]

Response to Finding No. 535

This proposed finding is improper, unclear, unsupported, and misleading. This finding is improper to the extent it cites only to expert testimony to support factual propositions that should be established by fact witnesses or documents, in contravention of this Court's Order dated October 10, 2018. [redacted]

[redacted]

[redacted] (Argue Tr. 6241 (*in camera*)). Complaint Counsel does not disagree that the MPK industry has featured significant innovation in recent years, driven in large part by the back-and-forth competition between Freedom and Otto Bock. (*See generally* CCFF ¶¶ 1011-55 (discussing the launch of the Plié, the innovations contained therein, and the competitive response of Otto Bock, including innovations added to the C-Leg 4)). Moreover, the innovation competition between Otto Bock and Freedom was ongoing and set to intensify with Freedom's launch of the Quattro, dubbed the "C-Leg 4 Killer." (CCFF ¶¶ 1179-1318).

[redacted]

[redacted]

This proposed finding is misleading and contrary to the weight of the evidence to the extent it suggests that Freedom has *not* been an innovative manufacturer of MPKs. Any assertions about Freedom not being innovative are contradicted by evidence of Freedom's continued MPK innovation, including its [redacted]

536. [redacted]

Response to Finding No. 536

[redacted] Record evidence indicates that the U.S. prosthetic foot segment generally is highly competitive and far less concentrated than the U.S. MPK market. (CCFF ¶ 2235-38). Dr. Argue testified that [redacted]

[redacted] (CCFF ¶ 2220-23; *see also* CCFF ¶¶ 2227-40 (Dr. Argue's market shares and concentration estimates for a K3 foot market are unreliable and ignore evidence in the record)).

The second sentence of this proposed finding is unclear, unsupported, and misleading. [redacted]

To the extent this proposed finding suggests that an acquisition of Freedom by Ossur would be more anticompetitive than an acquisition by Otto Bock with regard to the MPK market, it is unsupported, misleading and inconsistent with the evidence. Dr. Argue testified that [redacted] (CCFF ¶ 2224). Moreover, Dr. Argue testified that [redacted] (CCFF ¶¶ 2225-26).

537. [redacted] For instance, the C-Leg 4's battery can last up to 48 hours, but it can take a few hours to charge. (Solorio Tr. 1645-1646.)

Response to Finding No. 537

The first sentence proposed finding is incomplete and misleading. While it is true that [redacted] (Testerman (Freedom), Tr. 1214 (*in camera*); PX01255 (Freedom) at 001 (*in camera*)). Therefore, with the benefit of a removable battery, a Plié user can have several removable batteries and therefore longer usage time between charging. Complaint Counsel has no specific response regarding the battery life of the C-Leg 4.

E. Criticisms Of Fiona Scott Morton

538. [redacted]

Response to Finding No. 538

This proposed finding is unsupported and misleading. Nothing in the cited testimony from Dr. Scott Morton states that there was anything flawed in her economic approach to market definition. To the contrary, Dr. Scott Morton applied a reliable economic approach to market definition, including the use of the Hypothetical Monopolist Test endorsed by the Merger Guidelines. (*See generally* CCFF ¶¶ 767-93 (describing Dr. Scott Morton's use of, and conclusions drawn from, the Hypothetical Monopolist Test)).

539. [redacted]

Response to Finding No. 539

This proposed finding is unclear, incorrect, and misleading to the extent it suggests that Dr. Scott Morton "just add[s] in additional knees" and to the extent it suggests that her approach to market definition is incorrect or unsupported. Respondent appears to misunderstand that Dr. Scott Morton proved that three separate relevant product markets pass the hypothetical monopolist test and that the Merger is presumptively illegal by a wide margin in each of them.

In its Complaint, 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." (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"). Dr. Scott Morton 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 reasons she explains in her expert report, 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 (Scott Morton Report) at 058-65 (¶¶ 78-83)). Dr. Scott Morton demonstrated that the Merger is presumptively illegal, by a wide margin, in both of these relevant markets. (CCFF ¶¶ 964, 966).

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. 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. 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).

[redacted]

[redacted]

Consistent with record evidence that Freedom's Plié and Otto Bock's C-Leg do not compete as closely with lower-end MPKs, like Otto Bock's Compact and Kenevo, she also excludes those lower end knees from her "narrower" product market. In her reports she explains that she has "calculated market shares and pre-merger and post-merger HHIs for a narrower market. For this narrower market, I include Otto Bock's C-Leg (but exclude Otto Bock's higher-end Genium and X3 prosthetic knees as well as their lower-end Kenevo and Compact prosthetic knees), and I have also limited Össur sales to only the Rheo (excluding the XC and Power Knee), and Endolite sales to only the Orion." (PX06001A (Scott Morton Report) at 082 (n.205)). Dr. Scott Morton's conclusion that the Merger is presumptively illegal by a wide margin in this narrower MPK market (consisting of only Otto Bock's C-Leg, Freedom's Plié, Össur's Rheo, Endolite's Orion, each of DAW's MPKs, and Nabtesco's Allux) 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, 966), which are corroborated by Respondent's ordinary course analyses of the U.S. MPK market, (CCFF ¶¶ 967-80), disproving Respondent's unfounded criticism of Dr. Morton's product market definition analysis.

540. [redacted]

Response to Finding No. 540

To the extent this proposed finding suggests that there was anything incorrect regarding Dr. Scott Morton's application of economic principles in her market definition analysis, it is unsupported, incorrect, and misleading. 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]

[redacted]

[redacted]

541. [redacted]

[redacted]

Response to Finding No. 541

This proposed finding is unsupported, improper, incorrect, and misleading. This proposed finding is unsupported and improper to the extent it attempts to incorporate into the record statements that were never made or adopted by any witness, from articles which were not, themselves, offered into evidence, in direct contravention of this Court's Order of October 10, 2018 ("Do not cite to documents that are not in evidence. . . .")).

This proposed finding is also unsupported to the extent it cites to the testimony of Dr. Scott Morton for a proposition which appears only in the questions asked by Respondent on different (uncited) pages of the transcript, and with which Dr. Scott Morton never agreed. (Scott Morton Tr. 4101-03). None of Dr. Scott Morton's testimony adopts the articles listed and, in fact, Dr. Scott Morton explicitly rejected at least some of the conclusions contained therein. (Scott Morton Tr. 4107-08 ("Do you agree that the symmetric critical loss test has serious drawbacks? A. No. I disagree with this conclusion.")). This proposed finding is also improper to the extent it attempts to suggest anything about *Daubert* issues, given that Respondent filed no *Daubert* motion in this case.

To the extent this proposed finding suggests that there was anything incorrect regarding Dr. Scott Morton's application of economic principles in her market definition analysis, it is unsupported, incorrect, and misleading. 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. Respondent's internal analyses and plans to significantly raise Plié 3 prices after

Otto Bock and Freedom's MPKs came under common ownership, (CCFF ¶¶ 803-06), prove that Otto Bock and Freedom's MPKs constitute an appropriately defined relevant market.

[redacted]

[redacted]

[redacted]

542. [redacted]

Response to Finding No. 542

This proposed finding is wholly unsupported. First, the statement that Dr. Scott Morton's conclusion "completely lacks support in the record" is itself utterly devoid of support. And Dr. Scott Morton certainly did not testify (on the page cited by Respondent or otherwise) that her conclusions lack support.

Next, 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. *Merger Guidelines* §§ 4.1.1-4.1.3. The hypothetical monopolist test "is iterative, meaning it should be repeated with ever-larger candidates until it defines a [relevant market]," but once a candidate set of products passes the test, the analysis can stop. *FTC v. Advocate Health Care Network*, 841 F.3d 460, 468 (7th Cir. 2016) (internal citation omitted). 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.* Under the "narrowest market" principle, *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 26-27 (D.D.C. 2015) (internal citation omitted), "the relevant product market should ordinarily be defined as the smallest product market that will satisfy the hypothetical monopolist test," *FTC v. H&R Block, Inc.*, 833 F. Supp. 2d 50, 58-60

(D.D.C 2011) (citing *Merger Guidelines* § 4.1.1 ("[W]hen the Agencies rely on market shares and concentration, they usually do so in the 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).

[redacted]

To the extent this proposed finding suggests that there was anything incorrect regarding Dr. Scott Morton's application of economic principles in her market definition analysis, it is unsupported, incorrect, and misleading. 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. Respondent's internal analyses and plans to significantly raise Plié 3 prices after Otto Bock and Freedom's MPKs came under common ownership, (CCFF ¶¶ 803-06), prove that Otto Bock and Freedom's MPKs constitute an appropriately defined relevant market.

[redacted]

543. [redacted]

[redacted]

Response to Finding No. 543

[redacted]

[redacted]

[redacted]

544. [redacted]

Response to Finding No. 544

[redacted]

[redacted]

545. [redacted]

Response to Finding No. 545

[redacted]

546. [redacted]

Response to Finding No. 546

[redacted]

547. [redacted]

Response to Finding No. 547

[redacted]

548.

Response to Finding No. 548

[redacted]

549. [redacted]

Response to Finding No. 549

[redacted]

[redacted]

- [redacted]
- [redacted]

[redacted]

550. [redacted]

Response to Finding No. 550

[redacted]

[redacted]

551. [redacted]

Response to Finding No. 551

[redacted]

[redacted]

552.

Response to Finding No. 552

[redacted]

[redacted]

553. [redacted]

Response to Finding No. 553

[redacted]

[redacted] Days before acquiring Freedom, Scott Schneider,

Otto Bock's Vice President of Government, Medical Affairs, and Future Development, and several other Otto Bock executives [redacted] (CCFF ¶¶ 1377-78).

Shortly after [redacted] only days before the Merger was consummated, Mr. Schneider circulated his conclusions to several high-level Otto Bock executives—including Matthew Swiggum, Alexander Guck, Linus Cremer, Helmut Pfuhl, and Soenke Roessing—identifying in a chart the pros and cons of the Quattro, as well as the "risks if we do not control Quattro." (CCFF ¶¶ 1379, 1381). Under the "pros" column of the chart, Mr. Schneider stated that the Quattro "[a]ppears 'on par' with C-Leg 4 and a contender," has "[v]ery low noise," and has "[u]ser and CPO apps on Android and iOs." (CCFF ¶ 1382). Mr. Schneider highlighted that risks of Otto Bock not controlling the Quattro were that "[w]e will have to put more Genium functions in the C-Leg," "Ossur could have something that will compete better with C-Leg 4," and "[a]nyone who takes this product will cut in to C-Leg 4 market share." (CCFF ¶ 1382). [redacted] (CCFF ¶ 1383).

554. [redacted]

Response to Finding No. 554

[redacted] Before acquiring Freedom, Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs, and Future Development, and several other Otto Bock executives [redacted] CCFF ¶¶ 1377-78).

Shortly after [redacted] only days before the Merger was consummated, Mr. Schneider circulated his conclusions to several high-level Otto Bock executives—including Matthew Swiggum, Alexander Guck, Linus Cremer, Helmut Pfuhl, and Soenke Roessing—identifying in a chart the pros and cons of the Quattro, as well as the "risks if

we do not control Quattro." (CCFF ¶¶ 1379, 1381). Under the "pros" column of the chart, Mr. Schneider stated that the Quattro "[a]ppears 'on par' with C-Leg 4 and a contender," has "[v]ery low noise," and has "[u]ser and CPO apps on Android and iOs." (CCFF ¶ 1382). Mr. Schneider highlighted that risks of Otto Bock not controlling the Quattro were that "[w]e will have to put more Genium functions in the C-Leg," "Ossur could have something that will compete better with C-Leg 4," and "[a]nyone who takes this product will cut in to C-Leg 4 market share." (CCFF ¶ 1382). [redacted]

(CCFF ¶ 1383).

555. [redacted]

Response to Finding No. 555

[redacted]

[redacted]

556. [redacted]

Response to Finding No. 556

[redacted]

[redacted]

557. [redacted]

Response to Finding No. 557

[redacted]

558. [redacted]

Response to Finding No. 558

559. [redacted]

Response to Finding No. 559

[redacted]

[redacted]

The proposed finding is incomplete because it makes no reference to 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).

This proposed finding is also misleading and contrary to the weight of the evidence to the extent it suggests that the Plié was somehow deficient, and not an active competitor to the C-Leg at the time of the Merger. There is copious evidence in the record that Freedom's Plie MPK and Otto Bock's C-Leg MPK competed intensely and directly with each other before the Merger (CCFF ¶¶ 1008-1174). The record is also clear that customers have benefited from lower prices for MPKs as a result of the intense competition between the Plie and C-Leg, (CCFF ¶¶ 1141-62), and innovation increased as a result of this head-to-head competition, (CCFF ¶¶ 1163-74).

Numerous individuals – including prosthetistis, clinicians, and competitors, as well as employees of Respondent, have testified that the Plié is sold as a microprocessor knee, and competes directly with the C-Leg for sales, notwithstanding any differences in the functionality of the Plie and C-Leg. [redacted]

560. [redacted]

Response to Finding No. 560

This proposed finding is unsupported to the extent it cites only to the self-serving testimony of Otto Bock executive Scott Schneider. Moreover, it is directly contradicted by ordinary course documents and the testimony of Matthew Swiggum, Otto Bock's CEO at the time of the Merger, and Mr. Schneider's boss. [redacted]

[redacted]

561. [redacted]

Response to Finding No. 561

[redacted]

562.

Response to Finding No. 562

[redacted]

[redacted]

563. [redacted]

Response to Finding No. 563

[redacted]

564. [redacted]

Response to Finding No. 564

[redacted]

[redacted]

IV. COMPETITIVE EFFECTS

A. The Alleged MPK-Only Market Was Very Competitive And Marked By Constant Innovation Before The Acquisition

565. Complaint Counsel acknowledge that manufacturers in their alleged market competed on the price and features of their MPKs to secure the business of prosthetic clinics, even though they also claimed that Ottobock had a leading market share pre-Acquisition. (Compl., ¶¶ 9, 26).

Response to Finding No. 565

Complaint Counsel does not disagree that it included the following two paragraphs in its Complaint against Otto Bock, filed in this matter on December 20, 2017:

> Paragraph 9: "With the Merger, Otto Bock's share of the U.S. market for microprocessor prosthetic knees exceeds 80%. The Merger significantly increased concentration in the already highly concentrated market for microprocessor prosthetic knees in the United States, making the Merger presumptively unlawful under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ('Merger Guidelines')."
> Paragraph 26: "Manufacturers, including Respondent Otto Bock and Freedom, compete on both the price and features of their microprocessor prosthetic knees to secure the business of prosthetic clinics. Microprocessor prosthetic knee manufacturers negotiate multi-year contracts with each of their prosthetic clinic customers or distributors, typically offering significant discounts off the list prices for their products to maximize sales. The prices prosthetic clinics pay manufacturers for microprocessor prosthetic knees are substantially below the reimbursement rates the clinics receive from public and private insurers. Clinics use the reimbursement they receive from insurers to cover the cost of purchasing the microprocessor prosthetic knee from the manufacturer, fitting the knee and providing related services, and sustaining the profitability of their businesses, which allow them to compete to attract amputees by providing high-quality care and services."

This proposed finding is misleading and incorrect to the extent Respondent implies that it is not, and cannot simultaneously be, true that 1) MPK manufacturers compete on the price and features of their MPKs, and 2) Otto Bock has a leading market share for the sale of MPKs in the U.S. The record is clear that Otto Bock has, and had pre-Acquisition, a dominant market share in the sale of MPKs in the U.S. (CCFF ¶¶ 953-990). In fact, internal, ordinary course, documents show that Otto Bock's own executives estimated just prior to acquiring Freedom that Otto Bock

[redacted] At the same time, it is also true that MPK manufacturers compete on the price and features of their MPKs to secure the business of prosthetic clinics. (CCFF ¶¶ 562-96; *see, e.g.*, CCFF ¶ 580 [redacted] Indeed, this is precisely how Freedom has been able to steal market share away from Otto Bock, particularly with the introduction of the Plié 3. (CCFF ¶¶ 1011-27; *see, e.g.*, CCFF ¶ 1026 (stating the after the Plié 3 launched, Otto Bock's MPK sales decreased, allowing Freedom to "gain market share" while Otto Bock was "steadily losing market share")).

566. Industry participants describe the MPK segment as very competitive (Testerman, Tr. 1183 ("And it's a very competitive marketplace. So we are taking some business from C-Leg 4. We're taking some business from Rheo 3. We're taking business from the Orion 3, the Allux. We don't discriminate who we try to take market share from."; 1147 ("It's a very competitive market, and we have to find ways to differentiate ourselves as we discussed so far here today, and this is just another program that we implemented in order to stay competitive in order to try to take share from all microprocessor knees.")).

Response to Finding No. 566

This proposed finding is unsupported and misleading. Respondent's proposed finding is unsupported because it states that "[i]ndustry participants describe the MPK segment as very competitive," but only cites trial testimony from one single Freedom executive, Mark Testerman. Testimony from a single Respondent executive is not a basis to conclude anything about the views of "[i]ndustry participants."

The proposed finding is misleading to the extent that it implies that the U.S. MPK market is not highly concentrated and/or that other MPK manufacturers could expand to constrain the competitive harm that would result from Otto Bock's acquisition of Freedom. Instead, the large

body of evidence in this case shows that the U.S. MPK market is highly concentrated, (CCFF ¶¶ 953-990), and, beyond Otto Bock, there are only three other meaningful MPK manufacturers operating in the United States: Freedom, Össur, and Endolite. [redacted] (CCFF ¶ 975). Össur's Rheo will not constrain the Merger's likely anticompetitive effects because its MPKs rely on functionally different technology than Otto Bock's C-Leg 4 and Freedom's Plié that is associated with safety and reliability issues among clinic customers. Freedom's Quattro will also be functionally superior to, and lower-priced than, Össur's Rheo. (CCFF ¶¶ 1480-1527). Endolite will not constrain the Merger's likely anticompetitive effects due to its minimal presence in the MPK market, its technical and services issues, and [redacted] (CCFF ¶¶ 1530-47).

567. With respect to the MPK segment, industry participants recognize that "there's always so much going on with different products that are being launched" and the technology is rapidly changing. (Testerman, Tr. 1103; Doug Smith Tr. 5994).

Response to Finding No. 567

This proposed finding is unclear and misleading. The proposed finding is unclear because it is unclear what the phrase "there's always so much going on with different products that are being launched" means. Specifically, it is entirely unclear what "so much going on with" means, and it is unclear what products the proposed finding refers to. The portion of the proposed finding that states "the technology is rapidly changing," which appears based on testimony by Douglas

Smith, is also unclear because it is unclear what technology he is referring to and how quickly "rapidly" refers to.

This proposed finding is misleading to the extent it implies that "industry participants" in general, or, indeed, anyone beyond Respondent's own executive, Mark Testerman, recognizes that "there's always so much going on with different products that are being launched" and anyone beyond Mr. Smith recognizes that "technology is rapidly changing" in the MPK segment of the market.

Complaint Counsel agrees, however, that MPK technology has changed over time—and that competition between Otto Bock and Freedom has been the driving force behind improvements in MPK technology. For example, when Freedom launched its Plié 3, there were significant improvements related to customized stumble recovery, improved swing and stance performance, better control over a wider range of speeds, full water submersibility, interchangeable batteries, and real-time data display. (CCFF ¶¶ 1013-23). Similarly, after the launch of the Plié 3, when Otto Bock launched its C-Leg 4, Otto Bock touted the product's new features that, among other improvements, incorporated aspects of the Plié 3, including improved water-resistance and lower system height; in fact, Otto Bock's marketing plan specifically targeted selling against the Plié 3. (CCFF ¶¶ 1035-55).

568. [redacted]

Response to Finding No. 568

[redacted]

[redacted]

[redacted]

569. Patients are actually open to different makes of MPK when they replace their MPK, evidently because "technology changes so fast in three to five years." (PX05151, Patton (Prosthetic Solutions), Dep. at 105)).

Response to Finding No. 569

The proposed finding is incomplete, unsupported, and unclear. The proposed finding is incomplete because it ignores the entirety of Mr. Patton's testimony:

> "Q. As in a patient is actually more likely to switch to another brand than to keep the same one? A. They're just open to whatever – the technology changes so fast in three to five years, that they're open to what's available and what's the best."

To the extent anything can be gleaned from Mr. Patton's testimony about patient preferences when it comes to acquiring a new MPK, it is that patients are "open to what's available and what's the best."

The proposed finding is unsupported because it uses the deposition testimony of a single prosthetist to support an overly broad characterization about all prosthetic patients. The weight of the evidence—based on testimony from numerous prosthetists both at trial and in depositions—shows that prosthetists are unlikely to turn to numerous types of MPKs due to technological, quality, and service related differences. After the Merger, Össur is the only MPK supplier that would possess a market share greater than [redacted] percent. (CCFF ¶ 964). But Össur is unlikely to grow beyond its current [redacted] percent share of the market because, for many clinicians and patients, Össur's Rheo 3 is an unattractive alternative to the C-Leg 4 and Plié 3. (CCFF ¶ 1487) [redacted]

(CCFF ¶ 1491) (Michael Bright, owner of North Bay, testified that most patients who chose an MPK other than the Rheo after a trial fitting did so because "most just preferred the feel and function of either the Freedom Plie or the Otto Bock C-Leg"); *see also* (CCFF ¶¶ 1501, 1514-15). Moreover, Össur's Executive Vice President of R&D, Kim De Roy, testified at trial that Össur's MPKs use a functionally different technology than the C-Leg 4 or Plié 3, which are much more similar to each other than to the Rheo 3. (CCFF ¶¶ 1480-82) (describing "magnetorheologic technology"); (CCFF ¶¶ 1483-85) (market participant testimony on how the Rheo's technology and functionality differ from the C-Leg 4 and Plié 3). Many customers have safety and reliability concerns about Össur's MPK technology. (CCFF ¶¶ 1493-1516).

Endolite is even less likely to replace the competition lost from the Merger. (CCFF ¶ 964); (CCFF ¶ 1531) [redacted] (CCFF ¶¶ 1533-36). Although it has been selling MPKs in the United

States for more than twenty years, Endolite's market share remains less than [redacted] (CCFF ¶ 964). A principal reason for its inability to grow into a stronger MPK competitor is that, in the words of Endolite's Executive Chairman, Stephen Blatchford, Endolite [redacted] (CCFF ¶ 1536); *see also* (CCFF ¶¶ 1533-35). Although Endolite's MPK sales have improved slightly since the launch of the Orion 3 in September 2016, many prosthetic clinics remain wary of its product and its service. (CCFF ¶¶ 1539-40). There is substantial evidence in the record as well that indicates prosthetists are unlikely to switch to Nabtesco and/or DAW MPKs. *See, e.g.*, (CCFF ¶¶ 1548-1626; Response to RPFF ¶ 638).

Finally, the proposed finding is unclear because it is unclear what specific MPKs Mr. Patton believes prosthetists would turn to. He does not provide any details in his deposition testimony. (PX05151, Patton (Prosthetic Solutions), Dep. at 105))

570. All MPK manufacturers view every other base-level MPK on the United States market to be its competition in the MPK segment. (Blatchford, Tr. 2144; Testerman, Tr. 1262-1263). Blatchford testified that the Orion 3 competes against all other MPKs on the U.S. market, including the Ottobock C-Leg, Össur Rheo, Freedom Plié, Nabtesco Allux, and the MPK from DAW. (Blatchford, Tr. 2144).

Response to Finding No. 570

The proposed finding is unsupported, contrary to the weight of the evidence, unclear, and misleading. The proposed finding is unsupported because it purports to represent the views of "All MPK manufacturers" but only cites the trial testimony of executives from two manufacturers: Stephen Blatchford of Endolite and Mark Testerman of Freedom. Therefore, the statement "*All* MPK manufacturers view every other base-level MPK on the United States market to be its competition in the MPK segment" is unsupported by the cited evidence. The proposed finding is

also unclear as to what "base-level MPK" means and which specific MPKs would be classified as "base-level MPKs."

The proposed finding is contrary to the weight of the evidence, which shows that Otto Bock and Freedom do not view every other base-level MPK on the United States market to be their competition in the MPK segment. For example, Respondent's internal documents demonstrate that Nabtesco and DAW are, at most, viewed as distant MPK competitors. [redacted] (CCFF ¶¶ 1572-73, 1604); *see also* (CCFF ¶ 1585) (Lloyd Presswood, Freedom's Director of Field Sales and Clinical Training, describing the Allux as a "piece of crap knee")). Brad Mattear, Vice President of Orthotics at Proteor Inc., the exclusive distributor of Nabtesco's MPKs in the United States, described Proteor Inc. [redacted] (CCFF ¶¶ 1554, 1588). Like Nabtesco, DAW has minimal MPK sales in the United States. [redacted] (CCFF ¶ 1615). In fact, none of the customers who testified either at trial or in a deposition in this case currently buy MPKs from DAW. (CCFF ¶¶ 1614, 1616).

The statement "Blatchford testified that the Orion 3 competes against all other MPKs on the U.S. market, including the Ottobock C-Leg, Ossur Rheo, Freedom Plie, Nabtesco Allux, and the MPK from DAW," is also misleading to the extent it suggests that Mr. Blatchford views the Orion 3 as competing equally with all other "base-level MPKs." Mr. Blatchford's testimony, which Respondent failed to quote, was that the Orion 3 competes with the C-Leg 4, Rheo, and Plie, "and to a lesser extent" the Nabtesco Allux "and the DAW product, whose name I have forgotten." (Blatchford, Tr. 2144). Mr. Blatchford's testimony that Endolite competes to "a lesser extent" with the Nabtesco Allux and DAW MPKs is consistent with testimony from clinic

customers, who, to the extent they are even familiar with these MPKs, confirmed that Nabtesco and DAW MPKs are inferior and these manufacturers lack the requisite level of service and technical support. (CCFF ¶¶ 1593-1604 (Nabtesco); CCFF ¶¶ 1614-1626 (DAW)).

571. Maynard Carkhuff testified that Ottobock, Össur, Endolite, DAW, and Nabtesco all sell microprocessor knees in the United States, and Freedom competes with all of those manufacturers. (Carkhuff, Tr. 617)

Response to Finding No. 571

Complaint Counsel agrees that Ottobock, Össur, Endolite, DAW, and Nabtesco all sell microprocessor knees in the United States. The proposed finding that "Freedom competes with all of those manufacturers" is misleading to the extent it suggests that Freedom views all other MPKs sold in the United States as equally strong competitors as Otto Bock. The weight of the evidence shows that the Plié 3 and C-Leg are close competitors, (CCFF ¶¶ 1011-1174), and that Freedom's Quattro would have been an even closer competitor. (CCFF ¶¶ 1230-1318; *see, e.g.*, CCFF ¶¶ 1230, 1235 (noting that [redacted].

In addition, Respondent's internal documents demonstrate that Nabtesco and DAW are, at most, viewed as distant MPK competitors. For example, [redacted] (CCFF ¶ 975). [redacted] ((CCFF ¶¶ 1572-73, 1604); *see also* (CCFF ¶ 1585) (Lloyd Presswood, Freedom's Director of Field Sales and Clinical Training, describing the Allux as a "piece of crap knee")). Brad Mattear, Vice President of Orthotics at Proteor Inc., the exclusive distributor of Nabtesco's MPKs in the United States, described Proteor Inc. [redacted] (CCFF ¶¶ 1554, 1588). Like Nabtesco, DAW

has minimal MPK sales in the United States. Many customers have never fit a DAW MPK. (CCFF ¶ 1615). In fact, none of the customers who testified either at trial or in a deposition in this case currently buy MPKs from DAW. (CCFF ¶¶ 1614, 1616).

572. The direction of the technology now is going towards powered prosthetics, and right now the Össur Power Knee is leading that innovation, because it is the only powered knee on the market in the United States. (Doug Smith, Tr. 5995).

Response to Finding No. 572

The proposed finding is unclear and unsupported. The proposed finding is unclear as to what "[t]he direction of the technology now is going towards powered prosthetics" means. The proposed fact is also unsupported, as it is a broad statement about the future of prosthetic knee technology supported by the testimony of a single orthopedic surgeon who has no involvement with, or responsibilities related to, prosthetic knee manufacturing or development. (Smith (retired) Tr. 5961-62). Dr. Smith lacks the foundation to speak to this, as he is a retired professor and part-time surgeon that is not a prosthetist, (CCFF ¶¶ 3390, 3392-93), is unfamiliar with current MPKs on the market (CCFF ¶¶ 3394-99), is not certain which version of the C-Leg is on the market or how long it took Otto Bock to develop the C-Leg 4 (CCFF ¶ 3394), and is not certain he has ever seen a Freedom Plié 3, he is not aware of its specifications, and he may not have ever seen a patient using one. (CCFF ¶ 3399). Notably, the proposed finding is also not supported by any testimony or documents from Össur, the manufacturer of the Power Knee. Additionally, there is no evidence in the record that any other prosthetic manufacturer is currently working on developing a powered prosthetic knee, nor is there any evidence that insurers would reimburse for powered prosthetic knees.

573. Clinicians have observed that competition from both Össur and Endolite has compelled Ottobock and Freedom to improve their products. (PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 109)).

Response to Finding No. 573

The proposed finding is unsupported, as the cited testimony does not support it. The only cited support for this proposed finding is the deposition testimony of Paul Weott, a prosthetic clinic owner. Mr. Weott was asked at his deposition: "In your observation and experience in this industry, in particularly in – let's say the last five years, do you believe that innovation from Ossur has been a competitive motivator to generate product improvements by Ottobock for its microprocessor knees?" Complaint Counsel objected to the form of the question on the basis of foundation (an objection it maintains). Following the objection, Mr. Weott answered "I believe so."

First, Complaint Counsel refers to, and renews, its objection to the cited testimnony on the basis of foundation, as Paul Weott, a witness who is wholly unaffiliated with Otto Bock or Freedom, does not have any foundation to testify about what may have compelled Otto Bock and Freedom to improve their respective products.

Second, the testimony that Respondent cites to is devoid of any mention of Endolite, let alone whether competition from Endolite has compelled Otto Bock and Freedom to improve their products. The testimony is also devoid of any mention of Freedom, let alone what may have compelled Freedom to improve upon its products. Thus, based on the cited evidence, there is no basis to conclude anything about the impact of competition from Endolite or the impact of competition on Freedom.

Third, the proposed finding is misleading, as the testimony from a single clinician does not support a finding about what multiple "[c]linicians" have observed.

574. Dr. Doug Smith testified that all MPK manufacturers are trying to improve the durability of their products and their software, and all are trying to innovate. (Doug Smith, Tr. 5997-98).

Response to Finding No. 574

The proposed finding is unsupported, as Dr. Doug Smith, an orthopedic surgeon who has no involvement with or responsibilities related to prosthetic knee manufacturing or development does not have foundation to testify as to whether "all MPK manufacturers are trying to improve the durability of their products and their software, and all are trying to innovate." *See, e.g.*, Response to RPFF ¶ 572. Further, Dr. Smith's testimony about what "all MPK manufacturers are trying" to do is undermined by his admitted lack of familiarity with the current MPK manufacturers. *See, e.g.*, Response to RPFF ¶ 572; *see also* (CCFF ¶¶ 3390-99).

575. Mark Ford believes that four MPK manufacturers are "actively trying to get POA's business" even though he sells less than seven MPKs per year (Ford, Tr. 945-946).

Response to Finding No. 575

Complaint Counsel agrees that Mr. Ford testified that four MPK manufacturers are "actively trying to get POA's business." The proposed finding is misleading, however, to the extent it suggests that the four MPK manufacturers compete similarly for his business. Mr. Ford, the President and Managing Partner of POA, testified that, there is "inherent[ly] stronger competition" between Freedom and Otto Bock because of the "similar ideas and similar platforms" used by the respective companies. (CCFF ¶ 1433). On this point, Mr. Ford explained that compared to the Össur Rheo, Freedom's Plié 3 "is much more similarly designed to the C-Leg, does not use the magnetic fluid in the same way that the Össur knee does, and it's just the entire way that it operates is much more similar to the C-Leg than it is to the Rheo." (CCFF ¶ 1485). Mr. Ford testified that he has used the presence of Freedom's Plié 3 to obtain better prices from Otto Bock for its C-Leg 4. (CCFF ¶ 1160).

Mr. Ford further testified that Össur's Rheo is "viewed as a different product than the C-Leg or the Plié knee because of the platform, the functional platform that it's built on, so while

they're both in the MPK category, there are differences there. So they are competition, the Rheo knee is competition for the C-Leg, but for many clinicians it's not as close a competition as the Plié is to the C-Leg." (CCFF ¶ 1484). In addition, Mr. Ford indicated that Endolite "to a lesser degree" is trying to get their company's business due to less service and support compared to Otto Bock, Freedom, and Össur. (CCFF ¶ 1540) (noting that Endolite is a "smaller company," that they "don't have as much support staff . . . don't have as large a sales force, they have far fewer clinicians . . . [and] so it makes it more challenging to get the support in a timely basis and with the level of support that we get from [Otto Bock, Freedom, and Össur].").

576. Since Freedom launched the Plié 3 in 2014, the following products have been released in the United States: The Orion 3, the Allux, the Rheo 3, the current Rheo, the Rheo XC, the Symbionic, the Linx, the C-Leg 4, and the Genium facelift. (Schneider, Tr. 4398).

Response to Finding No. 576

The proposed finding is misleading and unsupported. First, it is unclear based on other evidence in the record when exactly the Symbionic launched in the United States, and Össur's Executive Vice President of R&D, Kim De Roy, testified that the product was being discontinued. (De Roy (Össur), Tr. 3586-87). To the extent Respondent implies that there are three Rheos that subsequently were released after the Plié 3, this is is misleading and incorrect, as there has been only the launch of the Össur Rheo 3 and Össur Rheo XC. (CCFF ¶¶ 897-901). The proposed finding is misleading because Respondent indicates the "Genium facelift" is a "product" that has been released, but ignores the product improvements and numerous releases of the Plié after 2014. *See, e.g.*, (CCFF ¶¶ 1832-36) (noting improvements in Plié 3 product quality). The proposed finding is misleading to the extent Respondent implies new manufacturers entered the United States, as all four of these companies (Otto Bock, Össur, Endolite, and Nabtesco) had previous products in the United States. (CCFF ¶¶ 863-932).

B. Freedom's Plié 3 And Ottobock's C-Leg 4 Are Not Close Competitors

1. Freedom's Plié 3 Technology And Functionality Is Inferior And Outdated Relative To Other MPKs Sold In The United States

577. Among prothetic knees that contain a microprocessor, the Plié 3 is most functionally distant from the C-Leg 4. (Schneider, Tr. 4351; [redacted] Kannenberg, Tr. 1881; Solorio, Tr. 1646-1647; Sabolich, Tr. 5859-5860).

Response to Finding No. 577

This proposed finding is inaccurate and contrary to the evidence. Prosthetists and clinic customers consider the Plié to offer comparable functionality to the C-Leg and other swing and stance MPKs. *See, e.g.*, CCFF ¶ 3083; (Ell (Mid-Missouri O&P), Tr. 1750 (testifying that Freedom and Otto Bock have competed for Mid-Missouri's business by presenting them "development of similar componentry" as well as improved technology); CCFF ¶¶ 999, 1167 (Mark Ford, President and Managing Partner of POA, testified that Otto Bock's C-Leg 4 and Freedom's Plié 3 "have a lot of similarities in terms of the base function that they work off of using hydraulic cylinders, the microprocessor," and "[b]ecause Freedom and Otto Bock had built their MPK designs on similar ideas and similar platforms, there was an inherent stronger competition between those two companies to essentially one-up each other to keep the attention of clinicians as to which product did they prefer. As they added new benefits, that created interest in their new versions.").

To the extent the proposed finding suggests that the Plié 3 is a distant *competitor* from the C-Leg 4, this is contradicted by copious evidence in the record that Freedom's Plié MPK and Otto Bock's C-Leg MPK competed intensely and directly with each other before the Merger. (*See* CCFF ¶¶ 1008-1174). The record is also clear that customers have benefited from lower prices for MPKs as a result of the intense competition between the Plié and C-Leg, (CCFF ¶¶ 1141-62) and innovation increased as a result of this head-to-head competition, (CCFF ¶¶ 1163-74). For example, [redacted]

[redacted] (CCFF ¶ 1044); *see also* (CCFF ¶ 1043-44). Moreover, Otto Bock itself identifies the Plié, along with other swing and stance MPKs, to be competitors to the C-Leg. (CCFF ¶ 3088). Dr. Kannenberg testified at trial and at his deposition that Freedom and Össur were the two most viable competitors against Otto Bock. (Kannenberg (Otto Bock) Tr. 1882). Ms. Solorio testified at trial that competition with the Plié 3 was pressuring Otto Bock to lower prices of the C-Leg 4. (Solorio (Otto Bock) Tr. 1596). Freedom considers other swing and stance MPKs to be the Plié's primary competition. (CCFF ¶ 3086).

578. [redacted]

Response to Finding No. 578

This proposed finding is incomplete and misleading for several reasons. Respondent's citation to PX01032 is incomplete and misleading to the extent the quoted language on page 021 implies that Freedom's Plié is not a direct competitor to Otto Bock's C-Leg 4. In the very same Otto Bock presentation, just three pages later, the slide states that [redacted] (PX01032 (Freedom) at 025 (*in camera*)). This is consistent with numerous other Otto Bock documents and testimony that show that the Plié 3 is a close, direct competitor to Otto Bock's C-Leg 4. (CCFF ¶¶ 1024-55, 1110-1113, 1133-36).

To the extent that Respondent's proposed finding is paraphrasing Dr. Prince's testimony to suggest that the Plié 3 technology is the same as the original Plié, that is misleading and inaccurate as the Plié has had substantial innovations that made it more effectively compete against

Otto Bock's C-Leg. (CCFF ¶¶ 1013-1023, 1026-27). This proposed finding is also misleading because it ignores the product updates and improved features that have been made since the introduction of the original Plié through the launch of the Plié 3, as well as the continuing updates that Freedom continues to make to improve the performance and reliability of the Plié 3. For example, [redacted] (CCFF ¶ 1832); *see also (*CCFF ¶ 1833-38).

This proposed finding also is misleading to the extent that it implies that Plié 3 sales were declining and that the product was no longer competitive in the MPK market. In fact, [redacted] (CCFF ¶¶ 1852, 1858, 1862, 1869, 1870-1873). [redacted] (CCFF ¶ 1858). [redacted] (CCFF ¶ 1862). Freedom's Chairman, Maynard Carkhuff testified at trial that [redacted] (CCFF ¶ 1873).

Moreover, this proposed findings is also misleading to the extent that the age of the Plié 3's "fundamental technology" is somehow indicative of its competitive significance against Otto Bock's C-Leg 4. There is copious evidence in the record that Freedom's Plié MPK and Otto Bock's C-Leg MPK competed intensely and directly with each other before the Merger. *See, e.g.*, CCFF ¶¶ 1008-1174). The record is also clear that customers have benefited from lower prices

for MPKs as a result of the intense competition between the Plié and C-Leg, (CCFF ¶¶ 1141-62), and innovation increased as a result of this head-to-head competition, (CCFF ¶¶ 1163-74). *See generally* Response to RPFF ¶ 577.

579. [redacted] (RX-0327; Testerman, Tr. 1291).

Response to Finding No. 579

This proposed finding is based on hearsay, is misleading, and contradicted by the weight of the evidence. At trial, Mark Testerman was asked by Respondent Counsel:

[redacted]

(Testerman (Freedom), Tr. 1290-91) (*in camera*). As shown above, Respondent cites to testimony that was not admitted for the truth of the matter asserted, but instead strictly as to Mr. Testerman's state of mind [redacted]

Respondent's citation to RX-0327 is incomplete and misleading. [redacted]

(RX-0327 (Freedom) at 001 (*in camera*)).

Moreover, RX-0327 and Mr. Testerman's testimony is contradicted by extensive trial testimony from the CEO of Hanger, the parent company of SPS. Vinit Asar, Hanger's CEO, testified that, the Plié 3 [redacted] (Asar (Hanger) Tr. 1414-1415 (*in camera*)). Hanger's CEO also testified that he received feedback that [redacted] (Asar (Hanger) Tr. 1390 (*in camera*)). Consistent with Mr. Asar's testimony, [redacted] (CCFF ¶ 1025). Mr. Asar of Hanger further testified [redacted] (CCFF ¶ 1154).

580. The Plié 3's pneumatic cylinder leaks air over time and must be pumped up manually, in fact, the knee leaks air often enough that users of the Plié 3 are supposed to carry their bicycle pumps around with them. (Kannenberg, Tr. 1953; Schneider, Tr. 4314-4319, [redacted]

Response to Finding No. 580

The proposed finding is misleading and against the weight of the evidence to the extent it seeks to portray the Plié 3 as not being a true microprocessor knee that competes directly with Otto Bock's C-Leg in the U.S. MPK market. (*See generally* CCFF ¶ 3062-3088; Response to RPFF ¶ 353) The record is clear that Freedom considers the Plié to be an MPK with swing and stance functionality. (CCFF ¶ 3064). The Plié is marketed by Freedom as a swing and stance MPK. (CCFF ¶ 3065). For example, in a Plié 3 marketing document, titled "Plié 3 Microprocessor Knee Fact Sheet" Freedom compared the "Plié 3 vs C-Leg4" noting that "[b]oth Plié 3 and C-Leg 4 have swing and stance control." (CCFF ¶ 3066). [redacted] (CCFF ¶ 3067-3068). [redacted] (CCFF ¶ 3069). [redacted] (CCFF ¶ 3072). [redacted] (CCFF ¶ 3071). Eric Ferris, Freedom's Vice President of Marketing, Customer Service, and Product Development, testified that Otto Bock salespeople were telling customers that the Plié does not offer swing and stance control, but the Plié does in fact have swing and stance control. (CCFF ¶ 3081). Respondent's other proposed findings confirm that Freedom's Plié is an "established, well known, and tested MPK" along with Otto Bock's C-Leg, Össur's Rheo, and Endolite's Orion. (*See, e.g.,* RPFF ¶ 783 [redacted]

[redacted]

There is copious evidence in the record that Freedom's Plié MPK and Otto Bock's C-Leg MPK competed intensely and directly with each other before the Merger. (*See* CCFF ¶¶ 1008-1174). The record is also clear that customers have benefited from lower prices for MPKs as a result of the intense competition between the Plié and C-Leg, (CCFF ¶¶ 1141-62) and innovation increased as a result of this head-to-head competition, (CCFF ¶¶ 1163-74).

Moreover, Otto Bock's ordinary course documents consistently identify the Plié, along with other swing and stance MPKs, as the C-Leg's primary competitors. (CCFF ¶ 3088). A prime example of such a document comes from Otto Bock's post-Merger integration planning materials, [redacted] Complaint Counsel adds that nowhere in Otto Bock's analysis does Respondent identify a segment for "MP-Switch" knees—Respondent's made-for-litigation characterization of the Plié 3. (*See* CCFF ¶ 974). No document in the record analyzes any market or market segment for "MP-Switch" knees because this is not a concept that existed in the ordinary course of business at Otto Bock or Freedom before Respondent Counsel came up with the label for these proceedings.

In addition, other market participants consider the Plié to be an MPK. (CCFF ¶ 3073). Prosthetists consider the Plié to be an MPK because they receive reimbursement for the

Plié under L-Code 5856. (CCFF ¶¶ 3072). United Healthcare reimburses clinics the same amount for the C-Leg 4 and Plié 3. (CCFF ¶¶ 3080); *see also* (CCFF ¶¶ 3067-3070, 3074-3078, 3082) [redacted] Prosthetists also consider the Plié to offer comparable functionality to the C-Leg and other swing and stance MPKs. (CCFF ¶ 3083; RPFF ¶ 783). Freedom's Plié 3 and Otto Bock's C-Leg have been direct competitors and viewed by Respondent and customers as close substitutes for each other for several years. (*See* CCFF ¶¶ 1028-1139).

581. The patient has to adjust the air pressure constantly because pressure in the Plié 3 is always changing either due to leakage or temperature or atmospheric changes. Changes to the air pressure in the Plié 3 can materially affect the swing phase of the knee increasing the chances that the user will stumble and fall. (Schneider, Tr. 4314-4319).

Response to Finding No. 581

The proposed finding is unsupported, unclear, and misleading. Respondent only cites Otto Bock's Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs, and Future Development, regarding testimony about the patient needing to "constantly" adjust the air pressure due to the temperature or atmospheric changes. Respondent does not cite to a single prosthetist, prosthetic clinic customer, Freedom engineer, or Freedom executive to support its claim that a patient must "constantly" adjust the air pressure.

The proposed finding is unclear as to the meaning of "constantly" and misleading to the extent that it implies that the Plié 3 is not an MPK, or an MPK that closely competes with Otto Bock's C-Leg 4. *See* Response to RPFF ¶ 580.

582. The pneumatic bladder in the Plié provides pressure to the hydraulic cylinder and because it is pressurized, it tends to leak, which is why it needs to be recharged with an air pump. (Blatchford, Tr. 2136).

Response to Finding No. 582

The proposed finding is unsupported and misleading. Respondent does not cite any testimony from a Freedom executive or engineer in support of this proposed finding, nor does Respondent cite any testimony from a prosthetist or clinic customer. The only witness whose testimony is cited—Mr. Blatchford—testified that he "could be wrong" regarding Plié's pneumatic bladder mechanism. (Blatchford (Endolite), Tr. 2136). The proposed finding is misleading to the extent that it implies that the Plié 3 is not an MPK, or an MPK that closely competes with Otto Bock's C-Leg 4. *See* Response to RPFF ¶ 580.

583. Maynard Carkhuff testified that with the Plié 3 alone, without redesigning the product, "it's going to be very difficult . . . to maintain [knee] sales because competitive brands have continued to innovate and outdistance all of the features that . . . the Freedom product has, so it would be very difficult to gain share." [redacted]

Response to Finding No. 583

This proposed finding is incomplete and misleading because it excludes additional testimony from Mr. Carkhuff and other Freedom executives that clearly state the company was

[redacted]

(CCFF ¶¶ 1456-57, 1463). According to John Robertson, Freedom's SVP of Research and Development, the primary improvements were related to improved software and programming of

the product. (CCFF ¶ 1457). [redacted] (CCFF ¶ 1461). As late as August 2017, David Smith sent to a Freedom shareholder a presentation showing that the [redacted] remained on schedule for an [redacted] (CCFF ¶ 1463-64). [redacted] (CCFF ¶ 1468).

584. Maynard Carkhuff stated that Plié is at the very end of its product life cycle. (Carkhuff, Tr. 616).

Response to Finding No. 584

This proposed finding is incomplete and misleading because it omits that Freedom was [redacted] *See* Response to RPFF ¶ 583.

This proposed finding is also misleading to the extent that it implies that, at the time of the Merger, the Plié 3 was not closely competing with Otto Bock's C-Leg 4 and that customers were not benefitting from this competition through more favorable pricing and innovation. There is substantial evidence in the record that the Plié 3 was closely and aggressively competing with Otto Bock's C-Leg 4. (CCFF ¶¶ 1011-1136). There is also substantial evidence in the record that customers were benefitting from the competition between Freedom's Plié 3 and Otto Bock's C-Leg 4 that resulted in more favorable pricing and greater innovation in terms of product features. (CCFF ¶¶ 1141-1174).

585. Maynard Carkhuff testified that Freedom's engineers believe that Plié is an old design, and having been redesigned a number of times, that there are very few improvements that they can make to the product based on its current technology platform. (Carkhuff, Tr. 616).

Response to Finding No. 585

This proposed finding is misleading to the extent that it implies that Freedom was not [redacted] to the extent that it implies that the Plié 3 is not closely competing with Otto Bock's C-Leg 4, and that customers have not benefitted from this competition through more favorable pricing and innovation. *See* Responses to RPFF ¶¶ 583, 584. The proposed finding also is misleading to the extent that it implies that Freedom [redacted] At the time of the Merger, [redacted] (CCFF ¶¶ 1176-77), and at the time of the Merger, [redacted] (CCFF ¶¶ 1207-09). [redacted] (CCFF ¶¶ 1230, 1232-36, 1380-83). As Freedom's Quattro Project Leader, Dr. Prince, testified, [redacted] (CCFF ¶¶ 1238-39, 1241-42, 1248-49).

586. Prior to the Acquisition, Freedom considered whether it could release the changes as a new iteration of the Plié, the Plié 4, but market intelligence concluded that the improvements were not significant enough for Freedom to "credibly call it a Plié 4." (Ferris, Tr. 2324; [redacted]

Response to Finding No. 586

This proposed finding is unsupported by the cited testimony and contradicted by the weight of the evidence. The proposed finding conflates Mr. Ferris's testimony regarding the various iterations of the Plié 3 with the workstream that David Smith, Freedom's former CEO, and John Robertson, Freedom's SVP of Research and Development, referred to as [redacted] (CCFF ¶¶ 1458-59). [redacted] this product would have provided customers a new higher-quality MPK by [redacted] (CCFF ¶¶ 1456-57, 1463). According to Mr. Roberston, [redacted] (CCFF ¶ 1457). In contrast, Mr. Ferris's testimony was specific to several discrete product improvements for the Plié 3 related to faster programming, durability, and changing the frame of the MPK to a uniform body in 2016 and 2017. (Ferris (Freedom) Tr. 2320-23).

Contrary to Mr. Ferris' testimony, the evidence shows that as late as August 2017, Mr. Smith sent to a Freedom shareholder a presentation showing that the [redacted] remained on schedule for an [redacted] (CCFF ¶ 1463-64). [redacted] (CCFF ¶ 1468).

587. [redacted]

Response to Finding No. 587

The proposed finding is misleading. While it is true that [redacted] (Testerman (Freedom), Tr. 1214 (*in camera*); PX01255 (Freedom) at 001 (*in camera*)). Therefore, with the benefit of a removable battery, a Plié user can have several removable batteries and therefore longer usage time between charging. Moreover, the C-Leg has a battery life of approximately 2 days with daily charging recommended by Respondent. (CCFF ¶ 865; PX01599 (Otto Bock) at 012).

588. The microprocessor in the Plié works differently than all of those products. (Schneider, Tr. 4322-4323). The difference between all of the former MPKs and the Plié 3 is important to K-3 and K-4 amputees. (Schneider, Tr. 4323). The variable resistance is what's important because it can adjust and vary the resistance to make the gait of the knee more natural, safe gait. (Schneider, Tr. 4323).

Response to Finding No. 588

This proposed finding is unclear, unsupported, and misleading. The proposed finding is unclear because it is not clear what "all of those products" is specifically referring to: is it all other MPKs in the market or specific MPKs in the market? It is also unclear as to how the difference between the other MPKs and the Plié 3 is "important to K-3 and K-4 amputees."

The portion of the finding concerning this alleged difference being "important to K-3 and K-4 amputees" is unsupported as Respondent only cites to a single Respondent witness—and no prosthetists, patients, or clinics—to support this proposition.

The portion of the finding that the microprocessor in the Plie works "differently" is misleading to the extent it seeks to portray the Plié 3 as not a true microprocessor knee that competes directly with Otto Bock's C-Leg in the U.S. MPK market. *See* Response to RPFF ¶ 580.

589. If a user has a Plié 3 and wants to change the resistance level for the stance phase of his or her Plié 3, to, for example, go for a bike ride, they have to make an appointment with the prosthetist for an adjustment. (Schneider, Tr. 4312).

Response to Finding No. 589

This proposed finding is unsupported and incomplete. The proposed finding is unsupported because Respondent does not cite to a single prosthetist, Freedom engineer, Freedom executive, or Freedom document for the proposition that a Plié 3 user must make an appointment with a prosthetist to change the resistance level to go for a bike ride. To the contrary, Freedom markets the Plié 3 as having "[a]djustable modes for special activities" and "allows the *user* to make manual adjustments to adapt to a wide range of activities with different settings." (CCFF ¶ 1108) (emphasis added).

590. Prosthetists do not like the fact that Plié 3 users must pump the pneumatic cylinder with air using a bike pump. (Sabolich, Tr. 5861). Sabolich testified, "I think it's very janky, for lack of a better word, to say here's an expensive knee, but you have to carry this plastic pump around with you. It's sort of silly." (Sabolich, Tr. 5861).

Response to Finding No. 590

This proposed finding is unsupported. Respondent cites to only a *single* prothestist for the proposition generally that "[p]rosthetists do not like the fact that Plié 3 users must pump the pneumatic cylinder with air using a bike pump." No other testimony or documents in the record address how prosthetists generally feel about users having to occasionally "pump the pneumatic cylinder." Additionally, Mr. Sabolich has extensive ties to Otto Bock. Mr. Sabolich testified that he does everything that he can every day to keep his clinic and Otto Bock moving forward together and agreed to testify at this trial because Otto Bock does a lot for him so he tries to do a lot for Otto Bock. (CCFF ¶¶ 3344, 3347). His clinic has maintained a clinical partnership with Otto Bock for over five years, he beta-tests products for Otto Bock, and is involved in research projects with Otto Bock. (CCFF ¶¶ 3349-50, 3355-56, 3374-75).

591. [redacted]

Response to Finding No. 591

This proposed finding is incomplete and misleading because it omits that Freedom was [redacted] *See* Response to RPFF ¶¶ 583, 584. This proposed finding is also misleading to the extent that it implies that, at the time of the Merger, the Plié 3 was not closely competing with Otto Bock's C-Leg 4 and that customers were not benefitting from this competition through more favorable pricing and innovation. *See* Response to RPFF ¶ 580.

592. [redacted]

Response to Finding No. 592

This finding is incomplete, misleading, and contrary to the weight of the evidence. The proposed finding is contradicted by the weight of the evidence which shows that, contrary to Mr. Carkhuff's testimony, [redacted] *See*, *e.g.*, CCFF ¶ 1837 [redacted]; *see also* CCFF ¶¶ 1852, 1858, 1862, 1870). In fact, Freedom's Senior VP of Sales and Marketing, Jeremy Mathews, testified that, [redacted] (CCFF ¶1838). Thus, the assertion that Freedom would be unable to maintain Plié 3 sales is refuted by the Plie 3's actual performance.

The proposed finding is incomplete and misleading because it omits that Freedom was [redacted]

[redacted] *See* Response to RPFF ¶¶ 583, 584. This proposed finding is also misleading to the extent that it implies that, at the time of the Merger, the Plié 3 was not closely competing with Otto Bock's C-Leg 4 and that customers were not benefitting from this competition through more favorable pricing and innovation. *See* Response to RPFF ¶ 584.

593. [redacted]

Response to Finding No. 593

This proposed finding is incomplete and misleading. Respondent cites PX01464 in support of its proposition, but omits the next sentence that states [redacted] (PX01464 (Otto Bock) at 005 (*in camera*)). On the same page, Otto Bock's due diligence team concluded that [redacted] (PX01464 (Otto Bock) at 005 (*in camera*)). The sub-bullet point of the cited statement states that, [redacted] (PX01464 (Otto Bock) at 005 (*in camera*)).

This proposed finding is also misleading to the extent it implies that Otto Bock's due diligence team did not value the Plié 3 in its assessment of Freedom. To the contrary, Otto Bock stated in PX01464 that Freedom [redacted]

[redacted] (PX01464 (Otto Bock) at 008 (*in camera*)).

594. Scott Schneider strongly disagrees with the allegation that when the Plié 3 was launched, it offered similar or better functions than the C-Leg at a discounted price. (Schneider, Tr. 4359). Plié 3 had very little advancements over the Plié 2. (Schneider, Tr. 4359-4360). The only thing it offered was IP67 rating. (Schneider, Tr. 4360).

Response to Finding No. 594

Complaint Counsel does not disagree that Scott Schneider testified to that effect at trial, but his testimony is inaccurate and contradicted by his prior testimony in his investigational hearing as well as abundant other evidence in the record that demonstrates that when the Plié 3 launched, it had improved functions over the C-Leg 3 at a discounted price, and that there were significant advancements in the Plié 3 over the Plié 2. Freedom sought to differentiate the Plié 3 from the C-Leg 3, Otto Bock's then-current MPK product, so it introduced several innovative features in the Plié 3, including customized stumble recovery, variable speeds, full submersibility, interchangeable batteries, remote access, and real-time data display. (CCFF ¶ 1017; *see also* CCFF ¶¶ 1013-16, 1018-23). [redacted] (CCFF ¶¶ 1014, 1023). According to Maynard Carkhuff, Freedom's CEO when it launched the Plié 3 and now Chairman of Freedom, the Plié 3 was the new "industry standard" and [redacted] (CCFF ¶¶ 1012, 1021).

Scott Schneider's trial testimony is also belied by his prior testimony from his investigational hearing. When describing the "competition that C-Leg 4 faces from Plié 3," Mr. Schneider testified that "[t]he Plié 3 did a very nice job of entering the market with some additional user benefits that the C-Leg 3 did not have. The C-Leg 4 then responded with a few of those as well." (PX05010 (Schneider (Otto Bock) IHT at 115). In particular, Mr. Schneider testified that

the "Plié 3 emphasized water resistance heavily, which was a major step improvement over the C-Leg. The Plié also has a very aggressive team of sales that has fewer products with greater focus and very strong marketing. Plié also leveraged a very popular foot portfolio in combination with their microprocessor knee." (PX05010 (Schneider (Otto Bock) IHT at 116). Furthermore, Mr. Schneider testified that the "programming is easier" on the Plié making it easier to fit on an amputee, which was an improvement that Otto Bock made in their subsequent release of the C-Leg 4. (PX05010 (Schneider (Otto Bock) IHT at 117).

595. The Plié 3 has had very minor updates since its launch in 2014. (Testerman, Tr. 1172-1173).

Response to Finding No. 595

This proposed finding mischaracterizes Mr. Testerman's testimony, is contradicted by testimony from other Freedom executives, and is misleading. Mr. Testerman testified that "the Plié 3 has had a few minor modifications," while Respondent characterized the testimony as "very minor" in its proposed finding. (Testerman (Freedom), Tr. 1172-73). Mr. Testerman's testimony also is contradicted by testimony from other Freedom executives. For example, Eric Ferris, Freedom's VP of Marketing and Product Development, testified that there were several product improvements made to the Plié 3 since its launch related to faster programming, durability, and changing the frame of the MPK to a uniform body in 2016 and 2017. (Ferris (Freedom), Tr. 2320-23). Similarly, Freedom's CEO at the time, David Smith, testified that Freedom [redacted]

(CCFF ¶ 1832).

The proposed finding is misleading to the extent it suggests that Freedom was not working on any additional updates to the Plie 3. [redacted]

[redacted] *See* Response to RPFF ¶ 583.

596. The Plié 3 is more similar to a non-MPK than it is to the C-Leg 4, and is not a particularly close competitor to the C-Leg 4 given its difference in functionality, quality, and price. (Doug Smith, Tr. 6020; Sabolich, Tr. 5859-5860; Solorio, Tr. 1646; Kannenberg, Tr. 1981-82; [redacted] arkhuff, Tr. 619-620 (Similarities between the Plié and a sophisticated Non-MPK, like the Mauch, include that "both the Plié and the Mauch use a very sophisticated hydraulic cylinder that the resistance can be adjusted to provide different levels of resistance for different patient categories, be it activity levels or strength. And they control the swing and stance of the knee in a similar way to the Plié.").

Response to Finding No. 596

The portion of the proposed finding that the "Plie 3 is more similar to a non-MPK than it is to the C-Leg 4" is misleading and against the weight of the evidence to the extent it seeks to portray the Plié 3 as not being a true microprocessor knee that competes directly with Otto Bock's C-Leg in the U.S. MPK market. 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). For example, Eric Ferris, Freedom's Vice President of Marketing and Product Development, testified that the Plié 3 has microprocessor swing and stance control, and agreed that the microprocessor in the Plié 3 allows for a certain resistance level as an amputee is walking down a ramp, and the resistance level is adjustable and provides greater stability than a mechanical knee. (Ferris (Freedom) Tr. 2351, 2382)). Freedom documents and testimony clearly establish that the company views the Plié to be a swing and stance MPK, and recommends that customers seek reimbursement for it as such. (*See* CCFF ¶¶ 3064-67, 3069-72). For example, in Freedom's publicly available "Fact Sheet," it addressed "Ottobock Claims vs. Reality," clearly explaining 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." (PX08008 (Freedom) at 001). Documents and testimony further demonstrate that market participants—including prosthetists and competing prosthetics makers—consider the Plié to be an MPK, and insurers reimburse the Plié as a swing and stance MPK. (CCFF ¶¶ 3072-80; *see also* CCFF ¶¶ 3067-3070, 3074-3078, 3082) (clinics receive the same reimbursement for the Plié as they do for the C-Leg and both are reimbursed under L-Code 5856). This is confirmed by Respondent's other proposed findings. (*See, e.g.*, RPFF ¶ 783 [redacted]

The portion of the proposed finding that the Plié "is not a particularly close competitor to the C-Leg 4" is incorrect, misleading, and contradicted by copious evidence in the record that Freedom's Plié MPK and Otto Bock's C-Leg MPK competed intensely and directly with each other before the Merger. (CCFF ¶¶ 1008-1174). Dr. Kannenberg, who is cited in support of this finding, testified at trial that Freedom and Össur were the two most viable competitors against Otto Bock. (Kannenberg (Otto Bock) Tr. 1882). Ms. Solorio who is also cited in support of this finding, testified at trial that competition with Plié 3 was pressuring Otto Bock to lower prices of the C-Leg 4. (Solorio (Otto Bock) Tr. 1596). Numerous other individuals—including prosthetists, clinicians, and competitors, as well as employees of Respondent—have testified that the Plié is sold as a microprocessor knee, and competes directly with the C-Leg for sales, notwithstanding any differences in the functionality of the Plié and C-Leg. For example, [redacted] (PX05108 (Yates (Jonesboro) Dep. at 64-65) (*in camera*)). Mark Ford of P&O Associates testified that "C-Leg and the Plié knees are our clinicians' preference" for MPKs. (Ford (POA) Tr. 937); *see generally* (CCFF ¶¶ 754, 1016, 1056, 1083, 3083-85). Respondent's documents and

testimony clearly establish that Otto Bock and Freedom viewed the Plié and C-Leg to be direct competitors. *See* CCFF ¶¶ 1016, 3086-88. [redacted] (Ferris (Freedom) Tr. 2409 (*in camera*)).

The portion of the proposed finding that claims that the Plié and C-Leg differ in terms of functionality and quality also is contradicted by record evidence. Testimony from prosthetists demonstrates that the Plié offers comparable functionality to the C-Leg and other swing and stance MPKs, and market participants view the Plié as an MPK based on its functionality and reimbursement. (CCFF ¶¶ 3063-3088). There is also abundant evidence demonstrating the C-Leg and Plié are more similar in terms of functionality and quality than the Össur Rheo. As Össur's Executive Vice President of R&D, Kim De Roy, testified at trial, Össur's MPKs use a functionally different technology than the C-Leg 4 or Plié 3, which are much more similar to each other than to the Rheo 3. (CCFF ¶¶ 1480-82) (describing "magnetorheologic technology"); (CCFF ¶¶ 1483-85) (market participant testimony on how the Rheo's technology and functionality differ from the C-Leg 4 and Plié 3). Moreover, many customers have safety and reliability concerns about Össur's MPK technology. (CCFF ¶¶ 1493-1516). As Manar Ammouri, Freedom's Senior Product Manager, explained, when the Rheo "goes into dead battery mode, the knee goes into free swing, which means it's loose, it's not stable." (CCFF ¶ 1495). For this reason, Keith Senn, COPC's President of Kentucky/Indiana Operations, testified that his company "steer[s]" patients away from the Rheo and to the Plié and C-Leg because the Rheo "increas[es] your risk of falls which is the whole purpose of the MPK." (CCFF ¶ 1505); *see also* (CCFF ¶ 1502) (Owner and Clinical Director of Scott Sabolich Prosthetics and Research testified at trial that in February 2015 "one of [his clinic's] patients [fell] on a Rheo Knee, and it broke literally in half"); (CCFF ¶¶ 1501, 1504)

(additional third-party testimony on safety concerns with the Rheo**).** [redacted]

[redacted] (CCFF ¶ 1492); *see also* (CCFF ¶ 1499); (CCFF ¶ 1500) (Freedom's Senior Product Manager testified that customers have told her that the Rheo is "heavier" than other MPKs, adding that "[t]he heavier the product," the fewer "patients you can put it on").

597. Prosthetists must make manual adjustments to set up the Plié. (Ell, Tr. 1709).

Response to Finding No. 597

The proposed finding is contradicted by Respondent's own documents that describe the Plié 3 as having "[a]djustable modes for special activities" and "allows the *user* to make manual adjustments to adapt to a wide range of activities with different settings." (CCFF ¶ 1108) (emphasis added).

Neither the proposed finding, nor the cited testimony, describe what the significance is, if any, of "manual adjustments" to set up the Plie. This proposed finding is misleading to the extent that it implies that other MPKs do not require prosthetists to make adjustments in order to set up the device for the patient. *See* RPFF ¶¶ 195, 415 (indicating that prosthetists must adjust the software settings of the C-Leg 4 for patients, and that providing an MPK is associated with "follow-up appointments, scheduled annual service appointments, [and] adjustments to the MPK"). To the extent Respondent is implying that the Plié 3 is not an MPK, or an MPK that does not closely compete with Otto Bock's C-Leg 4, that is contradicted by the weight of the evidence. *See* Response to RPFF ¶ 596.

598. Freedom believes that the Plié 3 is really at the end of its design cycle and Freedom feels that there is very little more that we can do to improve that product," [redacted]

[redacted]

Response to Finding No. 598

This proposed finding is incomplete and misleading for the same reasons articulated in Responses to Proposed Findings ¶¶ 583 and 592. Specifically, [redacted] *See* Responses to RPFF ¶¶ 583, 592.

599. [redacted]

Response to Finding No. 599

The proposed finding is unfounded to the extent that its categorization of the Plié is premised only on a single piece of self-serving testimony from a single source—Freedom's Dr. Prince. This proposed finding is misleading and against the weight of the evidence to the extent it seeks to portray the Plié 3 as not being a true microprocessor knee that competes directly with Otto Bock's C-Leg in the U.S. MPK market. *See, e.g.*, Responses to RPFF ¶¶ 580, 596. The record is clear that Freedom considers the Plié to be an MPK with swing and stance functionality. *See, e.g.*, Responses to RPFF ¶¶ 580, 596.

600. [redacted]

Response to Finding No. 600

The proposed finding is misleading and against the weight of the evidence to the extent it seeks to portray the Plié 3 as not being a true microprocessor knee that competes directly with Otto Bock's C-Leg in the U.S. MPK market. *See, e.g.*, Responses to RPFF ¶¶ 580, 596.

601. The issues with the Plié 3's pneumatic air chamber changing pressure and requiring pumping will increase the user's chance of stumbling. (Schneider, Tr. 4394). The swing phase of the Plié 3 is erratic and not controlled by the microprocessor. (Schneider, Tr. 4397).

Response to Finding No. 601

This proposed finding is unsupported and contrary to the evidence. The proposed finding is unsupported because Respondent cites only to a single Otto Bock executive for the claims in the finding but does not cite to any Freedom executives, clinic customers, or any other prosthetists. There is no other evidence in the record supporting Mr. Schneider's assertions. To the contrary, Freedom's executives claim that the Plié 3 offers significant safety benefits, (CCFF ¶¶ 657-73), and numerous prosthetists and clinic customers view the Plié 3 as a safe and appropriate MPK for their customers. *See* (CCFF ¶¶ 1147-74).

602. If you have a Plié 3, you need to carry around a pump with you when you leave home. (Schneider, Tr. 4397).

Response to Finding No. 602

This proposed finding is unsupported and irrelevant. Respondent cites only to a single Otto Bock executive for the proposed finding. Notably, Respondent does not cite a Freedom executive well-trained in the Plié 3, or any clinic customers or prosthetists. Neither the finding itself or cited testimony explain what the significance is, if any, on competition between the Plié and C-Leg.

2. Freedom's Recommendation That Plié 3 Is An L5856 Knee Is Improper

603. Maynard Carkhuff testified regarding the difference between Plié 3 and other MPKs: "our microprocessor will switch the product from stance to swing. Other products will control the actual resistance in a continuous manner throughout a range. The Plié microprocessor does not do that. The Plié basically is triggering the knee from stance to swing." (Carkhuff, Tr. 335).

Response to Finding No. 603

The proposed finding is misleading and against the weight of the evidence to the extent it seeks to portray the Plié 3 as not being a true microprocessor knee that competes directly with Otto Bock's C-Leg in the U.S. MPK market. *See, e.g.*, Responses to RPFF ¶¶ 580, 596.

604. The Plié 3's coding recommendation for L5856 swing and stance microprocessor control is not proper and is costing the U.S. taxpayer money. (Schneider, Tr. 4383). Its coding should be downgraded and reimbursement should be less by two to six thousand dollars per knee. (Schneider, Tr. 4384). [redacted]

Response to Finding No. 604

The proposed finding is misleading, irrelevant, and contradicted by the weight of the evidence. To the extent Respondent seeks to portray the Plié 3 as not being a true microprocessor knee that competes directly with Otto Bock's C-Leg in the U.S. MPK market, this is misleading and contrary to the evidence. *See, e.g.*, Responses to RPFF ¶¶ 580, 596. Mr. Schneider and Mr. Sabolich's testimony is contradicted by copious evidence in the record. Several Freedom witnesses testified that the Plié 3 is an MPK, (CCFF ¶ 3073), with functionality that competes directly against Otto Bock's C-Leg 4, (CCFF ¶¶ 3063-3078). Other MPK manufacturers also view the Plié 3 as an MPK that competes directly with the C-Leg and their own MPKs. (CCFF ¶ 754, 758). And clinics confirm that the Plié 3 is an MPK that competes directly with the C-Leg and other MPKs. (CCFF ¶¶ 1147-1162). Moreover, Otto Bock's internal documents consistently identify the Plié, along with other swing and stance MPKs, as the C-Leg's primary competitors.

(CCFF ¶ 3088). Finally, 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 ¶¶ 3067-3070, 3074-3078, 3082) (clinics receive the same reimbursement for the Plié as they do for the C-Leg). [redacted] (CCFF ¶ 3079). Thus, Respondent's proposed finding concerning the appropriateness of the Plié 3 coding recommendation is not only refuted by the trial record, but also irrelevant because Freedom has competed effectively in the U.S. MPK market with its product for years.

605. In addition, Mr. Sabolich's testimony is irrelevant and undermined by his statements regarding doing everything that he can every day to keep his clinic and Otto Bock moving forward together and agreed to testify at this trial because Otto Bock does a lot for him so he tries to do a lot for Otto Bock. (CCFF ¶¶ 3344, 3347). His clinic has maintained a clinical partnership with Otto Bock for over five years, he beta-tests products for Otto Bock, and is involved in research projects with Otto Bock. (CCFF ¶¶ 3349-50, 3355-56, 3374-75).The Plié is really more of a hybrid knee, which is basically just a mechanical swing and stance controlled knee with an MP-switch. (Schneider, Tr. 4351; Kannenberg, Tr. 1881).

Response to Finding No. 605

The proposed finding is unclear, unsupported, and misleading. The proposed finding is vague as to the meaning of "really more of a hybrid knee." The only cited evidence in support of the portion of the finding that the Plié is "just a mechanical swing and stance controlled knee with an MP-switch" is the testimony of two Otto Bock executives. In an attempt to undermine its competitor back in 2015, Otto Bock raised the same, tired claims that the Plié 3 is not a microprocessor-controlled swing and stance knee, but Freedom successfully rebutted these claims in the marketplace. (CCFF ¶ 994). For example, in Freedom's publicly available "Fact Sheet," it addressed "Ottobock Claims vs Reality," clearly explaining 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).

The proposed finding is misleading to the extent it implies that the Plié 3 is not a real MPK.

606.

Response to Finding No. 606

The proposed finding is unsupported and misleading. The proposed finding is unsupported because the cited testimony does not reference "down-coding" the Plié 3 in any way. The proposed finding is misleading to the extent it implies that the Plié 3 is not a properly coded swing and stance MPK.

[redacted]

3. There Is Very Little Evidence Of Head-To-Head Competition Between The C-Leg And The Plié

607. Prosthetic industry participants consider Ottobock's C-Leg 4 to be the gold standard and market-leader in the industry, including distributors, prosthetists, physicians, and other manufacturers. [redacted] Oros, Tr. 4794-95; Blatchford, Tr. 2144-2145; [redacted] Ell, Tr. 1797-98; De Roy, Tr. 3591 (Össur believes that C-Leg is the market leader because they were first, and "because it's a really good knee)).

Response to Finding No. 607

Complaint Counsel does not disagree that Otto Bock's C-Leg 4 is a market leading product in the U.S. market for MPKs. The proposed finding is misleading, however, to the extent it implies that Otto Bock's C-Leg 4 does not compete closely with Freedom's Plié. [redacted] In addition, the proposed finding

is partially unsupported, as not all of the cited evidence refers to the C-Leg as a "gold standard." In particular, Mr. Oros's testimony does not refer to the C-Leg 4 as the "gold standard," only that it created the MPK market in the U.S. (Oros (Scheck & Siress) Tr. 4794-95). Mr. Blatchford, the Executive Chairman of Endolite, does not refer to the C-Leg 4 as the "gold standard," but testified that it is the market leader and a "leading product over a number of years." (Blatchford (Endolite) Tr. 2144-55). Mr. Ell does not refer to the C-Leg 4 as the "gold standard" or "market leader" in the cited testimony. (Ell (Mid-Missouri O&P) Tr. 1797-98). While Mr. De Roy refers to the C-Leg 4 as the "current leader in MPKs," he does not refer to it as the "gold standard." (De Roy (Össur) Tr. 3590-91).

608. Maynard Carkhuff testified that Ottobock introduced the first swing and stance MPK to the US Market in 1998 and there was a period of time when Ottobock sold the only available swing and stance MPK in the United States, the C-Leg. (Carkhuff, Tr. 616).

Response to Finding No. 608

Complaint Counsel has no specific response.

609. The launch materials for the C-Leg 4 focused more on Össur and Endolite, than on the Plie. (Schneider, Tr. 4344, 4434-4436). The only functionality that the C-Leg has incorporated in response to the Plié is its IP67 rating. (Solorio, Tr. 1642-6643). Ottobock markets the C-Leg 4 as weatherproof. (Solorio, Tr. 1641). Freedom markets the Plié 3 as waterproof. (Solorio, Tr. 1641-42).

Response to Finding No. 609

The portion of the proposed finding that "[t]he launch materials for the C-Leg 4 focused more on Össur and Endolite, than on the Plie" is unsupported and contrary to the evidence. Notably, this portion of the proposed finding only cites to discrete trial testimony from one single Otto Bock executive, Scott Schneider, rather than any of the C-Leg 4 launch materials that are in the record**.** [redacted]

[redacted]

[redacted] Specifically, prior to the launch of the C-Leg 4, a cross-functional team comprised of Otto Bock sales, marketing, clinical, and service employees created launch materials that were circulated among top U.S. and global Otto Bock executives, including Bradley Ruhl, then President of Otto Bock Healthcare North America, who led the C-Leg 4 launch in the United States. (CCFF ¶¶ 1035-36). [redacted]

[redacted] Otto Bock's C-Leg 4 launch plans also included Otto Bock's estimates 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). [redacted]

This portion of the proposed finding also is unsupported by even the testimony by Mr. Schneider that it cites. Mr. Schneider's testimony is devoid of any indication that "[t]he launch materials for the C-Leg 4 focused more on Össur and Endolite, than on the Plie." [redacted]

The portion of the proposed finding that "[t]he only functionality that the C-Leg has incorporated in response to the Plié is its IP67 rating" is misleading and contrary to the evidence to the extent that it implies that Otto Bock was not competing against Freedom's Plié 3 with its C-Leg 4 on the basis of innovation. [redacted]

[redacted] With regard to the C-Leg 4 launch, the Otto Bock launch materials touted innovative new

features of the C-Leg 4, including a lower system height, new carbon frame construction, integration of all sensors, Bluetooth compatibility, knee-bending angle of 130 degrees, and weatherproofing. (CCFF ¶ 1038). [redacted]

Otto Bock's launch materials contrasted the C-Leg 4's features against the Plié 3's features, noting several advances over the Plié 3 including a greater knee flexion angle, longer battery life, Bluetooth compatibility, and protective cover. (CCFF ¶ 1049).

Freedom executives similarly recognized that Otto Bock was targeting the features of the Plié 3 with its launch of the C-Leg 4. [redacted]

610. Freedom admits that the Plié 3 should not contact salt or chlorinated water. (Ferris, Tr. 2330). Freedom's use of the word waterproof to describe an IP-67 rated product confuses practitioners. (Solorio, Tr. 1642). The "rule sets" in Ottobock MPKs are the brains in the computer which tells the valves to open and close to control the variance and the resistance of the valves. (Schneider, Tr. 4347).

Response to Finding No. 610

Complaint Counsel does not disagree that Freedom admits that the Plié 3 should not contact salt or chlorinated water, and adds that the C-Leg 4 also should not contact salt or chlorinated water. (Ferris (Freedom) Tr. 2330).

The proposed finding is unsupported because it states that Freedom's use of the word waterproof "confuses practitioners," but does not cite to a single practitioner for support. Instead, Respondent cites testimony from a single Otto Bock executive, Cali Solorio. The proposed finding also mischaracterizes Ms. Solorio's testimony because she suggested that it is Otto Bock's marketing tactics, not Freedom's, that confuse practitioners. Specifically, she testified that, "But because Freedom was using the waterproof term, when we came out with and chose to go the weatherproof route to create differentiation between X3 and C-Leg, it really confused practitioners." (Solorio (Otto Bock) Tr. 1642).

Complaint Counsel has no specific response to the statement "[t]he 'rule sets' in Ottobock MPKs are the brains in the computer which tells the valves to open and close to control the variance and the resistance of the valves."

611. The Ottobock C-Leg 4 is the market leader in the United States because "it is a very good product." (Blatchford, Tr. 2144). The C-Leg is considered a very reliable knee. (Blatchford, Tr. 2145). The launch of the C-Leg 4 had an immediate impact on the sales of Össur. (De Roy, Tr. 3679-3680).

Response to Finding No. 611

To the extent the term "market leader in the United States" refers to the MPK with the most sales in the United States, Complaint Counsel agrees. The proposed finding is misleading to the extent that it implies the launch of the C-Leg 4 had a greater impact on the sales of Össur's MPKs than it did on Freedom's MPKs. [redacted]

[redacted] One member of Freedom's board of directors noted that "the impact of OB's new C-leg launch [] correlates exactly with the decline in our Hangar [sic] knee business." (CCFF ¶ 1073). [redacted]

612. The entire prosthetics industry benefits from the clinical studies that Ottobock does. (Kannenberg, Tr. 1933).

Response to Finding No. 612

The proposed finding is unclear and incomplete. The proposed finding is unclear because it does not refer to which (or what types) of clinical studies Otto Bock performs from which the prosthetics industry may benefit. The proposed finding also is unclear and incomplete in that it does not explain how the industry benefits from Otto Bock's studies.

Complaint Counsel agrees that the prosthetics industry benefits from clinical studies performed by Otto Bock, as well as Freedom, that demonstrate safety and health benefits from MPKs over mechanical knees. Both Freedom and Otto Bock routinely use published clinical studies to educate their customers on the benefits of MPKs over non-MPKs and to market their products. For example, Freedom's website includes a "Microprocessor Knee Literature Review" that collects and summarizes academic articles "in an effort to understand where the research in

[MPK] has been focused and to determine where significant outcomes exist." (CCFF ¶ 672). The materials tout the conclusions of MPK clinical studies, stating that, "research has been able to show that the [MPK] user feels more stable on stairs, inclines, and uneven terrain, while reducing the cognitive demand required for walking." (CCFF ¶ 672). [redacted] Prosthetists consider these clinical studies when deciding whether to fit a patient with an MPK or a mechanical knee, and in practice, prosthetists testify that they observe the clinical benefits of MPKs in the patients they fit with them. (CCFF ¶¶ 618-620).

613. Over the years, Ottobock's MPKs have been subjected to various clinical studies, over sixty. (Schneider, Tr. 4360).

Response to Finding No. 613

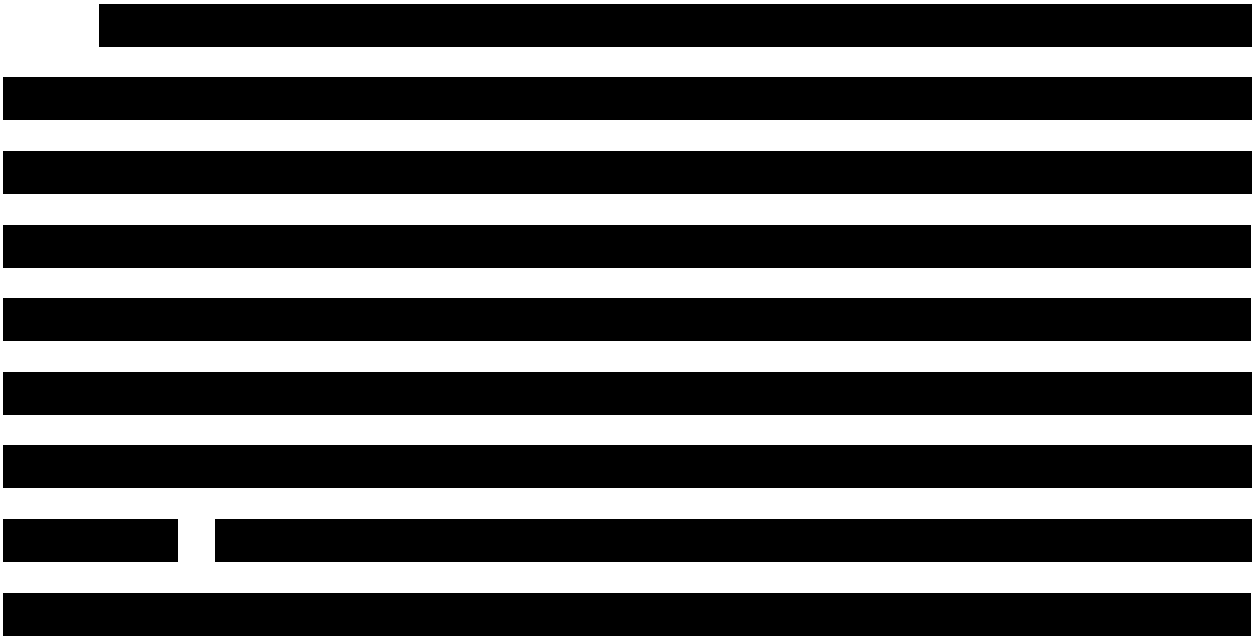
Complaint Counsel has no specific response.

614. Those clinical studies reveal that some of Ottobock's MPKs are safer and require less energy than non-MPKs. (Schneider, Tr. 4360-4361).

Response to Finding No. 614

Complaint Counsel agrees that some of Otto Bock's MPKs, including the C-Leg, have been demonstrated to be safer and require less energy than non-MPKs in clinical studies. The proposed finding is misleading to the extent it suggests that *only* Otto Bock MPKs have been demonstrated to be safer and require less energy than non-MPKs in clinical studies. In fact, the numerous clinical

studies show that MPKs in general, not just Otto Bock's MPKs, are safer and require less energy than non-MPKs. For example, one recent clinical study comparing the benefits of MPKs over mechanical knees, called the RAND report, concluded that "compared with NMPKs [non-microprocessor knees], MPKs are associated with meaningful improvement in physical function and reductions in incidences of falls and osteoarthritis." (CCFF ¶ 635). Published in 2017, the study found that "there is strong evidence suggesting that compared with [non-microprocessor knees], MPKs are associated with improvements in walking speed, gait symmetry, and the ability to negotiate obstacles in the environment[.]" (CCFF ¶¶ 632, 636). As a result of these improvements, patients wearing MPKs experience "fewer falls and lower incidences of osteoarthritis in the intact limb." (CCFF ¶ 637). MPK manufacturers find the RAND report valuable and reliable. For example, Maynard Carkhuff, Freedom's Chairman and former CEO, agreed at trial that the importance of the RAND report includes establishing that MPKs are safer than mechanical knees and provide greater stability for patients, which together helps lower healthcare costs associated with falls. (CCFF ¶ 638).



[redacted]

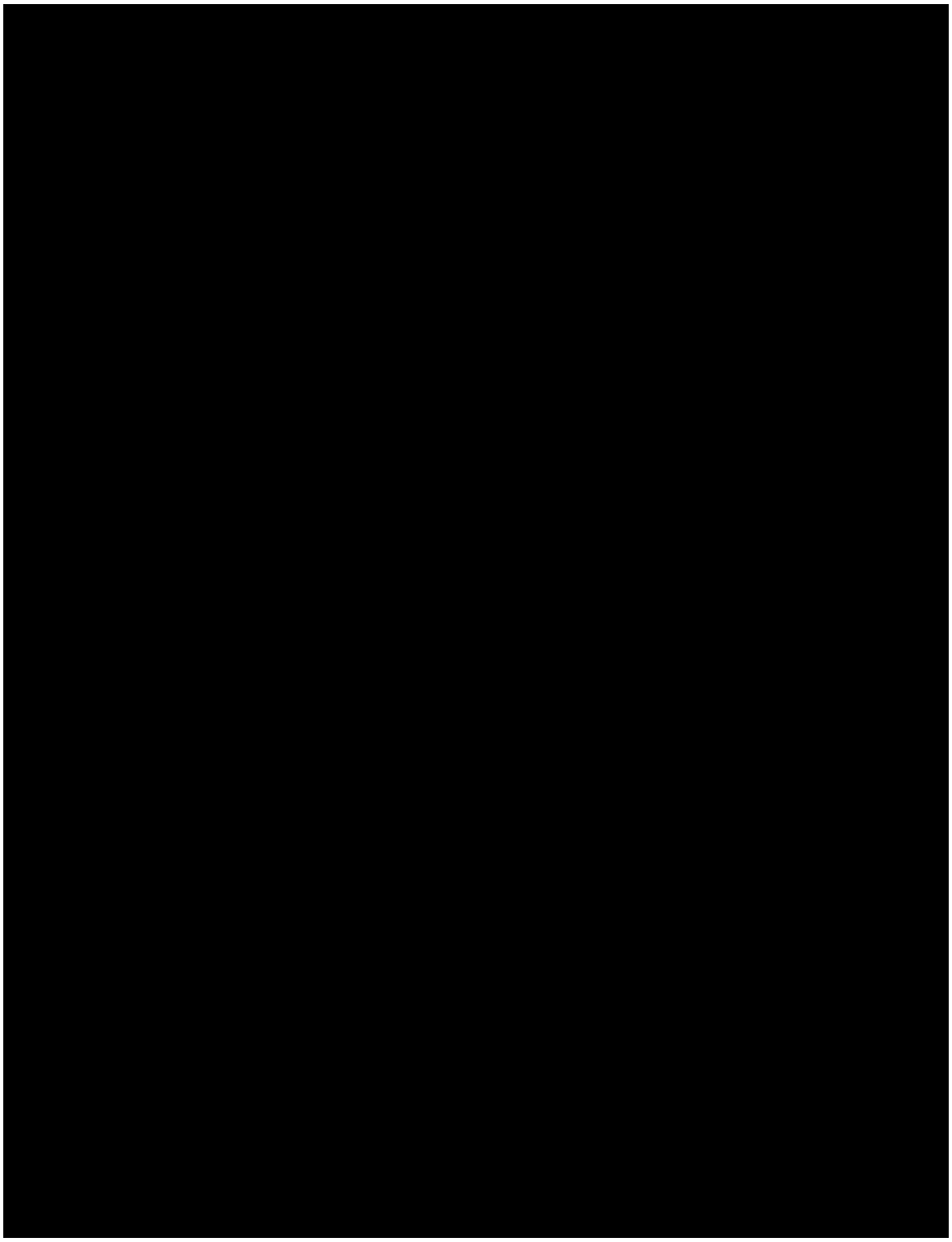
Numerous other peer-reviewed studies prove the many safety and performance benefits that MPKs provide amputees over mechanical knees. (CCFF ¶¶ 641-45). Dr. Kaufman testified that the key findings of his research on MPKs "are a recurring theme that the patients have more safety, they have improved mobility, and they have better quality of life" when they wear an MPK instead of a mechanical knee. (CCFF ¶ 646). Jason Kahle of the University of Southern Florida and Prosthetics Design & Research similarly testified that, based on his research of MPKs, the reduction in stumbles and falls is "the biggest benefit of a microprocessor knee" and is "the reason why microprocessor knees are paid for by both CMS and most insurance companies." (CCFF ¶ 648).

615. PX01499 was created in response to the misleading and false advertising claims being made by Freedom related to the functionality of the Plié 3. (Schneider, Tr. 4376-77).

Response to Finding No. 615

The proposed finding is incorrect and contradicted by the evidence because it wrongly suggests that Freedom has made misleading and false advertising claims related to the functionality of the Plié 3. Respondent does not cite—and the record is devoid of—any evidence that Freedom has ever made misleading or false advertising claims about the Plié 3, aside from the testimony of

Otto Bock's own executive, Scott Schneider. When testifying about PX01499 at trial, Mr. Schneider acknowledged that one way manufacturers of prosthetics compete is through marketing claims. Mr. Schneider explained that PX01499 is an internal presentation for Otto Bock's sales force to assist it in responding to certain marketing claims made by Freedom about the Plié 3. (Schneider (Otto Bock) Tr. 4728-29). Freedom, in turn, generated a response to these criticisms by Otto Bock. As depicted below, Freedom published on its website a document titled "Plié 3 Microprocessor Knee Fact Sheet" that compares the Plié 3's functions directly to Otto Bock's C-Leg 4. (CCFF ¶ 994).



Freedom's Plié 3 fact sheet identifies seven different Otto Bock claims about the Plié 3 and then explains the "reality" of why Otto Bock's claims are incorrect. For example, Freedom responded

to Otto Bock's claims in PX01499 that the Plié 3's IP67 rating is misleading, (PX01499 (Otto Bock) at 025), by asserting in its fact sheet that "Plié 3 is rated IP67, and therefore weatherproof and submersible up to 3 feet [in water] for 30 minutes." (CCFF ¶ 994). Otto Bock also claimed that Freedom's Plié stumble recovery capabilities are misleading, (PX01499 (Otto Bock) at 015-17); Freedom responded in its fact sheet by stating that "[i]n various head to head clinical settings comparison, Plié has been the preferred choice by patients and prosthetists." (CCFF ¶ 994). Freedom's fact sheet thus illustrates how Freedom rebutted the very criticisms that Mr. Schneider was rehashing about the Plié 3 at trial. Further, the invalidity of Mr. Schneider's claims about Freedom's Plié 3 marketing claims is contradicted by the Plie 3's sustained success in the U.S. market as one of the top three selling MPKs. (CCFF ¶ 964).

The Plié 3 fact sheet also highlights a number of areas in which the Plié 3 and C-Leg 4 have comparable functions. For example, the Plié 3 Fact Sheet shows that both the Plié 3 and C-Leg 4 have real-time swing and stance control, reliable stance release on challenging surfaces, clinically proven stumble recovery, waterproof with its IP67 rating, adjustable modes for special activities, and no-charge reimbursement support. (CCFF ¶ 995).

616. Össur and Endolite have not made misleading and false advertising claims about the functionality of the Rheo and Orion, respectively, therefore Ottobock has not created similar PowerPoints targeting their products. (Schneider, Tr. 4377).

Response to Finding No. 616

The proposed finding is misleading and unsupported. The proposed finding is unsupported because it suggests that the reason Otto Bock created "PowerPoints" about Freedom was because Freedom allegedly made misleading and false advertising claims. The weight of the evidence actually shows—as Mr. Schneider acknowledged at trial—that one way manufacturers of prosthetics compete is through marketing claims and that PX01499 is an internal presentation for Otto Bock's sales force to assist it in responding to certain marketing claims made by Freedom

about the Plié 3. (Schneider (Otto Bock) Tr. 4728-29). Moreover, the weight of the evidence shows that the actual reason for Otto Bock's creation of the document was likely to combat the impact of the Plié 3 on Otto Bock's MPK sales. Specifically, after the Plie 3 launched, Otto Bock's MPK sales decreased and Otto Bock responded with a variety of pricing and marketing responses. (CCFF ¶¶ 1027-1033).

The proposed finding is misleading to the extent that it implies that Freedom actually made misleading or false advertising claims about the Plié 3. The record is devoid of any credible evidence to support such an assertion. (*See* Response to RPFF ¶ 615.)

4. [redacted]

617. [redacted]

Response to Finding No. 617

[redacted]

[redacted]

618. Blatchford considers the Orion 3 to be the closest competitor to the C-Leg 4. (Blatchford, Tr. 2213:25-2214:2). Blatchford considers the Orion 3 to be functionally and qualitatively as good as the C-Leg 4. (Blatchford, Tr. 2214).

Response to Finding No. 618

The proposed finding is incomplete for the same reasons that Respondent's proposed finding number 617 is incomplete. (*See* Response to RPFF ¶ 617). Additionally, the proposed finding is misleading to the extent that it suggests that the Orion 3 *is* functionally and qualitatively as good as the C-Leg 4 or the Plié 3. [redacted]

Customers also view the Orion as an inferior MPK compared to the C-Leg or Plié. For example,

Mr. Senn, President of Kentucky/Indiana Operations at COPC, testified that COPC "feel[s] that the quality of the Plié or back up to the C-Leg 4 is greater than the Endolite knee." (CCFF ¶ 1539). He also previously testified, in March 2018, that COPC practitioners "do not feel the knee functions as well as the Freedom or Ottobock knees at this time." (CCFF ¶ 1539). Jeff Sprinkle, the co-owner of Sprinkle Prosthetics, testified that he has not fit an Endolite Orion MPK on a patient in seven to eight years for "two reasons." (CCFF ¶ 1544). He listed the reasons as "I didn't like the function of it. And the programming, for lack of a better word, seemed kind of Mickey Mouse, to me." (CCFF ¶ 1544).

619. Blatchford considers the Orion 3 to be functionally superior to Freedom's Plié 3. (Blatchford, Tr. 2214). "Because the stance control mechanism on the Plié is basically a simple – the stance control mechanism on the Plié is a simple on/off lock, it will either lock or it will be free to move, whereas the stance control on the Orion 3 can vary the resistance from a low resistance to a high resistance to a lock, hence you have more control. And also the swing phase on the Orion 3, there is greater control in the way it works than on the Plié." (Blatchford, Tr. 2214).

Response to Finding No. 619

Complaint Counsel does not disagree that the proposed finding accurately quotes Mr. Blatchford's testimony. However, the proposed finding is contrary to the weight of the evidence and misleading to the extent it implies that the Orion 3 actually is functionally superior to Freedom's Plié 3. Respondent only relies on the testimony from Endolite's own Executive Chairman, Stephen Blatchford. Notably, Respondent does not cite testimony from a single MPK customer to support this proposed finding. Customers, however, testified that the Orion 3 is not viewed as a functionally superior product to the Plié 3. For example, Keith Senn, President of Kentucky/Indiana Operations at COPC, testified that COPC "feel[s] that the quality of the Plié or back up to the C-Leg 4 is greater than the Endolite knee." (CCFF ¶ 1539). He also previously testified, in March 2018, that COPC practitioners "do not feel the knee functions as well as the

Freedom or Ottobock knees at this time." (CCFF ¶ 1539). Similarly, Jeff Sprinkle, the co-owner of Sprinkle Prosthetics, testified that he hasn't fit an Endolite Orion MPK on a patient in seven to eight years for "two reasons." (CCFF ¶ 1544). He listed the reasons as "I didn't like the function of it. And the programming, for lack of a better word, seemed kind of Mickey Mouse, to me." (CCFF ¶ 1544).

Mr. Blatchford's claim about the alleged superiority of the functionality of the Orion compared to the Plié 3 is further undermined by the market share data, which reflects customers' strong preference for the Plié over the Orion. [redacted]

This proposed finding is also misleading to the extent it implies that Endolite could constrain the Merger's likely anticompetitive effects. [redacted] In addition, [redacted]

[redacted] Although Endolite's MPK sales have improved slightly since the launch of the Orion 3 in September 2016, many prosthetic clinics remain wary of its product and its service. (CCFF ¶ 1539) (Keith Senn, COPC's President of Kentucky/Indiana Operations, testified at trial that its practitioners "feel that the quality of the Plié or back up to the C-Leg 4 is greater than the Endolite knee"); (CCFF ¶ 1540) (Mark Ford, the President and Managing Partner of POA, testified at trial that it is "more challenging" to get timely support from Endolite because they "don't have as much support staff … don't have as large a sales force, [and] they have far fewer clinicians"). Going forward, [redacted]

620. A transfemoral amputee would find the Orion 3 an easier knee to work with, it adapts better to the terrain, and it is just generally overall nice. (Blatchford, Tr. 2214-2215).

Response to Finding No. 620

The proposed finding is unclear, unsupported, and misleading. It is unclear because neither the proposed finding or cited testimony sheds any light on what the phrases "easier knee to work with" or "it is just generally overall nice" means. The proposed finding is unsupported because it purports to state what a "transfemoral amputee would find," but only cites to the testimony of Stephen Blatchford, the Executive Chairman of Endolite, rather than to testimony of one of the numerous prosthetists that have testified in this matter.

The proposed finding is misleading and unsupported to the extent it implies that the Orion is viewed as functionally superior to the Plié 3. (*See* Responses to RPFF ¶¶ 618-619). The proposed finding also is misleading to the extent it implies that Endolite could constrain the Merger's likely anticompetitive effects. (*See* Response to RPFF ¶ 619).

621. Endolite's Orion 3 does not have a large opening in the back of the knee like Freedom's Plié 3. (Blatchford, Tr. 2219).

Response to Finding No. 621

The proposed finding is unclear and misleading. The proposed finding is unclear because neither the proposed finding, nor the cited testimony, identify what significance, if any, the unidentified opening in the back of the knee has on the use of the Freedom MPK. Absent any evidence in the record about the significance of this opening, it is mere speculation whether the opening on the back of the Plié has any impact on the functionality or attractiveness of the Plié, and if so, whether the opening has a positive or negative impact. To the extent the proposed finding implies that the Endolite Orion is functionally superior to the Plié, the weight of the evidence demonstrates that the Orion is a functionally inferior MPK. (*See* Response to RPFF ¶ 619).

622. One of the design criteria for both the Endolite Orion 3 and Linx was to increase the stability of the knee because Endolite felt, from feedback from its customers, that the previous versions weren't as stable as Endolite's main competitor, the C-Leg 4. (Blatchford, Tr. 2219). So Orion 3 includes something which is called stance support mode so that when the amputee is not walking, the limb will effectively lockup and be stable. (Blatchford, Tr. 2219-2220).

Response to Finding No. 622

[redacted]

[redacted]

The portion of the proposed finding that suggests that Endolite improved the stability of the Orion is unclear. Although the proposed finding claims that the Orion 3 included an added "stance support mode" feature, the finding does not specify how much it improved the Orion 3's stability and whether the Orion 3 is now as stable as the C-Leg 4. The finding only cites to the testimony of Endolite's Executive Chairman and lacks any citation to testimony from prosthetists or clinic customers confirming that Endolite improved the stability of the Orion 3. [redacted]

623. The sensors in the Orion 3 and Linx have also been upgraded. (PX03176 at 10; Blatchford, Tr. 2220-2221). Previously, the Orion 2 just had a sensor which registered the weight going through the knee and a sensor which registered how much the knee had flexed, whereas in the Orion 3 it's been replaced by what we call an IMU, which will actually – will tell the knee the position in space the knee is at, where it is, whether it's flexed, and so on, and that gives the control unit more information about what the knee is doing. (PX03176 at 10; Blatchford, Tr. 22202220-2221 [sic]).

Response to Finding No. 623

The proposed finding is unclear because it does not explain what significance, if any, the upgrade in the sensors has on the Orion 3's functionality and performance other than that the sensors "gives the control unit more information." The finding only cites to the testimony of Endolite's Executive Chairman and lacks any citation to testimony from prosthetists or clinic customers confirming that the upgrade of the Orion 3's sensors is meaningful. Sales and market

share data, as well as customer testimony, show a lack of market acceptance of the Orion 3 despite this alleged improvement. (*See* Response to RPFF ¶¶ 619, 622). This proposed finding is also misleading to the extent it implies that the Orion 3 is functionally superior to the Plié 3. (*See* Response to RPFF ¶ 619).

624. The hybrid cylinder in the Orion 3 and Linx was also improved. (PX03176 at 10; 2221). "And the improvement is that we've spent quite a lot of time on the seals so that the unit is more reliable, it leaks less, and can actually deal with higher pressures within the hydraulic element of it." (Blatchford, Tr. 2221). The Orion 3, nor its predecessor versions, does not require an external pump to set the resistance level in the swing phase of the knee. (Blatchford, Tr. 2221).

Response to Finding No. 624

This proposed finding is misleading to the extent it implies that the Orion 3 is functionally superior to the Plié 3. (*See* Response to RPFF ¶ 619). The proposed finding that "[t]he Orion 3, not its predecessor versions, does not require an external pump to set the resistance level in the swing phase of the knee" is also irrelevant.

625. Orion 3 also added weatherproofing. (PX03176 at 10; 2221). The Orion 3 can now work outside in the rain or if it gets splashed with water. (PX0376-10; 2221-2222). There is no particularly consistent set of definitions surrounding the terms weatherproof and waterproof; what Endolite means is that the Orion 3 can be worn in adverse weather conditions but you cannot swim with it. (Blatchford, Tr. 2223-2224). The Orion 3 is also dustproof. (Blatchford, Tr. 2225).

Response to Finding No. 625

Complaint Counsel does not disagree with the portion of the proposed finding that the Orion 3 added weatherproofing, that a user cannot swim with the Orion 3, or that the Orion 3 is dustproof. However, the portion of the proposed finding stating that there "is no particularly consistent set of definitions surrounding the terms weatherproof and waterproof" is unsupported, contradicted by the weight of the evidence, and misleading to the extent it suggests that Endolite's Orion 3 has comparable water resistance to the Plié 3 and C-Leg 4. Freedom's Plié 3 was the first

waterproof MPK, and as a result, Otto Bock and Össur responded with a waterproof solution of their own. (CCFF ¶¶ 1020, 1164). This waterproof feature was particularly attractive to MPK customers. (CCFF ¶ 1020). With regards to the Plié 3, "waterproof" means that the MPK is "submersible up to 3 feet [of water] for 30 minutes." (CCFF ¶ 1107; *see also* CCFF ¶ 1102). In contrast to the Plié, C-Leg 4, and Össur Rheo, the Orion is only weatherproof, meaning that a user can wear it "in adverse weather conditions" but cannot "go swimming in it." (Blatchford (Endolite) Tr. 2223-2224).

626. The Orion 3 also offers intuitive software, which is software that is easy to use. (PX03176 at 10; Blatchford, Tr. 2226). Endolite has recently launched some apps so users can manipulate the programming of the Orion 3 with their smart phone. (Blatchford, Tr. 2226).

Response to Finding No. 626

This proposed finding is unclear and misleading. It is unclear what "manipulate the programming" means, and what benefit, if any, these apps provide to Orion 3 users. The proposed finding is misleading to the extent it implies that the Orion 3 is functionally superior to the Plié 3. (*See* Response to RPFF ¶ 619). [redacted]

627. Endolite significantly upgraded the battery in the Orion 3 and Linx. (Blatchford, Tr. 2226). While the Orion 2's battery could only last for a day and a half, the Orion 3's battery life is three days. (Blatchford, Tr. 2226). The Orion 2 offered a nickel metal hydride battery, whereas the Orion 3 offers a lithium ion battery. (Blatchford, Tr. 2226).

Response to Finding No. 627

This proposed finding is misleading to the extent it implies that the Orion 3 is functionally superior to the Plié 3. (*See* Response to RPFF ¶ 619).

628. Endolite's Orion 3 uses a combination of hydraulics and pneumatics to modify the resistance in the swing and stance phases of the knee. (Schneider, Tr. 4399)

Response to Finding No. 628

The proposed finding is unclear and misleading. The proposed finding is unclear because it does not specify what types of hydraulics the Orion 3 uses and what portions of the swing and stance phases are controlled by the hydraulics and pneumatics, respectively. The proposed finding also is vague because it does not explain what significance, if any, the use of a combination of hydraulics and pneumatics has on the functionality and performance of the Plié 3. The proposed finding is misleading to the extent it suggests that the Orion 3 is unique in using a combination of hydraulics and pneumatics. Further, the proposed finding is misleading to the extent it implies that the Orion 3 is functionally superior to the Plié 3. (*See* Response to RPFF ¶ 619.)

629. Ottobock does not consider Endolite's Orion 3 to be inferior to Freedom's Plié 3 because it is a full MP-Swing-and-Stance knee. (Schneider, Tr. 4399-4400).

Response to Finding No. 629

The proposed finding is unclear, unsupported, incorrect, and misleading. The phrase "full MP-Swing-and-Stance knee" is unclear. The portion of the proposed finding that implies that the Plié 3 is not a "full MP-Swing-and-Stance knee" is unsupported and contradicted by the weight of the evidence. The only evidence Respondent cites is Otto Bock's Scott Schneider, which is directly contradicted by Otto Bock's own documents. [redacted]

[redacted]

The record also is clear that Freedom considers the Plié to be an MPK with swing and stance functionality. (CCFF ¶ 3064). The Plié is marketed by Freedom as a swing and stance MPK. (CCFF ¶ 3065). For example, in a Plié 3 marketing document, titled "Plié 3 Microprocessor Knee Fact Sheet" Freedom compared the "Plié 3 vs C-Leg4" noting that "[b]oth Plié 3 and C-Leg 4 have swing and stance control." (CCFF ¶ 3066). Freedom recommends that customers seek reimbursement for the Plié under L-Code 5856, which is for microprocessor swing and stance knees. (CCFF ¶¶ 3067-3068). [redacted]

[redacted] Eric Ferris, Freedom's Vice President of Marketing, Customer Service, and Product Development, testified that Otto Bock salespeople were telling customers that the Plié does not offer swing and stance control, but the Plié does in fact have swing and stance control. (CCFF ¶ 3081).

The portion of the finding that "Ottobock does not consider Endolite's Orion 3 to be inferior to Freedom's Plié 3" also is unsupported and misleading to the extent it suggests that the Plié 3 is not a close competitor to Otto Bock's C-Leg. [redacted]

[redacted]

[redacted] Otto Bock targeted specific Plié 3 customers for "increasingly aggressive pricing on their MPKs." (CCFF ¶ 1032). Otto Bock's C-Leg 4 launch plans also included Otto Bock's estimates of shares in the "MPK" market, estimating Otto Bock's share to be 78 percent, and assigning an 11 percent share to Freedom, the firm that it believed was the next-largest competitor. (CCFF ¶ 1039). [redacted]

630. Finally, the proposed finding is misleading to the extent it implies that the Orion 3 is functionally superior to the Plié 3. (*See* Response to RPFF ¶ 619.) [redacted]

Response to Finding No. 630

Complaint Counsel does not disagree that Freedom, Otto Bock, Össur, Endolite, and Nabtesco all sell MPKs in the United States. However, the proposed finding is incorrect and misleading to the extent it suggests that Freedom competes *equally* with each of the MPK manufacturers. For example, market shares calculated by Complaint Counsel's expert, Dr. Fiona Scott Morton, show that, in 2017, [redacted]

[redacted] The market shares calculated by Dr. Scott Morton are highly consistent with Respondent's ordinary course market share estimates. (CCFF ¶¶ 967-80). For example, pre-Merger, in July 2017, Otto Bock executives prepared a memo for Otto Bock's owner, Hans Georg Näder, estimating Otto Bock's and Freedom's shares of the U.S. MPK market to be [redacted] respectively. (CCFF ¶ 971); *see also*, (CCFF ¶ 971) [redacted] (CCFF ¶ 972) (an August 2017 due diligence summary presented by Otto Bock executives included similar shares for the U.S. MPK market). [redacted] (CCFF ¶ 974). At trial, Otto Bock's Senior Prosthetics Marketing Manager, Cali Solorio, testified that—based on estimates it generated in November 2017—Otto Bock had a [redacted] percent share of MPKs sold in the United States, Freedom had a [redacted] percent share, Össur had a [redacted] percent share, and Endolite had a [redacted] percent share. (CCFF ¶ 975) [redacted]

This proposed finding also is misleading to the extent it implies that Ottobock is not Freedom's closest competitor in the U.S. market for MPKs. Otto Bock and Freedom have a long history of vigorous head-to-head competition with each other. (CCFF ¶¶ 1008-1174). Their actions over just the last several years, including the introduction of the Plié 3 by Freedom in 2014, (CCFF ¶¶ 1011-1027), the subsequent launch of Otto Bock's C-Leg 4 in 2015, (CCFF ¶¶ 1028-1073), and each company's respective competitive responses to those two launches, (CCFF ¶¶

1028-1139), show how customers have benefited from this intense rivalry. (*See also* Response to RPFF ¶ 629).

631. Freedom uses the Ideal Combo to compete against all competitor knees, including the C-Leg 4, Orion 3, or the Rheo 3, and it was not developed to combat the C-Leg 4 launch. (Testerman, Tr. 1146, 1201; Ferris, Tr. 2314, 2316).

Response to Finding No. 631

Complaint Counsel agrees with the portion of the finding that Freedom uses the Ideal Combo to compete against all competitor knees to the extent "competitor knees" means MPKs. The portion of the proposed finding that the Ideal Combo was not developed to combat the C-Leg 4 launch is contradicted by the record. The C-Leg 4 launched in April 2015, (CCFF ¶¶ 1034, 3197), and almost immediately, Freedom developed new marketing materials and promotions in response. (CCFF ¶¶ 1074-1116). Freedom equipped its sales team with new materials specifically highlighting the advantages of the Plié 3 over the C-Leg 4. (CCFF ¶¶ 1075-77). One of the primary [redacted] (CCFF ¶ 1080). The "Ideal Combo" provides free or discounted prosthetic feet to prosthetic clinics with the purchase of Freedom's Plié 3, (CCFF ¶ 1084), and one version involved offering a discount off of Freedom's Kinterra prosthetic ankle system with the purchase of a Plié of up to $1,000. (CCFF ¶ 1085). In addition to large discounts off the Kinterra, Freedom also offered as part of the Ideal Combo any Freedom graphite prosthetic foot free with the purchase of a Plié 3. (CCFF ¶ 1086).

The claim that the Ideal Combo was not developed to combat the C-Leg 4 launch is contradicted by testimony from Otto Bock executives that indicated that Freedom's Ideal Combo

promotions were developed precisely in response. Otto Bock's Scott Schneider, Vice President of Government, Medical Affairs, and Future Development, testified that after the launch of the C-Leg 4, Freedom responded with "promotional campaigns for other free products or coupling the knee with a popular foot choice." (CCFF ¶¶ 1081). At trial, Cali Solorio, Otto Bock's Senior Prosthetics Marketing Manager, testified that [redacted] (CCFF ¶ 1079 (citing Solorio (Otto Bock) Tr. 1588 (*in camera*); *see also* CCFF ¶ 1082 (indicating that Ms. Solorio wrote about Freedom to the Otto Bock sales team under the heading "Countering Freedom's Latest Promo" in September of 2015 that "C-Leg 4 has undoubtedly put considerable pressure on the competition – just look at the unique promos they've been running.")). Both Mr. Schneider and Ms. Solorio have testified that they observed the Ideal Combo promotions being offered by Freedom through 2017 prior to the Merger. (CCFF ¶ 1081; Solorio (Otto Bock) Tr. 1608-09).

Freedom's documents and executives confirm that the Ideal Combo was a promotion designed [redacted] (CCFF ¶ 1083) (emphasis added). Maynard Carkhuff testified to this fact in his deposition, agreeing that [redacted]

[redacted]

(CCFF ¶ 1083 (citing (PX5109 (Carkhuff (Freedom) Dep. at 126-27 (*in camera*))).

The portion of the proposed finding that the Ideal Combo was not developed to combat the C-Leg 4 launch is also contradicted by the record given that the Endolite Orion 3 and Össur Rheo 3 were launched subsequent to the creation of the Ideal Combo. Endolite launched the Orion 3 in September 2016, (CCFF ¶ 915), and Össur launched the Rheo 3 in September 2017, (CCFF ¶ 897); [redacted] By definition, Freedom could not have launched the Ideal Combo in response to the launch of the Orion 3 and Rheo 3 given that they were not yet on the market.

632. There is nothing special about the Ideal Combo as a sales promotion; Freedom's Sales team could use other discounting programs besides the Ideal Combo to make sales. (Testerman, Tr. 1149-1150).

Response to Finding No. 632

This proposed finding is unclear and incorrect. The proposed finding is vague and unclear as to the meaning of the phrase "nothing special." The proposed finding is incorrect and misleading to the extent it implies that alternative promotions could enable Freedom to drive sales of the Plié as effectively as the Ideal Combo has. Freedom's high-quality prosthetic foot portfolio was one of its distinctive competitive advantages over Otto Bock, and [redacted] One version of the Ideal Combo involved offering a steep discount, often as high as $1,000, off Freedom's popular Kinterra prosthetic ankle system with the purchase of the Plié 3. (CCFF ¶ 1085). In addition to large discounts off the Kinterra,

Freedom also offered as part of the Ideal Combo any Freedom graphite prosthetic foot free with the purchase of a Plié 3. (CCFF ¶ 1086).

In practice, the Ideal Combo enabled Freedom to leverage its leading prosthetic foot portfolio to drive sales of its high-margin Plié 3 and has become a hallmark of Freedom's MPK promotional strategy. [redacted] (CCFF ¶ 1080). The effectiveness of Freedom's Ideal Combo promotion is apparent from the trial testimony of several Respondent executives and even Respondent's own expert, Dr. David Argue, who [redacted] (CCFF ¶¶ 1092, 1097). [redacted] (CCFF ¶ 1093). [redacted] (CCFF ¶¶ 1094-96).

633. Freedom had used the demo knees program in key accounts prior to 2015 when Ottobock launched the C-Leg 4, and the demo knee program has been effective versus C-Leg 4, Orion 3, Rheo, and other MPKs. (Testerman, Tr. 1193).

Response to Finding No. 633

Complaint Counsel agrees with the portion of the proposed finding that Freedom's demo knee program has been effective in competing against the C-Leg 4, Orion 3, Rheo, and other MPKs. A direct sales model is important to the effective sale of MPKs in the United States, (CCFF ¶¶ 1676-1714), and one of the ways that direct sales representatives assist clinic customers is providing demo knees so that patients can trial the MPK. (CCFF ¶ 1703).

This proposed finding is incorrect and misleading to the extent it implies that Freedom operated a formalized demo knees program prior to the launch of the C-Leg 4. The record is clear that Freedom did not contemplate launching a formal demo knees program until after the launch of the C-Leg 4. (CCFF ¶ 1100 (citing (PX01247 (Otto Bock) at 001) (June 6, 2015 email with subject "FW: Sales Mgt – Brainstorming Ideas to Combat C-Leg 4" stating as one idea "Launch a P3 demo program with our top Key Accounts)). Freedom's Mark Testerman testified at trial that after the launch of the C-Leg 4, "The idea surfaced at that time. We have used demo knees in key accounts prior, but in our brainstorming idea we thought it would be a great way to formalize this program and take it versus the C-Leg 4 and other microprocessor knees." (Testerman (Freedom) Tr. 1192-93). This "Brainstorming Idea to Combat C-Leg 4" was successful, as Mr. Testerman further testified "I mentioned that we at Freedom Innovations like to attack and protect, and so the key account demo program has been effective in both gaining new business and protecting business." (Testerman (Freedom) Tr. 1193). This was corroborated in Freedom's documents after the launch of C-Leg 4: [redacted] (PX01249 (Freedom) at 002 (*in camera*)). [redacted] (PX01249 (Freedom) at 002 (*in camera*)).

634. PX01166 was an email from February 2016 from Freedom's senior product manager who manages the marketing of the Plié 3 to the highest executives at Freedom. (Testerman, Tr. 1268:25-1270:2). Freedom's product manager for the Plié 3 was concerned about an advertisement from Össur regarding the Rheo 3. (Testerman, Tr. 1270). The claims raised by Össur regarding the Rheo 3 were discussed by Freedom's SMC. (Testerman, Tr. 1270:14-21). Pages 4 and 5 reflect "a competitor update that again is designed to go to the

field force to give them messaging and understanding and learning of what they need to do and say to compete in this case versus Össur's microprocessor knee." (PX01166; 1271:1-16). Freedom's use this document to sell Plié 3 to Freedom's key accounts. (Testerman, Tr. 1271-1272).

Response to Finding No. 634

The proposed finding is unsupported, vague, and misleading. The portion of the proposed finding that "Freedom's product manager for the Plie 3 was concerned about an advertisement from Ossur regarding the Rheo 3" is unsupported. Respondent does not cite any testimony from the senior product manager, Manar Ammouri—who was deposed—in support of this claim. Nowhere in PX01166 is there any indication that anyone was "concerned" about an advertisement from Össur regarding the Rheo 3. Additionally, the testimony from Mark Testerman, who did not author PX01166, that Respondent cites to support this finding, is devoid of any indication that anyone at Freedom was "concerned" about an advertisement from Össur.

The proposed finding is vague because it is unclear from the finding, and the underlying testimony, what "SMC" means. The proposed finding is misleading to the extent it implies that Freedom and Össur are closer competitors than Freedom and Otto Bock. (*See* Responses to RPFF ¶ 630, 646).

635. PX01167 is an email from Plié 3's product manager to the highest-level executives at Freedom regarding Endolite's launch of the Orion 3 in late December 2016. (Testerman, Tr. 1272). It is important for the SMC and executives at Freedom to have an understanding of all competitive threats to the Plié 3, including the launch of Endolite's Orion 3. (Testerman, Tr. 1272-127). PX01167 was designed to combat the competitive threat from Orion 3. (Testerman, Tr. 1273).

Response to Finding No. 635

The proposed finding is unclear, unsupported, and misleading. The proposed finding is vague because it is unclear from the finding, and the underlying testimony, what "SMC" means. The portion of the proposed finding that "PX01167 was designed to combat the competitive threat

from Orion 3" is unsupported and contradicted by the evidence. Respondent does not cite any testimony from the author of PX01167, Manar Ammouri, that the Orion 3 was a "competitive threat." Neither PX01167 or the cited testimony of Mr. Testerman describe the Orion 3 as a competitive threat. Nor does Respondent cite to testimony from any other Freedom executives to support its claim that the Orion 3 was viewed as a threat to Freedom.

In fact, the evidence demonstrates that the Endolite's Orion 3 was not, and is not, a competitive threat to Freedom's MPK. Although it has been selling MPKs in the United States for more than twenty years, Endolite's market share remains less than [redacted] (CCFF ¶ 964). A principal reason for its inability to grow into a stronger MPK competitor is that, in the words of Endolite's Executive Chairman, Stephen Blatchford, Endolite [redacted] (CCFF ¶ 1536); *see also* (CCFF ¶¶ 1533-35). In addition, [redacted] Although Endolite's MPK sales have improved slightly since the launch of the Orion 3 in September 2016, many prosthetic clinics remain wary of its product and its service. (*See* Response to RPFF ¶ 619).

636. Page 4 of PX01167 is "an example of a competitor info document, similar to what we've seen, the Plié 3 versus the Orion 3. It's the goal of our marketing and clinical teams to provide our sales force with the correct selling points, messaging points, to be able to compete versus our competitors." (Testerman, Tr. 1273-1273).

Response to Finding No. 636

Complaint Counsel agrees that Respondent accurately quoted testimony of Mr. Testerman in this proposed finding. However, the proposed finding is unsupported and misleading to the

extent it suggests that the Orion 3 was a threat, or is a threat, to the Plié 3's MPK sales. *See* (Response to RPFF ¶ 635).

637. In December 2015, Testerman was hearing from Freedom's national and key accounts about the release of the Orion 3 in the United States. (Testerman, Tr. 1273). PX01167 helps Freedom's sales team drive revenue and profitability for Freedom related to the Plié 3. (Testerman, Tr. 1274).

Response to Finding No. 637

The portion of the proposed finding about feedback from national and key accounts is unclear and misleading. It is unclear from how many national key accounts Mr. Testerman was hearing about the release of the Orion 3. More importantly, it is unclear in both the proposed finding and the underlying testimony *what* Mr. Testerman was hearing regarding the Orion 3. For example, nowhere in the underlying cited testimony does Mr. Testerman say that national and key accounts told him anything positive about the Orion 3. Therefore, this portion of the proposed finding is unsupported and misleading to the extent it suggests that the Orion 3 was a threat to the Plié 3's MPK sales. (*See* Response to RPFF ¶ 635).

638. RX-0268 is an email from Maynard Carkhuff, Freedom's Chairman and former CEO, in August 2016. (Testerman, Tr. 1274). Carkhuff was warning Freedom executives about the launch of Nabtesco's new four-bar MPK, the Allux. (RX-0268; 1274). Freedom was seriously concerned about the competitive impact of Nabtesco's Allux even before it was fully launched in the United States. (RX-0268; Testerman, Tr. 1274).

Response to Finding No. 638

This proposed finding is unsupported, mischaracterizes the cited evidence, contradicted by the weight of the evidence, and misleading. The portion of the proposed finding that "Carkhuff was warning Freedom executives" is unsupported and mischaracterizes the cited evidence because RX-0268 does not state (or even imply) that Mr. Carkhuff was "warning Freedom executives about the launch of Nabtesco's new four-bar MPK, the Allux." To the contrary, in RX-0268, Mr.

Carkhuff simply states in an email that he "Recommend[s] we become familiar with Nabtesco's new 4 bar MPC knee." This falls well short of Respondent's incendiary characterization of the email as a "warning." Similarly, nothing in the testimony that Respondent cites to, which is from a Freedom executive (Mark Testerman) who did not even author the document, suggests that Mr. Carkhuff was "warning" anyone at Freedom about Nabtesco's Allux.

Similarly, the portion of the proposed finding that "Freedom was seriously concerned about the competitive impact of Nabtesco's Allux even before it was fully launched in the United States" is unsupported and mischaracterizes the evidence. Nothing in RX-0268 states (or even implies) that "Freedom was seriously concerned about the competitive impact of Nabtesco's Allux even before it was fully launched in the United States." Nothing in the cited trial testimony from Mr. Testerman that Respondent cites to supports this claim either.

In fact, Respondent's unsupported claims are contradicted by the weight of the evidence. [redacted] (CCFF ¶ 975; *See* Response to RPFF ¶ 630). Nabtesco, sells three MPKs in the United States, (CCFF ¶ 1563), but its "best-seller," [redacted] (CCFF ¶¶ 1564-66). Consistent with its *de minimis* sales, many customers testified that they were unfamiliar with Nabtesco's MPKs. (CCFF ¶¶ 1593-98). [redacted] (CCFF ¶ 1591). Among customers who had heard of Nabtesco's MPKs, several testified that they would not fit one on a patient because of concerns about reliability or service. (CCFF ¶¶ 1599-1602); (CCFF ¶ 1592) (Owner and Clinical Director of Scott Sabolich Prosthetics and Research testifying at trial that his clinic has not fit an Allux, which he described as a "very

janky knee"). [redacted] (CCFF ¶¶ 1572-73, 1604). In fact, Freedom's Director of Field Sales and Clinical Training, Lloyd Presswood, described the Allux as a "piece of crap knee." (CCFF ¶ 1585). Tellingly, Brad Mattear, Vice President of Orthotics at Proteor Inc., the exclusive distributor of Nabtesco's MPKs in the United States, described Proteor Inc. [redacted] (CCFF ¶¶ 1554, 1588).

639. "Nabtesco positions it as the ultimate safety knee as it uses a very safe mechanical geometry and MPC controlled hydraulic swing and stance control." (RX-0268; 1275:1-6). The list price of the Nabtesco Allux in 2016 was $17,485, roughly eight percent less than the Plié 3. (RX-0268; Testerman, Tr. 1275).

Response to Finding No. 639

The proposed finding is unclear and misleading. First, Nabtesco sells three different MPKs and it is unclear from the finding which knee Nabtesco positions as "the ultimate safety knee." Second, the portion of the proposed finding which suggests that the Nabtesco Allux has a list price eight percent less than the Plié 3 is irrelevant because the relevant price to customers is a negotiated discount off of the list price. (CCFF ¶ 570) (stating that [redacted] *see also* (CCFF ¶ 866) [redacted]

Finally, the proposed finding is misleading to the extent it suggests that Nabtesco has a meaningful competitive significance in the U.S. MPK market. (*See* Responses to RPFF ¶¶ 630, 638).

640. Plié 3's product manager responded: "We have had our eye on this product as well. We have provided the product info into the Quattro team a while ago to ensure we are up-to-date and aware of the continued changing market and product introductions." (RX-0268; Testerman, Tr. 1275).

Response to Finding No. 640

Complaint Counsel agrees that Respondent accurately quoted the testimony of Mr. Testerman. The proposed finding is misleading to the extent it implies that the Nabtesco Allux had any impact or influence on the design of the Quattro. Instead, the evidence shows that [redacted] (CCFF ¶¶ 1230, 1232, 1238, 1240-1242). In fact, [redacted] (CCFF ¶¶ 1198-1205). [redacted] (CCFF ¶¶ 1198-1205). For example, [redacted] (PX01038 (Otto Bock) at 016, 014). [redacted] (*See, e.g.*, CCFF ¶¶ 1240-43); (CCFF ¶ 1192 (citing PX01849 (Freedom) at 039 (*in camera*)) [redacted]

[redacted] (CCFF ¶ 1211 (citing PX01117 (Freedom) at 016 (*in camera*)) [redacted]

Indeed, [redacted] (CCFF ¶ 973). Nabtesco's Allux was not even included in this [redacted] (CCFF ¶ 973). Finally, the proposed finding also is misleading to the extent it attempts to overstate Nabtesco's competitive significance in the U.S. MPK market. (*See* Response to RPFF ¶¶ 630, 638).

641. Plié 3's product manager shared the Nabtesco Allux information with the Quattro R&D team because Freedom wanted to make sure that when new technology like Nabtesco's Allux is launched into the United Sates that Freedom understands that technology and can potentially incorporate that technology into the development of the Quattro. (RX-0268; Testerman, Tr. 1276).

Response to Finding No. 641

The proposed finding is unsupported and misleading. The only cited evidence in support of this proposed finding is the email from Manar Ammour, RX-0268, and the testimony of Mark Testerman. The email, RX-0268, does not state that the Allux information was shared "because Freedom wanted to make sure that when new technology like Nabtesco's Allux is launched into the United Sates [sic] that Freedom understands that technology and can potentially incorporate that technology into the development of the Quattro." Manar Ammouri, the author of RX-0268, did not testify in this matter as to why she shared the Nabtesco Allux information with the Quattro

team. [redacted] Instead, the clearest indication for why she shared this information with the Quattro team comes from RX-0268 itself, where Ms. Ammouri stated that she shared the information "to ensure we are up to date and aware of the continued changing market and product introductions." (RX-0268 (Freedom) at 00002).

The proposed finding is also misleading to the extent it implies that any technology from the Allux was incorporated into Freedom's Quattro. Instead, the evidence shows that [redacted] (*See* Response to RPFF ¶ 640).

642. Nabtesco's competitive significance in the United States has changed recently due to its acquisition of Ability Dynamics and the RUSH Foot. (Testerman, Tr. 1276).

Response to Finding No. 642

This proposed finding is either careless or an intentional misrepresentation. The record is clear that Nabtesco did not acquire Ability Dynamics. Although Mr. Testerman did testify that Nabtesco acquired Ability Dynamics, subsequent witnesses called by Respondent clarified that Proteor—not Nabtesco—acquired Ability Dynamics. Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs, and Future Development, testified to that effect in the following trial testimony:

[redacted]

[redacted] (Schneider (Otto Bock) Tr. 4718-19) (*in camera*).

Likewise, Brad Mattear, General Manager of O&P at Proteor Inc.,—the company that *actually* acquired Ability Dynamics—removed any doubt about what company acquired Ability Dynamics. Mr. Mattear testified that Proteor Inc. is "100 percent owned" by Proteor France, (Mattear (Proteor Inc.) Tr. 5712), that "Proteor Inc. does not own Nabtesco Corporation," "Nabtesco Corporation is a separate legal entity from Proteor, Inc.," and "Proteor Holdings in France does not own any of Nabtesco Corporation." (Mattear (Proteor Inc.) Tr. 5714).

643. RX-0277 is an email from September 2016 from Testerman to Matthews and Presswood. (Testerman, Tr. 1296). Freedom's VP of Sales (Matthews) asked Testerman to provide him with reasons why Plié 3 sales were declining in 2016. (Testerman, Tr. 1296). Testerman identified the top 5 reasons for the Plié 3's decline in 2016 as follows: (i) quality issues; (ii) loaner issues; (iii) introduction of the Allux by Nabtesco; (iv) aggressive pricing at $11,000 from Endolite with the Orion 3; and accounts switching from the Plié 3 to Non-MPKs based on reimbursement and audit pressures. (RX-0277; Testerman, Tr. 1296-1298). These five issues were raised by the SMC team regarding decline in Plié 3 sales. (RX-1299 at 1-4).

Response to Finding No. 643

The portion of the proposed finding that suggests one reason for the Plié 3's decline in 2016 was "quality issues" is unclear, incomplete, and misleading. Neither the proposed finding, nor the cited evidence, identify what specific quality issues the Plié 3 was experiencing in 2016. Moreover, the proposed finding is incomplete and misleading because Freedom successfully corrected the Plié 3 quality issues by the end of 2016. In 2016, Freedom put initiatives in place to improve the quality of the Plié 3. (CCFF ¶ 1831). [redacted]

[redacted] (CCFF ¶¶ 1837-38).

The portion of the proposed finding that suggests one reason for the Plié 3's decline in 2016 was "loaner issues" is incomplete and misleading. Although the proposed finding does not specify what precise "loaner issues" Freedom was experiencing, the cited testimony explains that the loaner issue was "the amount of time it took for the loaner knee to get to the practitioner[.]" (Testerman (Freedom) Tr. 1297). However, this proposed finding is incomplete and misleading because it omits that Freedom resolved the loaner issue by late 2016 according to Freedom's CEO, David Smith. (PX05122 (Smith (HEP) Dep. at 86 (explaining that, under Mr. Smith's leadership at Freedom, the loaner and warranty return process was changed to solve these issues)).

The portion of the proposed finding that suggests one reason for the Plié 3's decline in 2016 was the "introduction of the Allux" is unsupported, mischaracterizes the cited evidence, is contradicted by the weight of the evidence, and misleading. First, the cited document, RX-0277, only has the bullet point, "Introduction of the Allux by Nabtesco," and does not directly state that the introduction of the Allux *caused* a decline in Plié 3 sales. When asked about what the bullet point "Introduction of the Allux by Nabtesco" meant, Mr. Testerman stated that it "*could*

potentially cost us market share." (Testerman (Freedom) Tr. 1297-1298) (emphasis added). The claim that the Allux could be causing a decline in Plié 3 sales is also contradicted by the weight of the evidence. In all of 2016, Nabtesco [redacted] (CCFF ¶ 964 (Table 7)) (*in camera*).

The portion of the proposed finding that suggests one reason for the Plié 3's decline in 2016 was "aggressive pricing at $11,000 from Endolite for the Orion 3" is unclear, contradicted by the weight of the evidence, and misleading. This portion of the proposed finding is unclear regarding where, and to whom, Endolite was offering the alleged aggressive pricing. The proposed finding is contradicted by the weight of the evidence and misleading to the extent it suggests that Endolite is a significant MPK competitor in the United States. [redacted] (CCFF ¶ 975; *see* Response to RPFF ¶ 619). In 2016, when the document cited in support of this proposed finding was written, [redacted] (CCFF ¶ 1530).

The portion of the proposed finding that suggests one reason for the Plié 3's decline in 2016 was "accounts switching from the Plié 3 to Non-MPKs based on reimbursement and audit pressures" is unclear, contradicted by the weight of the evidence, and misleading. The proposed finding is unclear as to what "reimbursement and audit pressures mean" and how such "pressures" allegedly caused "accounts" to switch. Additionally, the proposed finding is vague because neither the proposed finding nor the cited evidence specify how frequent such switching allegedly occurred. The claim that clinics have switched from fitting MPKs to mechanical knees in response to reimbursement or audit pressures is also contradicted by the weight of the evidence. This document is the *only* document in the entire record that supports this claim. The weight of the

evidence shows that the interplay among surgeons, prosthetists, patients, and insurers determines whether a given patient receives an MPK or a mechanical knee—with decisions driven primarily by the medical ethics of healthcare professionals, preferences of patients for the feel of different prosthetic knees, and reimbursement regulations established by insurers. (CCFF ¶¶ 392-561; *see* Response to RFPP ¶ 393). The evidence shows that this decision is based on what healthcare professionals determine is medically best for the patient and justifiable to the patient's insurer. (CCFF ¶¶ 392-523; *see* Response to RFPP ¶ 393).

This proposed finding is also misleading to the extent it implies that RAC audits create reimbursement risks for prosthetic clinics, such that they switch patients to mechanical knees from MPKs. First, RAC audits existed before the Merger and have continued after the Merger. The Merger has not changed anything about the way payers conduct RAC audits. (CCFF ¶ 2977). [redacted] (CCFF ¶ 2979). Maynard Carkhuff, Chairman of Freedom, testified that since 2012, prosthetic clinics have improved their ability to document and receive reimbursement for MPKs, to varying degrees. (CCFF ¶ 2980). [redacted] (CCFF ¶ 2984). The record is clear that prosthetic clinics have not reduced their purchases of MPKs in response to RAC audits. (CCFF ¶ 2994). Mark Ford, President and Managing Partner of Prosthetic and Orthotic Associates ("POA"), testified that the concern of RAC audits does not cause POA to shift patients from MPKs to mechanical knees. (CCFF ¶ 2995). Keith Senn, President of the Kentucky/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 ¶ 2996). Jeffrey Brandt, CEO of Ability Prosthetics and

Orthotics ("Ability"), testified that the risk of a RAC audit has not affected the number of MPKs, including Freedom Pliés, that Ability fits on patients. (CCFF ¶ 2997). Michael Bright, a certified prosthetist and owner of North Bay Prosthetics, testified that North Bay has not stopped fitting MPKs in response to RAC audits. (CCFF ¶ 2999). If an MPK was medically appropriate for a patient, Mr. Bright would not fit the patient with a mechanical knee just for fear of a RAC audit. (CCFF ¶ 2999). There are many more examples of prosthetic clinics testifying in this case that they would not switch patients from MPKs to mechanical knees in the face of RAC audits. (CCFF ¶¶ 3000-06).

644. Testerman did not include competition from Ottobock's C-Leg 4 in his e-mail (RX-0277) because "it wasn't a top five issue" causing Plié 3 sales decline. (Testerman, Tr. 1299).

Response to Finding No. 644

This proposed finding is unclear, incomplete, and misleading. The proposed finding is vague and incomplete because it does not specify what time period Mr. Testerman was referring to. In the cited testimony, however, it is clear that Mr. Testerman was referring only to September 2016. (Testerman (Freedom) Tr. 1299). The proposed finding is misleading to the extent it implies that competition from Otto Bock's C-Leg 4 has not impacted Freedom's Plié 3 sales. In fact, Mr. Testerman did *not* testify that the C-Leg 4 was not causing a decline in sales—even in September 2016. Moreover, the weight of the evidence shows that the C-Leg 4 launch in 2015 dealt an immediate and significant blow to Freedom's MPK business. Rob Cripe, Freedom's Executive Vice President for North American Commercial Operations and Global Marketing, wrote to Freedom's then-CEO that, "[w]ith the C-leg, we are up against a new product and everyone wants to try it – you know the drill." (CCFF ¶ 1061). [redacted] (CCFF ¶¶ 1056-57). [redacted]

[redacted] (CCFF ¶ 1059). For example, in August 2015, just months after the C-Leg 4 launch, Freedom's CFO, Lee Kim, reported to Freedom's board of directors that [redacted] (CCFF ¶ 1058).

Freedom executives continued to [redacted] (CCFF ¶¶ 1060, 1132). Freedom's top executives viewed the impact of the C-Leg 4 launch as such an important development that they felt compelled to include it in their monthly compliance report to Freedom's lenders, where they noted that, [redacted] (CCFF ¶¶ 1059, 1062-63). According to internal documents from [redacted]

[redacted]

In the spring of 2016, Maynard Carkhuff, Freedom's former CEO and current Chairman, provided the board of directors with a "Diagnostics" assessment of Freedom's revenue decline, (CCFF ¶ 1064), which included a graph that charted Freedom's sales in various customer channels throughout the world, including the United States. The chart showed how Freedom's total sales and revenues ramped up immediately following the release of the Plié 3 and continued steadily until the launch of the C-Leg 4, when its sales took a precipitous decline. (CCFF ¶ 1064). In an email to the board of directors accompanying this diagnostic assessment, Mr. Carkhuff trumpeted the growth that Freedom had achieved up until June 2015; by that time, Otto Bock had introduced

the C-Leg 4 and closed the technology gap with the Plié MPK. (CCFF ¶ 1068). [redacted] (CCFF ¶¶ 1070, 1073). For example, one member of Freedom's board of directors noted that "the impact of OB's C-leg launch [] correlates exactly with the decline in our Hangar [sic] knee business." (CCFF ¶ 1073). [redacted] (CCFF ¶ 1071).

645. [redacted]

Response to Finding No. 645

This proposed finding is vague as to who Respondent means by "other executives." The underlying trial testimony from Mr. Ferris does not clarify who Mr. Ferris discussed the document with.

5. Ottobock's C-Leg Competes Most Closely With [redacted] With Respect To Functionality, Quality And Reliability

646. Other MPKs that offer functionality similar to the C-Leg include Össur Rheo and Össur Rheo XC, the Endolite Orion 3 and Linx, the Nabtesco Allux, and DAW Stealth. (Schneider, Tr. 4322).

Response to Finding No. 646

This proposed finding is unsupported, incorrect, and misleading. The only cited evidence in support of the proposed finding is testimony by Otto Bock's Scott Schneider. Notably, Respondent does not cite any clinic customers or prosthetists in support of its assertion that other MPKs offer "functionality similar to the C-Leg." Nor does Respondent cite any testimony from any other MPK manufacturers or any documents.

Contrary to Respondent's assertion, the other MPKs listed in the proposed finding offer much different functionality from Otto Bock's C-Leg. For example, there is extensive evidence,

including testimony from an Össur executive, 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). Moreover, many customers have safety and reliability concerns about Össur's MPK technology. (CCFF ¶¶ 1493-1516). Similarly, Endolite's Orion 3 and Linx have [redacted] (CCFF ¶ 1670)**.** Additionally, the Linx is an "integrated limb system" with a microprocessor-controlled knee connected to a microprocessor-controlled foot. (CCFF ¶ 918). Prosthetic clinics are wary of Endolite's MPK and level of service. (*See, e.g.*, (CCFF ¶ 1539) (Keith Senn, COPC's President of Kentucky/Indiana Operations, testified at trial that its practitioners "feel that the quality of the Plie 3 or back up to the C-Leg 4 is greater than the Endolite knee"); (CCFF ¶ 1540) (Mark Ford, the President and CEO of POA, testified at trial that it is "more challenging" to get timely support from Endolite because they "don't have as much support staff … don't have as large a sales force, [and] they have far fewer clinicians").

The proposed finding's suggestion that the Nabtesco and DAW MPKs offer similar functionality is unsupported and belied by their *de minimis* sales in the U.S. MPK market. Mr. Schneider, in the testimony cited, refers to Nabtesco as a "newcomer," and DAW as "claim[-ing]" to have a swing and stance MPK that Otto Bock "have not looked at yet." (Schneider (Otto Bock), Tr. 4322). Nabtesco and DAW have a negligible presence in the market. (CCFF ¶ 964). Nabtesco sells three MPKs in the United States, (CCFF ¶ 1563), but its "best-seller," [redacted]

[redacted] (CCFF ¶¶ 1564-66). Moreover, many customers testified that they were unfamiliar with Nabtesco's MPKs. (CCFF ¶¶ 1593-98). [redacted] (CCFF ¶ 1591). Among customers who had heard of Nabtesco's MPKs, several testified that they would not fit one on a patient because of concerns about reliability or service. (CCFF ¶¶ 1599-1602); (CCFF ¶ 1592) (Owner and Clinical Director of Scott Sabolich Prosthetics and Research testifying at trial that his clinic has not fit an Allux, which he described as a "very janky knee"). [redacted] (CCFF ¶¶ 1572-73, 1604); *see also* (CCFF ¶ 1585) (Lloyd Presswood, Freedom's Director of Field Sales and Clinical Training, describing the Allux as a "piece of crap knee"). Tellingly, Brad Mattear, Vice President of Orthotics at Proteor Inc., the exclusive distributor of Nabtesco's MPKs in the United States, described Proteor Inc. [redacted] CCFF ¶¶ 1554, 1588). At trial, Mr. Mattear further testified that the Allux [redacted] (CCFF ¶¶ 1575, 1579, 1582).

Like Nabtesco, DAW has minimal MPK sales in the United States. (CCFF ¶ 964); *see also* (CCFF ¶ 1610) [redacted] Many customers have never fit a DAW MPK. (CCFF ¶ 1615). [redacted] (CCFF ¶¶ 1614, 1616). Those customers familiar with DAW testified that they would not fit a DAW MPK on a patient because of concerns about the reliability of its MPKs or negative experiences they had with the company's sales or customer service staff. (CCFF ¶¶ 1620-23).

647. Össur considers the C-Leg 4 is functionally superior to the Plié 3. (De Roy, Tr. 3593). The Orion is functionally more comparable to the Plié according to Össur. (De Roy, Tr. 3594).

Response to Finding No. 647

The proposed finding is irrelevant, misleading, and incomplete. The portion of the proposed finding asserting that the Orion "is functionally more comparable to the Plie" is unsupported and mischaracterizes the cited testimony. It is unsupported and misleading because Mr. De Roy merely indicated that the Plié is "fairly comparable" in terms of functionality when asked "[h]ow does the Orion compare to the Plié" specifically. (De Roy (Össur), Tr. 3593). Mr. De Roy did not testify that the Plié in particular was more comparable to the Orion, just that the two MPKs "utilize the same technology" for "stance phase control." (De Roy (Össur), Tr. 3593-94). In addition, the proposed finding is incomplete because it fails to point out that Mr. De Roy testified on the same page that the Plié is more widely used in the market today and Endolite's sales force is "a lot smaller" compared to Össur's. (De Roy (Össur), Tr. 3594).

The proposed finding is irrelevant because how Össur views the functional superiority and comparability of the Plié to other MPKs does not speak to the fact that the Plié has had success taking share against C-Leg, (CCFF ¶¶ 1025-1033, 1098-1136), and that clinics and patients have benefitted from this competition through lower prices and greater innovation. (CCFF ¶¶ 1140-74). The proposed finding is misleading to the extent Respondent implies that the C-Leg 4 does not compete closely with the Plié 3. There is abundant evidence in the record that demonstrates that the C-Leg 4 competes closely with the Plié 3. (CCFF ¶¶ 991-1136, 1141-1174, 3063-3088).

648. [redacted]

Response to Finding No. 648

649.

Response to Finding No. 649

650. C-Leg 4's closest competitor is Össur's Rheo, because it is most similar to the C-Leg 4 in terms of functionality, quality, and price. Doug Smith, Tr. 6020; Sabolich, Tr. 5858).

Response to Finding No. 650

[redacted]

[redacted]

[redacted]

651. Maynard Carkhuff testified that Ottobock and Össur are the leading manufacturers of prosthetic knees for active and former military. (Carkhuff, Tr. 595).

Response to Finding No. 651

The proposed finding is unclear. The term "prosthetic knees" is vague as it is not clear from the proposed finding whether "prosthetic knees" refers to MPKs, mechanical knees, or both. However, Dr. Benjamin Potter, Chief Orthopedic Surgeon at Walter Reed National Military Medical Center, testified clearly that active and former military typically receive MPKs:

> "JUDGE CHAPPELL: Did I hear you say that when you write a prescription for a knee, you do or do not specify MPK versus other knee?
>
> THE WITNESS: I do not typically specify that. I -- but I -- to be frank, Your Honor, in my -- I don't need to. I know my patients are going to get a microprocessor knee." (Potter (DoD) Tr. 774).

The term "leading manufacturers" also is vague.

652. Ottobock considers Össur's Rheo to be C-Leg 4's closest competitor. (Solorio, Tr. 1646; Kannenberg, Tr. 1981).

Response to Finding No. 652

This proposed finding is unsupported and contrary to the weight of the evidence. The only support for this proposed finding is self-serving trial testimony by two Otto Bock officials, which is contradicted by a wealth of internal Otto Bock documents and contradictory testimony by other Otto Bock executives indicating that Otto Bock considers Freedom's Plié 3 to be C-Leg 4's closest competitor. For example, during Otto Bock's launch of its C-Leg 4 MPK, 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 goal to target the Plié was confirmed by Scott Schneider, Otto Bock's Chief Future Development Officer, who testified that Otto Bock [redacted]

[redacted] (CCFF ¶ 1044). Similarly, the proposed finding is contradicted by Otto Bock's due diligence and post-merger documents discussing Freedom's Quattro. For example, Otto Bock concluded [redacted] (CCFF ¶¶ 1409-10).

The proposed finding also is contradicted by third party testimony that shows that Freedom's Plie 3 is the C-Leg 4's closest competitor. Össur executive testified 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). One of Otto Bock's largest customers, [redacted] testified at trial that [redacted] (CCFF ¶ 983). The only insurance company witness to testify at trial told a consistent story from a claims perspective. Jack Sanders, Senior Clinical

Program Consultant for United Healthcare, testified that—based on his review of actual MPK claims—clinics [redacted] (CCFF ¶ 981). Moreover, many customers have safety and reliability concerns about Össur's MPK technology. (CCFF ¶¶ 1493-1516).

653. Össur's Rheo MPKs use magnetorheological ("MR") fluid to modify the resistance of the knee in swing and stance phase, but Ottobock does not consider Össur's Rheo to be inferior to Plié 3 because of the different types of technology platforms. (Schneider, Tr. 4398-4399).

Response to Finding No. 653

Complaint Counsel agrees that Ossur's Rheo uses magnetorheological ("MR") fluid to modify the resistance of the knee in swing and stance phase. To the extent the proposed finding implies that the Rheo is not actually inferior to the Plie 3 due to its different technology, the proposed finding is misleading and contradicted by the record. While the only cited support for this finding is self-serving testimony by Otto Bock's Scott Schnieder, record evidence from clinic customers and prosthetists shows Össur's Rheo MPK technology is significantly differentiated from Otto Bock's C-Leg 4 and Freedom's Plié, and that the Rheo technology is associated with safety and reliability issues. (CCFF ¶¶ 1484-1516).

654. Rheo competes with the following MPKs: C-Leg, Orion, Plié, Allux, Genium and X3. (De Roy, Tr. 3582).

Response to Finding No. 654

Complaint Counsel has no specific response.

655. Whether an insurer covers the Rheo depends on the patient's plan. (De Roy, Tr. 3582).

Response to Finding No. 655

Complaint Counsel has no specific response.

656. A former perceived disadvantage of the Rheo was that if it lost power, the knee would become free swinging; however, the latest version of the Össur Rheo does have a manual knee lock to mitigate this disadvantage. (Blatchford, Tr. 2149-2150). If the Rheo loses power, the knee enters free swing mode, so it can no longer provide variable cadence control, but it does offer a mechanical lock that can be engaged to stiffen the knee. (De Roy, Tr. 3581). Freedom learned that Össur had developed a new, manual safety lock for the Rheo 3 knee for circumstances where the knee lost power. (Ferris, Tr. 2333-2334; PX01176-003). There are also warning signals that prevent users from forgetting to recharge the Rheo. (De Roy, Tr. 3581).

Response to Finding No. 656

The proposed finding's characterization of this disadvantage of the Rheo as a "former" disadvantage is incorrect and contradicted by record evidence. Despite the changes to the Rheo described in this proposed finding, clinic customers still have serious safety and reliability concerns as a result of the Rheo's reliance on magnetorheological technology. (CCFF ¶¶ 1484-1516). For example, Keith Senn, President of Kentucky/Indiana of COPC, testified that the company "steer[s]" patients to the safer MPKs from Freedom and Otto Bock, instead of the Össur Rheo, because "when the battery goes out on the Rheo, it goes into free swing phase, whereas the C-Leg goes into stiff mode phase . . . [when the Rheo] goes into free swing . . . that's increasing your risk of falls which is the whole purpose of the MPK." (CCFF ¶ 1505). Moreover, clinic customers concerns are not just limited to the issue of the power loss resulting in an increased risk of falling. (CCFF ¶ 1501; *see also* CCFF ¶ 1506 [redacted] (CCFF ¶ 1502) (Scott Sabolich, the owner and Clinical Director of Scott Sabolich Prosthetics and Research, testified that in February 2015 his clinic "had one of [their] patients fall on a Rheo Knee, and it broke literally in half.").

657. Össur's Rheo is a very good knee that has been successfully marketed in the United States according to Blatchford. (Blatchford, Tr. 2235-2236).

Response to Finding No. 657

The meaning of the term "very good" and "successfully marketed" are unclear as it relates to the Rheo's competitive significance in the U.S. MPK market.

658. Dr. Potter testified that the only knees he was familiar with are Ottobock and Össur knees, and that he had never heard of Freedom prior to the government calling him and telling him about the acquisition. (Potter, Tr. 787-788, 791-792).

Response to Finding No. 658

The proposed finding is incorrect and mischaracterizes the testimony of Dr. Potter because he clearly testified he was familiar with Freedom's Plié. Although Dr. Potter responded, "No. I don't believe so." when asked whether he was familiar with "Freedom" prior to the Merger, just five questions later, Dr. Potter testified that he was familiar with the "Plie." (Potter (DoD) Tr. 791). According to Dr. Potter: "I've seen, you know, the C-Leg of various generations, the Plie, a handful of other, other knees, and the Power Knee around. But I honestly don't pay that much attention to it it's an Otto Bock or an Ossur or a Freedom Innovations product." (Potter (DoD) Tr. 792).

659. After the Rheo, the next closest competitor to C-Leg 4 is the Endolite Orion 3, given its similar functionality. (Sabolich, Tr. 5859 (testifying that if the C-Leg and Rheo were not available, he would look to Endolite Orion 3 because it is the third-best option); Kannenberg, Tr. 1981).

Response to Finding No. 659

The proposed finding is contrary to the evidence and misleading. Respondent cites to one prosthetist and one Otto Bock executive's self-serving testimony to support the proposition that, *in general*, the Orion 3 is the C-Leg 4's next closest competitor after the Rheo. There is abundant evidence in the record that demonstrates that this is not the case, and in fact, the weight of the evidence shows that Freedom Plié 3 is the closest competitor the Otto Bock C-Leg 4. (*See, e.g.*,

Responses to RPFF ¶¶ 580, 646, 650, 652). Moreover, the proposed finding is misleading to the extent that Respondent implies, once again, that the Plié 3 is not a "true" swing-and-stance MPK. (*See, e.g.*, Responses to RPFF ¶¶ 596, 646).

The proposed finding is also misleading to the extent Respondent implies that, post-Merger, Endolite would be able to expand to offset the likelihood of anticompetitive harm. Endolite has less than [redacted] of the U.S. MPK market and [redacted] (CCFF ¶ 964), compared to Freedom's Plié market share, [redacted] (CCFF ¶ 1367). *See also* (CCFF ¶ 1531) [redacted] (CCFF ¶¶ 1533-36). Although it has been selling MPKs in the United States for more than twenty years, Endolite's market share remains less than [redacted] (CCFF ¶ 964). Moreover, prosthetic clinics are wary of Endolite's MPK and level of service. (*See, e.g.*, (CCFF ¶ 1539) (Keith Senn, COPC's President of Kentucky/Indiana Operations, testified at trial that its practitioners "feel that the quality of the Plie 3 or back up to the C-Leg 4 is greater than the Endolite knee"); (CCFF ¶ 1540) (Mark Ford, the President and CEO of POA, testified at trial that it is "more challenging" to get timely support from Endolite because they "don't have as much support staff … don't have as large a sales force, [and] they have far fewer clinicians").

660. [redacted]

Response to Finding No. 660

The proposed finding is irrelevant and misleading. First, the proposed finding is irrelevant because the technical specifications and functionality of the Orion 3 compared to the Plie 3 has nothing to do with the closeness of competition between the Plie 3 and the C-Leg 4. To the extent Respondent implies that the "use of an air pump" implies the Plie 3 is a more distant competitor to the C-Leg 4, this is misleading given the abundant evidence in the record demonstrating vigorous competition between the two MPKs that has resulted in lower prices and greater innovation for prosthetic clinics and patients. (*See, e.g.* Responses to RPFF ¶¶ 646, 650, 652); *see also* (CCFF ¶¶ 1028-1139).

6. Freedom's Plié 3 Targets Price-Sensitive Prosthetists And Patients

661. Freedom's Plié 3 tends to be less expensive than all other MPKs sold in the United States. (Blatchford, Tr. 2148).

Response to Finding No. 661

The proposed finding is unclear, unsupported, and misleading. It is unclear whether the term "less expensive" in the proposed finding is referring to list price or [redacted] (CCFF ¶ 570). The proposed finding is unsupported because it relies solely on testimony from Stephen Blatchford of Endolite for this broad proposition about pricing rather than any testimony, documents, or data from customers or manufacturers about MPK pricing.

The proposed finding is misleading to the extent that Respondent implies that Otto Bock and Freedom are not close competitors because Plié 3 tends to be priced more aggressively compared to the C-Leg 4 and other MPKs. There is substantial evidence in the record that the Plié 3 is the closest competitor to the C-Leg 4, (*See, e.g.* Responses to RPFF ¶¶ 580, 596, 646, 650,

652), and that prosthetic clinics and patients have benefitted from this competition. (CCFF ¶¶ 1028-1139).

662. [redacted]

Response to Finding No. 662

[redacted]

663. Maynard Carkhuff testified that the Plié 3 is priced below C-Leg 4 because the Rheo and the Orion3 are more recent designs based on technology platforms that offer more features and benefits, and the Plié 3 has limited functions and capabilities relative to those products. (Carkhuff, Tr. 622-23).

Response to Finding No. 663

The proposed finding is unclear, nonsensical, and contradicted by record evidence. It makes no logical sense that alleged recent design to the Rheo and Orion 3 impact the Plié 3's price relative to the C-Leg 4, and the proposed finding does not explain this relationship. In fact, the record evidence shows that [redacted] (CCFF ¶ 1110).

The portion of the proposed finding that the Plie 3 has limited functions and capabilities relative to other MPKs is incorrect and contradicted by record evidence. (*See* Responses to RPFF ¶¶ 577-78, 587-88, 593)

664. [redacted]

Response to Finding No. 664

[redacted]

665.

Response to Finding No. 665

666. C-Leg 4 does not compete with Plié 3 on price. Ford, Tr. 1044 (POA clinicians believe that C-Leg is simply a better product than the Plié due to quality of their product and service;

Response to Finding No. 666

[redacted]

667. Össur considers the C-Leg 4 to be functionally superior to the Plié 3. (De Roy, Tr. 3593). The Orion is functionally more comparable to the Plié according to Össur. (De Roy, Tr. 3594). The two lowest priced MPKs are the Plié and the Orion. (De Roy, Tr. 3596). They are lower priced than the Össur Rheo and Ottobock C-Leg. (De Roy, Tr. 3597).

Response to Finding No. 667

The proposed finding is irrelevant, misleading, incomplete, and essentially duplicative to RPFF ¶¶ 647, 650. (*See* Responses to RPFF ¶¶ 647, 650). For example, the portion of the proposed finding asserting that the Orion "is functionally more comparable to the Plie" is unsupported and mischaracterizes the cited testimony. (*See* Response to RPFF ¶ 647). The proposed finding is misleading to the extent Respondent implies that the C-Leg 4 does not compete closely with the Plié 3. (*See, e.g.*, Responses to RPFF 646, 650, 652)

668. Even Tracy Ell, who was called to testify by Complaint Counsel testified that Mid-Missouri purchased 10 to 12 C-Leg 4s in 2017 and "not very many" Plié 3s. (Ell, Tr. 1740-41).

Response to Finding No. 668

The proposed finding is misleading because Respondent implies that 10-12 C-Leg 4 MPKs and "not very many" Plié 3s is insignificant for Mid-Missouri O&P. To the contrary, Mid-Missouri O&P is a relatively small practice with four Missouri clinics and fits between 10 and 20 MPKs annually, of which C-Leg 4s are typically more than half of the MPKs fitted. (CCFF ¶ 3246). At the time of trial in the beginning of August 2018, Tracy Ell, the owner and Chief Prosthetist at Mid-Missouri O&P, testified that the clinic had purchased three Plié 3s in 2018 at a $2,000 discount compared to the C-Leg 4. (Ell (Mid-Missouri O&P), Tr. 1742).

Tellingly, Mid-Missouri O&P provides an illustrative snapshot of the closeness of competition between Freedom and Otto Bock MPKs. Mid-Missouri O&P uses the same L codes for the C-Leg 4 as it does for the Plié 3 when seeking reimbursement and the clinics do *not* purchase MPKs from Össur due to "practice or personal preference and exposure to demonstration models of [the Össur] knee have led [Mr. Ell] to believe that it's not as inherently safe throughout all its usage." (Ell (Mid-Missouri O&P), Tr. 1732). In addition, Mr. Ell testified at trial that Otto Bock has matched Freedom prices for microprocessor knees, and that this usually happens when he reports this is what we are actually paying from one vendor, a sales representative will say, 'We'll match that price.'" (CCFF ¶ 586).

669. [redacted]

Response to Finding No. 669

[redacted]

[redacted]

670. Plié 3 is COPC's preferred knee according to its guidelines for K-3 amputees is Freedom's Plié 3 because of the discount arrangement between Freedom and COPC. (Senn, Tr. 180).

Response to Finding No. 670

The proposed finding is inaccurate and mischaracterizes the testimony. Complaint Counsel agrees that the Plié 3 is COPC's preferred knee according to its guidelines for K-3 amputees, but Respondent omitted testimony from Mr. Senn describing reasons in addition to price as to why the Plie is the preferred knee for COPC. Mr. Senn explained that the Plié 3 is the preferred knee for K-3 amputees "*based on the feedback from practitioners that they like the Plié 3, works well with patients*, *and* combined we have a discount arrangement with Freedom based on number of volume of knees that we purchase and so that we try to drive volume towards that, towards that knee, *if it's appropriate for the patient*." (Senn (COPC), Tr. 180) (emphasis added). Mr. Senn clearly states that the Plié 3 is the preferred knee due to the *combination* of feedback from clinicians who like the product, as well as the discount arrangement.

Other testimony from Mr. Senn also illustrates customers benefitting from competition between the C-Leg 4 and Plié 3. [redacted] (CCFF ¶ 1152). As a result, he saw Otto Bock offer "increasingly more aggressive pricing on their MPKs." (CCFF ¶ 1152). Mr. Senn explained that COPC has been able to use the cost savings to benefit patients by hiring more staff and "hiring residents with facilities, with programs that we put in support of the

patient care, such as compliance." (CCFF ¶¶ 579, 1151). [redacted] (CCFF ¶ 1430).

671. [redacted]

Response to Finding No. 671

[redacted]

672. [redacted]

Response to Finding No. 672

[redacted]

[redacted]

673. [redacted] COPC also received a rebate on each Plié 3 that COPC bought over a certain amount, and that rebate is still in effect post-acquisition. (1237-1238).

Response to Finding No. 673

[redacted]

674. [redacted]

Response to Finding No. 674

The proposed finding is incomplete, mischaracterizes the testimony, and is misleading. First, the proposed finding is incomplete and mischaracterizes Mr. Senn's testimony because it suggests the Plié 3 is preferred on the COPC product guide solely because of the "costing," but omits testimony from Mr. Senn describing reasons in addition to price as to why the Plie is the preferred knee for COPC. Mr. Senn explained that it is the preferred knee for K-3 amputees "*based on the feedback from practitioners that they like the Plié 3, works well with patients, and* combined we have a discount arrangement with Freedom based on number of volume of knees that we purchase and so that we try to drive volume towards that, towards that knee, *if it's appropriate for the patient*." (Senn (COPC), Tr. 180) (emphasis added). This proposed finding is also misleading to the extent that Respondent implies that the Plié is strictly targeting "price-sensitive prosthetic clinics and patients" and does not closely compete with the C-Leg 4 given the abundant evidence in the record demonstrating the closeness of competition between the C-Leg 4 and Plié 3. (*See, e.g.*, Responses to RPFF ¶¶ 646, 650, 652); (CCFF ¶¶ 1028-1139). In addition, the experience of COPC using Otto Bock and Freedom to extract greater savings from both companies' MPKs is illustrative of the closeness of competition between the C-Leg 4 and Plié 3. (*See, e.g.*, Response to RPFF ¶ 670).

675. [redacted]

Response to Finding No. 675

[redacted]

676. [redacted]

Response to Finding No. 676

[redacted]

[redacted]

677. The Orion 3, Nabtesco Allux, and Ottobock Compact are priced most closely to the Plié 3. (Schneider, Tr. 4355).

Response to Finding No. 677

This proposed finding is unclear, unsupported, overly broad, and misleading. It is unclear because the proposed finding does not distinguish between list price or the sales price that customers negotiate on an individual basis for MPKs. [redacted] (CCFF ¶ 570). It is also unclear what time period the proposed finding is referring to, and whether it is suggesting that the Orion 3, Allux, and Compact are priced higher or lower than the Plie 3.

The proposed finding is unsupported because it is based solely on the testimony of Otto Bock's Scott Schnieder, without any cite to testimony from other market participants, such as other

MPK manufacturers, prosthetic clinics, or distributors in support of its proposed finding, sales data, or ordinary course pricing documents. Mr. Schneider, as an Otto Bock executive, does not have the foundation to testify about the *sales price* of all non-Otto Bock MPKs.

In addition, the proposed finding is misleading to the extent it suggests that the Plié 3 competes more closely with MPKs from Endolite or Nabtesco. The weight of the evidence shows that [redacted] (Response to RPFF ¶ 820). Similarly, Nabtesco [redacted] (Response to RPFF ¶ 871).

678. [redacted]

Response to Finding No. 678

[redacted]

[redacted]

679. Freedom's Vice President for National and Key Accounts was aware of clinics that were paying around $11,000 for the Orion 3. (RX-0277; Testerman, Tr. 1296-1299).

Response to Finding No. 679

The proposed finding is unclear, unsupported, contradicted by the evidence, and misleading. It is unclear because the proposed finding does not distinguish between list price or

the sales price that customers negotiate on an individual basis for MPKs. It is also unclear how many clinics Mr. Testerman is aware of that were allegedly paying $11,000 for the Orion, and what year the clinics were allegedly paying this price.

The proposed finding is unsupported as it is based only on testimony from Freedom and a Freedom document, without any evidence from Endolite. The proposed finding is unsupported because neither the cited document or testimony support the claim that clinics were paying $11,000 for the Orion 3 knee rather than an earlier model Orion 3. The Orion 3 was launched in September 2016. (CCFF ¶ 915). The cited document, which is dated September 16, 2016, does not make clear whether it is referring to the Orion 3 or an earlier model (likely the Orion 2); it only states "ORION (11k/knee"). RX-0277. When asked about the document, of which he was the author, Mr. Testerman did not clarify whether he was referring to the Orion 3 or an earlier mode. Mr. Testerman merely refers to "their knee." (Testerman (Freedom) Tr. 1298). Additionally, neither the cited document or testimony support the claim that clinics—plural—were paying $11,000 for an Endolite knee. As noted, document only states "ORION (11k/knee)" and Mr. Testerman only identified a *single* customer that had received a "price of $11,000 per knee" as part of a volume discount. (Testerman (Freedom) Tr. 1298).

The proposed finding is contradicted by the weight of the evidence. Stephen Blatchford, Endolite's Chairman, testified that [redacted]

Finally, the proposed finding is misleading and contradicted by the weight of the evidence to the extent it suggests that Endolite's Orion 3 is a closer substitute to the Plie 3 than the C-Leg. The weight of the evidence shows that Endolite has consistently held less than a 5 percent share

of the U.S. MPK market and many prosthetic clinics remain wary of its product and its service. (Response to RPFF ¶ 820).

7. Össur's Rheo And Ottobock's C-Leg Compete Most Closely On Price

680. [redacted]

Response to Finding No. 680

[redacted]

681. [redacted]

Response to Finding No. 681

[redacted]

[redacted]

682. [redacted]

Response to Finding No. 682

[redacted]

[redacted]

683. The two lowest priced MPKs are the Plié and the Orion. (De Roy, Tr. 3596). They are lower priced than the Össur Rheo and Ottobock C-Leg. (De Roy, Tr. 3597).

Response to Finding No. 683

The proposed finding is unclear and unsupported. It is unclear because the proposed finding does not distinguish between list price or the sales price that customers negotiate on an individual basis for MPKs. Although MPK manufacturers publish list prices, [redacted] (CCFF ¶ 570). It is also unclear what specific model Plié, Orion, Rheo, and C-Leg the proposed finding is referring to, as well as what time period the proposed finding is referring to. The proposed finding is unsupported because it is based solely on the testimony of Össur's Kim De Roy, without any cite to testimony from any other market participants, including any prosthetic clinic, other MPK manufacturer, or distributor.

684. Ottobock considers the price of the Rheo and Rheo XC when setting the price of the C-Leg 4. (Schneider, Tr. 4343-4344). It does not consider the price of the Plié. (Schneider, Tr. 4344). [redacted]

Response to Finding No. 684

[redacted]

[redacted]

685. [redacted]

Response to Finding No. 685

[redacted]

686. Össur characterizes its Rheo as a "mainstream" MPK with a list price of $19,500. (De Roy, Tr. 3532). Össur characterizes its Rheo XC as a "step up" from the Rheo with a list price between $26,000 and $27,000. (De Roy, Tr. 3532).

Response to Finding No. 686

Complaint Counsel has no specific response.

687. [redacted]

Response to Finding No. 687

[redacted]

8. [redacted]

a. [redacted]

688. [redacted]

Response to Finding No. 688

[redacted]

689.

Response to Finding No. 689

690.

Response to Finding No. 690

[redacted]

[redacted]

b. [redacted]

691. [redacted]

Response to Finding No. 691

[redacted]

[redacted]

692.

Response to Finding No. 692

693.

Response to Finding No. 693

[redacted]

694. [redacted]

Response to Finding No. 694

[redacted]

695. [redacted]

Response to Finding No. 695

[redacted]

696. [redacted]

Response to Finding No. 696

[redacted]

[redacted]

697. [redacted]

Response to Finding No. 697

Complaint Counsel has no specific response.

698. [redacted]

Response to Finding No. 698

[redacted]

699. [redacted]

Response to Finding No. 699

[redacted]

700. [redacted]

Response to Finding No. 700

[redacted]

[redacted]

[redacted]

701. [redacted]

[redacted]

Response to Finding No. 701

[redacted]

[redacted]

702. [redacted]

Response to Finding No. 702

[redacted]

703. Kinnex's durability issues have "absolutely" impacted Freedom's overall revenue. (Testerman, Tr. 1251). "[W]hen you have a product that is rocking and rolling, like that product was, and you have revenue that's exceed or exceeding a million dollars and then that product is removed, it can have a – it can have a dramatic effect." (Testerman, Tr. 1251).

Response to Finding No. 703

The proposed finding is misleading and unclear. The proposed finding is misleading to the extent it suggests that the Kinnex has been permanently removed from the market. (*See* Responses to RPFF ¶¶ 692-695, 699). The proposed finding is unclear as to what is meant by "dramatic effect."

704. Freedom has not provided a date certain for when the Kinnex is going to be returned to the United States market. (Testerman, Tr. 1252).

Response to Finding No. 704

The proposed finding is unclear, unsupported, incorrect, and contradicted by the weight of the evidence. It is unclear what "date certain" means. The proposed finding is unsupported

because it relies solely on the testimony of Freedoms VP of National and Key Accounts, omitting any testimony from Freedom's lead Kinnex engineer, CEO, or Chairman. [redacted]

c. [redacted]

705. [redacted]

Response to Finding No. 705

[redacted]

[redacted]

706. [redacted]

Response to Finding No. 706

[redacted]

707. [redacted]

Response to Finding No. 707

[redacted]

[redacted]

708. [redacted]

Response to Finding No. 708

[redacted]

[redacted]

709. [redacted]

Response to Finding No. 709

[redacted]

710. [redacted]

Response to Finding No. 710

[redacted]

[redacted]

d. The features, pricing, and success of Quattro are speculative, if it ever launches

711. The Quattro is not a close competitor to C-Leg 4 because no one knows when Quattro will launch, what features it will have, how it will be priced, or if it will be a reliable product. (Testerman, Tr. 1252:11-14; [redacted]

Response to Finding No. 711

This proposed finding is unsupported, contrary to the evidence, and misleading. [redacted]

[redacted]

[redacted]

[redacted]

712. [redacted]

Response to Finding No. 712

This proposed finding is contradicted by the weight of the evidence and misleading. This proposed finding is contrary to the weight of the evidence because the record is clear that [redacted] (CCFF ¶ 1269). Her testimony is consistent with several ordinary course PAC Review presentations showing [redacted]

713. [redacted]

Response to Finding No. 713

[redacted]

714. [redacted]

Response to Finding No. 714

[redacted]

[redacted]

715. [redacted]

Response to Finding No. 715

[redacted]

716. [redacted]

Response to Finding No. 716

[redacted]

717. [redacted]

Response to Finding No. 717

[redacted]

718. [redacted]

Response to Finding No. 718

[redacted]

719. [redacted]

Response to Finding No. 719

[redacted]

[redacted]

720. [redacted]

Response to Finding No. 720

[redacted]

[redacted]

721. [redacted]

Response to Finding No. 721

[redacted]

722. [redacted]

Response to Finding No. 722

[redacted]

[redacted]

723. [redacted]

Response to Finding No. 723

[redacted]

[redacted]

724. [redacted]

Response to Finding No. 724

[redacted]

[redacted]

725. [redacted]

Response to Finding No. 725

[redacted]

726. "The Quattro project is a – another microprocessor knee that Freedom is looking to bring to market some day." (Testerman, Tr. 1252). There has been frustration from Freedom's sales team on the delayed development of the Quattro project. (Testerman, Tr. 1252).

Response to Finding No. 726

The proposed finding is irrelevant because, whether or not there has been frustration from Freedom's sales team or not, Dr. Prince clearly testified that he believed Freedom [redacted] (CCFF ¶ 1223), and with those issues resolved, Freedom expected to [redacted] (*See* CCFF ¶¶ 1224-27).

727. [redacted]

Response to Finding No. 727

[redacted]

728. [redacted]

Response to Finding No. 728

[redacted]

729. [redacted]

Response to Finding No. 729

[redacted]

730. [redacted]

Response to Finding No. 730

[redacted]

[redacted]

731.

Response to Finding No. 731

732.

Response to Finding No. 732

[redacted]

[redacted]

733. [redacted]

Response to Finding No. 733

[redacted]

[redacted]

734. [redacted]

Response to Finding No. 734

[redacted]

735. [redacted]

Response to Finding No. 735

[redacted]

[redacted]

736. [redacted]

Response to Finding No. 736

[redacted]

[redacted]

737. [redacted]

Response to Finding No. 737

[redacted]

[redacted]

738. [redacted]

Response to Finding No. 738

Complaint Counsel has no specific response.

739. [redacted]

Response to Finding No. 739

[redacted]

[redacted]

740. [redacted]

Response to Finding No. 740

[redacted]

[redacted]

741. [redacted]

Response to Finding No. 741

[redacted]

e. [redacted]

742. [redacted]

Response to Finding No. 742

[redacted]

743. [redacted]

Response to Finding No. 743

Complaint Counsel has no specific response.

744. [redacted]

Response to Finding No. 744

[redacted]

[redacted]

745. [redacted]

Response to Finding No. 745

[redacted]

[redacted]

746. [redacted]

Response to Finding No. 746

[redacted]

C. Customers Of MPKs Repeatedly And Consistently Engage In Inter-brand Switching

747. Prosthetists regularly substitute between various types of MPKs for K-3 and K-4 patients. (Schneider, Tr. 4403).

Response to Finding No. 747

The proposed finding is unclear and misleading. The proposed finding is unclear because Respondent has not defined "regularly" and Mr. Schneider does not use the term in the cited

testimony. Complaint Counsel also notes that Respondent has not cited to any clinic customer's prosthetists to support the proposed finding.

Complaint Counsel does not disagree that prosthetists are willing to substitute between different MPKs in certain circumstances, but notes that such switching is highly patient-and prosthetist-specific. The proposed finding is misleading to the extent that it suggests that clinic customers switch between different MPKs in equal measure. This inference is contradicted by the weight of the evidence, which shows significant switching and intense head-to-head competition between Otto Bock's C-Leg 4 and Freedom's Plié 3. (CCFF ¶¶ 1140-74). In contrast, many clinicians and patients regard Össur's "magnetorheologic technology" unfavorably, making them less likely to use the Rheo, (CCFF ¶¶ 1483-91). Similarly, many clinics are wary of Endolite's Orion and its level of service. *See, e.g.*, (CCFF ¶ 1539) (Keith Senn, COPC's President of Kentucky/Indiana Operations, testified at trial that its practitioners "feel that the quality of the Plie 3 or back up to the C-Leg 4 is greater than the Endolite knee"); (CCFF ¶ 1540) (Mark Ford, the President and CEO of POA, testified at trial that it is "more challenging" to get timely support from Endolite because they "don't have as much support staff … don't have as large a sales force, [and] they have far fewer clinicians"). In addition, MPKs offered by Nabtesco and DAW are considered, at best, far distant competitors to Otto Bock's C-Leg 4 and Freedom's Plié 3 with minimal presence and traction among prosthetists. (*See, e.g.*, Response to RPFF ¶ 646).

748. [redacted]

Response to Finding No. 748

[redacted]

[redacted]

749.

Response to Finding No. 749

750. "Prosthetists substitute based off of a patient's specific and individual needs. They could also make a decision based off of the history of the patient, if they have a high rate of falls, for example, or if they have a particular profession, surgeons, for example, short steps. They also, depending upon the payer and the contract that the prosthetist has or from a margin perspective could also play an important role in that decision on which microprocessor knee to use." (Schneider, Tr. 4403).

Response to Finding No. 750

In the United States, there are two steps to determine the eligibility of a K3/K4 amputee for an MPK. First, a patient's healthcare professionals (i.e., his or her surgeon and/or prosthetist) determine whether an MPK (rather than a mechanical knee) is the best medical option for the patient. (CCFF ¶¶ 392-93, 430-87). Second, the patient's insurance provider determines whether to reimburse a prosthetic clinic for fitting the patient with an MPK (rather than approving only a mechanical knee). (CCFF ¶¶ 394-99, 488-523). If both a patient's medical team and insurer determine an MPK is appropriate, and the patient is comfortable wearing one, the patient will be prescribed an MPK, the prosthetist at his or her clinic will fit the patient with one, and the patient's insurer will reimburse the clinic for the cost of fitting the patient's entire lower-limb prosthesis. (CCFF ¶¶ 392-561).

Several categories of healthcare professionals play a role in determining whether fitting a K3/K4 amputee with an MPK is medically appropriate. The surgeon, who performs the amputation, or another medical doctor, must write a prescription for a prosthetic knee. (CCFF ¶¶ 402-04). The prosthetist at the clinic to which the amputee is referred post-surgery typically plays a critical role in evaluating the amputee's ability to ambulate and which type of lower-limb prosthesis would be optimal for the patient. (CCFF ¶¶ 411-17, 430). These two healthcare professionals, sometimes along with others (e.g., a patient's physiatrist), work initially to determine a patient's K-level by evaluating his or her strength and ability to ambulate. (CCFF ¶¶ 431, 433-39). Healthcare professionals in the United States know that insurers typically do not provide reimbursement to clinics for fitting MPKs on K0, K1, or K2 patients. (CCFF ¶¶ 440-44). Therefore, only amputees identified as K3 or K4 ambulators (and sometimes K2 patients who would become K3 ambulators with a particular prosthesis) are considered candidates for an MPK by their healthcare professionals. (CCFF ¶¶ 445-46, 427, 557).

To determine whether an MPK is medically appropriate for a particular K3/K4 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).

U.S. 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 ¶¶ 496-514). 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).

In the United States, the vast majority of K3/K4 patients who are prescribed an MPK by medical professionals and have insurance coverage for an MPK receive and wear one. (CCFF ¶¶

531-37). A prosthetic clinic must go into the marketplace and purchase MPKs to fit on those patients whose prosthetists and other medical professionals determine would benefit medically from an MPK and have insurance coverage, ensuring the clinic will not lose money. (CCFF ¶¶ 430-523, 562-67). If patients qualify for MPKs, clinics do not try to switch them to mechanical knees over the recommendations of medical professionals; they purchase MPKs for those patients, because to do otherwise "would be a disservice to the patients and poor patient care." (CCFF ¶¶ 565-66). Clinics typically purchase MPKs directly from manufacturers, (CCFF ¶ 563), and the prices and terms on which MPKs are sold in the United States are established in one-on-one negotiations between clinics and manufacturers. (CCFF ¶ 569).

Although MPK manufacturers publish list prices, the price each clinic actually pays is individually negotiated and is almost always well below the published list price. (CCFF ¶ 570). Clinics generally negotiate MPK sales prices with manufacturers at least once per year during contract renewals, although manufacturers also offer lower prices to respond to competitive pressure from other MPK manufacturers at other times. (CCFF ¶¶ 571-73). The record shows that by discounting their MPK prices, MPK manufacturers are able to generate greater sales at the expense of other MPK manufacturers, and that clinics increase their MPK purchases from manufacturers that offer more favorable pricing. (CCFF ¶ 574). Price matters to a clinic because the lower the price of an MPK, the higher the clinic's margin, (CCFF ¶¶ 575-76), which clinics use to provide better patient care, improve their facilities and patient support services, and train their clinical staffs, (CCFF ¶ 577-79, 1437-45).

A clinic's bargaining leverage in negotiations with an MPK supplier turns on its ability to credibly threaten to switch some portion of its purchases to another MPK. (CCFF ¶¶ 581-86). During negotiations with MPK manufacturers, clinics often use a competitor's MPK prices to

negotiate lower prices. (CCFF ¶¶ 583-84, 587). According to Mr. Carkhuff, Freedom's Chairman, [redacted] (CCFF ¶ 584). Clinics regularly play MPK manufacturers, including Otto Bock and Freedom, off each other to negotiate lower MPK prices, (CCFF ¶¶ 587, 590-93, 595-96), because the ability to switch to competing MPKs provides clinics bargaining leverage, (CCFF ¶¶ 588, 590-93, 595-96). For example, at trial, Mark Ford, President and Managing Partner of Prosthetic & Orthotic Associates, testified that he has used the presence of Freedom's Plié 3 in negotiations with Otto Bock to get better pricing for the C-Leg 4. (CCFF ¶ 591). Mr. Ford testified that having both Freedom and Otto Bock allows him to "negotiate with both companies knowing there are alternatives, that our clinicians are both – are comfortable with both alternatives, so it allows us to negotiate." (CCFF ¶ 593).

751. Prosthetists also switch depending on quality. (Schneider, Tr. 4403-4404). "The market is extremely fickle. The margins .. are getting smaller and smaller and the transactional costs are higher and higher. If a company falters on its commitment to quality or has quality issues, it is damaged quickly, and prosthetists will make an immediate change." (Schneider, Tr. 4404).

Response to Finding No. 751

Complaint Counsel does not disagree to the extent that the proposed finding suggests that prosthetic clinics prefer to buy high quality MPKs such as the Plie and C-Leg rather than low-quality knees. For example, clinic customers have indicated that there are some legitimate safety and reliability concerns that deter them from using Össur MPKs. *See, e.g.*, (CCFF ¶¶ 1493-1516). Even Respondent's witness, Scott Sabolich, testified that his clinic "had one of [their] patients fall on a Rheo Knee, and it broke literally in half." (CCFF ¶ 1502). [redacted] (CCFF ¶¶ 1533-34), and clinic customers have testified that they do not feel the quality of Endolite's MPKs, and their

service levels, are as respectable as Freedom's and Otto Bock's MPKs. (CCFF ¶¶ 1539-40, 1543-44). Nabtesco and DAW are, at best, far distant competitors with minimal presence and traction among prosthetists. *See, e.g.*, RFF 646, 719; *see also* (CCFF ¶ 1585) (Lloyd Presswood, Freedom's Director of Field Sales and Clinical Training, describing the Allux as a "piece of crap knee").

752. Prosthetists also make immediate changes to other MPKs based on price. (Schneider, Tr. 4404).

Response to Finding No. 752

The proposed finding is unclear and misleading. It is unclear because Respondent has not defined "immediate" and Mr. Schneider did not do so in the cited testimony. Complaint Counsel also notes that Respondent has not cited to any clinic customer's prosthetists to support the proposed finding.

Complaint Counsel does not disagree that clinics are willing to switch between MPKs based on price, adding that the record shows that Otto Bock's C-Leg 4 and Freedom's Plié engaged in vigorous pricing competiton pre-Merger. (CCFF ¶¶ 1141-62). The proposed finding is misleading to the extent that it suggests that clinic customers switch between different MPKs in equal measure. This inference is contradicted by the weight of the evidence, which shows significant switching and intense head-to-head competition between Otto Bock's C-Leg 4 and Freedom's Plié 3, (CCFF ¶¶ 1140-74), but that many clinics view Össur's Rheo and Endolite's Orion less favorably. *See, e.g.*, (CCFF ¶¶ 1483-91); (CCFF ¶ 1539-40). In addition, MPKs by Nabtesco and DAW are considered, at best, far distant competitors to Otto Bock's C-Leg 4 and Freedom's Plié 3 with minimal presence and traction among prosthetists. (CCFF ¶¶ 1593-1604, 1614-26); *see also* Response to RPFF ¶ 646.

1. Prosthetics Clinics Are Price Sensitive And Will Switch Between MPKs Due To Price

753. COPC purchased more Pliés than Össur MPKs because Freedom "gave very aggressive pricing based on the volume of knees that we purchased from Freedom." (Senn, Tr. 192).

Response to Finding No. 753

The proposed finding is incomplete and misleading. The proposed finding is incomplete because Mr. Senn, President of the Kentucky and Indiana operations for COPC, testified that, COPC purchased more Pliés than Össur MPKs not only because of Freedom's "very aggressive pricing," but also "due to the comparison of the knees," stating that "[COPC] practitioners liked the Plié." (Senn (COPC) Tr. 192).

The proposed finding is also misleading because Respondent implies that COPC prefers the Plié over Össur's MPKs solely because of price. Mr. Senn testified that the Plié 3 is the preferred MPK for K-3 amputees at COPC's clinics "based on the feedback from practitioners that they like the Plié 3, works well with patients, and combined we have a discount arrangement with Freedom based on number of volume of knees that we purchase and so that we try to drive volume towards that, towards that knee, if it's appropriate for the patient." (Senn (COPC) Tr. 180). Mr. Senn's testimony thus makes its clear that the Plié 3 is the preferred knee for COPC's practioners due to the combination of feedback from clinicians, who like the product, as well as the discount arrangement.

754. [redacted]

Response to Finding No. 754

[redacted]

[redacted]

[redacted]

755. If the price of the Plié went up, one prosthetist testified that "I just wouldn't use it. I would use the Orion 3." (PX05151 (Patton (Prosthetic Solutions), Dep. at 123)).

Response to Finding No. 755

The proposed finding is incomplete and misleading to the extent it suggests that a significant number of clinics would switch from the Plié to the Orion in response to a Plié price increase. The evidence shows the Endolite has less than [redacted] of the U.S. MPK market and [redacted] (CCFF ¶ 964); (CCFF ¶¶ 1531, 1535-1536). Although it has been selling MPKs in the United States for more than twenty years, Endolite's market share remains less than [redacted] (CCFF ¶ 964). A principal reason for its inability to grow into a stronger MPK competitor is that, in the words of Endolite's Executive Chairman, Stephen Blatchford, Endolite [redacted] (CCFF ¶ 1536); *see also* (CCFF ¶¶ 1533-35). In addition, [redacted] Although Endolite's MPK sales have improved slightly since the launch of the Orion 3 in September 2016, many prosthetic clinics remain wary of its product and its service. (CCFF ¶¶ 1539-40).

756. [redacted]

Response to Finding No. 756

[redacted]

757. [redacted]

Response to Finding No. 757

The proposed finding is incomplete and misleading to the extent it suggests that COPC negotiates the best rates possible based solely on volume discounts and not playing Freedom and Otto Bock off of each other in negotiations. Evidence shows that [redacted]

[redacted] (Senn (COPC) Tr. 221-222 (*in camera*); *see also* (PX05128 (Senn (COPC) Dep. at 24-25) (testifying that when COPC switched from Otto Bock's C-Leg MPK to Freedom's Plié, he saw Otto Bock provide "increasingly more aggressive pricing on their MPKs . . . .")). [redacted] (CCFF ¶ 1153).

758. [redacted]

Response to Finding No. 758

Complaint Counsel does not disagree that [redacted] (CCFF ¶ 574).

The proposed finding is misleading to the extent it suggests that clinics will switch patients from MPKs to mechanical knees based on the relative prices or margins of those two classes or products. Evidence shows that if patients qualify for MPKs, clinics do not try to switch them to mechanical knees over the recommendations of medical professionals; they purchase MPKs for those patients, because to do otherwise "would be a disservice to the patients and poor patient care." (CCFF ¶¶ 565-66). Patients are not switched from MPKs to mechanical knees based on the prices paid by clinics for those two classes of products. (CCFF ¶¶ 525-29). The interplay

among surgeons, prosthetists, patients, and insurers determines whether a given patient receives an MPK or a mechanical knee—with decisions driven primarily by the medical ethics of healthcare professionals, preferences of patients for the feel of different prosthetic knees, and reimbursement regulations established by insurers. (CCFF ¶¶ 392-561). Dr. Argue completely ignored that the U.S. healthcare system sorts K3/K4 patients into two groups: (1) those with an MPK prescription and coverage for an MPK and (2) those without. (CCFF ¶¶ 427-429). The first group does not view mechanical knees, and their inferior technology, as substitutes for the high-tech MPKs that their medical professionals have prescribed and insurers have covered to improve their health, safety, and quality of life. (CCFF ¶¶ 531-537, 602). The second group has no ability to choose an MPK, since they do not have a valid prescription and/or insurance coverage. (CCFF ¶¶ 520-523).

759. [redacted]

Response to Finding No. 759

The proposed finding is misleading to the extent it suggests that clinics will switch patients from MPKs to mechanical knees based on the relative prices or margins of those two classes or products. (*See* Response to RPFF ¶ 758).

760. [redacted]

Response to Finding No. 760

Complaint Counsel does not disagree that [redacted] (CCFF ¶ 574).

761. [redacted]

Response to Finding No. 761

Complaint Counsel does not disagree that [redacted]

(CCFF ¶ 574). The proposed finding is misleading to the extent it suggests that clinics will switch patients from MPKs to mechanical knees based on the relative prices or margins of those two classes or products. (*See* Response to RPFF ¶ 758).

2. Price Discounts In The Prosthetics Industry Are Often Based On Volume Discounts, So It Is Beneficial To Clinics To Drive Volume Toward A Few Suppliers

762. The price offered by Endolite to COPC for the Orion 3 is without negotiating any volume discounts. (Senn, Tr. 254). If COPC negotiated volume discounts with Endolite and COPC moved volume to COPC, the price paid by COPC for the Orion 3 would go down even further. (Senn, Tr. 254-255).

Response to Finding No. 762

Complaint Counsel does not disagree, but adds that Mr. Senn, President of Kentucky/Indiana Operations at COPC, testified that COPC "feel[s] that the quality of the Plié or back up to the C-Leg 4 is greater than the Endolite knee." (CCFF ¶ 1539). He also previously testified, in March 2018, that COPC practitioners "do not feel the knee functions as well as the Freedom or Ottobock knees at this time." (CCFF ¶ 1539). Given Mr. Senn's view that the Orion is inferior to the Plie and C-Leg, it is not surprising that he purchased one Orion in 2016 and two in 2017. (PX05128 (Senn) (COPC) Dep. at 39, 43). Therefore, it is not surprising that they did not receive a volume discount. Complaint Counsel has no specific response regarding whether if COPC negotiated volume discounts with Endolite and COPC moved volume to COPC, the price

paid by COPC for the Orion 3 would go down even further. But the record is clear they have no plans to do so. (Senn (COPC) Tr. 225-226).

763. Some prosthetics clinics require their prosthetists to follow purchasing guidelines related to the selection of MPKs and non-MPKs for K-3 and K-4 users of prosthetic knees. (Senn, Tr. 154-155, 179, 230). Those guidelines provide the clinics' prosthetists with preferred products to which the clinics would like to drive volume because of contracts and discounts with manufacturers of those products. (Senn, Tr. 179).

Response to Finding No. 763

Complaint Counsel does not disagree that [redacted] (CCFF ¶ 574). Evidence shows that if patients qualify for MPKs, clinics do not try to switch them to mechanical knees over the recommendations of medical professionals; they purchase MPKs for those patients, because to do otherwise "would be a disservice to the patients and poor patient care." (CCFF ¶¶ 565-66). Patients are not switched from MPKs to mechanical knees based on the prices paid by clinics for those two classes of products. (CCFF ¶¶ 525-29). The interplay among surgeons, prosthetists, patients, and insurers determines whether a given patient receives an MPK or a mechanical knee—with decisions driven primarily by the medical ethics of healthcare professionals, preferences of patients for the feel of different prosthetic knees, and reimbursement regulations established by insurers. (CCFF ¶¶ 392-561). Dr. Argue completely ignored that the U.S. healthcare system sorts K3/K4 patients into two groups: (1) those with an MPK prescription and coverage for an MPK and (2) those without. (CCFF ¶¶ 427-429). The first group does not view mechanical knees, and their inferior technology, as substitutes for the high-tech MPKs that their medical professionals have prescribed and insurers have covered to improve their health, safety, and quality of life. (CCFF ¶¶ 531-537, 602). The second group has

no ability to choose an MPK, since they do not have a valid prescription and/or insurance coverage. (CCFF ¶¶ 520-523).

Additionally, the first sentence of the proposed finding is unsupported and misleading. First, Respondent cites a single prosthetic clinic in support of the proposition that "some prosthetic clinics require" prosthetists to follow purchasing guidelines. Second, Mr. Senn explicitly stated that the purchasing guideline is provided to COPC clinicians, but that "[i]t's not *mandatory*, so if another knee or foot would be appropriate for that patient, that is fine as well[.]" (Senn (COPC), Tr. 179) (emphasis added). Furthermore, Mr. Senn explained that the Plié 3 is the preferred MPK for K-3 amputees at COPC clinics "based on the feedback from practitioners that they like the Plié 3, works well with patients, and combined we have a discount arrangement with Freedom based on number of volume of knees that we purchase and so that we try to drive volume towards that, towards that knee, if it's appropriate for the patient." (Senn (COPC), Tr. 180).

764. COPC's negotiations with manufacturers of MPKs focus primarily on volume discount arrangements. (Senn, Tr. 195). COPC negotiates pricing with MPK manufacturers annually. (Senn, Tr. 195).

Response to Finding No. 764

The proposed finding is incomplete and contradicted by other testimony from Mr. Senn. The proposed finding is incomplete to the extent it states that COPC's negotiations with manufacturers of MPKs focus primarily on volume discount arrangements. Other evidence shows that competition between MPK manufacturers, and COPC's ability to play them off of each other, allows COPC to negotiate the most favorable prices possible. For example, Mr. Senn testified that he increased his purchases of Freedom's Plié due to "[t]he competitive pricing that we received from them." (CCFF ¶ 1150). [redacted]

[redacted] (CCFF ¶ 1152). As a result, he saw Otto Bock offer "increasingly more aggressive pricing on their MPKs." (CCFF ¶ 1152).

765. Though COPC has not yet had a need to do so, COPC could switch enough MPK volume to Össur that would give COPC a discount that would be comparable to Freedom. (Senn, Tr. 193).

Response to Finding No. 765

The proposed finding is conclusory, speculative, and blatantly misleading. Mr. Senn [redacted] (Senn (COPC) Tr. 223). Nowhere does Mr. Senn suggest that he would ever consider switching enough MPK volume to Össur that it would give COPC a discount that would be comparable to Freedom.

766. The prosthetist makes the decision of which knee will be ordered for a particular patient. (Senn, Tr. 205-206). COPC publishes a preferred guideline to its practitioners, but practitioners are "not required to completely follow [the guideline] in every case." (Senn, Tr. 205-206). COPC's guideline specifies that Freedom's Plié 3 is its preferred MPK due to the costing o the knee. (Senn, Tr. 205, 208). The Plié 3 is COPC's preferred MPK because of its low cost and the higher margin it affords COPC. (Senn, Tr. 208). If a prosthetist at COPC wants to choose an MPK besides Plié 3, the prosthetist needs to justify that decision by sending a request to the general manager explaining why, and the general manager must approve the request. (Senn, Tr. 209-210).

Response to Finding No. 766

The proposed finding is incomplete. The interplay among surgeons, prosthetists, patients, and insurers determines whether a given patient receives an MPK or a mechanical knee—with decisions driven primarily by the medical ethics of healthcare professionals, preferences of patients for the feel of different prosthetic knees, and reimbursement regulations established by insurers. (CCFF ¶¶ 392-561). Dr. Argue completely ignored that the U.S. healthcare system sorts K3/K4

patients into two groups: (1) those with an MPK prescription and coverage for an MPK and (2) those without. (CCFF ¶¶ 427-429). The first group does not view mechanical knees, and their inferior technology, as substitutes for the high-tech MPKs that their medical professionals have prescribed and insurers have covered to improve their health, safety, and quality of life. (CCFF ¶¶ 531-537, 602). The second group has no ability to choose an MPK, since they do not have a valid prescription and/or insurance coverage. (CCFF ¶¶ 520-523).

The third and fourth sentences of the proposed finding are misleading because Mr. Senn testified that the Plié 3 is COPC's preferred MPK not only due to "costing," but also the "quality" and the clinicians "feel that the Plié fits and works well for the majority of their patients." (Senn (COPC) Tr. 208). In addition, Mr. Senn testified that the Plié 3 is COPC's preferred MPK "based on the feedback from practitioners that they like the Plié 3, works well with patients, and combined we have a discount arrangement with Freedom based on number of volume of knees that we purchase and so that we try to drive volume towards that, towards that knee, if it's appropriate for the patient." (Senn (COPC) Tr. 180).

767. All MPKs are available to every prosthetic clinic, even if it is not a product that the clinic typically purchases. (Ell, Tr. 1731). A prosthetist from Mid-Missouri testified that MPKs from Ottobock, Freedom, Össur, Endolite, and DAW are available for purchase). (Ell, Tr. 1731)

Response to Finding No. 767

Complaint Counsel has no specific response.

768. Mark Ford testified that even though POA has not purchased an Össur Rheo in the last three years, POA still makes the Rheo available for "test driving." (Ford, Tr. 955).

Response to Finding No. 768

The proposed finding is unclear, irrelevant and misleading. If is unclear what the term "test driving" refers to. Complaint Counsel agrees with the proposed finding to the extent that it

suggests that Ossur's Rheo is an unattractive MPK for POA because despite being available to test drive, it has admittedly made no Rheo sales in three years. This consistent with other evidence. Mr. Ford, the President and Managing Partner of POA, testified that, there is "inherent[ly] stronger competition" between Freedom and Otto Bock because of the "similar ideas and similar platforms" used by the respective companies. (CCFF ¶ 1433). On this point, Mr. Ford explained that compared to the Össur Rheo, Freedom's Plié 3 "is much more similarly designed to the C-Leg, does not use the magnetic fluid in the same way that the Össur knee does, and it's just the entire way that it operates is much more similar to the C-Leg than it is to the Rheo." (CCFF ¶ 1485). Moreover, Mr. Ford testified that Össur's Rheo is "viewed as a different product than the C-Leg or the Plié knee because of the platform, the functional platform that it's built on, so while they're both in the MPK category, there are differences there. So they are competition, the Rheo knee is competition for the C-Leg, but for many clinicians it's not as close a competition as the Plié is to the C-Leg." (CCFF ¶ 1484).

769. Clinics can negotiate for better prices on a volume basis. (Senn, Tr. 195). Price sensitive clinics want to "drive volume as much as they can." (Senn, Tr. 207).

Response to Finding No. 769

Complaint Counsel does not disagree that [redacted] (CCFF ¶ 574). Evidence shows that if patients qualify for MPKs, clinics do not try to switch them to mechanical knees over the recommendations of medical professionals; they purchase MPKs for those patients, because to do otherwise "would be a disservice to the patients and poor patient care." (CCFF ¶¶ 565-66). Patients are not switched from MPKs to mechanical knees based on the prices paid by clinics for those two classes of products. (CCFF ¶¶ 525-29).

The interplay among surgeons, prosthetists, patients, and insurers determines whether a given patient receives an MPK or a mechanical knee—with decisions driven primarily by the medical ethics of healthcare professionals, preferences of patients for the feel of different prosthetic knees, and reimbursement regulations established by insurers. (CCFF ¶¶ 392-561). Dr. Argue completely ignored that the U.S. healthcare system sorts K3/K4 patients into two groups: (1) those with an MPK prescription and coverage for an MPK and (2) those without. (CCFF ¶¶ 427-429). The first group does not view mechanical knees, and their inferior technology, as substitutes for the high-tech MPKs that their medical professionals have prescribed and insurers have covered to improve their health, safety, and quality of life. (CCFF ¶¶ 531-537, 602). The second group has no ability to choose an MPK, since they do not have a valid prescription and/or insurance coverage. (CCFF ¶¶ 520-523).

770. Keith Senn is not familiar with the Nabtesco Allux at this time, but he believes that COPC could switch purchases of MPKs from Freedom to Nabtesco if COPC got educated on Nabtesco's MPKs. (Senn, Tr. 194).

Response to Finding No. 770

The proposed finding is unsupported and misleading. Keith Senn has no basis to testify about the Nabtesco Allux as he is admittedly "not familiar with the knee." (Senn (COPC), Tr. 194). To the extent the proposed finding suggests anything else, the proposed finding is misleading.

771. All MPK manufacturers market to all prosthetics clinics and try to win their business, even if it has not historically been a large customer. (Ell, Tr. 1732 (Testifying that he does not buy MPKs from Össur, but that the Össur sales reps still come out and demonstrate the knee to his clinic; Ell, Tr. 1736-1737 (Ottobock, Freedom, Össur, and Endolite have all provided demonstrations on MPK knees and training coursework to Mid-Missouri)

Response to Finding No. 771

Complaint Counsel does not disagree that Mr. Ell and his clinic Mid-Missouri O&P view Össur's MPKs as unattractive as he admittedly "does not buy MPKs from Össur," despite "Össur sales reps still com[ing] out and demonstrate[ing} the knee to his clinic." The unattractiveness of Össur's MPKs implied by the proposed finding is consistent with a substantial body of other evidence in the case. *See, e.g.*, Response to RPFF ¶ 596. In addition, the proposed finding is overly broad, incomplete, and misleading for several reasons. First, the proposed finding is overly broad and misleading because Respondent cites to a single prosthetist for the proposition that "*all* MPKs are available to *every* prosthetic clinic, even if it is not a product that the clinic typically purchases." Mr. Ell lacks foundation to speak to what every prosthetic clinic is capable of doing, and this also assumes that every prosthetic clinic is visited by sales representatives from the respective companies.

772. Clinics describe pricing negotiations as being based on driving volume, do not describe them as based on playing one manufacturer against another. [redacted] Ford, Tr. 904, 935-937; [redacted].

Response to Finding No. 772

The proposed finding is incomplete, misleading, and contradicted by the weight of the evidence. To the extent that the proposed finding implies that clinics do not play "one manufacturer against another," it is contradicted by substantial evidence. Clinics use not only their volume as leverage in negotations to gain the best pricing possible, but also the ability to credibly threaten to switch some portion of its purchases to another MPK manufacturer. (CCFF ¶¶ 581-96). [redacted] (CCFF ¶ 583). There is abundant evidence in the

record that clinic customers benefits from the price competition between the Plié and C-Leg based on customers playing them off one another. (CCFF ¶¶ 1140-62).

Respondent's citation to Keith Senn is misleading because [redacted] (Senn (COPC) Tr. 227 (*in camera*)), and Otto Bock reduced its price based on the discounts Freedom offered on the Plié. (CCFF ¶ 595) (further stating Mr. Senn testified that COPC started using more Pliés in 2015, and Otto Bock responded with "increasingly more aggressive pricing on their MPKs, on their C-Leg 3 and C-Leg 4, and working to continue to try to increase their overall volume to Ottobock, not just the knees but in their -- their line of business, so we can reach dollar thresholds for increased discounts." Mr. Senn elaborated that by "increasingly more aggressive, he meant that the "discounts were greater."")). [redacted] (CCFF ¶ 1136). Moreover, [redacted] (CCFF ¶ 1162).

The citation to Mr. Ford is misleading because Mr. Ford, President and Managing Partner of POA, testified that he has used the presence of Freedom's Plié 3 to obtain better prices from Otto Bock for its C-Leg 4. (CCFF ¶ 1160). In addition, Mr. Ford has expressed concern that, as a result of the Merger, "the price of MPKs can go up over time" and that POA would lose leverage in negotiations against Otto Bock for MPKs. (CCFF ¶ 1161).

The citation to [redacted] is also misleading given his other testimony. [redacted] also testified that C-Leg's "price has come down

significantly . . . I think that it's probably pretty well documented that it's competition with Freedom's Plié that has contributed to that, at least some." (CCFF ¶ 1157). [redacted] clarified that "well documented" means that it is "common knowledge just among providers and manufacturers that it's obvious from where I sit that [Freedom and Ottobock] are – that [Freedom and Ottobock] are, you know, very traditionally one-upping each other and trying to do – pack more into a knee for the same price or less." (CCFF ¶ 1157). In addition [redacted] testified that as a result of the Merger, he is concerned "prices will start going back up" for the Plié and the C-Leg. (CCFF ¶ 1428).

a. Reimbursement encourages switching

773. The amount of reimbursement that COPC receives from Medicare and private insurance does not vary depending on the brand of MPK, and brand is not indicated on reimbursement submission. (Senn, Tr. 200).

Response to Finding No. 773

Complaint Counsals has no specific response.

774. The reimbursement is paid according to L-Codes and is manufacturer agnostic. (Schneider, Tr. 4352; Kannenberg, Tr. 1934).

Response to Finding No. 774

Complaint Counsals has no specific response.

775. Mark Ford believes that the most important person in knee provided is the insurance company, and they do not have a preference as between MPKs manufacturers, as long as the L-Codes are the same. (Ford Tr. 920).

Response to Finding No. 775

The proposed finding is unclear to the extent that the statement "most important person in knee provided is the insurance company" is vague and confusing. The proposed finding is also incomplete and misleading, to the extent it suggests insurers are the single most important player

in the prosthetic fitting process, because evidence shows that several different players in the U.S. healthcare system collectively determine whether it is medically appropriate to prescribe and reimburse the fitting of an MPK on a particular amputee. (CCFF ¶¶ 400-29). The interplay among surgeons, prosthetists, patients, and insurers determines whether a given patient receives an MPK or a mechanical knee—with decisions driven primarily by the medical ethics of healthcare professionals, preferences of patients for the feel of different prosthetic knees, and reimbursement regulations established by insurers. (CCFF ¶¶ 392-561). The price that a clinic must pay out-of-pocket for a particular MPK, and the general difference in out-of-pocket prices for MPKs and mechanical knees paid by clinics, do not play a significant role in whether a particular patient is prescribed an MPK or mechanical knee. (CCFF ¶¶ 524-29). The evidence shows that this decision is based on what healthcare professionals determine is medically best for the patient and justifiable to the patient's insurer. (CCFF ¶¶ 392-523). Otto Bock's acquisition of Freedom does not significantly affect how medical professionals determine what is best for patients, whether patients prefer MPKs or mechanical knees, or how insurance companies determine whether to reimburse clinics for MPKs.

776. All MPK manufacturers use clinical studies that study Ottobock knees to market their MPKs and encourage switching (Kauffman, Tr. 892-893).

Response to Finding No. 776

Complaint Counsel has no specific response other than to add that the proposed finding does not suggest, and certainly does not prove, that MPK manufacturers use clinical research that studies other, non-Otto Bock MPKs, to market their MPKs and encourage switching by clinics among MPKs.

D. Expansion Into The Alleged MPK Market Would Be Timely, Likely, And Sufficient

777. There is minimal investment in hiring and training additional sales representatives (Schneider, Tr. 4286; Testerman, Tr. 1255-1256). Freedom's regional sales managers are paid somewhere in the mid-$70,000 range. (Testerman, Tr. 1257-1258). New prosthetics sales representatives can be trained to sell MPKs and other products in three months or less. (Schneider, Tr. 4286; Testerman, Tr. 1255-1256).

Response to Finding No. 777

The proposed finding is unclear, misleading, and contradicted by other evidence in the record. The term "minimal" is unclear. Additionally, when Respondent writes about "hiring and training sales representatives" it does not explain what they will be hired or trained to do. The only testimony cited for any statement in this proposed finding comes from Respondent employees. To the extent that the proposed finding implies that developing an entire sales force that can effectively sell MPKs in three months or less, it is misleading, because the cited testimony only refers to the training of individual sales representatives. An entrant would not have to hire and train one sales representative, it would have to hire and train an entire staff. As of March 2018, Freedom employed a team of approximately 19 employees responsible for sales. (CCFF ¶ 885). This team includes 13 sales representatives located across the United States and 3 clinical sales representatives who are licensed certified prosthetists and certified prosthetists and orthotists. (CCFF ¶ 885). Otto Bock employs 28 sales representatives divided into separate regions located across the United States. (CCFF ¶ 869). Respondent does not offer any evidence regarding how long it would take to hire or train an entire sales force that would be on par with that of Respondent's sales force.

In addition, the third sentence of the proposed finding stating that sales representatives can be trained to sell MPK in "three months or less" is misleading and contradicted by other evidence from Respondent. It is misleading because the relevant issue is not only when a sales representative could sell *any* MPKs, rather it is determining when a sales representative could sell

MPKs *as effectively as Freedom had pre-Merger*. [redacted]

778. None of Freedom's regional sales managers sell only the Plié 3 in the United States, they sell all of Freedom's products. (Testerman, Tr. 1258).

Response to Finding No. 778

Complaint Counsel has no specific response.

779. Prior to joining Freedom, Testerman had no experience selling MPKs. (Testerman, Tr. 1248:17-20). Testerman was able to start effectively selling Plié 3 within a month or two. (Testerman, Tr. 1248-1249).

Response to Finding No. 779

The proposed finding is misleading and unclear. Mr. Testerman testified that he was able to sell MPKs because he was joining "a real strong sales team" with "a lot of experience" who had previously "built the market" for the Plié 2. (Testerman (Freedom) Tr. 1248-1249). It is also misleading to the extent that Mr. Testerman is being held up as a case study for all salespeople as opposed to the statement of one of Respondent's employees. The proposed finding is unclear because Mr. Testerman did not explain what it means to "effectively" sell the Plié 3 and because he did not provide any explanation for how many Plié 3's he was able to sell "within a month or two" of joining Freedom. (Testerman (Freedom) Tr. 1248). The proposed finding is contradicted by other evidence from Respondent to the extent it suggests that all sales representatives could be trained and begin performing at the level of current Freedom sales representatives in "a month or two." [redacted]

[redacted]

780. [redacted]

Response to Finding No. 780

[redacted]

781. POA sells a little less than seven MPKs per year on average. (Ford, Tr. 945-946)

Response to Finding No. 781

Complaint Counsel does not disagree that Mr. Ford's testimony supports the proposed finding as written, but the proposed finding is misleading to the extent that it implies that U.S. prosthetic clinics generally do not purchase a significant number of MPKs, or that clinic witnesses who testified at trial do not purchase a significant number of MPKs. Mark Ford was only one of

several clinic witnesses who testified in this case. [redacted]

1. Freedom Was Not Ottobock's Only Competitive Constraint In The MPK-Only Market

782. For clinics who primarily buy Freedom and Ottobock MPKs, this is not borne out of necessity, and other firms can constrain prices at those clinics. [redacted]

Response to Finding No. 782

[redacted]

[redacted]

783. [redacted]

Response to Finding No. 783

[redacted]

784. If any prosthetics supplier in the U.S. acquired Freedom's MPK assets, they would acquire an immediate presence in the MPK segment in the United States. (De Roy, Tr. 3726).

Response to Finding No. 784

The proposed finding is misleading because Respondent has not proposed to sell all of Freedom's MPK assets. (*See* Response to RPFF ¶ 1081).

785. Pricing of the Plié 3 has had only a "limited effect" on Össur's and Ottobock's pricing. (De Roy, Tr. 3676).

Response to Finding No. 785

The proposed finding is unclear, unfounded, and contrary to the weight of the evidence. The proposed finding is unclear because Respondent does not explain what "limited effect" means. The proposed finding is unfounded because, as a competitor, Mr. De Roy has no personal knowledge about the pricing effect that the Plie 3 has had on Otto Bock's products. The proposed finding is also contrary to the weight of the evidence because a large body of testimony and ordinary course documents show that Freedom's Plié pricing had a substantial effect on Otto Bock C-Leg pricing. For example, when Freedom launched the Plié 3, Otto Bock responded to Freedom's aggressive pricing and promotion strategy. Dr. Helmut Pfuhl, an Otto Bock GmbH executive vice president, wrote to colleagues that "pricing keeps me up at night more than anything

else!" and underscored that Otto Bock was losing sales because Freedom was pricing the Plié 3 below the C-Leg 3. (CCFF ¶ 1030). Another top executive, Otto Bock's Executive Medical Director for North America, Andreas Kannenberg, testified that, "Freedom was driving a very aggressive marketing and promotional campaign with pretty high discounts and giveaways of additional products." (CCFF ¶ 1027). [redacted] Otto Bock targeted specific Plié 3 customers for "increasingly aggressive pricing on their MPKs." (CCFF ¶ 1032). [redacted] Otto Bock also armed 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). In response to Freedom's aggressive promotions after Otto Bock launched its C-Leg 4, Otto Bock's marketing group provided its sales team with guidance on "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). [redacted] Otto Bock and Freedom continued to compete intensely with each other right up until the time of the Merger in September 2017. [redacted]

786. [redacted]

Response to Finding No. 786

[redacted]

[redacted]

787. [redacted]

Response to Finding No. 787

[redacted]

788.

Response to Finding No. 788

[redacted]

2. Össur Is A Significant Competitive Constraint

789. Össur sells the Rheo, Rheo XC, and Power Knee in the United States. (De Roy, Tr. 3576). The Power Knee is a powered microprocessor-controlled device. (De Roy, Tr. 3576).

Response to Finding No. 789

The proposed finding is incomplete and misleading because Respondent does not explain what the Power Knee is and how it compares to other microprocessor knees. In contrast to other MPKs, including the Rheo and Rheo XC, Össur's Power Knee uses a motor to provide power and momentum for the MPK. The motor in the Power Knee functions like "your quad muscle" to enable a user to rise out of a chair and propel a person "throughout every step." (CCFF ¶ 906). Össur's Executive VP of R&D testified that, "there's no real comparable technology [to the Power Knee] on the market today." (CCFF ¶ 906). [redacted]

790. [redacted]

Response to Finding No. 790

Complaint Counsel has no specific response.

791. [redacted]

Response to Finding No. 791

Complaint Counsel has no specific response.

792. Össur offers the full range of lower-limb prosthetic products to restore mobility. (De Roy, Tr. 3537).

Response to Finding No. 792

Complaint Counsel does not disagree that Mr. De Roy, Össur's Executive Vice President of R&D believes that the company he works for offers a full range of lower-limb prosthetics. To the extent that the proposed finding implies that Össur's lower-limb prosthetics are exactly like the products offered by Freedom and Otto Bock, it is misleading. [redacted]

793. [redacted]

Response to Finding No. 793

Complaint Counsel has no specific response.

794. Össur is constantly innovating its MPKs. (De Roy, Tr. 3545). "I think it's fair to say that we always have projects ongoing for MPKs. Since we developed the Rheo Knee, there's been continuous improvements and updates and upgrades to the product, so we are always working on a project of that type, yes." (De Roy, Tr. 3545).

Response to Finding No. 794

Complaint Counsel has no specific response.

795. The 2017 upgrade version of the Rheo was the fourth generation Rheo, but Össur dropped the numbering system and called it simply the Rheo. (De Roy, Tr. 3545).

Response to Finding No. 795

Complaint Counsel has no specific response.

796. Össur is constantly innovating its MPKs "because it is a competitive field and we want to make sure that we have the ability to compete with other products that are on the market as well." (De Roy, Tr. 3546).

Response to Finding No. 796

Complaint Counsel does not disagree that Mr. De Roy, Össur's Executive Vice President of R&D believes that Össur innovates to ensure the company has "the ability to compete with other" MPK products. The proposed finding is misleading to the extent it implies that Össur has achieved the ability to compete with the Plie 3 and the C-Leg as effectively as those two products compete against each other. Össur's MPK technology is associated with safety and reliability concerns among customers. [redacted] Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs, and Future Development, testified similarly that the Össur Rheo knee "go[es] into a free swing when the battery was dead" while the Otto Bock microprocessor knees "have the safety of locking up" if the battery dies or malfunctions. (CCFF ¶ 1494). Manar Ammouri, Freedom's Senior Product

Manager, explained that Össur's Rheo knee causes a "safety concern" because "[w]hen the product goes into dead battery mode, the knee goes into free swing, which means it's loose, it's not stable." (CCFF ¶ 1495). Third-party witnesses have testified about safety concerns with respect to the Össur Rheo knee. (CCFF ¶ 1501). Mr. Sabolich, the owner and Clinical Director of Scott Sabolich Prosthetics and Research, testified that in February 2015 his clinic "had one of [their] patients fall on a Rheo Knee, and it broke literally in half." (CCFF ¶ 1502). Jonathan Endrikat, CEO of Empire Medical, stated that unlike the "safety mode" that occurs in the C-Leg and Plié when the battery runs out, the Össur Rheo goes into "free swing" that is unable to support the person's weight, resulting in "the perception being that it's not as safe because it goes into free swing." (CCFF ¶ 1504). [redacted]

797. Over the last few years, the time frames of product launches have gotten shorter and new generations of MPKs are being launched more frequently. (De Roy, Tr. 3546).

Response to Finding No. 797

The proposed finding is unclear and misleading. Respondent does not specify which products the finding relates to and does not explain what "more frequently" means. To the extent that it implies all MPKs are being launched "more frequently," Mr. De Roy had only been asked "how often does Össur offer a newer version of its MPK" so it is clear he was only speaking about the time frame between recent launches of Össur's own MPK, the Rheo, not all MPK launches. (De Roy (Össur) Tr. 3546).

798. Össur uses clinical studies to market its MPKs against non-MPKs. (De Roy, Tr. 3549).

Response to Finding No. 798

The proposed finding is incorrect, misleading, and constitutes a blatant misrepresentation of the cited testimony. The entirety of Mr. De Roy's testimony cited by Respondent is as follows:

> Q. Now, you mentioned earlier that there are various K levels and that Össur offers a variety of mechanical knees for different K levels. Are these differences in stability between a microprocessor knee and mechanical knee also true of the difference between a K3 mechanical knee and a microprocessor knee?
> A. Absolutely. Yes.
> Q. And are there any benefits to clinicians who prescribe a microprocessor knee?
> A. I think that the one that we all strive for as clinicians is to provide a better clinical outcome, so they will be able to provide their patients with a more successful use of their prosthesis and with that all the benefits of social reintegration, professional reintegration, so that's what I think is the driving factor for many. And then I think -- yeah, I think that would be the main, the main driving factor.
> Q. You spoke earlier of the studies that demonstrate the benefits of microprocessor knees. Does Össur ever use these types of studies to market its microprocessor knees?
> A. Yes.

(De Roy (Össur) Tr. 3548-3549).

Nowhere in the Mr. De Roy's testimony cited by Respondent does he testify that Össur uses clinical studies "to *market* its MPKs *against non-MPKs*." The only facts this testimony establishes are that: (1) Mr. De Roy "absolutely" believes that there are "differences in stability between" between MPKs and K-3 mechanical knees; (2) the "main driving factor" for "clinicians who prescribe a microprocessor knee" is to "provide a better clinical outcome" for the patient; and (3) there are "studies that demonstrate the benefits of microprocessor knees." Respondent misleadingly takes Mr. De Roy's affirmative answer to the question "Does Össur ever use these types of studies to market its microprocessor knees?"—which makes no reference to marketing MPKs *against mechanical knees*—and simply asserts with no support that Össur uses clinical

studies to market MPKs against non-MPKs. This is a blatant misrepresentation of the testimony Respondent cites to support it proposed finding.

799. Össur does not sell any MPKs or non-MPKs that require an external air pump. (De Roy, Tr. 3551-3552).

Response to Finding No. 799

Complaint Counsel has no specific response.

800. [redacted]

Response to Finding No. 800

[redacted]

[redacted]

801. [redacted]

Response to Finding No. 801

[redacted]

802. [redacted]

Response to Finding No. 802

[redacted]

[redacted]

803. [redacted]

Response to Finding No. 803

Complaint Counsel has no specific response.

804. [redacted]

Response to Finding No. 804

Complaint Counsel has no specific response.

805. [redacted]

Response to Finding No. 805

Complaint Counsel has no specific response.

806. [redacted]

Response to Finding No. 806

[redacted]

[redacted]

[redacted]

807. [redacted]

Response to Finding No. 807

[redacted]

3. Endolite Is A Significant Competitive Constraint [redacted]

808. Blatchford is a global company employing about 900 people worldwide. (Blatchford, Tr. 2208).

Response to Finding No. 808

Complaint Counsel has no specific response.

809. Adrian Stenson has been Endolite's global CEO since April 1, 2015. (Blatchford, Tr. 2208).

Response to Finding No. 809

Complaint Counsel has no specific response.

810. Stenson manages the day-to-day operations of Endolite while Stephen Blatchford handles strategic initiatives and product development. (Blatchford, Tr. 2208-2209).

Response to Finding No. 810

The proposed finding is incorrect. While Mr. Blatchford is still "extremely interested in product development and product direction" he no longer chairs the new product development board, even though he attends all of the meetings. (Blatchford (Endolite) Tr. 2095).

811. Stenson is also tasked with achieving Endolite's ambitious growth plant to increase its revenues from $60 million pounds per year to 125 million by 2020 and 250 million by 2025. (Blatchford, Tr. 2209).

Response to Finding No. 811

Complaint Counsel has no specific response.

812. Professor Saeed Zahedi is Endolite's Director of Technology and also sits on Endolite's management team. (Blatchford, Tr. 2210). He has a background in prosthetic and orthotic technology and a Ph.D. from Strathclyde University. (Blatchford, Tr. 2211). He is a knight. (Blatchford, Tr. 2211).

Response to Finding No. 812

Complaint Counsel has no specific response.

813. [redacted]

Response to Finding No. 813

Complaint Counsel has no specific response.

814. Endolite has a significant U.S. presence with about eighty total employees, sixty of whom are located at Endolite's U.S. headquarters in Miamisburg, Ohio. (Blatchford, Tr. 2211; 2213). Endolite's Ohio headquarters manages marketing, finance, and administrative functions and also manufactures hydraulic cylinders for Endolite's fluid-controlled, non-MPKs. (Blatchford, Tr. 2213). John Braddock is the U.S. sales manager, and John Hawke is financial controller for the U.S. business. (Blatchford, Tr. 2211-2212).

Response to Finding No. 814

A portion of the proposed finding is unclear as Respondent does not define the term "significant."

815. Endolite's U.S. sales force reports to John Braddock and consists of two regional sales managers for the east and the west, respectively, and fifteen sales representatives

Response to Finding No. 815

The proposed finding is unsupported as Respondent has not included any citations to prove the assertion.

816. [redacted]

Response to Finding No. 816

[redacted]

817. [redacted]

Response to Finding No. 817

[redacted]

818. [redacted]

Response to Finding No. 818

Complaint Counsel has no specific response to the proposed finding.

819. [redacted]

Response to Finding No. 819

The proposed finding is unsupported. [redacted]

[redacted]

820. After a slow start the Orion 3 has done very well in the U.S. market and has been stealing market share. (Schneider, Tr. 4400).

Response to Finding No. 820

The proposed finding is unclear, incorrect, and not supported by the weight of the evidence. First, the proposed finding is unclear because Respondent does not define the term "very well." Second, the proposed finding is incorrect because Endolite has not been able to increase its share of the MPK market. [redacted]

[redacted] Actual sales data confirms that Endolite has maintained a very small share of the U.S. MPK market over the past several years. [redacted]

Even if it is true that Endolite's MPK sales have improved slightly since the launch of the Orion 3 in September 2016, many prosthetic clinics remain wary of its product and its service. Keith Senn, COPC's President of Kentucky/Indiana Operations, testified at trial that its practitioners "feel that the quality of the Plié or back up to the C-Leg 4 is greater than the Endolite knee." (CCFF ¶ 1539). Mark Ford, the President and CEO of POA, testified at trial that it is "more challenging" to get timely support from Endolite 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).

821. [redacted]

Response to Finding No. 821

[redacted]

822. [redacted]

Response to Finding No. 822

[redacted]

823. [redacted]

Response to Finding No. 823

[redacted]

824. [redacted]

Response to Finding No. 824

[redacted]

825. [redacted]

Response to Finding No. 825

Complaint Counsel has no specific response.

826. [redacted]

Response to Finding No. 826

The proposed finding is unclear and unsupported by the evidence cited. [redacted]

827. [redacted]

Response to Finding No. 827

The proposed finding is incorrect. [redacted]

828. [redacted]

Response to Finding No. 828

The proposed finding relies on hearsay, is not supported, and is contrary to the weight of the evidence. [redacted]

[redacted]

[redacted]

829. [redacted]

Response to Finding No. 829

The proposed finding is unclear and unsupported. [redacted]

830. [redacted]

Response to Finding No. 830

Complaint Counsel has no specific response.

831. [redacted]

Response to Finding No. 831

The proposed conclusion is incomplete and misleading. [redacted]

832. "Endolite was taking a very aggressive approach in the pricing of their [Orion 3]. In particular, I can think of an account outside of Memphis, Tennessee, Human Technologies, where we were losing share because they were offering in some cases buy more than one knee, you receive a price of $11,000 per knee. And that was costing us business." (Testerman, Tr. 1297-1298).

Response to Finding No. 832

The proposed finding is unfounded, unclear, and not supported by the weight of the evidence. The proposed finding is unfounded because the record does not establish that Mr. Testerman has personal knowledge of what prices or terms Endolite offered to the customer referenced in the proposed finding. The proposed finding is unclear because the terms "very aggressive," "losing share" and "costing us business" are not defined. The proposed finding encompasses Mr. Testerman's opinion of the effect the Orion 3 had on Plie sales. However, as an employee of Freedom, he is not best situated to testify about the price the Orion 3 sells for. [redacted]

833. Mark Ford believes that competition from Endolite has caused improvements in innovation in MPKs. (Ford, Tr. 1050-1052; PX05145 (Ford, Dep. at 144)).

Response to Finding No. 833

Complaint Counsel has no specific response other than to note that the proposed finding is unclear because Respondent does not identify any particular improvement or MPK that may have been affected by competition from Endolite.

834. There have been increasing amounts of head-to-head trial battles between Orion 3 and C-Leg 4. (Solorio, Tr. 1647). Endolite's Orion 3 is a good product and is an improvement over the Orion 2. (Solorio, Tr. 1647). Endolite is becoming a stronger competitor to Ottobock as a result of the improved quality of Orion 3. (Solorio, Tr. 1647).

Response to Finding No. 834

The proposed finding is unclear, unsupported, and contrary to the weight of the evidence. The proposed finding is unclear because the terms "increasing amounts," "good product," "improvement," "stronger competitor" and "improved quality" are not defined. The proposed finding is unsupported because all three sentences are based on the self-serving testimony of one Otto Bock employee, Cali Solorio. The third sentence is incorrect because there is no evidence that the Orion 3 has become a "stronger competitor" to Otto Bock. Endolite's share of the market has remained small for the past several years. (Response to RPFF ¶ 820). There is no evidence in the record that Endolite has significantly increased its share as a result of changes made to the Orion.

835. Prosthetic clinics believe that the Orion is becoming more interchangeable as a result of the improved quality of that product. (PX05128 (Senn, Dep. at 107)).

Response to Finding No. 835

The proposed conclusion is unclear, unsupported, and misleading. First, it is unclear because Respondent does not define the term "interchangeable" and provides no context for what, if anything, the Orion could be "interchangeable" with. Second, the proposed finding is

unsupported because it refers to "clinics" but only cites to one witness. Third, Mr. Senn's testimony is "Because of some differences with the Rheo with a particular patient, that knee may not be interchangeable. You know, as they change that, it may become interchangeable, but today it's not. The Orion I think is becoming more interchangeable as they improve that product." (PX05128 (Senn (COPC) Dep. at 107) (emphasis added)). The proposed finding is misleading because Mr. Senn clearly said that today the Orion is not interchangeable with other MPKs, such as the Rheo.

836. If the Plié stopped being available or increased in price, COPC would consider buying more Orions. (Senn, Tr. 256). At COPC, Orion, C-Leg, and Plié are on the OK to provide list on the product selection guide, and Orion and Plié received the same rating on that guide selection system. [redacted]

Response to Finding No. 836

The first sentence of the proposed finding is incorrect. [redacted] Specifically**,** Mr. Senn testified that COPC "feel[s] that the quality of the Plié or back up to the C-Leg 4 is greater than the Endolite knee" and that COPC practitioners "do not feel the knee functions as well as the Freedom or Ottobock knees at this time." (CCFF ¶ 1539). Complaint Counsel has no specific response regarding the second sentence of the proposed finding.

837. The only complaints voiced by customers regarding Endolite have to do with its size, and not the quality of its products. (Ford, Tr. 967; [redacted]

Response to Finding No. 837

The proposed finding is incorrect. For example, Mr. Senn of COPC and Jeff Sprinkle of Sprinkle Prosthetics have both expressed quality complaints regarding Endolite. Mr. Senn, President of Kentucky/Indiana Operations at COPC, testified that COPC "feel[s] that the quality of the Plié or back up to the C-Leg 4 is greater than the Endolite knee" and that COPC practitioners "do not feel the knee functions as well as the Freedom or Ottobock knees at this time." (CCFF ¶ 1539).

Jeff Sprinkle, the co-owner of Sprinkle Prosthetics, testified that he hasn't fit an Endolite Orion MPK on a patient in seven to eight years for "two reasons." (CCFF ¶ 1544). He listed the reasons as "I didn't like the function of it. And the programming, for lack of a better word, seemed kind of Mickey Mouse, to me." He defined "Mickey Mouse" as "[w]ell, basically, since I had never fit one, I called Endolite, the manufacturer, and we got on the phone. And you have to press certain buttons on the knee to get it to do certain things, have them walk. Then you press another button on the knee. There was no computer or hand-held laptop-type device to program it when I programmed the knee. It was basically from pressing buttons. And I just didn't like that way of – I didn't think that way was effective in programming a knee. It may have changed. But like I said, I don't fit that knee, so I don't know." (CCFF ¶ 1544).

838. [redacted]

Response to Finding No. 838

[redacted]

[redacted]

839. [redacted]

Response to Finding No. 839

[redacted]

840. [redacted]

Response to Finding No. 840

[redacted]

841. [redacted]

Response to Finding No. 841

[redacted]

842. [redacted]

Response to Finding No. 842

[redacted]

843. [redacted]

Response to Finding No. 843

[redacted]

844. [redacted]

Response to Finding No. 844

[redacted]

845. [redacted]

Response to Finding No. 845

Complaint Counsel has no specific response.

846. [redacted]

Response to Finding No. 846

[redacted]

[redacted]

847. [redacted]

Response to Finding No. 847

Complaint Counsel has no specific response.

848. [redacted]

Response to Finding No. 848

[redacted]

849. [redacted]

Response to Finding No. 849

Complaint counsel does not disagree with the first sentence of the proposed finding. The second sentence of the proposed finding is unclear because it appears to contain a typo. [redacted]

850. [redacted]

Response to Finding No. 850

Complaint Counsel has no specific response.

851. [redacted]

Response to Finding No. 851

[redacted]

852. [redacted]

Response to Finding No. 852

[redacted]

[redacted]

853. [redacted]

Response to Finding No. 853

[redacted]

854. [redacted]

Response to Finding No. 854

[redacted]

855. [redacted]

Response to Finding No. 855

[redacted]

[redacted]

[redacted]

856. [redacted]

Response to Finding No. 856

[redacted]

857. [redacted]

[redacted]

Response to Finding No. 857

[redacted]

858. [redacted]

Response to Finding No. 858

[redacted]

859. Freedom executives routinely shared competitive information regarding Endolite's Orion 3. (Ferris, Tr. 2338; PX01176-005). Freedom had noted that the Orion 3 offered three days of battery life versus the one day of battery life with the Plié 3. (Ferris, Tr. 2340 (PX01176-005).

Response to Finding No. 859

The proposed finding is incorrect and incomplete. The proposed finding is incorrect because Freedom was using the document cited to explain to its customers that the Plié 3 offers the convenience of a rechargeable, removable battery as opposed to the Orion 3, which needs to be plugged into a wall to recharge. (Ferris (Freedom) Tr. 2340-41). The proposed finding is incomplete because Mr. Ferris also testified that the Orion 3 had many disadvantages when compared to Freedom's Plié. He said that the Orion 3 is heavier than the Plié 3. (Ferris (Freedom) Tr. 2338-39). The Orion 3 is longer than the Plié 3, which impacts some patients because they need the right amount of limb length so their gait pattern matches their residual leg. (Ferris (Freedom) Tr. 2339). Additionally, Mr. Ferris testified that the Orion 3 is "only weatherproof" and not submersible up to one meter for up to 30 minutes like the Plié 3, which is a disadvantage for some users. (Ferris (Freedom) Tr. 2341).

4. Nabtesco Proteor Is A Market Participant [redacted]

860. Nabtesco Proteor was started in 2016 and is relatively new to the marketplace. (Mattear, Tr. 5518).

Response to Finding No. 860

The proposed finding is misleading and unsupported to the extent Proteor Inc. "is relatively new to the marketplace." In the portion of his testimony cited by Respondent, Mr. Mattear did not testify that "Nabtesco Proteor" is "relatively new" and the phrasing itself is vague. Complaint Counsel does not disagree that Proteor Inc. was formed in 2016. (*See* CCFF ¶ 1552).

The proposed finding is also misleading to the extent Respondent uses the name "Nabtesco Proteor" to suggest either Nabtesco Corporation or Proteor Inc. owns the other. Proteor Inc. is simply a distributor in the United States that sells prosthetic products manufactured by Nabtesco Corporation. (*See* CCFF ¶ 1551). Proteor Holdings ("Proteor France") owns Proteor Inc. (*See* CCFF ¶ 1553). Nabtesco Corporation does not own Proteor Inc., and Proteor Inc. does not own Nabtesco Corporation. (*See* CCFF ¶ 1553).

861. Nabtesco manufactures the Allux and other Sophisticated, Non-MPKs. (Mattear, Tr. 5541-5542). Nabtesco manufactures the Hybrid and Symphony knees. (Mattear, Tr. 5568; RX-0345). The Symphony knee utilizes six-bar technology, is considered very sophisticated and took a lot of engineering to develop. (Mattear, Tr. 5573-5574). It utilizes p-MRS technology that uses geometrics and proprietary technology to detect different gait phases of the knee and adapt the stability accordingly. (Mattear, Tr. 5574; RX-0897; Mattear, Tr. 5580-5582). It has a hydraulic cylinder and allows for manually-adjusted extension and flexion adjustments. (Mattear, Tr. 5576). It has excellent flexion of 170 degrees offering greater range of motion than other K-3 and K-4 knees on the market. (Mattear, Tr. 5577).

Response to Finding No. 861

The proposed finding is unsupported and misleading because Respondent has not defined "Sophisticated, Non-MPKs" and Mr. Mattear did not use this phrase. Complaint Counsel does not disagree that Mr. Mattear testified that Nabtesco manufacturers "prosthetic knees without a microprocessor for K3/K4 patients," (Mattear (Proteor Inc.) Tr. 5542), but notes that Mr. Mattear is not an employee of Nabtesco Corporation and no one from Nabtesco testified at the trial or in a deposition, (*see* CCFF ¶¶ 1550, 3326, 3333). Complaint Counsel also does not disagree that Nabtesco manufacturers the Hybrid and Symphony knees.

This proposed finding is misleading and unfounded because Mr. Mattear never characterizes the Symphony knee as "very sophisticated." (Mattear, Tr. 5573-74). Mr. Mattear testifies about one feature of the Symphony knee, stating that the "geometrics of the knee are sophisticated" but does not discuss how the geometrics of the Symphony knee are important, if at

all, for its functionality, and makes no comparison of performance or sophistication of the Symphony knee to any other product, including any MPK or mechanical knee. (Mattear, Tr. 5573-74). This proposed finding is also vague because Respondent and the cited testimony from Mr. Mattear do not explain what "a lot of engineering" means or what processes are involved in "a lot of engineering."

Complaint Counsel has no specific response to the last three sentences of the proposed finding.

862. The Hybrid Knee has MP-Swing control and hydraulic stance control. (Mattear, Tr. 5594-5597; RX-0345-003). It is billed as a swing-only knee with L-Code L5857, not L5856, which has negatively impacted sales. (Mattear, Tr. 5595). It does offer a unique battery that can last for a year without requiring recharge, which is one reason users chose the Hybrid knee. (Mattear, Tr. 5596-5597).

Response to Finding No. 862

Complaint Counsel has no specific response to the first sentence. With respect to the second sentence, the proposed finding is unfounded because the cited testimony does not mention L-Code 5857 for the Hybrid knee. (Mattear (Proteor Inc.) Tr. 5595). Complaint Counsel also has no specific response for the third sentence.

863. The Allux's four-bar technology allows for greater toe clearance which lowers the tendency that a user will stumble or fall. (Mattear, Tr. 5616-5617; RX-0894 at 008).

Response to Finding No. 863

The proposed finding is unclear because Respondent has not explained what knees they use as a comparison to the Allux with respect to its alleged ability to lower "the tendency that a user will stumble or fall." The proposed finding is unsupported to the extent Respondent implies a comparison to other MPKs because neither Mr. Mattear's testimony nor the document cited by Respondent references any other MPK.

864. The Allux offers greater range of motion than its primary MPK rivals. (Mattear, Tr. 5617). It offers 155 degrees of flexion, more than MPKs on the market. (Mattear, Tr. 5617). The Allux also allows users to bike. (Mattear, Tr. 5618).

Response to Finding No. 864

The proposed finding is unclear, misleading, and unsupported. The proposed finding is unclear and unsupported because Respondent has not defined "primary MPK rivals" and this phrase does not appear in the portion of Mr. Mattear's testimony cited by Respondent. Complaint Counsel does not disagree that Mr. Mattear testified that the Allux offers 155 degrees of flexion, but the finding is unsupported for suggesting this is "more than MPKs on the market." (*See* Mattear (Proteor Inc.) Tr. 5617-18). Mr. Mattear did not compare the Allux to any other MPK in the testimony cited by Respondent. (*See* Mattear (Proteor Inc.) Tr. 5617-18). Complaint Counsel has no specific response to the assertion that the Allux allows users to bike, but notes that the proposed finding is unclear because Respondent has not explained how the Allux "allows users to bike."

865. The Allux can also accumulate up to two years of user data that can be shared with a prosthetist to assist with performance and reimbursement. (Mattear, Tr. 5619-5620; RX-0894-015).

Response to Finding No. 865

Complaint Counsel has no specific response, but adds that Mr. Mattear subsequently testified that the Plié 3 and the C-Leg also offer this feature. (Mattear (Proteor Inc.) Tr. 5620-21).

866. The Allux has an internal battery that only takes 3 hours to charge, and it also offers a backup battery for emergencies. (Mattear, Tr. 5621-5622).

Response to Finding No. 866

Complaint Counsel has no specific response.

867. RX-0898 shows the benefits of the Allux versus the C-Leg 4, Össur Rheo, Endolite Orion 3, and Freedom Plié 3, including greater flexion angle and longer battery life. (Mattear,

Tr. 5622-5626). The Allux is also the lowest price option. (Mattear, Tr. 5630-5632; RX-0898). A clinician would earn the highest margin on an Allux relative to the C-Leg, Rheo, Orion, and Plié. (Mattear, Tr. 5632; RX-0898).

Response to Finding No. 867

The proposed finding is incomplete, misleading, unsupported, contrary to the weight of the evidence. [redacted]

The second sentence is also misleading, unsupported, and contrary to the weight of the evidence because Respondent has not defined "lowest price option" and Mr. Mattear did not use this phrase in the portion of his testimony cited. Further, the proposed finding is also misleading because Respondent has not distinguished between the list price and the sales price of an MPK. Complaint Counsel does not disagree that Mr. Mattear testified about list prices, as reflected in RX-0898. (*See* Mattear (Proteor Inc.) Tr. 5630-32). [redacted] Importantly, Mr. Mattear does not have the foundation to testify about the sales price of *all* sales of Nabtesco's Allux as an employee of a distributor of Nabtesco's products that did not exclusively distribute its products until shortly before his testimony. (*See* CCFF ¶¶ 925-27).

[redacted]

[redacted]

The third sentence of the proposed finding is also misleading, unsupported, and contrary to the weight of the evidence. The proposed finding is misleading and unsupported because Respondent has used the *list price* to calculate a clinic's margin. [redacted] A discussion of a clinic's margin using only lists prices is misleading and incorrect to the extent Respondent intends to suggest a "margin" is calculated by subtracting a purchase price from the amount of reimbursement received from a clinic.

Further, the proposed finding is unsupported because Mr. Mattear, as an employee of a prosthetics distributor, does not have the foundation to testify about the margins earned by clinics on the fitting of a prosthetic knee. Mr. Mattear also does not have the foundation to testify about the *sales price* of any Allux purchases that did not go through Proteor Inc. as a distributor (or the sales price of any other MPK). [redacted]

[redacted] Notably, the document cited by Respondent also shows that a clinic would receive less in reimbursement for an Allux MPK ($30,036) than a C-Leg 4 and Plié 3 ($30,457). (RX-0898 (Proteor Inc.) at 001 (listing "Average 2018 Reimbursement")).

868. [redacted]

Response to Finding No. 868

[redacted]

869. [redacted]

Response to Finding No. 869

Complaint Counsel has no specific response.

870. [redacted]

Response to Finding No. 870

[redacted]

[redacted]

871. The introduction and penetration of the Allux in the United States was causing Freedom some "heartbreak" in 2016, even while the Allux was still in beta release. (Testerman, Tr. 1297). Nabtesco also has an ex-Freedom certified prosthetist working for it and their national sales director came from SPS and had over 20 years' experience in the prosthetics industry; according to Testerman, she "had great relationships and knew the industry inside and out." (Testerman, Tr. 1297).

Response to Finding No. 871

The proposed finding is unclear, misleading, unsupported, and contrary to the weight of the evidence. The proposed finding is unclear because Respondent does not define or explain the meaning of (or importance of the terms) "heartbreak" or "great relationship." The proposed finding is misleading and unsupported to the extent it implies the introduction of the Allux was a competitive concern for Freedom with only the support of self-serving testimony from Mark Testerman. In the portion of his testimony cited by Respondent, Mr. Testerman simply testified, in response to a question about a Freedom document that mentioned the introduction of the Allux, that the introduction "was going to cause us some heartbreak as they look to introduce this product into the marketplace." (Testerman (Freedom) Tr. 1297 (discussing RX-0277)). Mr. Testerman's testimony suggests there was the potential for concern, but he did not testify that the introduction *actually* resulted in any concern or competitive threat, and Respondent never followed up to ask if that potential for "heartbreak" materialized. (Testerman (Freedom) Tr. 1297).

Notably, Mr. Testerman also testified that "Nabtesco was purchased by Proteor," which is untrue and shows his misunderstanding of the structure and business relationship between Proteor Inc. and Nabtesco Corporation. (Testerman (Freedom) Tr. 1277; *see also* CCFF ¶¶ 1551-57). Proteor Inc. is *only* a distributor of products manufactured by Nabtesco Corporation in Kobe, Japan. (CCFF ¶ 925, 1551). Although Proteor Inc. became the exclusive distributor of Nabtesco

Corporation products in the United States in September 2018, (*see* CCFF ¶ 1554), neither Proteor Inc. nor Nabtesco Corporation owns the other, (*see* CCFF ¶ 1553). Proteor Inc. is entirely owned by Proteor Holdings ("Proteor France"). (CCFF ¶ 1553). Proteor France does not own Nabtesco Corporation. (Mattear (Proteor Inc.) Tr. 5712-14). Nabtesco Corporation does not own Proteor France. (Mattear (Proteor Inc.) Tr. 5712-14). Accordingly, the second sentence of the proposed finding is incorrect because the record provides *no evidence* that *Nabtesco* employs a former Freedom or SPS employee. Nabtesco Corporation is a manufacturer located in Kobe, Japan with no direct sales force in the United States. (PX03004 (Nabtesco) at 001; CCFF ¶ 925). Complaint Counsel does not disagree that Proteor Inc. has employees who previously worked at SPS and Freedom, but the proposed finding is incorrect because it suggests *Nabtesco* employs either of these people.

The proposed finding is also contrary to the weight of the evidence to the extent Respondent implies that Freedom felt any competitive threat from Nabtesco's release of the Allux. Nabtesco has made negligible sales of the Allux in the United States since its launch in 2015. (*See* CCFF ¶ 931). Nabtesco sells significantly fewer Allux MPKs each year than Freedom. [redacted]

[redacted]

Similarly, other MPK manufacturers have confirmed that the launch of Nabtesco's Allux does not pose a serious competitive threat to MPK sales in the United States. [redacted] Stephen Blatchford, the Executive Chairman of Endolite, testified at trial that the Allux has a "very limited presence" and Endolite does not "come across it very much at all." (CCFF ¶ 1571). [redacted] Similarly, Mr. De Roy from Össur testified, with respect to the design of the Allux, that he "would say from a functional perspective, [Nabtesco does] not provide the same level of functionality" with the Allux as other MPKs, including Freedom's Plié 3 and Otto Bock's C-Leg 4. (De Roy (Össur) Tr. 3593-95).

Several clinic customers also testified that they are not familiar with MPKs manufactured by Nabtesco. (*See* CCFF ¶ 1593). Jeff Sprinkle, the owner of Sprinkle Prosthetics, testified in April 2018 that he had never heard of Nabtesco as a manufacturer. (CCFF ¶ 1594). James Curtis Patton, III, the President and owner of Prosthetic Solutions, testified in April 2018 that he had seen the Allux MPK "at a show" but was not familiar with it. (CCFF ¶ 1595). Jeffrey Brandt, the CEO of Ability Prosthetics & Orthotics, testified in April 2018 that he was "vaguely" familiar with

Nabtesco as a company and he did not know "a whole lot" but had "heard the name before." Mr. Brandt further testified that he didn't "really have any, like, experience with" the MPK knee sold by Nabtesco "or really even know anything about it." (CCFF ¶ 1596). Anthony Filippis, the CEO of Wright & Filippis, testified in April 2018 that he had never heard of the company Nabtesco or the Allux MPK. (CCFF ¶ 1597). Keith Senn, the President of Kentucky/Indiana Operations at the Center for Orthotic and Prosthetic Care, testified in July 2018 that COPC had not purchased any MPKs from Nabtesco in 2017 because he was not familiar with their MPK. (CCFF ¶ 1598). He further elaborated that COPC did not have any plans to shift purchases of MPKs from Freedom to Nabtesco. (CCFF ¶ 1598).

Other clinic customers who had heard of MPKs manufactured by Nabtesco testified they would not fit a Nabtesco MPK on a patient because of difficulties with customer service or concerns about the reliability of the MPK. (*See* CCFF ¶ 1599). For example, Michael Bright, the owner of North Bay Prosthetics, testified in April 2018 that North Bay had "tried to do a trial fit one time" on the Nabtesco Allux "and it didn't work, like the electronics didn't function, so we weren't even able to begin the trial because it didn't work, and that was our last attempt at it. It was something we did not – it's a lot cheaper, I believe, but it wasn't worth the risk of outcomes for us." (CCFF ¶ 1600). Mark Ford, the President of Prosthetics and Orthotics Associates, testified in August 2018 that POA has not purchased an MPK from Nabtesco. According to Mr. Ford, "[b]ecause they have a smaller sales and support staff, it's difficult for our clinicians to have knowledge about it." (CCFF ¶ 1601). Mark Ford also testified in August 2018 that Nabtesco's level of service and technical support is "not nearly to the degree that Össur or Otto Bock and Freedom have." (CCFF ¶ 1602).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent Respondent suggests the alleged "beta release" impacted the competitive significance of the Allux after its launch in 2015. The proposed finding is misleading and unsupported because Mr. Testerman did not testify about a "beta release" in the testimony cited by Respondent, and Respondent has not explained what this means. (*See* Testerman (Freedom) Tr. 1297). Further, the proposed finding is contrary to the weight of the evidence because Nabtesco began selling the Allux in 2015, (*see* CCFF ¶ 931), and Respondent has provided no evidence that Nabtesco restricted sales of the Allux during the alleged "beta release."

872. [redacted]

Response to Finding No. 872

[redacted]

[redacted]

873. [redacted]

[redacted]

Response to Finding No. 873

[redacted]

874.

Response to Finding No. 874

875.

Response to Finding No. 875

876. Össur is familiar with Nabtesco and its MPK, the Allux. (De Roy, Tr. 3594-3595). The Allux offers multiaxial, polycentric design. (De Roy, Tr. 3595). To De Roy's knowledge, Nabtesco did not have direct sales force in the United States. (De Roy, Tr. 3595).

Response to Finding No. 876

Complaint Counsel has no specific response other than to add that Mr. De Roy also testified, with respect to the design of the Allux, that he "would say from a functional perspective, [Nabtesco does] not provide the same level of functionality" with the Allux as other MPKs, including Freedom's Plié 3 and Otto Bock's C-Leg 4. (De Roy (Össur) Tr. 3593-95).

877. [redacted]

Response to Finding No. 877

Complaint Counsel does not disagree.

878. [redacted]

Response to Finding No. 878

Complaint Counsel does not disagree.

879. [redacted]

Response to Finding No. 879

Complaint Counsel does not disagree.

880. [redacted]

Response to Finding No. 880

[redacted]

[redacted]

881. Blatchford is familiar with Nabtesco, and the MPK it sells in the United States, the Allux. (Blatchford, Tr. 2150).

Response to Finding No. 881

Complaint Counsel has no specific response other than to add that Mr. Blatchford testified that Nabtesco's Allux has "[a] very limited presence" in the United States and Endolite doesn't "come across it very much at all." (CCFF ¶ 1571).

882. Endolite's Chairman, Stephon Blatchford, considers Nabtesco's Allux to be "quite a nice functioning knee." (Blatchford, Tr. 2227). Blatchford had not yet heard about Nabtesco's distribution arrangement with Proteor in the United States. (Blatchford, Tr. 2227). Blatchford is familiar with Proteor, a French prosthetics company owned by the Pierron family that has been in business for about 90 years. (Blatchford, Tr. 2227).

Response to Finding No. 882

Complaint Counsel has no specific response other than to add Mr. Blatchford testified that Nabtesco's Allux has "[a] very limited presence" in the United States and Endolite doesn't "come across it very much at all." (CCFF ¶ 1571).

883. Blatchford is aware of the fact that Proteor acquired Ability Dynamics. (Blatchford, Tr. 2228). Ability Dynamics makes the Rush Foot which competes with Endolite's line of prosthetic feet in the United States. (Blatchford, Tr. 2228).

Response to Finding No. 883

Complaint Counsel has no specific response.

884. Blatchford believed that Nabtesco lacked an adequate U.S. sales force. (Blatchford, Tr. 2229) Nonetheless, he believed that it would only take Nabtesco six months to a year to hire the necessary sales force and another six months to train the sales force to effectively compete in the United States. (Blatchford, Tr. 2229).

Response to Finding No. 884

The proposed finding is inaccurate because Mr. Blatchford did not use the word "only" and the proposed finding is misleading to the extent Respondent suggests he testified that this is a short timeframe. (Blatchford (Endolite) Tr. 2229). In addition, the proposed finding is misleading to the extent it suggests that Nabtesco has any plans to hire additional sales personnel because Mr. Blatchford has no personal knowledge of any plans Nabtesco may have.

885. Nabtesco is part of Kobe Steel, a very large Japanese manufacturer. (Blatchford, Tr. 2229).

Response to Finding No. 885

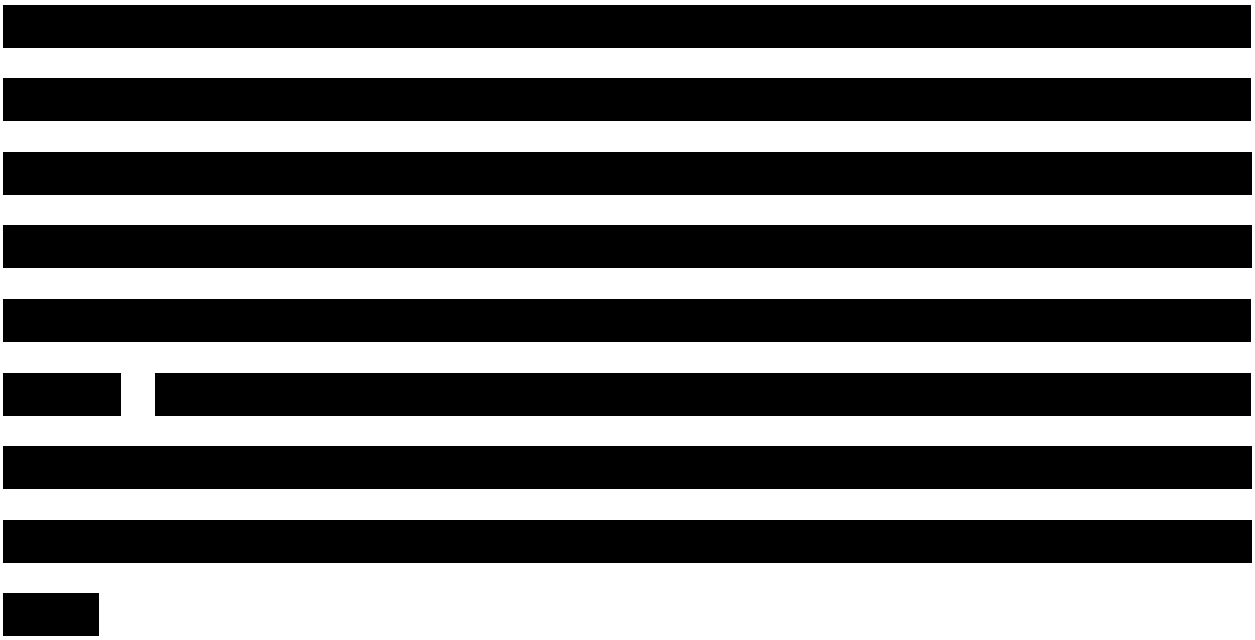
Complaint Counsel has no specific response.

886. Blatchford agreed to execute an affidavit in this case to avoid coming to the United States of an investigational hearing. (Blatchford, Tr. 2230) Blatchford modified the draft affidavit that was prepared by Complaint Counsel in this case to add the word "currently" to the following sentence: "Nabtesco is not currently a meaningful competitor for microprocessor knees." (Blatchford, Tr. 2231-2234; [redacted] RX-0707). "I was concerned that the original version didn't reflect the functionality of the knee, and therefore I was concerned that if the sales support structure around that sold the product was better, then it could become a competitor, a meaningful competitor, because there is nothing wrong functionally with the knee they sell." (Blatchford, Tr. 2234). "If they would add a sales force, it would mean that we would – and if they did a good job, we would worry about it, yes." (Blatchford, Tr. 2234-2235).

Response to Finding No. 886

The proposed finding is contrary to the weight of the evidence to extent it suggests Nabtesco's Allux will meaningfully compete for MPK sales in the United States. (*See* Responses to RPFF ¶¶ 871-72). The record is clear that Endolite does not currently consider Nabtesco's Allux a meaningful competitor for MPK sales in the United States. As Respondent proposed finding acknowledges, Mr. Blatchford indicated in his declaration that "Nabtesco is not currently a meaningful competitor for microprocessor knees." (*See* Blatchford (Endolite) Tr. 2231-34; PX04001 (Blatchford (Endolite) Decl.)). Mr. Blatchford also testified at trial that the Allux has a "very limited presence" and Endolite doesn't "come across it very much at all." (*See* CCFF ¶ 1571). [redacted]

The record also shows that even Proteor representatives, currently the exclusive distributor of the Allux MPK in the United States, believe Nabtesco's Allux competes in a different segment of the market than MPKs like Endolite's Orion. [redacted]



The proposed finding is also unclear, incomplete, and misleading because it states that Mr. Blatchford's affidavit "was prepared by Complaint Counsel," but in reality the initial draft of Mr. Blatchford's affidavit was based on an extensive interview with Mr. Blatchford and, as Respondent's proposed finding indicates, the final signed affidavit included additional input from Mr. Blatchford. (*See* PX04001 at 003 (Blatchford (Endolite) Decl.)).

887. The Allux as a "relatively new product" and as a "new entrant" into the market, that has started to show recurring interest in the field. (Collins, Tr. 3280-81, 3305).

Response to Finding No. 887

The proposed finding is unclear and incomplete. The proposed finding is unclear because Respondent counsel has not defined "recurring interest." It is also incomplete because Mr. Colllins' full testimony reads: "The Allux is a relatively new product. It's been in development by Nabtesco for more than five years, to my knowledge. And so it's a new entrant with *limited sales* into that market." (Collins (Cascade) Tr. 3280-81) (emphasis added)).

888. Jeff Collins testified that Nabtesco's Allux is starting to show recurring interest in the field. (Collins, Tr. 3305).

Response to Finding No. 888

Complaint Counsel has no specific response other than to note that the proposed finding is unclear because Respondent does not explain what is meant by "recurring interest."

889. Jeff Collins testified that with the right investment of resources, there are some things that Cascade could do that would increase the sales of the Allux, such as the addition of salespeople, clinical staff, and a reimbursement support team, and the creation of a loaner pool. (Collins, Tr. 3305-3306).

Response to Finding No. 889

The proposed finding is misleading and unsupported to the extent Respondent suggests that Mr. Collins's speculative testimony supports an inference that Cascade can increase the sales of the Allux in the United States "with the right investment of resources." In the portion of his testimony cited by Respondent, Mr. Collins agreed with a series of Respondent's questions about things that Cascade *could* do to potentially increase the sales of the Allux, but at no point did Mr. Collins explain the basis for why these things *would* lead to greater sales. Further, the proposed finding is incorrect to the extent Respondent suggests that Cascade does not already have a loaner program for the Allux, as Mr. Collins testified clearly that Cascade has an "inventory of knees for trials in clinics" and a loaner pool "but [they] could add to it." (Collins (Cascade) Tr. 3305-06).

890. Jeff Collins testified that an exclusive distribution arrangement would allow a distributor to invest in a product and be rewarded for making that investment. (Collins, Tr. 3307).

Response to Finding No. 890

The proposed finding is misleading to the extent Respondent implies anything about the incentives and potential success of an exclusive distribution agreement between Nabtesco Corporation and Proteor Inc. The proposed finding is misleading because Respondent asked Mr. Collins generic questions about an "exclusive distribution agreement," without specifying whether its questions involved the distribution of prosthetic knees, including specifically MPKs, or any of

Nabtesco's products. (Collins (Cascade) Tr. 3306-07). Further, the proposed finding is unclear because Respondent has not defined the phrase "rewarded for making that investment."

891. Jeff Collins believes that an exclusive distribution arrangement incentives a distributor to dedicate more resources to a product than it otherwise would. (Collins, Tr. 3307).

Response to Finding No. 891

The proposed finding is misleading to the extent Respondent intends to imply anything about the distribution arrangement between Nabtesco Corporation and Proteor Inc. (*See* Response to RPFF ¶ 890).

a. Nabtesco Proteor has repositioned [redacted] Allux's market share

892. Proteor France wants to significantly grow its U.S. business, and that is why it has acquired Ability Dynamics and entered into an exclusive distribution agreement with Nabtesco Corporation in 2018. (Mattear, Tr. 5562).

Response to Finding No. 892

The proposed finding is misleading to the extent Respondent suggests Proteor France has predicated the growth of its U.S. business on the sale of more prosthetic knees manufactured by Nabtesco Corporation. Proteor Holdings ("Proteor France") is a manufacturer of prosthetic and orthotic products based out of Dijon, France that sells its products in the United States and elsewhere. (*See* CCFF ¶ 1551, 1553-55). [redacted] Proteor Inc. also distributes products in the United States, including prosthetic knees, manufactured by Nabtesco Corporation. (*See* CCFF ¶ 1551).

Complaint Counsel does not disagree that Proteor Inc. entered into an exclusive distribution agreement with Nabtesco Corporation in September 2018. However, Mr. Mattear notably did not

testify that Proteor France wants to grow its U.S. business specifically by selling more MPKs manufactured by Nabtesco and, in fact, he never even mentioned the exclusive distribution agreement between Proteor Inc. and Nabtesco Corporation in the portion of testimony cited by Respondent. (*See* Mattear (Proteor Inc.) Tr. 5562).

893. [redacted]

Response to Finding No. 893

[redacted]

894. [redacted]

Response to Finding No. 894

[redacted]

[redacted]

895. [redacted]

Response to Finding No. 895

[redacted]

[redacted]

896. [redacted]

Response to Finding No. 896

[redacted]

897. [redacted] One of Nabtesco's engineers developed the technology currently used in the C-Leg. (Mattear, Tr. 5534). Nabtesco also developed the technology that was used in the first MP-Swing knee sold by Endolite, the IP knee. (Blatchford, Tr. 2141-2142). Nabtesco has a very good reputation for quality and innovation. (Mattear, Tr. 5534-55357).

Response to Finding No. 897

[redacted]

898. Nabtesco Proteor had a very small operation in Wisconsin until it acquired Ability Dynamics in 2018 and its large sales and clinical team. (Mattear, Tr. 5518-5520; 5527-5528). Nabtesco Proteor now has seven sales representatives, a certified prosthetist clinician, and a business development manager. (Mattear, Tr. 5527-5528; 5555-5559; 5563-5564). Ability Dynamics also makes the Rush Foot, which is a sophisticated fiberglass foot. (Mattear, Tr. 5555-5561).

Response to Finding No. 898

Complaint Counsel does not disagree that Proteor Inc. had a very small operation in Wisconsin and acquired Ability Dynamics in 2018. The proposed finding is misleading and unclear because Respondent has not defined or quantified "large sales and clinical team." The proposed finding is against the weight of the evidence to the extent Respondent suggests Proteor Inc. currently has a meaningful presence in the United States prosthetics market. [redacted]

The proposed finding is also misleading to the extent Respondent uses the name "Nabtesco Proteor" to suggest either Proteor Inc. or Nabtesco Corporation owns the other. Proteor Inc. is only a distributor of prosthetic products manufactured by Nabtesco Corporation. (*See* Response to RPFF ¶ 860; CCFF ¶ 1551, 1553).

899. Ability Dynamics was a start-up that developed a fiberglass foot technology. (Testerman, Tr. 1278). That technology, combined with a strong combination of experienced, former Freedom sales reps, marketing, and clinical allowed Ability to do a very nice job in taking share from Freedom and other foot manufacturers. (Testerman, Tr. 1278).

Response to Finding No. 899

The proposed finding is unclear and misleading because Respondent has not defined "clinical" or "a very nice job" and has not quantified "taking share." Further, the proposed finding is unsupported to the extent it relies entirely on the self-serving testimony of Mark Testerman, a Freedom employee, who does not have the foundation to testify about what "allowed" Ability Dynamics to make prosthetic foot sales.

900. Prior to being acquired, Ability Dynamics had 27 or 28 employees. (PX05158 (Swain (Ability Dynamics), Dep. at 9)). Ability Dynamics had multiple consulting certified prosthetists who assist in product development, continuing education, and attendance at trade shows. (PX05158 (Swain (Ability Dynamics), Dep. at 14)). Dynamics has a sales team in the US selling to prosthetists and international distribution. (PX05158 (Swain (Ability Dynamics), Dep. at 16-17)).

Response to Finding No. 900

Complaint Counsel has no specific response other than to note that Respondent has relied entirely on testimony taken from Blount Swain, then the President of Ability Dynamics, on April 5, 2018. The proposed finding is misleading to the extent Respondent has not addressed any changes at Ability Dynamics between the date of this deposition and when Proteor Inc. purchased the company in or around June 2018. (*See* Mattear (Proteor Inc.) Tr. 5528).

901. Ability Dynamics sells six types of mechanical prosthetic feet. (PX05158 (Swain (Ability Dynamics), Dep. at 19)). Ability Dynamics has tested feet from Ottobock, Össur, Freedom, Endolite, Fillauer, and College Park. (PX05158 (Swain (Ability Dynamics), Dep. at 23)).

Response to Finding No. 901

Complaint Counsel does not disagree that Ability Dynamics sells six types of mechanical prosthetic feet. Complaint Counsel also does not disagree that Mr. Swain testified that Ability Dynamics "tested" prosthetic feet manufactured by Otto Bock, Össur, Freedom, Endolite, Fillauer, and College Park, but the proposed finding is unclear because Respondent has not explained what it means to "test" feet.

902. Freedom launched the Maverick glass composite foot to compete directly with Ability Dynamics. (PX05158 (Swain (Ability Dynamics), Dep. at 23-24)). Although Freedom's product is similar and identical in color, it is an inferior product. (PX05158 (Swain (Ability Dynamics), Dep. at 24-26)).

Response to Finding No. 902

The proposed finding is misleading and unsupported because Respondent has relied *entirely* on testimony from Blount Swain, an employee of Ability Dynamics, to support an

assertion about Freedom's motivations for launching its Maverick foot product. Respondent has made no effort to establish Mr. Swain's foundation for testifying about Freedom's motivations, which Complaint Counsel also properly highlighted with its objection during the deposition. (*See* PX05158 (Swain (Ability Dynamics) Dep. at 24).

The proposed finding is also misleading and unsupported because Respondent has again relied only on Mr. Swain's testimony to make a broad, subjective assertion that Freedom's Maverick glass foot is "an inferior product" to Ability Dynamics's feet products. Respondent has again relied entirely on the *opinion* of a prosthetic foot competitor who notably is comparing his product to a competing product. This testimony provides little, if any, support for a sweeping, objective assertion about the relative quality of two competing products.

903. Ability Dynamics sells feet to the VA and Hanger/SPS. (PX05158 (Swain (Ability Dynamics), Dep. at 43-44)). An advertising arrangement between SPS and Ability Dynamics allows it to reach more customers. (PX05158 (Swain (Ability Dynamics), Dep. at 60)).

Response to Finding No. 903

Complaint Counsel has no specific response.

904. Ability Dynamics considers its foot products differentiated from others in the market and puts product quality at a premium. (PX05158 (Swain (Ability Dynamics), Dep. at 62-63)).

Response to Finding No. 904

Complaint Counsel has no specific response.

905. Ability Dynamics has different types of mechanical feet in its R&D product pipeline. (PX05158 (Swain (Ability Dynamics), Dep. at 90)).

Response to Finding No. 905

Complaint Counsel has no specific response.

906. According to a study under peer review for publication by Dr. Kaufman of the Mayo Clinic, patients have significantly higher satisfaction with glass composite feet than carbon fiber feet. (PX05158 (Swain (Ability Dynamics), Dep. at 109-110)).

Response to Finding No. 906

Complaint Counsel has no specific response.

907. Unique glass composite construction makes Rush foot the best performing prosthetic foot on the market. (PX05158 (Swain (Ability Dynamics), Dep. at 126-127)). This is based on patient feedback about their quality of life and ability to do things. (PX05158 (Swain (Ability Dynamics), Dep. at 126-127)). Prosthetists enjoy a margin of two to three times above list price on Rush products. (PX05158 (Swain (Ability Dynamics), Dep. at 128)).

Response to Finding No. 907

The proposed finding is misleading, unclear, and unsupported because Respondent has relied entirely on testimony from Blount Swain, the President of Ability Dynamics at the time of his deposition, to support broad, subjective assertions about the quality of the products his company manufactures and sells. Further, the proposed finding is misleading because Respondent does not define "best performing" or "ability to do things," which renders the proposed finding unclear. The proposed finding is also misleading because Respondent has not defined "margin," which may make a material distinction.

908. Industry trends support increasing domestic and international demand for Rush Foot products. (PX05158 (Swain (Ability Dynamics), Dep. at 128)).

Response to Finding No. 908

The proposed finding is misleading and unclear because Respondent has not defined "industry trends," which is a necessary phrase to understand how "industry trends *support*" an increase in demand. Without defining this term, the proposed finding is confusing and its relevance impossible to discern.

909. Prior to Nabtesco/Proteor's acquisition of Ability, it had one sales rep; it now has eight sales reps to sell the Allux in the United States. (Testerman, Tr. 1278-1279).

Response to Finding No. 909

The proposed finding is unsupported and misleading. The proposed finding is unsupported because it relies entirely on the self-serving testimony of Mr. Testerman, a Freedom employee, about the business structure of Proteor Inc. Importantly, Mr. Testerman also testified that "Nabtesco was purchased by Proteor," which is untrue and reveals his misunderstanding of the structure and relationship of Proteor Inc. and Nabtesco Corporation. (Testerman (Freedom) Tr. 1277; *see also* CCFF ¶¶ 1551-57). [redacted]

The proposed finding is misleading to the extent Respondent uses the name "Nabtesco/Proteor" to suggest either Proteor Inc. or Nabtesco Corporation owns the other. Proteor Inc. is only a distributor of prosthetic products manufactured by Nabtesco Corporation. (*See* Response to RPFF ¶ 860; CCFF ¶ 1551, 1553).

910. Nabtesco Proteor's certified prosthetist is Craig Armstrong, a former employee of Freedom. (Mattear, Tr. 5564-5565). He has been at Nabtesco Proteor for about a year. (Mattear, Tr. 5566).

Response to Finding No. 910

Complaint Counsel has no specific response other than to add that the proposed finding is misleading to the extent Respondent uses the name "Nabtesco Proteor" to suggest either Proteor Inc. or Nabtesco Corporation owns the other. (*See* Response to RPFF ¶ 860). Proteor Inc. is only a distributor of Nabtesco Corporation's products. (CCFF ¶ 1551).

911. Four or five of the sales reps that Nabtesco Proteor acquired with the Ability Dynamics acquisition used to work at Freedom and have experience selling the Plié 3. (Mattear, Tr. 5566-5567).

Response to Finding No. 911

Complaint Counsel has no specific response other than to add that the proposed finding is misleading to the extent Respondent uses the name "Nabtesco Proteor" to suggest either Proteor Inc. or Nabtesco Corporation owns the other. (*See* Response to RPFF ¶ 860). Proteor Inc. is only a distributor of Nabtesco Corporation's products. (CCFF ¶ 1551).

912. Nabtesco Proteor presented the Allux at the 2018 Hanger Education Fair, a significant opportunity for Nabtesco Proteor to educate prosthetists from around the United States on the features and benefits of the Allux. (Mattear, Tr. 5608; RX-0894). Craig Armstrong and Akio Sakata, certified prosthetists, demonstrated the Allux and its various benefits and features at the Hanger Education Fair. (Mattear, Tr. 5608; RX-0894).

Response to Finding No. 912

The proposed finding is misleading because Respondent has not defined the words "significant" or "features and benefits" and Mr. Mattear did not use these phrases in the portion of his testimony cited by Respondent. (*See* Mattear (Proteor Inc.) Tr. 5608). Further, the proposed finding is misleading to the extent Respondent uses the name "Nabtesco Proteor" to suggest either Proteor Inc. or Nabtesco Corporation owns the other. (*See* Response to RPFF ¶ 860). Proteor Inc. is only a distributor of Nabtesco Corporation's products. (CCFF ¶ 1551).

913. Nabtesco Proteor started to exclusively distribute Nabtesco Corporation's products in September 2018 and has the exclusive right to supply the Nabtesco Allux in the United States through its direct sales force. (Mattear, Tr. 5521; 5525-5526; RX-0896; RX-0167; Mattear, Tr. 5546-5547). Nabtesco believes this new business structure will be more advantageous than the previous structure. (Mattear, Tr. 5554).

Response to Finding No. 913

The proposed finding is misleading and incorrect to the extent Respondent suggests Proteor Inc. will only sell the Allux MPK through its "direct sales force." Mr. Mattear testified that Proteor

Inc. will sell Nabtesco products through other distributors, including PEL, Cascade, and SPS, after becoming its exclusive distributor in September 2018. (Mattear (Proteor Inc.) Tr. 5716; *see also* CCFF ¶ 1557). Complaint Counsel does not disagree that Proteor, Inc. became the exclusive distributor of Nabtesco's prosthetic knees in the United States starting on September 1, 2018. (*See* CCFF ¶ 1554).

The proposed finding is also misleading, incorrect, and unsupported to the extent *Nabtesco* believes *Proteor Inc.'s* new business structure will be "more advantageous." Respondent has relied entirely on testimony from Brad Mattear, an employee of Proteor Inc., about his opinion on the relative benefits of the changed business structure of Proteor Inc. (*See* Mattear (Proteor Inc.) 5554). Mr. Mattear is not an employee of Nabtesco Corporation and does not have the foundation to speak about the views of Nabtesco Corporation. (*See* CCFF ¶¶ 3326-27, 3332-33). No one from Nabtesco testified at the trial or testified in a deposition. (*See* CCFF ¶ 1550). Proteor Inc. is *only* a distributor of products manufactured by Nabtesco Corporation in Kobe, Japan. (CCFF ¶¶ 925, 1551).

914. [redacted]

Response to Finding No. 914

[redacted]

[redacted]

915. [redacted]

Response to Finding No. 915

[redacted]

[redacted]

916. [redacted]

Response to Finding No. 916

[redacted]

[redacted]

917. [redacted]

Response to Finding No. 917

[redacted]

[redacted]

918. Competitors are taking note of Nabtesco's recent growth. Freedom's Vice President of National and Key Accounts noted that Nabtesco's exclusive distribution arrangement with Proteor, Inc. give him "a lot heartburn." (Testerman, Tr. 1276).

Response to Finding No. 918

The proposed finding is unclear, unsupported, and misleading because Respondent has only cited to self-serving testimony from Freedom's Mark Testerman to support an assertion about all "competitors," a term which Respondent does not define. Respondent has not cited to *any* representatives from Otto Bock, or more importantly, third-parties such as Endolite, or Össur, to support a sweeping assertion that competitors are "taking note" of Nabtesco's growth. Further, the proposed finding is unclear and misleading because Respondent has not defined "taking note" or explained its relevance to the ability for Nabtesco's Allux to meaningfully compete for sales in the U.S. market.

The proposed finding is also unsupported to the extent it relies entirely on Mr. Testerman's testimony. In the portion of his testimony quoted by Respondent, Mr. Testerman testified that "Nabtesco was purchased by Proteor," which is untrue and reveals his misunderstanding of the structure and the business relationship between Proteor Inc. and Nabtesco Corporation. (Testerman (Freedom) Tr. 1277; *see also* CCFF ¶¶ 1551-57). In fact, Mr. Testerman even attributed his "heartburn" to this false understanding of the business structure of Nabtesco

Corporation. (*See* Testerman (Freedom) Tr. 1277). Proteor Inc. is simply a distributor who sells prosthetic products manufactured by Nabtesco Corporation in the United States. (*See* CCFF ¶ 1551). Proteor Holdings ("Proteor France") owns Proteor Inc. (*See* CCFF ¶ 1553). Nabtesco Corporation does not own Proteor Inc., and Proteor Inc. does not own Nabtesco Corporation. (*See* CCFF ¶ 1553). Mr. Testerman did not testify about the exclusive distribution agreement between Proteor Inc. and Nabtesco Corporation *at any point* in the testimony cited by Respondent. (Testerman (Freedom) Tr. 1276-78).

919. As part of the Ability Dynamics acquisition, Nabtesco Proteor acquired Ability Dynamics' seven sales reps, five of whom used to work at Freedom and four of whom reported to Testerman when he was Vice President of Domestic Sales. (Testerman, Tr. 1277). Those four sales reps have "extensive knowledge of microprocessor knees and the Plié," of large microprocessor knee customers, and relationships based on their tenure at Freedom. (Testerman, Tr. 1277). The fifth former Freedom sales person is the Freedom's former National Sales Director. (Testerman, Tr. 1277). Nabtesco Proteor's current manager is a certified prosthetist and also an ex-Freedom clinical specialist. (Testerman, Tr. 1277-1278).

Response to Finding No. 919

Complaint Counsel has no specific response other than to note that Mr. Testerman lacks the adequate personal knowledge to testify about the business structure of Proteor Inc. (*See* Response to RPFF ¶ 871). Further, the proposed finding is misleading to the extent Respondent suggests Proteor Inc. is currently a meaningful competitor in the United States prosthetics market. (*See* Response to RPFF ¶ 898). The proposed finding is also misleading to the extent Respondent uses the name "Nabtesco Proteor" to suggest either Proteor Inc. or Nabtesco Corporation owns the other. Proteor Inc. is only a distributor of prosthetic products manufactured by Nabtesco Corporation. (*See* Response to RPFF ¶ 860; CCFF ¶ 1551, 1553).

920. According to Testerman, "this recent acquisition and the change with Proteor and Nabtesco I believe is dramatic and that – it keeps me up at night." (Testerman, Tr. 1278).

Response to Finding No. 920

The proposed finding is misleading and irrelevant because Mr. Testerman's personal knowledge of the business relationship between Nabtesco Corporation and Proteor Inc. does not provide him sufficient basis to speak about the competitive significance of either. In testimony immediately preceding this quote, Mr. Testerman testified that "Nabtesco was purchased by Proteor," which is untrue and reveals his misunderstanding of the structure and business relationship between Proteor Inc. and Nabtesco Corporation. (Testerman (Freedom) Tr. 1277; *see also* CCFF ¶¶ 1551-57). Proteor Inc. is only a distributor of prosthetic products manufactured by Nabtesco Corporation. (*See* Response to RPFF ¶ 860; CCFF ¶ 1551, 1553). The proposed finding is also misleading because Respondent has taken only a portion of Mr. Testerman's testimony without indicating what "recent acquisition" or "change with Proteor and Nabtesco" he is discussing in his testimony. The proposed finding is also contrary to the weight of the evidence to the extent Respondent implies that Nabtesco's Allux meaningfully competes for sales with Freedom's Plié. (*See* Response to RPFF ¶ 871).

921. "The Allux product is very intriguing." (Schneider, Tr. 4400). The addition of Ability's aggressive and dedicated sales force and the RUSH foot product line will increase Allux's competitiveness in the U.S. (Schneider, Tr. 4400-4401).

Response to Finding No. 921

The proposed finding is unclear, irrelevant, misleading, unsupported, and contrary to the weight of the evidence. The proposed finding is unclear because Respondent does not define "intriguing" or explain how, if at all, the Allux being intriguing is relevant to any issue in this case. The proposed finding is misleading and unsupported because Respondent relies entirely on self-serving testimony from Scott Schneider, an Otto Bock employee, to support an assertion about Nabtesco's Allux MPK and the current business structure of Proteor Inc. The proposed finding is

unclear because Respondent has not explained or quantified what it means that "Allux's competiveness in the U.S." will increase. The record is clear that Nabtesco Corporation has historically achieved minimal sales of its MPK in the United States. [redacted] Further, the proposed finding is contrary to the weight of the evidence to the extent it suggests Nabtesco's Allux will meaningfully compete with other MPKs for sales in the United States. (*See* Response to RPFF ¶ 871).

922. The four-bar technology in the Allux actually shortens when the knee swings making it easier to clear the toe and avoid stumbling. (Ferris, Tr. 2357).

Response to Finding No. 922

Complaint Counsel has no specific response, other than to note that the proposed finding does not make reference to any other products, relative to which, the Allux would make it "easier" to clear the toe.

b. Allux is the ideal MPK for knee disarticulation patients, who are currently underserved by MPKs in the marketplace

923. A knee disarticulation is a subset of amputations, where the part of the leg is removed by dividing between the knee joint surfaces; separating the joint. (Doug Smith, Tr. 5981, 5985). Knee disarticulation patients require a knee joint as part of their prosthetic device. (Doug Smith, Tr. 5981-82).

Response to Finding No. 923

Complaint Counsel does not disagree and adds that Dr. Smith also estimated that surgeons perform roughly 20 times more transfemoral amputations than knee disarticulation amputations. (*See* CCFF ¶ 310).

924. Knee disarticulation has some advantages, such as allowing more weight-bearing on the residual limb, and more balanced thigh muscles. (Doug Smith, Tr. 5981, 5986). Dr. Doug Smith testified that if he could choose between knee disarticulation and transfemoral amputation, he would choose knee disarticulation, but a prosthetist finds it difficult to fit a prosthetic knee onto a knee disarticulation patient because the residual limb is long and the knees end up at different levels. (Doug Smith, Tr. 5987).

Response to Finding No. 924

Complaint Counsel has no specific response.

925. In Doug Smith's view, for a knee disarticulation patient, the most clinically appropriate knee is a four-bar linkage knee, and that patient should receive a four-bar knee, regardless of whether or not that knee has a microprocessor or not. (Doug Smith, Tr. 6017-6019).

Response to Finding No. 925

Complaint Counsel has no specific response.

926. The fact that a knee has four-bar linkage is a more important feature for knee disarticulation patients than the presence of a microprocessor. (Doug Smith, Tr. 6019).

Response to Finding No. 926

Complaint Counsel has no specific response other than to note that Respondent makes a broad generalization that "four-bar linkage is a more important feature for knee disarticulation patients than the presence of a microprocessor," citing the testimony of only a single witness.

5. DAW Is A Market Participant

927. DAW sells MPKs in the United States that are manufactured by Teh Lin in Taiwan. (PX05147 (Belzidsky (DAW), Dep. at 16, 23-24)). DAW sold 48 MPKs in the United States in 2016, and as of December 15, 2017, DAW had sold 44 MPKs. (PX05146, (Marquette, Dep. at 34-35)). DAW has been selling MPKs in the United States for a little over fifteen years. (PX05147 (Belzidsky (DAW), Dep. at 36)).

Response to Finding No. 927

[redacted]

928. DAW also sells prosthetic feet, ankles, liners, skins, foam, and titanium components along with the prosthetic knees. (PX05146 (Marquette (DAW) Dep. at 23)).

Response to Finding No. 928

Complaint Counsel does not disagree.

929. It employs six or seven sales and customer service representatives. (PX05146 (Marquette (DAW) Dep. at 25)).DAW uses sales representatives to sell MPKs and non-MPKs and offers a full range of prosthetic products. (PX05147 (Belzidsky (DAW), Dep. at 34-35)).

Response to Finding No. 929

The proposed finding is misleading and unsupported by the evidence. In the deposition testimony cited by Respondent, Mr. Belzidsky does not address DAW's use of sales representatives, what products DAW's sales representatives sell, or whether DAW's sales representatives offer a "full range" of prosthetic products. (PX05147 (Belzidsky (DAW) Dep. at 34-35)). The proposed finding is misleading to the extent that it implies that sales personnel must have the same skill set to sell MPKs as to sell mechanical knees. Record evidence shows that to sell MPKs effectively 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. (*See* Response to RPFF ¶ 463).

Complaint Counsel has no specific response to the proposed finding that DAW employs six or seven sales and customer service representatives.

930. DAW sets is prices for MPKs according to reimbursement amounts. (PX05147, Belzidsky, Dep. 50).

Response to Finding No. 930

[redacted]

931. Dr. Doug Smith testified that Teh Lin markets in the United States through DAW industries, has driven advances in microprocessor knees, and has great knees. (Doug Smith, Tr. 5996).

Response to Finding No. 931

This proposed finding is unfounded and confusing to the extent that neither Respondent nor Mr. Smith define the terms "driven advances in microprocessor knees" or "great knees." In the cited testimony, Mr. Smith offers no explanation for how DAW "has driven advances in microprocessor knees" and no explanation of what makes the DAW knees "great." (Doug Smith (retired) Tr. 5996). This proposed finding is unfounded because Dr. Smith has not seen a DAW knee in the last ten years and only knows details about their knees "from looking online." (CCFF ¶ 3397). He is not familiar with the battery on the DAW knee, he does not remember speaking with anyone at DAW in the last ten years, does not know how many employees DAW has selling MPKs in the United States, and does not know how long DAW spent developing its MPK. (CCFF ¶ 3397).

932. Blatchford is familiar with DAW "to a limited extent." (Blatchford, Tr. 2151). Blatchford does not know the name of the DAW MPK and believes it had very little presence in the United States. (Blatchford, Tr. 2151).

Response to Finding No. 932

Complaint Counsel has no specific response.

933. [redacted]

Response to Finding No. 933

Complaint Counsel has no specific response.

934. [redacted]

Response to Finding No. 934

Complaint Counsel has no specific response.

935. [redacted]

Response to Finding No. 935

[redacted]

936. [redacted]

Response to Finding No. 936

[redacted]

937. [redacted]

Response to Finding No. 937

[redacted]

938. DAW's Taiwanese manufacturer, Teh Lin could easily meet an increase in demand for MPKs. (PX05147, Belzidsky, Dep. 97-98).

Response to Finding No. 938

This proposed finding is unsupported and irrelevant. This proposed finding is unsupported because Respondent did not establish Mr. Belzidsky's foundation for speaking about the production capabilities of Teh Lin. (*See* PX05147 (Belzidsky (DAW) Dep. at 97-98)).

To the extent the proposed finding implies that simply increasing the supply of DAW MPKs in the United States would alleviate harm from the Merger, it is incorrect and misleading. To replace the competition lost by the Merger, customers would need to have access to MPKs with the same or better quality as those they buy today and purchase them at the same or better prices than they do today. Simply making more DAW MPKs available in the marketplace does not ensure that customers who preferred Freedom's Plié and Otto Bock's C-Leg before the Merger, would be able to buy knees that they value as much as their previous preferred option and be able to buy those MPKs at the same or better prices. In fact, a large body of evidence shows that clinics will be harmed and DAW will not be able to prevent that harm.

Even if Teh Lin and DAW were able to "easily meet an increase in demand for MPKs," clinic customers do not prefer DAW MPKs. [redacted]

[redacted] For other clinic customers who had heard of the MPKs distributed by DAW, they testified that they would not fit a DAW MPK on a patient because of difficulties with customer service, interactions with sales representatives, or concerns about the reliability of the MPK. (CCFF ¶ 1620).

939. DAW has plans to expand the sale of MPKs in the United States. (PX05147, Belzidsky, Dep. at 23).

Response to Finding No. 939

The proposed finding is unclear because Respondent does not define what it means by "expand the sale of MPKs in the United States." In the testimony cited by Respondent, when asked "[w]hat steps would DAW Industries take to expand the sales of its microprocessor knees if it planned to do so," Mr. Belzidsky testifies only that, "[w]e have salespeople and we attend trade shows, and we do demonstrations of the performance of the product." (PX05147 (Belzidsky (DAW) Dep. at 24). No other explanation is given for DAW's "plans to expand the sale of MPKs in the United States."

940. Even DAW, which lacks the resources of the other MPK manufacturers, launched a new MPK, the Multi-Matrix Self-Learning Knee ("MTX"), in 2017. (RX-0734 (Declaration of Stuart Marquette (DAW Industries) Dec. 15, 2017) at ¶ 4).

Response to Finding No. 940

Complaint Counsel does not disagree that DAW "lacks the resources of the other MPK manufacturers." This proposed finding is misleading and contrary to the evidence insofar as it implies that the MTX knee is a significant competing product in the United States. [redacted]

E. Ottobock's Rationale For The Acquisition Was The Acquisition Of Freedom's Foot Products.

941. The primary strategic rationale for Ottobock's acquisition of Freedom was to [redacted]

Response to Finding No. 941

[redacted]

[redacted]

[redacted] (CCFF ¶ 1367) (emphasis added).

942. [redacted]

Response to Finding No. 942

[redacted]

[redacted]

[redacted] **(CCFF ¶ 1383).**

943. Maynard Carkhuff testified that Freedom is most well-known for its carbon fiber foot products, it sells 18 foot products with 27 models, and roughly 75% of its annual revenue is derived from foot sales. (RX-0439; Carkhuff, Tr. 603-04).

Response to Finding No. 943

[redacted]

944. [redacted]

Response to Finding No. 944

[redacted]

945. Freedom has a great line of prosthetic feet. (Testerman, Tr. 1150). Freedom sells twenty-plus brands of feet in the United States. (Testerman, Tr. 1249:16-19). Freedom offers a large portfolio of feet, and prosthetists like them. (Ferris, Tr. 2316). Freedom offers feet that can fit any stage of the amputee experience. (Ferris, Tr. 2317-2318).

Response to Finding No. 945

Complaint Counsel has no specific response.

946. The market thinks very highly of Freedom's feet. (Ferris, Tr. 2316 ("We have done some studies and some, you know, qualitative, quantitative studies, and our feedback from that from our customer base says that they value them greatly); [redacted]

Response to Finding No. 946

Complaint Counsel has no specific response.

947. The market has a low perception of Ottobock's feet. ((PX05158 (Swain (Ability Dynamics), Dep. at 65, 83). Ability P&O noted that Ottobock has the worst prosthetic feet on the market, Össur and Freedom feet are higher quality. ((PX05158 (Swain (Ability Dynamics), Dep. at 65, 83).

Response to Finding No. 947

The proposed finding is incorrect, unsupported, and contradicted by the weight of the evidence. The second sentence is incorrect because it purports to cite "Ability P&O," which is a prosthetic clinic, (CCFF ¶¶ 3226-3232), but actually cites to the testimony of Ability Dynamics, a competitor of Otto Bock. The proposed finding is unsupported and unreliable in that the sole cited evidence is the testimony of a single competitor to Otto Bock. Moreover, the proposed finding is unsupported because it cites to a single foot manufacturer yet makes the general claim that the "market" has a low perception of Otto Bock's feet.

948. Ottobock acquired Freedom to obtain its very desirable foot portfolio, where Ottobock has a gap. (Schneider, Tr. 4410).

Response to Finding No. 948

[redacted]

[redacted]

949. [redacted]

Response to Finding No. 949

The proposed finding is unsupported in that it relies solely on the testimony of Össur to support the claim that Össur is the leading supplier of prosthetic feet in the United States. Further, the proposed finding is vague as it is unclear what "leading" means or by what metric "leading" is being measured.

950. The proposed finding is unsupported in that it relies solely on the testimony of Ossur to support the claim that Ossur is the leading supplier of prosthetic feet in the United States. Further, the proposed finding is vague as it is unclear what "leading" means or by what metric "leading" is being measured. [redacted]

Response to Finding No. 950

Complaint Counsel has no specific response, except to note that the proposed finding is misleading to the extent it suggests that the U.S. prosthetic foot market is not highly competitive. (*See* Response to RPFF ¶ 1502).

951. [redacted]

Response to Finding No. 951

[redacted]

[redacted]

952. [redacted]

Response to Finding No. 952

[redacted]

953. [redacted]

Response to Finding No. 953

The proposed finding is unclear, unsupported, and misleading. It is unclear what "overlap" means in this context, what extent of overlap allegedly exists, and what significance, if any, there is to the overlap. The proposed finding is unsupported because it is based solely on the testimony of one of Freedom's competitors, Össur. Finally, the proposed finding is misleading to the extent it suggests that the U.S. prosthetic foot market is not highly competitive. (*See* Response to RPFF ¶ 1502.)

954. Scott Schneider led the U.S. due diligence team related to the Acquisition. (Schneider, Tr. 4407). He analyzed the U.S. commercial market and reimbursement issues. (Schneider, Tr. 4407). Schneider analyzed Freedom's product portfolio and how to code Freedom's products. (Schneider, Tr. 4407).

Response to Finding No. 954

[redacted]

[redacted]

955. Schneider's team did not look at potential pricing decisions for the Plié 3 or Freedom's foot portfolio. (Schneider, Tr. 4407).

Response to Finding No. 955

[redacted]

[redacted]

956. Matt Swiggum played "very little" role in the due diligence and decision to acquire Freedom. (Schneider, Tr. 4408). He had only two or three comments during due diligence, and Schneider authored the diligence report and Swiggum just put his name on it. (Schneider, Tr. 4408).

Response to Finding No. 956

The proposed finding is unsupported, misleading, and contradicted by the weight of the evidence. The proposed finding is unsupported and unreliable because it relies entirely on the self-serving trial testimony of Mr. Schneider, *who reported to Mr. Swiggum*. Mr. Schneider's after-the-fact attempt to diminish the role of Mr. Swiggum is contradicted by voluminous testimony and documentary evidence. The weight of the evidence shows that Mr. Swiggum, as the CEO of Otto

Bock at the time of the Merger, was significantly involved in the due diligence process. For example, Mr. Swiggum was involved in the following activities:

- Mr. Swiggum supervised the four different U.S. due diligence work streams—including the work stream headed by Mr. Schneider. (CCFF ¶¶ 70-71). This work involved reviewing Freedom's sales and marketing activities relating to North America. (CCFF ¶ 70); (PX05148 (Swiggum) (Otto Bock) Dep. at 72). [redacted] (PX05148 (Swiggum) (Otto Bock) Dep. at 74-75).

- [redacted] (CCFF ¶ 1338).

- [redacted] (CCFF ¶ 79).

- [redacted] (CCFF ¶ 1346).

- [redacted]

- [redacted] (CCFF ¶ 1353). [redacted] **(CCFF ¶ 1353).**

- [redacted]

[redacted] (Swiggum (Otto Bock) Tr. 3357 (*in camera*)). According to Mr. Swiggum, some Otto Bock executives expressed concern that continuing to sell the Plié post-Merger would take sales away from the C-Leg. (CCFF ¶ 1360).

957. Swiggum did not participate in any commercial due diligence meetings related to the Acquisition. (Schneider, Tr. 4411).

Response to Finding No. 957

The proposed finding is incorrect and misleading. [redacted] The proposed finding also is misleading because it takes the cited evidence, Mr. Schneider's testimony, out of context. Mr. Schneider testified that Mr. Swiggum received updates on team meetings that he did not attend and "participated in the management meeting that was put on from the Freedom Innovations management team." (Schneider (Otto Bock) Tr. 4411). [redacted] (*See* Response to RPFF ¶ 956).

958. Swiggum did not analyze Freedom's product portfolio and how that would fit in with Ottobock's product portfolio. (Schneider, Tr. 4408).

Response to Finding No. 958

The proposed finding is unsupported, incorrect, and contradicted by the weight of the evidence. The proposed finding is unsupported and unreliable because it relies entirely on the self-serving trial testimony of Mr. Schneider, *who reported to Mr. Swiggum*. Mr. Schneider's after-the-fact attempt to diminish the role of Mr. Swiggum is contradicted by voluminous testimony and documentary evidence. [redacted] (*See* Responses to RPFF ¶¶ 954, 956). [redacted]

959. The North American commercial due diligence team consisted of Schneider, Dr. Andreas Kannenberg, Scott Weber, Walter Governor, Sebastian Kuch, and Kimberly Hanson. Swiggum did not participate in the commercial due diligence efforts. (Schneider, Tr. 4409).

Response to Finding No. 959

The proposed finding is misleading. [redacted]

960.

Response to Finding No. 960

961.

Response to Finding No. 961

[redacted]

[redacted]

[redacted]

F. There Are Numerous Structural Competitive Constraints With Respect To Prosthetic Knees

962. Actual sales prices to clinics are determined by bilateral negotiations between prosthetic clinic and prosthetic manufacturer. (Brandt, Tr. 3770 (testifying that every year he has a negotiation with each manufacturer to negotiate price for the next year based on volume; PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 33))

Response to Finding No. 962

Complaint Counsel has no specific response.

963. [redacted]

Response to Finding No. 963

[redacted]

[redacted]

964. **;** (Sabolich, Tr. 5866 (testifying that Sabolich testified that because Medicare "sets the price," that makes him "want to sort of stand up and scream why are we all here.")

Response to Finding No. 964

[redacted]

965. Reimbursement rates constrain Össur's MPK pricing. (De Roy, Tr. 3557-3558). Reimbursement affects Össur's development plans and product line plans. (De Roy, Tr. 3557). Reimbursement is important for Össur to position its MPKs and how to price its MPKs. (De Roy, Tr. 3557-3558).

Response to Finding No. 965

The proposed finding is unclear, unsupported, and mischaracterizes the testimony. The proposed finding is vague because it is unclear from the cited testimony how reimbursement affects Ossur's pricing and what other factors Ossur takes into account. The proposed finding is unsupported and mischaracterizes the testimony because nowhere in the cited testimony does Mr. De Roy state or suggest that reimbursement rates *constrain* Össur's pricing In the relevant portion of the testimony cited, Mr. De Roy testified as follows:

> Q. How are you aware of these reimbursement rates?
> A. Through my role as the VP of sales in Americas, so basic knowledge that you have to have, plus marketing as well. So 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).

At no point in this answer did Mr. De Roy explicitly say, or merely suggest, reimbursement rates *constrain* Össur's pricing. Finally, to the extent the proposed finding implies that insurer reimbursement rates will prevent post-merger MPK price increases, the proposed finding is incorrect and contradicted by the weight of the evidence. **(***See* Response to RPFF ¶ 633).

966. The price offered by Endolite to COPC for the Orion 3 is without negotiating any volume discounts. (Senn, Tr. 254). If COPC negotiated volume discounts with Endolite and COPC moved volume to COPC, the price paid by COPC for the Orion 3 would go down even further. (Senn, Tr. 254-255).

Response to Finding No. 966

Complaint Counsel has no specific response to the first sentence. The second sentence of the proposed finding is incomplete and misleading to the extent it suggests [redacted] (Senn (COPC) Tr. 225) (*in camera*). Mr. Senn explained that COPC "feel[s] that the quality of the Plié or back up to the C-Leg 4 is greater than the Endolite knee" and that COPC practitioners "do not feel the knee functions as well as the Freedom or Ottobock knees at this time." (CCFF ¶ 1539). [redacted] (Senn (COPC) Tr. 225) (*in camera*).

G. Hanger Is A Power Buyer That Constrains Manufacturers

1. Hanger Is A Large Organization That Plays A Big Role In The Prosthetics Industry In The United States

967. Hanger is a nationwide network of prosthetics and orthotics clinics. (Schneider, Tr. 4401). Hanger does business in 44 states and Washington, D.C. (Asar, Tr. 1307:14-19) Hanger is a publicly traded company, but was delisted from the New York Stock Exchange in 2016 and is currently traded on the OTC pink market. (Asar, Tr. 1530).

Response to Finding No. 967

Complaint Counsel has no specific response.

968. Hanger is composed of two business segments: Patient Care, and Products & Services. Products & Services has a distribution business (SPS) and therapeutic solutions business that calls on skilled nursing facilities (Asar, Tr. 1307-1308).

Response to Finding No. 968

Complaint Counsel has no specific response.

969. Hanger's total yearly revenue is $1 billion, with $850 million in the patient care segment. (Asar, Tr. 1307-1308).

Response to Finding No. 969

Complaint Counsel has no specific response.

970. Southern Prosthetic Supply ("SPS") is the distribution business of Hanger. (Asar, Tr. 1318-1319; Schneider, Tr. 4402). It has independent O&P clinics as its customers. (Asar, Tr. 1318-1319). The O&P clinics use SPS as a one-stop shop, rather than having to deal with numerous manufacturers. (Asar, Tr. 1318-1319).

Response to Finding No. 970

Complaint Counsel has no specific response.

971. Hanger represents a large portion of the Prosthetic Clinics in the United States. Hanger has 800 clinics across the country. It employs about 1,500 clinicians. By comparison, there are about 6,500 total clinicians in the US, and there are about 3,400 clinics. (Asar, Tr. 1312, 1313, 1316, 1317, [redacted] *see also* [redacted]**;** (Carkhuff, Tr. 298:17-21) (testifying that Hanger is virtually every manufacturer's biggest customer in the United States); (Sanders, Tr. 5379) (testifying that Hanger is the largest O&P network that has a contract with United Healthcare in the United States)

Response to Finding No. 971

Complaint Counsel has no specific response.

972. Hanger owns its contract provider, Linkia, which helps non-Hanger clinics make reimbursement claims. (Schneider, Tr. 4401-4402).

Response to Finding No. 972

Complaint Counsel has no specific response.

973. Hanger is Ottobock's largest U.S. customer. (Schneider, Tr. 4401).

Response to Finding No. 973

Complaint Counsel does not disagree.

974. [redacted]

Response to Finding No. 974

Complaint Counsel has no specific response other than to note that the proposed finding refers to all of Freedom's business, not its MPK sales..

975. [redacted]

Response to Finding No. 975

Complaint Counsel does not disagree.

2. Hanger Exerts Significant Bargaining Power Over Manufacturers

976. [redacted]

Response to Finding No. 976

This proposed finding is unsupported, unclear, and misleading. [redacted]

[redacted]

977. [redacted]

Response to Finding No. 977

Complaint Counsel has no specific response.

978. [redacted]

Response to Finding No. 978

[redacted]

[redacted]

979. [redacted]

Response to Finding No. 979

[redacted]

980. Hanger is keenly aware of its significant leverage over manufacturers, given its size and ability to get better pricing and discounts. (Asar, Tr. 1554). Hanger lists as a "competitive strength" on their 10-K the fact that they have purchasing power for O&P components and that its purchasing power promotes the usage by its patient care clinics of clinically appropriate products that also enhance its profit margins. (Asar, Tr. 1555).

Response to Finding No. 980

This proposed finding is unclear, unsupported, and misleading. This proposed finding is unclear because Respondent does not define "keenly aware," and it is unsupported because the cited testimony does not even mention this phrase. (Asar, Tr. 1554). Mr. Asar simply testifies that the greater volume Hanger purchases, the better its ability to negotiate more favorable terms. (Asar, Tr. 1554-555).

The proposed finding is misleading to the extent it implies (1) that Hanger currently has absolute leverage to dictate any price it wants to Respondent or (2) that the Merger does not reduce Hanger's leverage in negotiations with the merged firm, relative to its leverage when negotiating against Otto Bock and Freedom independently, and therefore Hanger will not be harmed by the Merger. Economic theory is clear that the leverage a customer like Hanger has remains unaffected by a merger; only the merging firm's leverage changes. The relevant question is whether the merger will cause such a significant increase in the merging firms' bargaining leverage that they will be able to profitably impose a price increase. Record evidence shows that prior to the Merger, Hanger's leverage in negotiations with Otto Bock came, in substantial part, from its ability to shift or credibly threaten to shift sales from Otto Bock to Freedom's Plie 3 (and vice versa). For example, Mr. Carkhuff, Freedom's Chairman, testified that Hanger's ability to threaten to move Plié volume to 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]

[redacted]

981. [redacted]

Response to Finding No. 981

[redacted]

982. [redacted]

Response to Finding No. 982

[redacted]

983. [redacted]

Response to Finding No. 983

Complaint Counsel has no specific response.

984. [redacted]

Response to Finding No. 984

Complaint Counsel has no specific response.

3. Hanger Has Tools To Constrain Ottobock's Pricing Going Forward

985. One of Hanger's most important tools to shift volume to other manufacturers is Hanger's ability to control the prices that Hanger clinicians pay for prosthetic components. [redacted]

Response to Finding No. 985

This proposed finding is unclear, unsupported, misleading, and irrelevant. The proposed finding is unclear because Respondent does not define or explain the phrase "ability to control the prices that Hanger clinicians pay." The proposed finding is unsupported because **nowhere in Mr. Asar's testimony does he address "Hanger's most important tools to shift volume." (Asar, Tr. 1372-1373).** The proposed finding is misleading to the extent it implies that the approach taken by Hanger and SPS regarding setting internal transfer rates or charges for different products achieves something that Hanger, or any other company, could not do on its own. Respondent does not explain the relevance of the interactions between SPS and Hanger or how it affects any material aspect of this case.

The proposed finding is also misleading to the extent it implies (1) that Hanger currently has absolute leverage to dictate any price it wants to Respondent or (2) that the Merger does not reduce Hanger's leverage in negotiations with the merged firm, relative to its leverage when negotiating against Otto Bock and Freedom independently, and therefore Hanger will not be harmed by the Merger. Economic theory is clear that a customer like Hanger's leverage remains unaffected by a merger; only the merging firm's leverage changes. The record shows that the loss of an independent Freedom will reduce Hanger's negotiating leverage with the Respondent, likely resulting in higher prices. (*See* Response to RPFF ¶ 980).

986. [redacted]

Response to Finding No. 968

Complaint Counsel has no specific response.

987. **Freedom believes that Hanger is able to induce its clinics to select certain MPKs over others. (Ferris, Tr. 2446).** [redacted]

Response to Finding No. 987

[redacted]

[redacted]

988. Hanger's past experience indicates that its clinicians will select MPKs based on price. [redacted]

Response to Finding No. 988

This proposed finding is unclear, unsupported, and misleading. The proposed finding is unclear because Respondent does not explain what it means by "clinicians will select MPKs based on price." To the extent that Respondent means that [redacted] Complaint Counsel does not disagree. (*See* CCFF ¶ 574).

The proposed finding is unsupported and misleading to the extent that it implies that Hanger will shift significant volume away from Respondent's MPKs because of a price increase for any of those MPKs. [redacted]

[redacted]

989. One of Hanger's tools to constrain Ottobock's pricing is the opportunity that it has to provide centralized education to all of its clinicians and educate its clinicians about competitor or alternative products. The Hanger education fair is hosted in February, where Hanger has 1,000 of its employees come together, together with manufacturers, with a focus on providing education courses to the clinicians. (Asar, Tr. 1325; 1326; 1328 -1329).

Response to Finding No. 989

The proposed finding is unclear and misleading. The proposed finding is unclear because Respondent does not explain what it means by "Hanger's tools to constrain Ottobock's pricing" or explain how "centralized education" purportedly constrains Otto Bock's prices.

The proposed finding is also misleading to the extent it implies (1) that Hanger currently has absolute leverage to dictate any price it wants to Respondent or (2) that the Merger does not reduce Hanger's leverage in negotiations with the merged firm, relative to its leverage when negotiating against Otto Bock and Freedom independently, and therefore Hanger will not be harmed by the Merger. Economic theory is clear that a customer like Hanger's leverage remains unaffected by a merger; only the merging firm's leverage changes. The record shows that the loss of an independent Freedom will reduce Hanger's negotiating leverage with the Respondent, likely resulting in higher prices. (*See* Response to RPFF ¶ 980).

990. [redacted]

Response to Finding No. 990

Complaint Counsel has no specific response.

4. [redacted]

991. [redacted]

Response to Finding No. 991

Complaint Counsel has no specific response.

992. [redacted]

Response to Finding No. 992

Complaint Counsel has no specific response.

993. [redacted]

Response to Finding No. 993

The proposed finding is unclear and incomplete. The proposed finding is unclear because Respondent does not explain what it means by [redacted] which is ambiguous.

The proposed finding is incomplete because record evidence shows that [redacted]

994. [redacted]

Response to Finding No. 994

The proposed finding is unclear, incomplete, and misleading. The proposed finding is unclear because Respondent does not explain what it means by [redacted]

The proposed finding is incomplete and misleading because record evidence shows that [redacted]

995. [redacted]

Response to Finding No. 995

The proposed finding is incorrect and misleading. [redacted]

[redacted]

The proposed finding is misleading to the extent that it implies that Hanger could prevent post-Merger price increases from Respondent by shifting more volume to other manufacturers. The record clearly shows that [redacted]

[redacted]

[redacted]

996. [redacted]

Response to Finding No. 996

The proposed finding is incorrect and misleading. [redacted]

997. [redacted]

Response to Finding No. 997

This proposed finding is incomplete and misleading. The proposed finding is incomplete because, [redacted]

[redacted]

998. [redacted]

Response to Finding No. 998

The proposed fining is unclear, misleading, and irrelevant. [redacted] The proposed finding is misleading to the extent it implies that the approach taken by Hanger and SPS regarding setting internal transfer rates or charges for different products achieves something that Hanger could not do on its own. In addition, the proposed finding is unclear, and ultimately irrelevant, because Respondent does not explain the relevance of the interactions between SPS and Hanger or how it affects any material aspect of this case.

999. [redacted]

Response to Finding No. 999

[redacted]

[redacted]

1000. [redacted]

Response to Finding No. 1000

The proposed finding is unclear, misleading, and irrelevant. The proposed finding is unclear because Respondent does not explain what it means by [redacted] The proposed finding is misleading to the extent it implies that the approach taken by Hanger and SPS regarding setting internal transfer rates or charges for different products achieves something that Hanger could not do on its own. In addition, the proposed finding is unclear, and ultimately irrelevant, because Respondent does not explain the relevance of the interactions between SPS and Hanger or how it affects any material aspect of this case.

1001. [redacted]

Response to Finding No. 1001

The proposed finding is misleading to the extent it implies that the approach taken by Hanger and SPS regarding setting internal transfer rates or charges for different products achieves something that Hanger could not do on its own. In addition, the proposed finding is unclear, and ultimately irrelevant, because Respondent does not explain the relevance of the interactions between SPS and Hanger or how it affects any material aspect of this case. To the extent that the purpose of Respondent's proposed finding is to indicate that [redacted] Complaint Counsel does not disagree. (*See* CCFF ¶ 574).

1002. [redacted]

Response to Finding No. 1002

The proposed finding is misleading to the extent it implies that the approach taken by Hanger and SPS regarding setting internal transfer rates or charges for different products achieves something that Hanger could not do on its own. To the extent that the purpose of Respondent's proposed finding is to indicate that [redacted] Complaint Counsel does not disagree. (*See* CCFF ¶ 574).

1003. [redacted]

Response to Finding No. 1003

Complaint Counsel has no specific response.

H. The Acquisition Has Not Had Anticompetitive Effects In The Alleged MPK-Only Market

1. Freedom's Pricing And Promotions Have Remained Autonomous

1004. Since the acquisition, Ottobock never had any involvement in any of the day-to-day operations of Freedom. (1304:1-3). Since the acquisition, Ottobock has not given any directives to Testerman about negotiation prices with Freedom's key accounts. (1304). Since the acquisition, Testerman never had any conversations with anyone from Ottobock regarding pricing and promotions for the Plié 3. (1304). Since the acquisition, Freedom has continued to promote the Plié 3 to its key accounts and to try to take share from all of its competitors, including Ottobock. (1304).

Response to Finding No. 1004

The proposed finding is unsupported, irrelevant and misleading. The proposed finding is unsupported because it relies solely on the testimony of Mark Testerman, Freedom's VP of National and Key Accounts, as the basis for a claim that Ottobock never had any involvement in any of the day-to-day operations of Freedom. Indeed, the unreliability of Mr. Testerman's testimony is highlighted by the fact that Mr. Testerman was apparently unaware about conversations that his boss, Jeremy Matthews, had with Otto Bock's CEO since the acquisition. (CCFF 1475-76). Moreover, whether or not *Mr. Testerman is aware* of anyone from Ottobock directing him or anyone else at Freedom regarding pricing and promotions is irrelevant to the issue of whether the Merger has already harmed competition. The relevant issue is whether there was a reduction in the intensity of competition between Otto Bock and Freedom since the Merger. The proposed finding is misleading and incorrect to the extent it suggests that no one from Ottobock has in fact directed anyone from Freedom regarding pricing and promotions. As discussed in response to RPFF 1040, testimony from Mr. Carkhuff and other Respondent executives reveals that Otto Bock and Freedom ceased to compete with each other as aggressively as they did prior to the Merger. (*See* Response to RPFF ¶ 1040).

1005. [redacted]

Response to Finding No. 1005

[redacted]

1006. [redacted]

Response to Finding No. 1006

[redacted]

[redacted]

1007. Michael Oros testified that as a major customer for prosthetic knees in the United States, he has no concerns about Ottobock's acquisition of Freedom, and he has no objection to the acquisition. (Oros, Tr. 4795-4796).

Response to Finding No. 1007

[redacted]

1008. Dr. Kauffman testified that he has observed no effects. (Kauffman, Tr. 893-894).

Response to Finding No. 1008

This proposed finding is unclear because Respondent does not explain what it means by "effects" as used in the proposed finding and the subject to which "effects" applies. To the extent "effects" means impacts to Dr. Kauffman's research, Complaint Counsel does not dispute that Dr. Kauffman testified that the Merger has not impacted his research at the time of his testimony. To the extent that the proposed finding uses Dr. Kauffman's testimony to support Respondent's assertion that there have no effects from the Merger on patients, prosthetists, or prosthetic clinics, the proposed finding is unsupported, misleading, and contrary to the evidence. The proposed finding is unsupported because there is no evidence that Dr. Kauffman has any basis to opine whether the Merger has impacted any patients or prosthetists. The proposed finding is misleading to the extent it suggests that prosthetic clinics customers generally are not concerned about the likely effcts of the Merger. [redacted]

1009. [redacted]

Response to Finding No. 1009

[redacted]

[redacted]

1010. [redacted]

Response to Finding No. 1010

[redacted]

1011. [redacted]

Response to Finding No. 1011

[redacted]

[redacted]

1012. Tracy Ell testified that Mid-Missouri has not lost any sales or business opportunities as a result of the Acquisition, the Acquisition has not had any impact on Mid-Missouri's business, he is not aware of any clinics that have been impacted by the Acquisition, and he is not aware of any patients that have been impacted by the Acquisition. (Ell, Tr. 1799-1800).

Response to Finding No. 1012

The proposed finding is misleading to the extent it suggests that prosthetic clinics customers generally are not concerned about the likely effects of the Merger. The proposed finding is also unsupported to the extent that it relies solely on Tracy Ell to support a claim that the Merger has not had any impact on other clinics. [redacted] The proposed finding is also incomplete in that it omits the fact that Mr. Ell testified that has benefitted from competition between Otto Bock and Freedom in the past. (CCFF ¶ 1160). Specifically, Mr. Ell testified that he can get Otto Bock to match Freedom's pricing. (CCFF ¶ 586).

1013. Tracy Ell testified that Mid-Missouri has not changed its ordering practices, and has not seen any changes in product prices since the Acquisition. (Ell, Tr. 1800).

Response to Finding No. 1013

The portion of the proposed finding that Mid-Missouri has not seen any changes in product prices since the Acquisition" is misleading to the extent this suggests that Mid-Missouri has not been harmed by the Merger. The relevant comparison is not whether Mid-Missouri has received

the same pricing that it received prior to the Merger, but whether it has received the same pricing that it would have received from Freedom if the Merger had not occurred. The proposed finding is also incomplete in that it omits the fact that has benefitted from competition between Otto Bock and Freedom in the past. (CCFF ¶ 1160). Specifically, Mr. Ell testified that he can get Otto Bock to match Freedom's pricing. (CCFF ¶ 586).

1014. Freedom has continued to add sales representatives as needed after the acquisition; Freedom has 14 sales reps, including one that was added within the last 60 to 90 days. (Testerman, Tr. 1114-1115).

Response to Finding No. 1014

This proposed finding is misleading and incomplete. The proposed finding is misleading to the extent that it suggests that Freedom increased the size of its sales force despite the Merger. The evidence shows that since the Merger, many employees have left including two domestic regional sales managers. (CCFF ¶ 173-74). The proposed finding is incomplete because it omits evidence that 32 employees have left Freedom since the Merger, including at least one engineer working on the Quattro project. (CCFF ¶ 127). According to Maynard Carkhuff, employees have left Freedom "because they are concerned about the future of their jobs" and Freedom has had "challenges" with employee morale as a result. (CCFF ¶ 172).

1015. [redacted]

Response to Finding No. 1015

[redacted]

[redacted]

1016. [redacted]

Response to Finding No. 1016

[redacted]

[redacted]

1017. [redacted]

Response to Finding No. 1017

[redacted]

[redacted]

[redacted]

1018. Freedom has continued to hire new, necessary personnel. Freedom has recently hired a senior director of quality, and she is on the Product Approval Committee ("PAC"). (Prince, Tr. 2680-2681).

Response to Finding No. 1018

This proposed finding is unclear, misleading, and incomplete. The proposed finding is unclear because neither the proposed finding or cited testimony explain who was hired, what her experience is, who she is replacing, and what impact, if any, her hiring has on Freedom. The proposed finding is misleading to the extent that Respondent suggests that Freedom has increased hiring of employees despite the Merger. The record evidence shows that when Respondent closed its acquisition on September 22, 2017, Otto Bock fired or allowed numerous Freedom employees to leave, (CCFF ¶¶ 124, 127, 1446-68). Further, 32 employees have left Freedom since the Merger, including at least one engineer working on the Quattro project, and two domestic regional sales managers. (CCFF ¶ 127, 173-74). According to Maynard Carkhuff, employees have left Freedom "because they are concerned about the future of their jobs" and Freedom has had "challenges" with employee morale as a result. (CCFF ¶ 172).

1019. [redacted]

Response to Finding No. 1019

[redacted]

[redacted]

1020. [redacted]

Response to Finding No. 1020

[redacted]

[redacted] **(CCFF ¶ 1385).** [redacted] **(CCFF ¶ 1386).**

The claim that the "session relating to plans for the Plié 3 was 'to kind of throw up every idea you had on the wall,'" is contradicted by the weight of the evidence. At the November 2017 meeting, Otto Bock executives discussed that, prior to the Merger, Freedom had been marketing the Plié 3 against the C-Leg 4 "[i]n a very concentrated way." (CCFF ¶ 1392). [redacted] **(CCFF ¶ 1389).** [redacted] **(CCFF ¶ 1389).** [redacted] **(CCFF ¶ 1389).** [redacted] **(CCFF ¶ 1394).** [redacted]

[redacted]

1021. [redacted]

Response to Finding No. 1021

[redacted]

[redacted]

1022. [redacted]

Response to Finding No. 1022

This proposed finding is unclear, unsupported, and contradicted by other evidence in the record. The proposed finding is unclear about what it means by the phrase "formal or detailed discussions" and the cited testimony does not use that phrase. The proposed finding is further wholly unsupported in that the cited testimony. [redacted] Nowhere in his cited testimony does he remotely suggest that he **never participated in any formal or detailed discussions about what would happen to the Plié post-acquisition.**

The proposed finding is contradicted by the voluminous evidence, which shows that Mr. Ferris, along with other numerous other high-level Otto Bock and Freedom executives, (CCFF ¶¶ 1385-86, 1389; Ferris (Freedom) Tr. 2420), participated in the November 7-8, 2017 meetings when Dr. Pfuhl explained the details of Otto Bock management's recommendation for the Plié 3 go-forward strategy. (*See* Response to RPFF ¶ 1020). According to Dr. Pfuhl, prior to the Merger, Freedom marketed the Plié 3 "[i]n a very concentrated way" against Otto Bock's C-Leg 4. (CCFF ¶ 1392). [redacted] (CCFF ¶ 1473). Thus, management recommended that going forward the Plié 3 and C-Leg 4 [redacted] (CCFF ¶¶ 1395, 1404). Dr. Pfuhl presented a [redacted]

[redacted] (CCFF ¶ 1394). Otto Bock's strategy made business sense because Respondent estimated that the C-Leg 4 would recapture at least [redacted] percent, and up to [redacted] percent, of any lost Plié 3 sales. (CCFF ¶ 1363). [redacted] (CCFF ¶ 1403).

2. [redacted]

1023. The Quattro was being designed to compete against all other microprocessor knees. (Testerman, Tr. 1208-1209).

Response to Finding No. 1023

This proposed finding is unsupported because the sole basis for its support is Mark Testerman, Freedom's VP of National and Key Accounts, who testified that he does not "sit on product development teams", "sit in these – the marketing meetings…as relates to setting whatever the strategic direction or whatever the case may be for a product that is far away from being on the market." (Testerman (Freedom) Tr. 1209). Further, Mr. Testerman is not on the Quattro Core Team or the Quattro R&D Team. (CCFF ¶¶ 1181, 1183).

The proposed finding is also contradicted by the weight of the evidence, which demonstrates that Quattro's singular focus was on Otto Bock's market-leading product. (CCFF ¶¶ 1230, 1232-36-, 1380-83). [redacted] As Freedom's Quattro Project Leader, Dr. Prince, testified, [redacted] (CCFF ¶¶ 1238-39, 1241-42, 1248-49). [redacted] **(CCFF ¶¶ 1242, 1243-50).** Not only is Quattro likely to be higher quality than C-Leg 4, [redacted] (CCFF ¶ 1269). Her testimony is consistent with several ordinary course PAC Review presentations showing [redacted]

1024. [redacted]

Response to Finding No. 1024

Complaint Counsel has no specific response.

1025. [redacted]

Response to Finding No. 1025

[redacted]

[redacted]

1026. [redacted]

Response to Finding No. 1026

[redacted]

1027. [redacted]

Response to Finding No. 1027

[redacted]

[redacted]

1028. [redacted]

Response to Finding No. 1028

The proposed finding is contradicted by the weight of the evidence, which shows that other individuals at Freedom besides David Smith referred to the Quattro as the C-Leg killer both internally and to third parties. [redacted]

[redacted]

1029. [redacted]

Response to Finding No. 1029

The proposed finding is incomplete, irrelevant, and misleading. [redacted]

[redacted]

1030. [redacted]

Response to Finding No. 1030

This proposed finding is unclear, irrelevant, incomplete, and misleading. [redacted]

[redacted]

1031. [redacted]

Response to Finding No. 1031

[redacted]

The proposed finding also is irrelevant and incomplete because Dr. Prince clearly testified that he believed Freedom [redacted] (CCFF ¶ 1223), and with those issues resolved, Freedom expected to [redacted]

1032. [redacted]

Response to Finding No. 1032

Complaint Counsel does not disagree with the first sentence of the proposed finding. The second sentence of the proposed finding is contrary to the weight of the evidence because the record is clear that [redacted] (CCFF ¶ 1269). Her testimony is consistent with several ordinary course PAC Review presentations showing [redacted]

1033. [redacted]

Response to Finding No. 1033

[redacted]

[redacted]

1034. [redacted]

Response to Finding No. 1034

[redacted]

[redacted]

1035. [redacted]

Response to Finding No. 1035

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1036. [redacted]

Response to Finding No. 1036

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1037. [redacted]

Response to Finding No. 1037

[redacted]

1038. [redacted]

Response to Finding No. 1038

[redacted]

[redacted]

I. The Acquisition Will Promote Competition

1. Dual Brand Strategy

1039. [redacted]

Response to Finding No. 1039

The proposed finding is unsupported, incorrect, and misleading. [redacted]

[redacted] Otto Bock and Freedom are now owned by a single, profit-maximizing entity, as even Respondent's economic expert concedes. (PX05173 (Argue (Economists, Inc.) Dep. at 161)). As the Merger Guidelines explain, a profit maximizing firm may find it profitable to unilaterally raise the price of one or both products above the pre-merger level, whereas it would not have been profitable for either firm to raise prices before they fell under common ownership:

> 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. (Merger Guidelines § 6.1).

[redacted]

[redacted]

[redacted]

1040. [redacted]

Response to Finding No. 1040

The proposed finding is incomplete and misleading. The proposed finding is incomplete because subsequent to this alleged discussion, testimony from Mr. Carkhuff and other Respondent executives reveals that Otto Bock and Freedom ceased to compete with each other as aggressively as they did prior to the Merger. [redacted]

[redacted] (CCFF ¶ 1473). And this played out almost immediately after the Merger was completed. [redacted] (CCFF ¶ 1474). In October 2017, Mr. Swiggum wrote to Jeremy Mathews, Freedom's Senior VP of Sales and Marketing, to address a complaint from Kyra Velett Strupp, Florida Territory Manager from Freedom, regarding an Otto Bock sales representative making false Plié 3 claims. (CCFF ¶ 1475). In response to this complaint, Mr. Swiggum wrote, "We are absolutely one company today and the target is not each other!" and Mr. Mathews responded with, "as long as we are aligned in our messaging, we will get through this." (CCFF ¶ 1475). Furthermore, [redacted] (CCFF ¶ 1476). [redacted] (CCFF ¶ 1476).

David Reissfelder, the Freedom CEO put in place by Otto Bock after the Merger, testified that Mr. Swiggum and Andreas Schultz, Otto Bock's CFO, also expressed concern to him about perceived aggressive promotions and discounting on the Plié 3 after the Merger. (CCFF ¶ 1477). Mr. Reissfelder testified that Mr. Swiggum and Mr. Schultz told him that "they felt like it was a lot of discounting" and "they thought that it wasn't something they would allow the OttoBock

sales team to do, and therefore *they recommended or they wanted us to stop doing it*." (CCFF ¶ 1477) (emphasis added).

The proposed finding is misleading because Respondent cites it in support of the assertion that "the Acquisition will promote competition through a 'Dual Brand Strategy' that would allow Freedom to exist and compete independent of Ottobock," (*see* Resp. Post-Tr. Br. at 58), but the record evidence and economic theory show that Otto Bock and Freedom will operate as a single, profit-maximizing firm, with the ability and incentive to raise price, reduce quality, and/or reduce innovation. (*See* Response to RPFF ¶ 1039).

1041. [redacted]

Response to Finding No. 1041

[redacted]

[redacted]

1042. [redacted]

Response to Finding No. 1042

The proposed finding is unsupported, unclear, incorrect and contradicted by the weight of the evidence. The only cited evidence for this proposed finding is the testimony of Mr. Carkhuff. Mr. Carkhuff's blanket denials of Otto Bock involvement in Freedom's operations is directly contradicted by testimony and documents from multiple Otto Bock and Freedom executives—including Mr. Carkhuff. The record evidence shows that immediately after the Merger, Otto Bock had significant involvement in the day-to-day operations of Freedom, including, firing Freedom's CEO, David Smith (CCFF ¶¶ 124, 127, 1446-68), taking over Freedom's international distribution, (CCFF ¶ 150), halting [redacted] (CCFF ¶¶ 1446-68).

The meaning of the phrase "any directives" in the portion of the proposed finding about pricing also is unclear. It also appears contradicted by Mr. Carkhuff's own testimony. According to Mr. Carkhuff, [redacted] (CCFF ¶ 1476). [redacted] (CCFF ¶ 1476). Other Otto Bock and Freedom executives, including Otto Bock's CEO at the time, Matt Swiggum, and Freedom's CEO, David Reissfelder, also had communications regarding pricing and promotions, including discussions memorialized in email. *See* Response to RPFF ¶ 1064.

1043. [redacted]

Response to Finding No. 1043

The proposed finding is unclear, incomplete, and misleading. The proposed finding is vague as to what the direction actually was, and unclear as to what "independent" means given that it is undisputed that Freedom was acquired by Otto Bock and is a wholly owned subsidiary. (CCFF ¶¶ 109, 111). The proposed finding also is unclear on its face as to when Mr. Carkhuff heard this direction, although the cited testimony appears to suggest that Mr. Carkhuff received this direction on September 22, 2017. To the extent the proposed finding is intended to relate to the September 22, 2017 direction that Mr. Carkhuff received, the proposed finding is incomplete because Mr. Carkhuff received subsequent directions from Otto Bock executives regarding competition. *See* Response to RPFF ¶ 1064. The proposed finding is misleading because Respondent cites it in support of the assertion that "the Acquisition will promote competition

through a "Dual Brand Strategy" that would allow Freedom to exist and compete independent of Ottobock," (*see* Resp. Post-Tr. Br. at 58), but the record evidence and economic theory show that Otto Bock and Freedom will operate as a single, profit-maximizing firm, with the ability and incentive to raise price, reduce quality, and/or reduce innovation. (*See* Response to RPFF ¶ 1039).

1044. Maynard Carkhuff testified that since the acquisition, Freedom has required financial assistance from Ottobock and Ottobock has provided that assistance. (Carkhuff, Tr. 710)

Response to Finding No. 1044

The proposed finding is unclear, irrelevant, misleading, and contradicted by record evidence. It is unclear from the proposed finding when Freedom received financial assistance, and how much financial assistance Freedom received. The proposed finding is irrelevant to any assessment of Freedom's financial health and Respondent's assertion of the failing firm defense. When Respondent closed its acquisition on September 22, 2017, Otto Bock fired or allowed numerous Freedom employees to leave, (CCFF ¶¶ 124, 127, 1446-68), and began handling Freedom's international distribution, (CCFF ¶ 150). Otto Bock halted [redacted] (CCFF ¶¶ 1446-68). Freedom's incentives to compete as an independent MPK manufacturer also changed. Thus, Freedom's financial performance since the Merger is not probative of Freedom's true financial health because its operations have been substantially altered by the Merger—e.g., [redacted] The proposed finding is misleading to the extent it suggests that Freedom would have been unable to meet its financial obligations absent the Merger. (*See* CCFF ¶¶ 1945-2060). Finally, the proposed finding is contradicted by record evidence to the extent that it implies that an independent Freedom required financial assistance of Otto Bock. Otto Bock's

financial assistance is required pursuant to the Hold Separate Agreement since Freedom cannot independently avail itself of external sources of funding. (CCFF ¶¶ 146, 150-51).

1045. Maynard Carkhuff testified that as a person who cares about where Freedom's business is going, he believes that Freedom is better off as a result of the Acquisition by Ottobock. (Carkhuff, Tr. 710)

Response to Finding No. 1045

The proposed finding is unclear, irrelevant, and misleading. The phrase "better off" is vague as it is unclear by what metric or metrics Freedom is allegedly "better off." Moreover, whether or not Freedom is "better off" in the subjective view of Mr. Carkhuff is irrelevant as to whether the Merger is likely to lead to anticompetitive effects. As Complaint Counsel explained in Response to RPFF ¶ 1039, certain strategies could be profitable for the combined Otto Bock and Freedom—thus making Freedom "better off"—while simultaneously harming clinic customers and patients through higher prices and reduced innovation.

1046. Maynard Carkhuff believes that Freedom is better off as part of Ottobock, because "Otto Bock has long been admired as the best orthotic and prosthetic company in the U.S. and in the world. They're the most innovative. They have high integrity. They have the very highest quality. And certainly they have the resources to fund our projects, and to me, they've demonstrated the intent to do that, and they continue to support the company." (Carkhuff, Tr. 710-711).

Response to Finding No. 1046

The proposed finding is unclear, irrelevant, and misleading. The phrase "better off" is vague as it is unclear by what metric or metrics Freedom is allegedly "better off." Moreover, whether or not Freedom is "better off", Otto Bock has "long been admired," Otto Bock is "innovative," or Otto Bock has "high integrity" is irrelevant as to whether the Merger is likely to lead to anticompetitive effects. Otto Bock could be "admired," "innovative," and have "high

integrity" and, as a profit maximizing firm, still harm clinic customers and patients through higher prices and reduced innovation. (*See* Response to RPFF ¶ 1039).

1047. Maynard Carkhuff testified that Ottobock is "the ideal partner" and personally feels "very honored that they would respect Freedom and acquire Freedom, enable it to operate as an independent business and to enable us to maintain our own heritage." (Carkhuff, Tr. 711)

Response to Finding No. 1047

The proposed finding is unclear, irrelevant, and misleading. The terms "ideal partner" and "maintain our own heritage" are vague and their significance, if any, to MPK competition is unclear. The proposed finding is irrelevant because it is unclear how Mr. Carkhuff's personal sentiment about the Merger—including that he "personally feels 'very honored'—relates to the Merger's impact on competition on the U.S. market for MPKs. The phrase "independent business" is unclear and misleading because it is undisputed that Freedom was acquired by Otto Bock and is a wholly owned subsidiary. (CCFF ¶¶ 109, 111). The proposed finding is misleading because Respondent cites it in support of the assertion that "the Acquisition will promote competition through a 'Dual Brand Strategy' that would allow Freedom to exist and compete independent of Ottobock," (*see* Resp. Post-Tr. Br. at 58), but the record evidence and economic theory show that Otto Bock and Freedom will operate as a single, profit-maximizing firm, with the ability and incentive to raise price, reduce quality, and/or reduce innovation. (*See* Response to RPFF ¶ 1039).

1048. [redacted]

Response to Finding No. 1048

The proposed finding is unclear and misleading. The phrase "operated as a separate entity" is unclear and misleading because it is undisputed that Freedom was acquired by Otto Bock and is a wholly owned subsidiary. (CCFF ¶ 109, 111). The proposed finding is misleading to the extent

the proposed finding suggests that keeping Freedom as a standalone brand or separate division would preclude competitive harm because the record evidence and economic theory show that Otto Bock and Freedom will operate as a single, profit-maximizing firm, with the ability and incentive to raise price, reduce quality, and/or reduce innovation. (*See* Response to RPFF ¶ 1039).

1049. [redacted]

Response to Finding No. 1049

Complaint Counsel has no specific response to the first sentence of this proposed finding. The second sentence of the proposed finding is unclear, irrelevant, misleading, and contradicted by record evidence. It is unclear from the face of the proposed finding how much financial assistance Freedom received. The proposed finding is irrelevant to any assessment of Freedom's financial health and Respondent's assertion of the failing firm defense. When Respondent closed its acquisition on September 22, 2017, Otto Bock fired or allowed numerous Freedom employees to leave, (CCFF ¶¶ 124, 127, 1446-68), and began handling Freedom's international distribution, (CCFF ¶ 150). Otto Bock halted [redacted] (CCFF ¶¶ 1446-68). Freedom's incentives to compete as an independent MPK manufacturer also changed. Thus, Freedom's financial performance since the Merger is not probative of Freedom's true financial health because its operations have been substantially altered by the Merger—[redacted] The proposed finding is misleading to the extent it suggests that Freedom would have been unable to meet its financial obligations absent the Merger. (*See* CCFF ¶¶ 1945-2060). Finally, the proposed finding is contradicted by record evidence to the extent that it implies that

an independent Freedom required financial assistance of Otto Bock. Otto Bock's financial assistance is required pursuant to the Hold Separate Agreement since Freedom cannot independently avail itself of external sources of funding. (CCFF ¶¶ 146, 150-51).

1050. [redacted]

Response to Finding No. 1050

The proposed finding is unclear, irrelevant, misleading, and contradicted by record evidence. It is unclear what "financial obligations" Freedom allegedly would have been unable to meet—neither the proposed finding nor cited testimony explain—as Freedom's primary financial obligation (the debt owed to Madison Capital and BMO) was fully repaid through the proceeds from the Merger. (CCFF ¶ 113). The proposed finding is irrelevant to any assessment of Freedom's financial health and Respondent's assertion of the failing firm defense. Freedom's financial performance since the Merger is not probative of Freedom's true financial health because its operations have been substantially altered by the Merger—[redacted] The proposed finding is misleading to the extent it suggests that Freedom would have been unable to meet its financial obligations absent the Merger. (*See* CCFF ¶¶ 1945-2060). Finally, the proposed finding is contradicted by record evidence to the extent that it implies that an independent Freedom required financial assistance of Otto Bock. Otto Bock's financial assistance is required pursuant to the Hold Separate Agreement since Freedom cannot independently avail itself of external sources of funding. (CCFF ¶¶ 146, 150-51).

1051. Testerman was a shareholder of Freedom when it was acquired by Ottobock in September 2017. (Testerman, Tr. 1299). As a shareholder, Testerman voted to approve the acquisition. (Testerman, Tr. 1299). Ottobock had a plan in place at the time of the

acquisition to move forward as two separate entities under the one umbrella and that the entities would operate under a dual brand strategy. (Testerman, Tr. 1299-1300). The plan was communicated to Freedom's key accounts immediately after the acquisition that pricing and sales would remain completely separate in the United States. (Testerman, Tr. 1299-1300). On the Sunday before the acquisition, Carkhuff called Testerman to tell him about the separate entity strategy. (Testerman, Tr. 1300). "Within the next 48 hours, phone calls were had that confirmed that this was going to be the strategy moving forward: separate entities, dual-brand strategy, status quo, let's go take share from all microprocessor knees and all competitors." (Testerman, Tr. 1300).

Response to Finding No. 1051

The proposed finding is unclear, incomplete and misleading. The description of Otto Bock and Freedom as "two separate entities under one umbrella" is unclear and incorrect to the extent it suggests that they are two independent, standalone companies. It is undisputed that Freedom was acquired by Otto Bock and is a wholly owned subsidiary. (CCFF ¶ 109, 111). The proposed finding is incomplete because the dual brand strategy continued to be subject to extensive discussion, notably at the November 2017 meeting, subsequent to this email, which was sent on October 6, 2017. (CCFF ¶ 1395). The proposed finding is misleading because Respondent cites it in support of the assertion that "the Acquisition will promote competition through a 'Dual Brand Strategy' that would allow Freedom to exist and compete independent of Ottobock," (*see* Resp. Post-Tr. Br. at 58), but the record evidence and economic theory show that Otto Bock and Freedom will operate as a single, profit-maximizing firm, with the ability and incentive to raise price, reduce quality, and/or reduce innovation. (*See* Response to RPFF ¶ 1039.)

1052. PX00824 is an email from Matthews to Hanger's highest-level field executives after the acquisition in October 2017. (PX00824; Testerman, Tr. 1300). It was a follow-up to a conference call regarding the dual brand strategy. (PX00824; Testerman, Tr. 1301-1302). PX00824 reflects Freedom's official corporate message to key accounts after the acquisition. (Testerman, Tr. 1302).

Response to Finding No. 1052

The proposed finding is unsupported and incomplete. The portion of the finding asserting that PX00824 is the "official" corporate message is unsupported by the cited evidence. In PX00824-001, Mr. Matthews merely wrote that it was "my summary of the corporate communication." The proposed finding is incomplete because the dual brand strategy continued to be subject to extensive discussion, notably at the November 2017 meeting, subsequent to this email, which was sent on Octoober 6, 2017. (CCFF ¶ 1395).

1053. [redacted] (Testerman, Tr. 1302). National O&P was a diamond status Ottobock account that had bought five C-Legs in the last three months and another patient ready to fit with a C-Leg. (Testerman, Tr. 1302-1303). Testerman did not ask anyone from Ottobock if he could go after a diamond status C-Leg account because Freedom was continue to operate aggressively against Ottobock pursuant to the dual brand strategy. (Testerman, Tr. 1303).

Response to Finding No. 1053

The portion of the proposed finding that "Freedom was continue [sic] to operate aggressively against Ottobock pursuant to the dual brand strategy" is contradicted by the weight of the evidence. Record evidence shows that Otto Bock and Freedom ceased to compete with each other as aggressively as they did prior to the Merger. (*See* Response to RPFF ¶ 1040). This portion of the proposed finding is misleading to the extent it suggests that implementation of a dual brand strategy would result in non-profit maximizing behavior. (*See* Response to RPFF ¶¶ 1039, 1040). Complaint Counsel has no specific response to the remainder of the proposed finding.

1054. Freedom's decision not to go forward with a sales strategy with Empire that it had discussed in May 2017 in no way related to Ottobock's acquisition of Freedom. (Testerman, Tr. 1303).

Response to Finding No. 1054

The proposed finding is unclear and unsupported. It is unclear what "sales strategy with Empire" means on the face of the proposed finding. To the extent "sales strategy with Empire" is

referring to [redacted] (Testerman (Freedom) Tr. 1207) (*in camera*); *see also* PX00861 (Freedom) at 003).

The claim that Freedom's decision not to go forward with this "sales strategy" was "in no way related" to the Merger is only supported by self-serving testimony of Respondent's witness, Mr. Testerman, who provided no explanation for why Freedom decided not to go forward with that strategy. Abandonment of such a program to try to convince a customer to order Plies instead of other MPKs, however, is consistent with the diminished incentive that Otto Bock and Freedom had to compete with one another as aggressively post-Merger. (*See* Response to RPFF ¶ 1040).

1055. As an executive that has been with Freedom since 2010, Testerman cares about what happens to Freedom. (Testerman, Tr. 1304). "There's no doubt in my mind that [Freedom is better after the acquisition]. Ottobock is a strong company, an innovative company. I love the idea of being able to move forward with this dual-brand strategy, coupled with the resources from Ottobock, and if Ottobock had not stepped in, who knows what it would be." (Testerman, Tr. 1305).

Response to Finding No. 1055

The proposed finding is irrelevant, unclear, and misleading. Mr. Testerman's sentiment regarding the Merger is irrelevant as it is unclear how, if at all, his sentiment relates to the Merger's impact on competition on the U.S. market for MPKs. Whether or not Mr. Testerman "love[s]" the dual-brand strategy or the Merger is irrelevant as to whether the Merger is likely to lead to anticompetitive effects. Also, it is unclear what is meant by "who knows what it would be," and the cited testimony does not clarify this phrase. The proposed finding is incorrect and misleading to the extent the finding suggests that Freedom would have been unable to meet its financial obligations absent the Merger. (*See* CCFF ¶¶ 1945-2060).

1056. Since the acquisition, Ottobock never had any involvement in any of the day-to-day operations of Freedom. (Testerman, Tr. 1304). Since the acquisition, Ottobock has not given any directives to Testerman about negotiation prices with Freedom's key accounts. (Testerman, Tr. 1304). Since the acquisition, Testerman never had any conversations with anyone from Ottobock regarding pricing and promotions for the Plié 3. (Testerman, Tr. 1304). Since the acquisition, Freedom has continued to promote the Plié 3 to its key accounts and to try to take share from all of its competitors, including Ottobock. (Testerman, Tr. 1304).

Response to Finding No. 1056

The proposed finding is unsupported, irrelevant and misleading. The proposed finding is unsupported because it relies solely on the testimony of Mr. Testerman, Freedom's VP of National and Key Accounts, as the basis for a claim about all communications between anyone at Otto Bock and Freedom. Indeed, Mr. Testerman's lack of awareness is highlighted by the fact that he was apparently unaware about conversations that his boss, Jeremy Matthews, had with Otto Bock's CEO. (CCFF ¶¶ 1475-76). Whether or not Mr. Testerman is aware of anyone from Ottobock directing him or anyone else at Freedom regarding pricing and promotions is irrelevant to the issue of whether the Merger has already harmed competition. The relevant issue is whether anyone from Ottobock *has in fact* directed anyone from Freedom regarding pricing and promotions. The proposed finding is misleading and incorrect to the extent it suggests that no one from Ottobock has directed anyone from Freedom regarding pricing and promotions. Testimony from Mr. Carkhuff and other Respondent executives reveals that Otto Bock and Freedom ceased to compete with each other as aggressively as they did prior to the Merger. (*See* Response to RPFF ¶ 1040).

1057. As an executive that has been with Freedom since 2010, Testerman cares about what happens to Freedom. (Testerman, Tr. 1304). "There's no doubt in my mind that [Freedom is better after the acquisition]. Ottobock is a strong company, an innovative company. I love the idea of being able to move forward with this dual-brand strategy, coupled with the resources from Ottobock, and if Ottobock had not stepped in, who knows what it would be." (Testerman, Tr. 1305).

Response to Finding No. 1057

The proposed finding is irrelevant, unclear, misleading, and identical to RPFF ¶ 1055. (*See* Responses to RPFF ¶ 1055).

1058. [redacted]

Response to Finding No. 1058

Complaint Counsel has no specific response to the first sentence of the proposed finding. The second sentence of the proposed finding is incomplete and misleading to the extent it implies that Mr. Ferris did not receive subsequent communications and instructions about the dual brand strategy. For example, Mr. Ferris was one of the executives who participated in the November 2017 meeting, (CCFF ¶ 1386), where there was a discussion about pivoting Quattro's marketing strategy to target Össur's Rheo rather the C-Leg. (CCFF ¶¶ 1409-10). There was also a discussion about discontinuing the Plié 3 at this meeting, (CCFF ¶ 1402) and, in fact, Mr. Ferris was assigned with the action item of [redacted] **(CCFF ¶ 1403).**

1059. [redacted]

Response to Finding No. 1059

The proposed finding is unclear, unsupported, and contradicted by record evidence. It is unclear what is meant by "marketing plans and strategies," including whether the term includes the product promotions and pricing that fall under the responsibility of Mr. Ferris, the VP of Marketing. (CCFF ¶ 3174). The proposed finding is unsupported because it relies solely on the testimony of one Freedom executive for the broad claim that no one from Otto Bock had any

involvement in Freedom's marketing plans and strategies. Indeed, Mr. Ferris' lack of awareness is highlighted by the fact that he was apparently unaware about conversations that his boss, David Reissfelder, had with Otto Bock's CEO about perceived aggressive promotions and discounting on the Plié. (CCFF ¶ 1477). The proposed finding is misleading and incorrect to the extent it suggests that no one from Ottobock has directed anyone from Freedom regarding pricing and promotions. Testimony from Mr. Carkhuff and other Respondent executives reveals that Otto Bock and Freedom ceased to compete with each other as aggressively as they did prior to the Merger. (*See* Response to RPFF ¶ 1040).

1060. [redacted]

Response to Finding No. 1060

The proposed finding is unclear, unsupported, and misleading. It is unclear what meaning the addition of "PX01306" is intended to add to the proposed finding. The proposed finding is vague as to *how long* Freedom is alleged to be kept as a "separate (standalone) brand" in the United States. Complaint Counsel agrees that the Hold Separate Agreement requires Otto Bock to "restore all services, locations, employees, products, operations or businesses" of Freedom that were transferred to or consolidated with Otto Bock after the Acquisition Date. (CCFF ¶ 146). The proposed finding is misleading to the extent the proposed finding suggests that keeping Freedom as a standalone brand apart from the Hold Separate agreement would preclude Otto Bock and Freedom from operating as a single, profit-maximizing firm or that implementation of a dual brand strategy could not result in anticompetitive effects. (*See* Response to RPFF ¶ 1039).

1061. [redacted]

Response to Finding No. 1061

The proposed finding is irrelevant, unclear, and misleading. Mr. Ferris' sentiment regarding, and view of, the Merger is irrelevant. Whether or not Mr. Ferris thinks the Merger is "a positive" is irrelevant to the issue of whether the Merger is likely to lead to anticompetitive effects. Also, it is unclear what specifically is meant by "would be better" or "a positive," and how, if at all, those benefits would impact competition in the U.S. market for MPKs. The proposed finding is incorrect and misleading to the extent the finding suggests that Freedom would have been unable to meet its financial obligations absent the Merger. (*See* CCFF ¶¶ 1945-2060).

1062. Prosthetic Clinics recognize that "if Freedom product line was managed under a stronger financial entity, it could help with product development." (PX05135 (Weber (Prosthetic & Orthotic Care), Dep. at 125)).

Response to Finding No. 1062

The proposed finding is unsupported and misleading. This quote was in response to the following question at a deposition from Respondent counsel to Mr. Weber of P&O Care to which Complaint Counsel objected:

> (Respondent Counsel): "Do you think Otto Bock's acquisition of Freedom could lead to product innovations?
> (Complaint Counsel): Objection, form, foundation.

Complaint Counsel maintains its objection that this question calls for speculation and that Mr. Weber, as the President of P&O Care, has no foundation to speak to Freedom's financial situation and whether Otto Bock's acquisition of Freedom could lead to product innovations. The proposed finding is also misleading and contradicted by the record to the extent it suggests Otto Bock's acquisition is actually likely to promote MPK innovation, as the evidence shows Respondent's incentive and ability to impose competitive harm on consumers in the U.S. MPK market extends to Freedom's pipeline products. (CCFF ¶¶ 1405-1411).

1063. After Ottobock acquired Freedom, there were no plans to lower the R&D budget for Ottobock. (Schneider, Tr. 4380).

Response to Finding No. 1063

The proposed finding is unsupported, unclear and misleading. The term "plans" is vague and the time period referenced is unclear. For example, it is unclear from the proposed finding and cited testimony when Otto Bock develops its budget. Just as other integration activities were paused when Respondent entered into the Hold Separate agreement in December 2017, Respondent's budget planning may have been similarly affected. (CCFF ¶¶ 151, 1748). The proposed finding is misleading to the extent it implies that the absence of a change to Otto Bock's budget demonstrates that the Merger has not resulted in any harm to innovation already. The record evidence shows that the Merger has already harmed competition, [redacted]

1064. Since Acquisition in September 2017, Ottobock has not any involvement in the day-to-day operations of Freedom. (Schneider, Tr. 4413). Ottobock has not given any directives to Freedom on how to set prices. (Schneider, Tr. 4414). Ottobock has had no communications with Freedom regarding pricing or promotions. (Schneider, Tr. 4414).

Response to Finding No. 1064

The proposed finding is unsupported, incorrect and contradicted by the weight of the evidence. The only cited evidence for this proposed finding is the testimony of Mr. Schneider. Mr. Schneider's blanket denials of Otto Bock involvement in Freedom's operations or Otto Bock communications regarding pricing and promotions are directly contradicted by testimony and documents from multiple Otto Bock and Freedom executives. Immediately after the Merger, Otto Bock had significant involvement in the day-to-day operations of Freedom, including firing Freedom's CEO, David Smith (CCFF ¶¶ 124, 127, 1446-68), taking over Freedom's international distribution, (CCFF ¶ 150), halting [redacted], and delaying

[redacted] (CCFF ¶¶ 1446-68). Freedom's incentives to compete as an independent MPK manufacturer also changed. Otto Bock and Freedom executives, including Otto Bock's CEO at the time Matt Swiggum and Freedom's CEO David Reissfelder, also had communications regarding pricing and promotions, including discussions memorialized in email. For example, in October 2017, Mr. Swiggum wrote to Jeremy Mathews, Freedom's Senior VP of Sales and Marketing, to address a complaint from Kyra Velett Strupp, Florida Territory Manager from Freedom, regarding an Otto Bock sales representative making false Plié 3 claims. (CCFF ¶ 1475). In response to this complaint, Mr. Swiggum wrote, "We are absolutely one company today and the target is not each other!" and Mr. Mathews responded with, "as long as we are aligned in our messaging, we will get through this." (CCFF ¶ 1475). Furthermore, [redacted] (CCFF ¶ 1476). [redacted] (CCFF ¶ 1476).

Similarly, David Reissfelder, the Freedom CEO put in place by Otto Bock after the Merger, testified that Mr. Swiggum and Andreas Schultz, Otto Bock's CFO, also expressed concern to him about perceived aggressive promotions and discounting on the Plié 3 after the Merger. (CCFF ¶ 1477). Mr. Reissfelder testified that Mr. Swiggum and Mr. Schultz told him that "they felt like it was a lot of discounting" and "they thought that it wasn't something they would allow the OttoBock sales team to do, and therefore *they recommended or they wanted us to stop doing it*." (CCFF ¶ 1477) (emphasis added).

1065. A dual brand strategy is when a single company will have two different brands and brand promises in the same market. (Schneider, Tr. 4414)

Response to Finding No. 1065

The proposed finding is unclear and misleading. It is unclear from the proposed finding whether it refers to dual brand strategies generally or Otto Bock's dual brand strategy specifically. It also is unclear what is meant by the phrase "brand promises." The proposed finding is misleading to the extent it suggests that keeping Freedom as a standalone brand would preclude Otto Bock and Freedom from operating as a single, profit-maximizing firm or that implementation of a dual brand strategy could not result in anticompetitive effects. (*See* Response to RPFF ¶ 1039).

1066. Ottobock utilizes a dual brand strategy in markets outside the United States. (Schneider, Tr. 4414-4415). Ottobock utilizes the Polior brand in Brazil, Russia, India, and China. (Schneider, Tr. 4415). Ottobock uses the Polior brand to target price-sensitive customers and Ottobock as a more premium brand in those markets. (Schneider, Tr. 4415). The dual brand strategy has been successful for Ottobock in those markets. (Schneider, Tr. 4415).

Response to Finding No. 1066

Complaint Counsel has no specific response to the first three sentences of the proposed finding. The last sentence of the proposed finding is vague and misleading. The phrase "successful for Ottobock" is vague; a dual brand strategy could be profitable for Otto Bock while simultaneously harming clinic customers and patients through higher prices and reduced innovation. (Response to RPFF ¶ 1039). The last sentence is also misleading because Respondent cites it in support of the assertion that "the Acquisition will promote competition through a 'Dual Brand Strategy' that would allow Freedom to exist and compete independent of Ottobock," (*see* Resp. Post-Tr. Br. at 58), but the record evidence and economic theory show that Otto Bock and Freedom will operate as a single, profit-maximizing firm, with the ability and incentive to raise price, reduce quality, and/or reduce innovation. (*See* Response to RPFF ¶ 1039).

1067. Since the date of the Acquisition, Schneider is not aware of anyone from Ottobock directing anyone from Freedom to change how Freedom markets its products. (Schneider, Tr. 4416).

Response to Finding No. 1067

The proposed finding is irrelevant and misleading. Whether or not Mr. Schneider is aware of anyone from Otto Bock directing anyone from Freedom to change how Freedom markets its products is irrelevant to the issue of whether the Merger has already harmed competition. The relevant issue is whether anyone from Otto Bock *has in fact* directed anyone from Freedom to change how Freedom markets its products. The proposed finding is misleading and incorrect to the extent it suggests that no one from Otto Bock has directed anyone from Freedom to change how Freedom markets its products. Testimony from Mr. Carkhuff and other Respondent executives reveals that Otto Bock and Freedom ceased to compete with each other as aggressively as they did prior to the Merger. (*See* Response to RPFF ¶ 1040).

1068. Schneider is not aware of anyone from Ottobock directing anyone at freedom to change how freedom is developing its next-generation MPK since the Acquisition. (Schneider, Tr. 4416).

Response to Finding No. 1068

The proposed finding is unclear, contradicted by the evidence, and misleading. It is unclear whether the term "its next-generation MPK" refers to the Quattro or Otto Bock's C-Leg 5. To the extent the term refers to the Quattro, the proposed finding is misleading because it is contradicted by record evidence showing that the November 2017 meeting resulted in an Action item to [redacted] (CCFF ¶ 1411). The proposed finding is misleading to the extent it suggests that the implementation of a dual brand strategy would not result in any competitive harm. (*See* Responses to RPFF ¶¶ 1039-40).

1069. Schneider disagrees with the allegation that the Acquisition has already harmed consumers because neither company has done anything differently post-acquisition. (Schneider, Tr. 4416-4417). There has been no change in Freedom's operations except that Ottobock is now providing financial funding to Freedom so it can stay viable. Otherwise, Freedom would have gone out of business. (Schneider, Tr. 4417).

Response to Finding No. 1069

The proposed finding is unsupported, contradicted by the weight of the evidence, and irrelevant. The proposed finding is unsupported as it relies solely on the self-serving testimony of Otto Bock's Scott Schneider to speak for the entirety of the operations of Otto Bock and Freedom post-Merger. Indeed, Mr. Schneider's lack of knowledge about Freedom's operations post-Merger is highlighted by the fact that he is unaware of many of the changes in Freedom's operations detailed below. The proposed finding also is contradicted by the weight of the evidence. Record evidence shows that [redacted] (CCFF ¶ 1474). In October 2017, Mr. Swiggum wrote to Jeremy Mathews, Freedom's Senior VP of Sales and Marketing, to address a complaint from Kyra Velett Strupp, Florida Territory Manager from Freedom, regarding an Otto Bock sales representative making false Plié 3 claims. (CCFF ¶ 1475). In response to this complaint, Mr. Swiggum wrote, "We are absolutely one company today and the target is not each other!" and Mr. Mathews responded with, "as long as we are aligned in our messaging, we will get through this." (CCFF ¶ 1475). Furthermore, [redacted] (CCFF ¶ 1476). [redacted]

[redacted]

(CCFF ¶ 1476).

David Reissfelder, the Freedom CEO put in place by Otto Bock after the Merger, testified that Mr. Swiggum and Andreas Schultz, Otto Bock's CFO, also expressed concern to him about perceived aggressive promotions and discounting on the Plié 3 after the Merger. (CCFF ¶ 1477). Mr. Reissfelder testified that Mr. Swiggum and Mr. Schultz told him that "they felt like it was a lot of discounting" and "they thought that it wasn't something they would allow the OttoBock sales team to do, and therefore *they recommended or they wanted us to stop doing it*." (CCFF ¶ 1477) (emphasis added).

The portion of the proposed finding that Freedom "would have gone out of business" is unsupported and contradicted by the weight of the evidence. This portion of the finding is unsupported because Mr. Schneider, an Otto Bock executive, was uninvolved in Freedom's sales process and finances prior to the Merger, and his testimony is contradicted by extensive record evidence showing that Freedom would have been able to meet its financial obligations, (CCFF ¶¶ 1847-1944), and options other than bankruptcy, including an offer from Össur. (CCFF ¶¶ 2116-2193).

This portion of the proposed finding regarding financial funding to Freedom is irrelevant to any assessment of Freedom's financial health and Respondent's assertion of the failing firm defense. Freedom's financial performance since the Merger is not probative of Freedom's true financial health because its operations have been substantially altered by the Merger—[redacted]

[redacted]

1070. Schneider disagrees with the allegation that Ottobock and Freedom sales personnel no longer have an incentive to compete against each other for sales because the plan is to keep the sales forces separate, therefore they are still competing in the marketplace against each other. (Schneider, Tr. 4417).

Response to Finding No. 1070

The proposed finding is incorrect and misleading. The proposed finding is incorrect because, to the extent Otto Bock and Freedom personnel are still competing today as part of separate sales forces, it is because Respondent entered into a hold separate agreement to avoid the need for a federal court proceeding seeking an injunction to hold the companies apart. (*See* CCFF ¶¶ 145-51). Absent the hold separate agreement, the Otto Bock and Freedom sales personnel would have a drastically altered incentives to compete against each other. (*See* Response to RPFF ¶ 1040). [redacted]

(CCFF ¶ 1475). Finally, the proposed finding is misleading because Respondent cites it in support of the assertion that "the Acquisition will promote competition through a 'Dual Brand Strategy' that would allow Freedom to exist and compete independent of Ottobock," (*see* Resp. Post-Tr. Br. at 58), but the record evidence and economic theory show that Otto Bock and Freedom will operate as a single, profit-maximizing firm, with the ability and incentive to raise price, reduce quality, and/or reduce innovation. (*See* Response to RPFF ¶ 1039).

1071. [redacted]

Response to Finding No. 1071

The proposed finding is unclear, unsupported, incomplete, misleading and contrary to the weight of the evidence. The proposed finding is unclear because the terms "did not seriously contemplate" and "very aggressive coding" are vague. The proposed finding is unsupported because it relies primarily on self-serving testimony of Mr. Schnieder, ignoring the testimony of Mr. Schneider's boss and Otto Bock's CEO at the time, Matt Swiggum. For example, [redacted]

[redacted] (CCFF ¶ 1353).

PX01004, the other evidence cited by this proposed finding, is a due diligence document created "sometime around" the date of Mr. Swiggum's email. (CCFF ¶ 1209). Rather than support the proposed finding, PX01004 contains observations consistent with Otto Bock's subsequent evaluation of a Plié price increase. In PX01004, [redacted] (PX01004 (Otto Bock) at 058-059).

The proposed finding is further contradicted by evidence omitted from the finding about the November 2017 meeting between high-level Otto Bock and Freedom executives. At the meeting, Dr. Pfuhl presented a [redacted] (CCFF ¶ 1394). Otto Bock's strategy made business sense because Respondent estimated that the C-Leg 4 would recapture at least [redacted] percent, and up to [redacted] percent, of any lost Plié 3 sales. (CCFF ¶ 1363). [redacted]

[redacted] (CCFF ¶ 1403).

Finally, the proposed finding is misleading to the extent "very aggressive coding" implies that the Plié 3 is not a true microprocessor knee that competes directly with Otto Bock's C-Leg in the U.S. MPK market. (*See generally* CCFF ¶¶ 3062-3088). The record is clear that Freedom considers the Plié to be an MPK with swing and stance functionality. (CCFF ¶ 3064). The Plié is marketed by Freedom as a swing and stance MPK. (CCFF ¶ 3065). For example, in a Plié 3 marketing document, titled "Plié 3 Microprocessor Knee Fact Sheet" Freedom compared the "Plié 3 vs C-Leg4" noting that "[b]oth Plié 3 and C-Leg 4 have swing and stance control." (CCFF ¶ 3066). Freedom recommends that customers seek reimbursement for the Plié under L-Code 5856, which is for microprocessor swing and stance knees. (CCFF ¶ 3067-3068). Freedom has published recommended L Codes for the Plié 3 with HCPCS code L5856 (microprocessor control feature, swing & stance phase) on its website. (CCFF ¶ 3069). Freedom is aware that Medicare has provided reimbursement to prosthetic clinics for Freedom's Plié 3 under HCPCS code L5856, (CCFF ¶ 3070), and record evidence clearly shows that the Plié is, in fact, reimbursed as a swing and stance MPK, under L-Code 5856, (CCFF ¶ 3072). Respondent even admitted that, "Freedom believes that it does" have "a microprocessor controlled swing and microprocessor controlled stance phase." (CCFF ¶ 3071). Eric Ferris, Freedom's Vice President of Marketing, Customer Service, and Product Development, testified that Otto Bock salespeople were telling customers

that the Plié does not offer swing and stance control, but the Plié does in fact have swing and stance control. (CCFF ¶ 3081). Respondent's other proposed findings confirm that Freedom's Plié is an "established, well known, and tested MPK" along with Otto Bock's C-Leg, Össur's Rheo, and Endolite's Orion. (*See, e.g.,* RPFF ¶ 783 ("Jeff Collins [of Cascade] testified that the established, well known, and tested MPK brands on the market include Ottobock's C-Leg, Össur's Rheo, Freedom's Plié, and Endolite's Orion.")).

1072. [redacted]

Response to Finding No. 1072

The proposed finding is unsupported, incorrect, and misleading. Respondent cites to only one Otto Bock executive's self-serving testimony in support of the proposed finding, which in fact is contradicted by the thrust of the document cited in the proposed finding.

Respondent's citation to PX01306 in support of the proposition that [redacted] is inaccurate. The cited document is [redacted] (CCFF ¶¶ 1392-1396). According to the minutes, multiple decisions were made, including assigning Freedom's Eric Ferris the action item of "[e]valuat[ing] 3E80 as an option for the Plie 3.0 un the U.S. market" and assigning [redacted] (CCFF ¶ 1411; PX01306 (Otto Bock) at 004 (*in camera*)). [redacted]

[redacted]

1073. Despite decreasing reimbursement rates and a lack of approval for new L-Codes, Ottobock has continued to innovate. (Schneider, Tr. 4299). The Compact is the predicate device for L-5858 and C-Leg is predicate for L-5856, and those codes did not exist when Ottobock developed those products. (Schneider, Tr. 4299-4300).

Response to Finding No. 1073

The proposed finding is unclear and contradicted by record evidence. It is unclear from the proposed finding which prosthetic devices have allegedly experienced decreasing reimbursement rates, when the alleged decreases occurred, and by how much these reimbursement rates have allegedly decreased. To the extent the proposed finding is suggesting the current reimbursement rates for MPKs are decreasing, it is incorrect. CMS increased its fee schedule by 0.7 percent in 2017 so the reimbursement for an MPK should increase. (CCFF ¶ 3060). The relationship of the reimbursement rates to Otto Bock's innovation also is unclear given that Otto Bock introduced the C-Leg nearly twenty years ago. (CCFF ¶ 1008).

Similarly, the portion of the proposed finding "lack of approval for new L-Codes" is unclear and unsupported. The proposed finding does not identify how many L-Codes have not been approved, and the cited testimony merely states that six new codes have been *approved* in the past decade without any discussion of "lack of approval" other than the comment that "it's difficult to get new technologies warranted and to have a new code issued." (Schnieder (Otto Bock) Tr. 4298-99).

2. Ottobock Has Continued To Innovate Post-Acquisition

1074. The C-Leg 5 has been in development since February 2017. (Schneider, Tr. 4354). [redacted]

Response to Finding No. 1074

Complaint Counsel has no specific response to the first sentence of the proposed finding. The portion of the proposed finding that "meeting participants did not think that idea made any sense" is contradicted by record evidence. In support of this assertion, Respondent only relies on the self-serving trial testimony of Otto Bock's Scott Schneider. Mr. Schneider's testimony is contradicted by the meeting minutes from the meeting at which repositioning the Quattro against the Rheo was discussed. Specifically, [redacted] (CCFF ¶ 1410), and the result of the discussion was [redacted] (CCFF ¶ 1411).

1075. [redacted]

Response to Finding No. 1075

The proposed finding is unclear. First, it is unclear what "very shortly" means in the context of when the C-Leg 5 will be launched. According to [redacted] (PX01762 (Otto Bock) at 053 (*in camera*); *see also* PX07049 at 024 (Otto Bock Amended Answer)(*in camera*)). Second, it is unclear whether the "C-Leg 5" mentioned in Mr. Schneider's testimony refers to an MPK developed internally by Otto Bock or the Quattro re-branded as the C-Leg 5. [redacted]

[redacted] (CCFF ¶ 1405). [redacted] (CCFF ¶ 1406).

3. Customers Have Not And Will Not Be Harmed By The Acquisition

1076. Ottobock's acquisition of Freedom has not impacted COPC's business at all. (Senn, Tr. 264). COPC is still receiving the exact same pricing it received before the acquisition. (Senn, Tr. 264-265). COPC has not lost any sales and its patients have not been impacted by the acquisition. (Senn, Tr. 265). Post-acquisition, COPC is still able to buy Freedom's Plié 3 at discounted prices offered pre-acquisition. (Senn, Tr. 265).

Response to Finding No. 1076

The proposed finding is irrelevant, misleading, and incomplete. The proposed finding is irrelevant and misleading because the fact that COPC may not yet have been harmed is not evidence that Otto Bock will be, in the future, unable to implement a Dual Brand Strategy that would result in anticompetitive effects, including higher prices and reduced innovations for clinic customers, such as COPC, and their patients. (*See, e.g.*, Responses to RFF 1039-40).

The portion of the proposed finding that "COPC is still receiving the exact same pricing it received before the acquisition" is misleading to the extent this suggests that COPC has not been harmed by the Merger. The relevant comparison is not whether COPC has received the same pricing that it received prior to the Merger, but whether it has received the same pricing that it would have received from Freedom if the Merger had not occurred. [redacted]

[redacted]

1077. Scott Sabolich testified that he understands why Ottobock bought Freedom, because Ottobock's foot portfolio is not very strong, and he thinks that Ottobock bought Freedom for the feet, not for the Plié. (Sabolich, Tr. 5866).

Response to Finding No. 1077

The proposed finding is irrelevant, unsupported and contradicted by the weight of the evidence. As an owner of a prosthetic clinic, Mr. Sabolich's speculation about why Otto Bock decided to acquire Freedom is irrelevant. The proposed finding is unsupported because there is no evidence that Mr. Sabolich has any basis to opine why Otto Bock bought Freedom as he was not involved in any of the due diligence or decision to purchase Freedom. (CCFF ¶¶ 69-71). The proposed finding is contradicted by the evidence because Otto Bock's due diligence shows that **the rationales for the Merger included:** [redacted] (CCFF ¶ 1367; *see also* CCFF ¶¶ 1325-83), and as **a** [redacted] (CCFF ¶ 1355).

1078. Scott Sabolich testified that as a major customer for prosthetic knees in the United States, he does not have any concern that Ottobock's acquisition of Freedom would harm competition in the United States with respect to MPKs. (Sabolich, Tr. 5866-5867).

Response to Finding No. 1078

The proposed finding is misleading and unreliable. The proposed finding is misleading to the extent it suggests that prosthetic clinics customers generally are not concerned about the likely effects of the Merger. In fact, clinics such as Hanger, COPC, Mid-Missouri O&P, and POA, have all testified regarding their serious concerns of the Merger, (CCFF ¶¶ 1416-45), and have indicated the extent to which they have benefited from the head-to-head competition between Freedom and

Otto Bock. (CCFF ¶¶ 1141-74). Moreover, given Mr. Sabolich's close relationship and clinical partnerships with Otto Bock, Mr. Sabolich's situation differs from most clinic customers, and as such, he is not a reliable proxy for customer concern. (*See* CCFF ¶¶ 3343-3384).

1079. Scott Sabolich testified that he believes that the Acquisition could benefit clinics, because Ottobock could improve the quality of the Plié. (Sabolich, Tr. 5867).

Response to Finding No. 1079

The proposed finding is misleading, unreliable, and contradicted by the evidence. The proposed finding is misleading to the extent it suggests that prosthetic clinics customers generally believe the Merger will benefit them. In fact, clinics such as Hanger, COPC, Mid-Missouri O&P, and POA, have all testified regarding their serious concerns of the Merger, (CCFF ¶¶ 1416-45). Moreover, given Mr. Sabolich's close relationship and clinical partnerships with Otto Bock, Mr. Sabolich's situation differs from most clinic customers, and as such, he is not a reliable proxy for customer concern. (*See* CCFF ¶¶ 3343-3384).

Mr. Sabolich's assertion that Otto Bock could improve the Plie is contradicted by the evidence because Otto Bock's post-Merger planning shows that Otto Bock intended to either discontinue the Plié 3 or raise its price. (CCFF ¶¶ 1392-1404).

1080. [redacted]

Response to Finding No. 1080

The proposed finding is unsupported and misleading. The proposed finding is unsupported because PX01463, the document [redacted] (PX01463 (Otto Bock) at 022). Nowhere in the document does it

indicate that [redacted] (Schneider (Otto Bock), Tr. 4519-20). The proposed finding is misleading to the extent that it implies that Hanger could prevent post-Merger price increases from Respondent by shifting more volume to other manufacturers. (*See* Response to RPFF ¶ 995).

J. [redacted]

1081. [redacted]

Response to Finding No. 1081

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1082. [redacted]

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1083. [redacted]

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1085. [redacted]

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1087. [redacted]

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1089. [redacted]

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1090. [redacted]

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1091. [redacted]

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1093. [redacted]

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1103. [redacted]

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1105. [redacted]

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1106. [redacted]

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1107. [redacted]

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1109. [redacted]

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1112. [redacted]

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1113. [redacted]

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1114. [redacted]

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1115. [redacted]

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1116. [redacted]

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1118. [redacted]

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1122. [redacted]

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1124. [redacted]

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1125. [redacted]

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1126. [redacted]

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1127. [redacted]

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1128. [redacted]

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1129. [redacted]

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1130. [redacted]

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1131. [redacted]

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1132. [redacted]

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1133. [redacted]

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1134. [redacted]

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1135. [redacted]

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1137. [redacted]

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1151. [redacted]

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1152. [redacted]

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1153. [redacted]

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1154. [redacted]

Response to Finding No. 1154

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2. The Acquisition Is Not Likely To Have A Substantially Adverse Effect On Competition In Any Relevant Market

a. Since the Acquisition, Ottobock has maintained the independence of Freedom and financially stabilized Freedom and competition has not been adversely affected

1155. [redacted]

Response to Finding No. 1155

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1156. [redacted]

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1157. [redacted]

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1160. [redacted]

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1163. [redacted]

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1177. [redacted]

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1187. [redacted]

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1189. [redacted]

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1190. [redacted]

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1191. [redacted]

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1193. [redacted]

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1194. [redacted]

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1197. [redacted]

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1200. [redacted]

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1202. [redacted]

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ii. [redacted]

1203. [redacted]

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1204. [redacted]

Response to Finding No. 1204

[redacted]

[redacted]

1205. [redacted]

Response to Finding No. 1205

[redacted]

1206. [redacted]

Response to Finding No. 1206

[redacted]

[redacted]

1207. [redacted]

Response to Finding No. 1207

[redacted]

1208. [redacted]

Response to Finding No. 1208

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1209. [redacted]

Response to Finding No. 1209

[redacted]

1210. [redacted]

Response to Finding No. 1210

[redacted]

[redacted]

1211. [redacted]

Response to Finding No. 1211

[redacted]

1212. [redacted]

Response to Finding No. 1212

[redacted]

1213. [redacted]

Response to Finding No. 1213

[redacted]

1214. [redacted]

Response to Finding No. 1214

[redacted]

[redacted]

1215. [redacted]

Response to Finding No. 1215

[redacted]

[redacted]

1216. [redacted]

Response to Finding No. 1216

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1217. [redacted]

Response to Finding No. 1217

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1218. [redacted]

Response to Finding No. 1218

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1219. [redacted]

Response to Finding No. 1219

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1220. [redacted]

Response to Finding No. 1220

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1221. [redacted]

Response to Finding No. 1221

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1222. [redacted]

Response to Finding No. 1222

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1223. [redacted]

Response to Finding No. 1223

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1224. [redacted]

Response to Finding No. 1224

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1225. [redacted]

Response to Finding No. 1225

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1226. [redacted]

Response to Finding No. 1226

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[redacted]

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1227. [redacted]

Response to Finding No. 1227

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1228. [redacted]

Response to Finding No. 1228

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1229. [redacted]

Response to Finding No. 1229

[redacted]

[redacted]

[redacted]

1230. [redacted]

Response to Finding No. 1230

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1231. [redacted]

Response to Finding No. 1231

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1232. [redacted]

Response to Finding No. 1232

[redacted]

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1233. [redacted]

Response to Finding No. 1233

[redacted]

[redacted]

1234. [redacted]

Response to Finding No. 1234

[redacted]

[redacted]

1235. [redacted]

Response to Finding No. 1235

[redacted]

[redacted]

1236. [redacted]

Response to Finding No. 1236

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1237. [redacted]

Response to Finding No. 1237

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[redacted]

1238. [redacted]

Response to Finding No. 1238

[redacted]

[redacted]

iii. [redacted]

1239. [redacted]

Response to Finding No. 1239

[redacted]

[redacted]

1240. [redacted]

Response to Finding No. 1240

[redacted]

1241. [redacted]

Response to Finding No. 1241

[redacted]

[redacted]

1242. [redacted]

Response to Finding No. 1242

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1243. [redacted]

Response to Finding No. 1243

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1244. [redacted]

Response to Finding No. 1244

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1245. [redacted]

Response to Finding No. 1245

[redacted]

1246. [redacted]

Response to Finding No. 1246

[redacted]

1247. [redacted]

Response to Finding No. 1247

[redacted]

[redacted]

1248. [redacted]

Response to Finding No. 1248

[redacted]

3. [redacted]

1249. [redacted]

Response to Finding No. 1249

[redacted]

1250. [redacted]

Response to Finding No. 1250

[redacted]

1251. [redacted]

Response to Finding No. 1251

[redacted]

[redacted]

a. [redacted]

1252. [redacted]

Response to Finding No. 1252

[redacted]

1253. [redacted]

Response to Finding No. 1253

[redacted]

1254. [redacted]

Response to Finding No. 1254

[redacted]

[redacted]

1255. [redacted]

Response to Finding No. 1255

[redacted]

1256. [redacted]

Response to Finding No. 1256

[redacted]

[redacted]

b. [redacted]

1257. [redacted]

Response to Finding No. 1257

[redacted]

1258. [redacted]

Response to Finding No. 1258

[redacted]

1259. [redacted]

Response to Finding No. 1259

[redacted]

c. [redacted]

1260. [redacted]

Response to Finding No. 1260

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1261. [redacted]

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Response to Finding No. 1261

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1262. [redacted]

Response to Finding No. 1262

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1263. [redacted]

Response to Finding No. 1263

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1264. [redacted]

Response to Finding No. 1264

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1265. [redacted]

Response to Finding No. 1265

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[redacted]

1266. [redacted]

Response to Finding No. 1266

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1267. [redacted]

Response to Finding No. 1267

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[redacted]

1268. [redacted]

Response to Finding No. 1268

[redacted]

1269. [redacted]

[redacted]

Response to Finding No. 1269

[redacted]

[redacted]

1270. [redacted]

Response to Finding No. 1270

[redacted]

[redacted]

d. [redacted]

1271. [redacted]

Response to Finding No. 1271

[redacted]

[redacted]

1272. [redacted]

Response to Finding No. 1272

[redacted]

1273. [redacted]

Response to Finding No. 1273

[redacted]

[redacted]

1274. [redacted]

Response to Finding No. 1274

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1275. [redacted]

Response to Finding No. 1275

[redacted]

[redacted]).

1276. [redacted]

Response to Finding No. 1276

[redacted]

1277. [redacted]

Response to Finding No. 1277

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e. [redacted]

1278. [redacted]

Response to Finding No. 1278

[redacted]

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1279. [redacted]

Response to Finding No. 1279

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1280. [redacted]

Response to Finding No. 1280

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1281. [redacted]

Response to Finding No. 1281

[redacted]

1282. [redacted]

Response to Finding No. 1282

[redacted]

4. [redacted]

1283. [redacted]

Response to Finding No. 1283

[redacted]

1284. [redacted]

Response to Finding No. 1284

[redacted]

[redacted]

1285. [redacted]

Response to Finding No. 1285

[redacted]

1286. [redacted]

Response to Finding No. 1286

[redacted]

1287. [redacted]

Response to Finding No. 1287

[redacted]

1288. [redacted]

Response to Finding No. 1288

[redacted]

[redacted]

1289. [redacted]

Response to Finding No. 1289

[redacted]

[redacted]

1290. [redacted]

Response to Finding No. 1290

[redacted]

[redacted]

V. [redacted]

A. [redacted]

1. [redacted]

1291. [redacted]

Response to Finding No. 1291

[redacted]

1292. Freedom's audited financial data for the years 2012 through 2016 is reflected in its audited financial statements, which are contained in RX-0822, [redacted] and RX-0824. Freedom's unaudited financial data for the first months of 2017 is contained in [redacted]

Response to Finding No. 1292

[redacted]

1293. [redacted]

Response to Finding No. 1293

[redacted]

[redacted]

1294. [redacted]

Response to Finding No. 1294

[redacted]

1295. [redacted]

Response to Finding No. 1295

1296. Freedom's operating income was ($836,000) in 2012; ($4,061,000) in 2013; ($4,815,000) in 2014;

Response to Finding No. 1296

1297.

Response to Finding No. 1297

[redacted]

[redacted]

1298. [redacted]

Response to Finding No. 1298

[redacted]

[redacted]

[redacted]

1299. [redacted]

Response to Finding No. 1299

[redacted]

1300. [redacted]

Response to Finding No. 1300

[redacted]

[redacted]

1301. [redacted]

Response to Finding No. 1301

Complaint Counsel has no specific response.

1302. [redacted]

Response to Finding No. 1302

[redacted]

1303. [redacted]

Response to Finding No. 1303

[redacted]

1304. [redacted]

Response to Finding No. 1304

[redacted]

[redacted]

1305. [redacted]

Response to Finding No. 1305

[redacted]

[redacted]

1306. [redacted]

Response to Finding No. 1306

[redacted]

[redacted]

1307. [redacted]

Response to Finding No. 1307

[redacted]

[redacted]

1308. In addition, in 2017, Freedom presented a projected loss at the EBITDA level before consideration of additional cash requirements of the business including taxes, debt service and capital spending in its pitch book to potential investors. (RX-0451, at 11).

Response to Finding No. 1308

[redacted]

[redacted]

1309. [redacted]

Response to Finding No. 1309

[redacted]

1310. [redacted]

Response to Finding No. 1310

This proposed finding is unsupported. The only citation for this proposed finding is the demonstrative exhibit, RDX0007. *See* Order on Post-Trial Briefs at 3 ("Do not cite to demonstrative exhibits as substantive evidence").

1311. [redacted]

Response to Finding No. 1311

This proposed finding is unsupported. The only citation for this proposed finding is the demonstrative exhibit, RDX0007. *See* Order on Post-Trial Briefs at 3 ("Do not cite to demonstrative exhibits as substantive evidence").

1312. [redacted]

Response to Finding No. 1312

[redacted]

[redacted]

1313. [redacted]

Response to Finding No. 1313

[redacted]

[redacted]

1314. Likewise, in early 2017, Freedom's financial condition was so dire that Smith believed that "we weren't going to make payroll" so Freedom "put . . . money in the trust account" that "could only be used for payroll and payroll taxes." (Smith, Tr. 6429-31). Freedom did the same thing later in the summer "during the bank negotiations." (Smith, Tr. 6431-32).

Response to Finding No. 1314

[redacted]

2. Freedom's Financial Projections Were Terrible

1315. [redacted]

Response to Finding No. 1315

[redacted]

[redacted]

1316. Smith believed that Freedom's projections were "cooked" and "misleading." (Smith, Tr. 6414-6417).

Response to Finding No. 1316

[redacted]

[redacted]

[redacted]

1317. The following chart compares Freedom's annual revenue projections prepared in 2012 for the years 2014, 2015, and 2016 to Freedom's actual annual revenue in the same years:[1]

	2014	2015	2016

[1] [redacted]

2012 Projected Revenue	$69,282	$87,713	$106,476
Actual Revenue	$40,215	[redacted]	[redacted]
Shortfall	($29,067)	[redacted]	[redacted]

Response to Finding No. 1317

[redacted]

1318. The following chart compares Freedom's annual EBITDA projections prepared in 2012 for the years 2014, 2015, and 2016 to Freedom's actual EBITDA in the same years:[2]

	2014	2015	2016
2012 Projected EBITDA	$25,055	$34,054	$42,991
Actual EBITDA	$3,414	[redacted]	[redacted]
Shortfall	($21,641)	[redacted]	[redacted]

Response to Finding No. 1318

[redacted]

[redacted]

[2] [redacted]

[redacted]

1319. [redacted]

Response to Finding No. 1319

[redacted]

1320. [redacted]

Response to Finding No. 1320

[redacted]

1321. [redacted]

Response to Finding No. 1321

[redacted]

[redacted]

1322. [redacted]

Response to Finding No. 1322

[redacted]

[redacted]

[redacted]

1323. [redacted]

Response to Finding No. 1323

This proposed finding is contradicted by the weight of the evidence. [redacted]

[redacted]

1324. [redacted]

Response to Finding No. 1324

The proposed finding is unclear and unsupported. [redacted]

1325. [redacted]

Response to Finding No. 1325

The proposed finding is unclear, incomplete, misleading and contrary to the record. [redacted]

[redacted]

[redacted]

1326. [redacted]

Response to Finding No. 1326

The proposed finding is unsupported, argumentative, unclear, and contradicted by the record. [redacted]

1327. [redacted]

Response to Finding No. 1327

The proposed finding is vague, misleading, and incorrect. [redacted]

1328. [redacted]

[redacted]

Response to Finding No. 1328

The proposed finding is unclear and, for several reasons, is also misleading. [redacted]

1329. [redacted]

Response to Finding No. 1329

This proposed finding is unclear, unsupported, and misleading. [redacted]

[redacted]

[redacted]

3. David Smith's Attempted Turnaround Failed

1330. Because Freedom's financial condition was so poor in 2016, Freedom replaced Carkhuff as CEO with David Smith, effective April 1, 2016. (Smith, Tr. 6413-6415).

Response to Finding No. 1330

The proposed finding is vague, unsupported, argumentative, conclusory, and misleading. The proposed finding is vague and unsupported because Respondent does not explain what it means by "poor" as it relates to Freedom's financial condition and the cited testimony does not use the term "poor". Instead, Mr. Smith merely testified that he "felt" that "they needed some help" without explaining whether he was talking about Freedom or HEP. (Smith (HEP) Tr. 6414).

Mr. Smith further testified that he saw a "problem" and "it was about finding it" and that is "when they asked me to join as CEO." (Smith (HEP) Tr. 6413-6415). In the cited testimony for the proposed finding, there is no testimony that Mr. Carkhuff was replaced as CEO due to Freedom's financial condition. Thus, this proposed finding is argumentative and conclusory because it suggests that Freedom replaced Carkhuff as CEO due to Freedom's "poor" financial condition.

1331. Before joining Freedom, Smith was a partner in HEP. (Smith, Tr. 6410).

Response to Finding No. 1331

Complaint Counsel has no specific response.

1332. Smith surrendered his partnership with HEP after becoming the CEO of Freedom in order to avoid any potential conflict of interest. (Smith, Tr. 6410).

Response to Finding No. 1332

Complaint Counsel has no specific response.

1333. Smith had no experience in the prosthetics industry before he joined Freedom. (Smith, Tr. 6411; *see also* Smith, Tr. 6411 (Smith confirming that he learned everything he knows about the prosthetics industry in the year and a half he served as CEO of Freedom.)).

Response to Finding No. 1333

Complaint Counsel has no specific response.

1334. As a result, Smith persuaded the board to retain Carkhuff in an executive role as Vice Chairman so he could advise Smith about the industry. (Smith, Tr. 6411-6412).

Response to Finding No. 1334

The proposed finding is inaccurate and incomplete. The portion of the finding that "Smith persuaded the board to retain Carkhuff" is unsupported by the cited testimony because Mr. Smith merely testified that he "refused the board's first direction to me of firing him" and that Mr. Smith "didn't want him [Carkhuff] in a decision-making role." (Smith (HEP) Tr. 6412). The proposed finding is incomplete because Mr. Smith testified that he also wanted to keep Mr. Carkhuff at Freedom because Mr. Carkhuff could "potentially…have a role after [Mr. Smith] left." (Smith (HEP) Tr. 6411-12). In fact, Mr. Carkhuff has continued to work at Freedom, and is currently serving as the Chairman of the Board of Freedom and as the Hold Separate Manager. (CCFF ¶¶ 3164, 3169).

1335. Around the time he became CEO, Smith learned about Freedom's financial condition and concluded that prior management had "cook[ed]" the books and "misleading the board for a long time." (Smith, Tr. 6414-6415).

Response to Finding No. 1335

This proposed finding is vague, misleading, and incomplete. The testimony cited by Respondent does not clearly state that prior management by Freedom had "'cooked' the books." In the cited testimony on page 6414, it is unclear whether Mr. Smith was referring to Freedom *managemen*t or Freedom's *financials* as to what was "cooked." (Smith (HEP) Tr. 6414). Mr. Smith testified in full that, "Well, when they [Freedom management] gave me the new financials, you know, they were cooked because they'd been misleading the board for a long time." (Smith (HEP) Tr. 6414).

Even assuming that Mr. Smith was referring to Freedom's "new financials" as cooked in the cited testimony, the proposed finding is misleading to the extent it suggests that Freedom's actual (historic) financial numbers—rather than its future projections—were inaccurate. Mr. Smith testified that he believed that the "historical financials" were "on the board", meaning they "have been accomplished" and that it was the "projections for the future" that were incorrect. (Smith (HEP) Tr. 6413-6417; *see also* [redacted]

The proposed finding is also vague in that neither Respondent nor the cited testimony describes what "a long time" is as it relates to the "books" and Freedom's board. According to the cited testimony, prior to joining Freedom Mr. Smith was presented with financial numbers by prior Freedom management at a February 2016 board meeting. (Smith (HEP) Tr. 6414-15). Mr. Smith testified that he asked Freedom's management to create new financials by March 2016 and that

those financials were "different" from "the ones they'd been presenting at that February board meeting." (Smith (HEP) Tr. 6414-15). There was no testimony by Mr. Smith that *any other* financial statements presented to Freedom's board of directors were inaccurate or misleading.

Finally, the proposed finding is incomplete and misleading to the extent it suggests that Freedom financial projections subsequent to April 2016 were "cooked."

1336. Smith's initial objectives as CEO were to try to "improve product portfolio, improve, you know, customer satisfaction, improve profitability, improve innovation." (Smith, Tr. 6422).

Response to Finding No. 1336

Complaint Counsel has no specific response.

1337. However, Smith soon realized that the company needed to "survive" by increasing revenue without spending more money: "So my goal was to increase revenues without spending money so I have more on the bottom so that I could pay debt and maybe hit my covenants or have money to fix the problems that I could see." (Smith, Tr. 6422-6423).

Response to Finding No. 1337

Complaint Counsel agrees that Respondent accurately quoted the testimony of Mr. Smith in this proposed finding. However, the proposed finding is misleading to the extent it suggests that Freedom did not spend money investing in the business once David Smith became CEO. For example, as of August 2017, the last full month before the acquisition,

1338. Smith attempted to implement a turnaround plan, but he identified significant obstacles that prevented him from doing so. For example, Freedom's products did not match the company's warranty and marketing claims. (Smith, Tr. 6423).

Response to Finding No. 1338

This proposed finding is vague, misleading, overly broad, inaccurate, and contrary to the weight of the evidence. The proposed finding's reference to "significant obstacles" is unclear because Respondent does not explain what is meant by that term and the cited testimony does not use that term. The proposed finding is vague and overly broad in that Respondent does not refer to any specific time period to evaluate whether Mr. Smith's turnaround plan had been implemented when the referenced "significant obstacles" were present. This proposed finding is misleading to the extent that Respondent is attempting to suggest that Mr. Smith blamed warranty and marketing claims as obstacles to his implementation of a turnaround plan. In the cited testimony, Mr. Smith testified that "Our products weren't meeting the warranty claims that we have and the marketing claims that we have, you know, da, da, da, da, da, da, da." (Smith (HEP) Tr. 6423). There is no testimony explaining what Mr. Smith meant by his statement. Regardless of what Mr. Smith may have meant, he did not identify these as "significant obstacles" that "prevented him" from "implement[ing] a turnaround plan." On the contrary, his testimony was that he identified problems that he "needed to solve", including that "it took us four weeks to ship product instead of next day" and "took us two months to repair a leg[.]" (Smith (HEP) Tr. 6423).

The proposed finding is inaccurate and contrary to the weight of the evidence to the extent that it suggests that Freedom had not implemented a turnaround plan or that the implemented plan was not working. [redacted]

[redacted]

Far from the turnaround plan not being implemented, the evidence in the record demonstrates that Freedom's financials began improving in December 2016. Mr. Smith testified at trial that Freedom began to see improvement in this top-line revenue in the final quarter of 2016 and "in the [2017] March quarter and June quarter [Freedom] had great results from a historical perspective." (Smith (HEP) Tr. at 6426). This testimony is supported by testimony from Lee Kim,

Freedom's CFO, that, in December 2016, Freedom's revenues and profit exceeded its annual financial plan as well as the [redacted] Complaint Counsel's expert, Ms. Hammer, concluded that "Freedom's financial position had significantly improved by the time Otto Bock acquired it in September 2017." (CCFF ¶ 1908).

1339. In addition, Freedom's "team wasn't as competent as they needed to be to execute the strategy to be successful." (Smith, Tr. 6423).

Response to Finding No. 1339

This proposed finding is unclear because Respondent does not state which Freedom executives and management that the term "team" refers to and the cited testimony does not either. The proposed finding is overly broad, ambiguous, and misleading to the extent that it suggests that the Freedom team put in place by Mr. Smith was an obstacle to Mr. Smith's turnaround plan.

The proposed finding is also misleading to the extent it suggests that all of Freedom's prior management was not sufficiently "competent" in the view of Mr. Smith. Complaint Counsel agrees that, after joining Freedom, Mr. Smith made personnel changes as part of his turnaround plan. [redacted] But Mr. Smith *retained* numerous high-level Freedom management,

including Maynard Carkhuff, Lee Kim (Freedom's CFO), John Robertson (Freedom's SVP of Research & Development), and Dr. Stephen Prince (Freedom's Quattro Project Manager).

The proposed finding is also misleading to the extent it suggests that Mr. Smith did nothing to address his initial concerns about competency. For example, he made [redacted]

1340. [redacted]

Response to Finding No. 1340

This proposed finding is unclear and incomplete. Complaint Counsel agrees that [redacted]

[redacted]

1341. [redacted] Smith, Tr. 6426; 6429).

Response to Finding No. 1341

This proposed finding is unclear, argumentative, and misleading. The proposed finding is unclear because Respondent does not describe what it means by the [redacted]

[redacted] For these reasons, Complaint Counsel's expert, Ms. Christine Hammer, concluded that, at the time of the Merger, Freedom would have been able to meet its financial obligations in the near future. (CCFF ¶ 1945). [redacted] Based on Freedom's financial results from late 2016 through the first eight months of 2017, Complaint Counsel's expert, Ms. Hammer, concluded that, "Freedom's financial position had significantly improved by the time Otto Bock acquired it in September 2017. (CCFF ¶ 1908).

1342. [redacted]

Response to Finding No. 1342

This proposed finding is unsupported and contradicted by other testimony. [redacted] (CCFF ¶ 3163). This is consistent with Mr. Smith's statements before the acquisition when he told Moelis in July 2017 that "Hans is afraid we are growing by reducing price. Not true. He is market leader. Market leader drives price. We only respond to his move[.]" (PX02010 (HEP) at 001). [redacted] (PX05122 (Smith (HEP) Dep. at 42-44) (*in camera*)).

Other evidence confirms that the margins on all of Freedom's products except for the Kinnex had remained steady. Mr. Smith wrote to Moelis on July 15, 2017 that "Revenues for the 6 months are up more than 15% over last year. Gross margin is up 65% versus 64% excluding new product Kinnex." (PX02010 (HEP) at 001). [redacted] (PX05122 (Smith (HEP) Dep. at 42-44) (*in camera*)).

1343. [redacted]

Response to Finding No. 1343

This proposed finding is misleading, incomplete, and unsupported. [redacted]

[redacted]

[redacted]

1344. [redacted]

Response to Finding No. 1344

This proposed finding is unclear, misleading, and contradicted by the weight of the evidence. [redacted]

[redacted]

[redacted]

[redacted]

1345. [redacted]

Response to Finding No. 1345

This proposed finding is incorrect and misleading. [redacted]

[redacted]

1346. The improvement in top line revenue in 2017 did not solve Freedom's financial problems because Freedom "needed capital." (Smith, Tr. 6429).

Response to Finding No. 1346

This proposed finding of fact is unclear, misleading, and incomplete. The proposed finding is vague because Respondent fails to define the "needed capital" and the cited testimony does not either. Further, there is no evidence in the record that Freedom could not obtain the capital needed to complete the implemented 2017 Strategic Plan. The proposed finding is also incomplete because Respondent ignores the record evidence showing [redacted] (*See* Response to RPFF ¶ 1344).

[redacted] (CCFF ¶ 2203), Respondent has produced no direct evidence to support its assertion that, absent the Merger, the two banks it owed money would have foreclosed on the company's debt, (CCFF ¶¶ 2037-39, 2041-43). Respondent did not call any witness from Madison Capital or BMO to testify at trial, and did not depose anyone from either bank during discovery. (CCFF ¶¶ 2037-39, 2041-43). Moreover, Respondent does not rely on a single Madison Capital or BMO document to substantiate its claim that the banks would have "taken" Freedom had Otto Bock not acquired the company in September 2017. Additionally, Freedom's actions in 2017 leading up to the Merger—including increased R&D expenditures, renewal of leases, and awarding of discretionary bonuses—are inconsistent with Respondent's argument that Freedom would have been unable to meet its financial obligations in the near future. (*See* Response to RPFF ¶ 1344).

1347. [redacted]

Response to Finding No. 1347

This proposed finding is vague, incomplete and unsupported. [redacted]

1348. [redacted]

Response to Finding No. 1348

This proposed finding is vague, argumentative, and unsupported. [redacted]

[redacted]

1349. [redacted]

Response to Finding No. 1349

This proposed finding is unclear, inaccurate, misleading, and incomplete. [redacted]

[redacted]

1350. [redacted]

Response to Finding No. 1350

This proposed finding is misleading and incomplete. [redacted]

1351. [redacted]

Response to Finding No. 1351

[redacted]

[redacted]

1352. [redacted]

Response to Finding No. 1352

[redacted]

1353. [redacted]

Response to Finding No. 1353

[redacted]

[redacted]

1354. [redacted]

Response to Finding No. 1354

[redacted]

1355. Smith did not have sufficient time before Freedom's outstanding debt was due to implement a turnaround plan. (Smith, Tr. 6424-6425).

Response to Finding No. 1355

This proposed finding is unclear, mischaracterizes the cited testimony, and inaccurate to the extent that it suggests that David Smith did not have sufficient time to implement any portion

of any turnaround plan. The proposed finding is also vague in that Respondent does not specify which "due" date for Freedom's outstanding debt it is referring to and the cited testimony does not specify clarify.

The proposed finding mischaracterizes the testimony because in the cited testimony, Mr. Smith states that during the time he was CEO, he did not have time to "implement the *entire* plan" that he put together. (Smith (HEP) Tr. 6424-6425) (emphasis added). The cited testimony does not explain how much of the plan had not been implemented by the time of the acquisition by Otto Bock. When Respondent asks Mr. Smith "how much more time would you have like to have had as CEO to fully implement the plan[,]" Mr. Smith responds with information about the best time to sell but acknowledges that his answer was not responsive: "I'm not sure I answered your question. I don't even remember your question anymore." (Smith (HEP) Tr. 6424-6425).

The record does show, however, that Mr. Smith implemented significant changes to turnaround Freedom by the time of the Merger. [redacted] (CCFF ¶ 1827). [redacted] (CCFF ¶ 1826). Mr. Smith hired Jeremy Mathews (Freedom's current senior VP of sales and marketing) as VP of domestic sales, who then [redacted] (CCFF ¶¶ 1828-29). [redacted] (CCFF ¶ 1831). As Mr. Smith testified, under his leadership, [redacted] (CCFF ¶ 1832). Other

Freedom executives agreed that [redacted] (CCFF ¶¶ 1833-38).

1356. Smith believed that he needed at least an additional 18 months to implement the plan, assuming he could have obtained sufficient financing of $27.5 million to pay off the debt, and $10 million to $15 million of capital to improve the business. (Smith, Tr. 6424-6425).

Response to Finding No. 1356

This proposed finding is vague, unsupported, misleading, and inaccurate. The proposed finding is vague and unsupported because neither the proposed finding nor the cited testimony provide any explanation to give context to the "additional 18 months." Complaint Counsel agrees that David Smith testified that he could "put together a reasonably good planner during the time, which is 18 months" when asked whether he was able to compose all of the elements of a strategic plan during the time that he had as CEO. From this cite, Mr. Smith could be referring to the amount of time he was CEO, which was about eighteen months, (Smith (HEP) Tr. 6408)), the total amount of time he needed to implement his strategic plan, or the amount of additional time from the date of acquisition.

The proposed finding is also vague in that Respondent does not state whether the $10 to $15 million capital refers to additional money needed at the time of the acquisition or whether it refers to the [redacted] (CCFF ¶¶ 1840-41 (citing PX01014 (Freedom) (*in camera*); PX03009 (Madison Capital) at 002 (*in camera*))). [redacted] (CCFF ¶ 1841 (citing PX03009 (Madison Capital) at 002 (*in camera*))). [redacted]

[redacted] (CCFF ¶¶ 1844-1845 (citing (Smith (HEP) Tr. 6489 (*in camera*)))).

Mr. Smith's assertion that he needed [redacted] (CCFF ¶ 2203), Respondent has produced no direct evidence to support its assertion that, absent the Merger, the two banks it owed money would have foreclosed on the company's debt, (CCFF ¶¶ 2037-39, 2041-43). Respondent did not call any witness from Madison Capital or BMO to testify at trial, and did not depose anyone from either bank during discovery. (CCFF ¶¶ 2037-39, 2041-43). Moreover, Respondent does not rely on a single Madison Capital or BMO document to substantiate its claim that the banks would have "taken" Freedom had Otto Bock not acquired the company in September 2017. In fact, evidence indicates that it is highly unlikely that Freedom would have been unable to extend its existing credit arrangement with the banks or secure additional funding to satisfy the loan. [redacted]

(CCFF ¶ 2056). Though these alternative arrangements may not have been as favorable to Freedom's equity investors as the sale to Otto Bock, as Complaint Counsel's expert, Ms. Hammer, explained, they "would likely have been pursued" in lieu of bankruptcy or liquidation. (CCFF ¶ 2060).

1357. At the same time, it would have been difficult to raise capital because "until [Freedom] started getting some operational results, bringing in capital was going to be a difficult process because anybody that brings in capital is going to be intelligent and they're going to want to do due diligence, and [Freedom] never would have passed due diligence at that time." (Smith, Tr. 6423-24).

Response to Finding No. 1357

This proposed finding is vague and misleading. The proposed finding is unclear on its face what time period it is referring to, and thus misleading to the extent it implies that Freedom was not eventually able to achieve operational results or raise capital. In the cited testimony, David Smith clearly testifies that the quoted language refers to mid-2016 (the "April, May, June, July of '16" time period), not 2017 or the time of the Merger. In contrast to 2016, the record evidence shows that Freedom was able [redacted] (PX03009 (Madison Capital) at 002 (*in camera*)). **Specifically,** [redacted] (CCFF ¶ 1841). Moreover, the evidence shows that Freedom began to achieve operational results starting in December 2016 and continuing to the time of the acquisition and beyond. (*See* Responses to RPFF ¶¶ 1338, 1340, 1343-44).

1358. [redacted]

Response to Finding No. 1358

This proposed finding is unsupported and misleading. [redacted]

[redacted]

4. Freedom's Pricing Strategy Was Not Sustainable

1359. [redacted]

Response to Finding No. 1359

[redacted]

[redacted]

1360. [redacted]

Response to Finding No. 1360

[redacted]

1361. [redacted]

Response to Finding No. 1361

[redacted]

1362. [redacted]

Response to Finding No. 1362

[redacted]

[redacted]

1363. [redacted]

Response to Finding No. 1363

[redacted]

[redacted]

1364. From 2012 to YTD17, Freedom's gross margin was more than [redacted] basis points lower than guideline public companies ("GPCs") with operations similar to Freedom, according to Peterson. (RX-1048-0011 ¶ 22). GPC data are typically used to benchmark private companies against publicly traded companies. (RX-1048-0012 ¶ 23).

Response to Finding No. 1364

[redacted]

1365. Those margins indicate that [redacted] (RX-1048-0012 ¶ 24). Given the observed below-market margins, Freedom would likely need to raise its prices in order to achieve industry level margins. (RX-1048-0013 ¶ 24.b).

Response to Finding No. 1365

[redacted]

[redacted]

1366. Össur's YTD gross margin for the same time period was [redacted], approximately [redacted] basis points higher than Freedom's. (RX-1048-0012 ¶ 24.a) If Freedom increased its prices to achieve a gross margin consistent with Össur, Freedom's YTD17 EBITDA would have been [redacted] higher than the company's actual performance. (RX-1048-0012 ¶ 24.a). This level of EBITDA would imply an EBITDA margin for Freedom of [redacted], which is much higher than actual performance, but still well below that of Össur's EBITDA margin, as of June 30, 2017, of [redacted] (RX-1048-0012 ¶ 24.a, [redacted]

Response to Finding No. 1366

[redacted]

1367. From 2012 to 2015, total operating expenses increased from $14.2 million or 48.0% of revenue to $27.0 million or 63.1% of revenue, driven by increases in sales and marketing, research and development, and general and administrative spending that outpaced the pricing strategy of Freedom. (RX-1048-0013 ¶ 25, [redacted] RX-822-6, RX-824-6).

Response to Finding No. 1367

[redacted]

1368. "Freedom's low margins [were] not sustainable. In order to operate in the prosthetics industry and compete effectively, significant R&D is required. Further, absent market level EBITDA, lenders are unlikely to provide capital necessary to fund growth." (RX-1048 ¶ 27**;** [redacted]

Response to Finding No. 1368

[redacted]

B. Freedom's Debt Was Insurmountable

1369. Freedom was burdened by significant debt. Freedom entered into a Credit Agreement, dated as of February 16, 2012 (the "Credit Agreement") that provided Freedom with, among other things, a $40 million term loan. (RX-826 at 00001; RX-826 at 00028).

Response to Finding No. 1369

Complaint Counsel agrees that Freedom entered into a credit agreement with Madison Capital Funding LLP and BMO Capital Markets on February 16, 2012 that provided Freedom with a $40 million term loan. Respondent does not explain what it means by "significant" debt and cites to no evidence explaining that term. Also, Respondent's use of this proposed finding is misleading. In its post-trial brief, Respondent cites solely to this finding for the claim that "[i]n addition to disastrous financial performance, Freedom was burdened by insurmountable debt that it could not pay other than through the Acquisition." (Resp. Post-Tr. Br. at 102). To the extent this finding is thus used to suggest anything about (1) a "disastrous financial performance," (2) "insurmountable debt", or (3) that the debt could only be repaid through an Acquisition, it is wholly unsupported by the cited document. The cited document, RX-826, is merely Freedom's 2012 credit agreement, which provides no discussion of Freedom's subsequent financial performance, whether the debt was "insurmountable," or whether the debt could only be repaid through an Acquisition.

1370. [redacted]

Response to Finding No. 1370

Complaint Counsel has no specific response.

1371. [redacted]

Response to Finding No. 1371

[redacted]

[redacted]

1372. [redacted]

Response to Finding No. 1372

Complaint Counsel has no specific response.

1373. [redacted]

Response to Finding No. 1373

Complaint Counsel has no specific response.

1374. Throughout the life of the Credit Agreement, Freedom routinely breached certain covenants and required various amendments in order to become compliant with the terms of the Credit Agreement. (PX-5113, (Chung, Dep. at 135)).

Response to Finding No. 1374

Complaint Counsel does not dispute that the referenced Credit Agreement was amended eight times. The portion of the proposed finding that Freedom "routinely breached certain covenants" is argumentative, unclear, and unsupported. The proposed finding is unsupported, argumentative and unclear because Respondent does not describe what it means by "routinely breached" and the only cited evidence—testimony from Mr. Chung of HEP—does not use that term either. Further, the cited testimony was a response to a deposition question to which

Complaint Counsel objected at the time on the basis that it called for a legal conclusion. Complaint Counsel maintains that objection.

1375. [redacted]

Response to Finding No. 1375

Complaint Counsel has no specific response.

1376. The first through sixth amendments were executed on March 31, 2013, June 7, 2013, November 24, 2014, June 30, 2016, August 15, 2016, and August 22, 2016, respectively. RX-831 (First Amendment); RX-832 (Second Amendment); RX-829 (Third Amendment); RX-827 (Fourth Amendment); RX-830 (Fifth Amendment); RX-828 (Sixth Amendment).

Response to Finding No. 1376

Complaint Counsel has no specific response.

1377. [redacted]

Response to Finding No. 1377

Complaint Counsel has no specific response.

1378. [redacted]

Response to Finding No. 1378

[redacted]

1379. [redacted]

Response to Finding No. 1379

Complaint Counsel has no specific response.

1380. [redacted]

Response to Finding No. 1380

[redacted] (CCFF ¶¶ 2037-39, 2041-43).

1381. [redacted]

Response to Finding No. 1381

[redacted]

[redacted]

1382. [redacted]

Response to Finding No. 1382

[redacted]

[redacted]

1383. [redacted]

Response to Finding No. 1383

[redacted]

1384. [redacted]

Response to Finding No. 1384

[redacted]

[redacted]

[redacted]

[redacted]

1385. [redacted]

Response to Finding No. 1385

[redacted]

1386. [redacted]

Response to Finding No. 1386

[redacted]

1387. [redacted]

Response to Finding No. 1387

[redacted]

[redacted]

1388. [redacted]

Response to Finding No. 1388

[redacted]

1389. [redacted]

Response to Finding No. 1389

[redacted]

1390. [redacted]

Response to Finding No. 1390

Complaint Counsel has no specific response.

1391. [redacted]

Response to Finding No. 1391

[redacted]

1392. [redacted]

Response to Finding No. 1392

[redacted]

[redacted]

1393. [redacted]

Response to Finding No. 1393

[redacted]

1394. [redacted]

Response to Finding No. 1394

[redacted]

1395. [redacted]

Response to Finding No. 1395

[redacted]

[redacted]

1396. [redacted]

Response to Finding No. 1396

Complaint Counsel has no specific response.

1397. [redacted]

Response to Finding No. 1397

Complaint Counsel has no specific response.

1398. [redacted]

Response to Finding No. 1398

Complaint Counsel has no specific response.

1399. [redacted]

Response to Finding No. 1399

[redacted]

[redacted]

1400. [redacted]

Response to Finding No. 1400

[redacted]

[redacted]

1401. [redacted]

Response to Finding No. 1401

[redacted]

[redacted]

1402. [redacted]

Response to Finding No. 1402

[redacted]

1403. [redacted]

Response to Finding No. 1403

[redacted]

[redacted]

1404. [redacted]

Response to Finding No. 1404

[redacted]

1405. [redacted]

[redacted]

Response to Finding No. 1405

[redacted]

[redacted]

1406. [redacted]

Response to Finding No. 1406

Complaint Counsel has no specific response.

1407. [redacted]

Response to Finding No. 1407

[redacted]

1408. [redacted]

Response to Finding No. 1408

[redacted]

1409. [redacted]

Response to Finding No. 1409

Complaint Counsel has no specific response.

1410. [redacted]

Response to Finding No. 1410

Complaint Counsel has no specific response.

1411. [redacted]

Response to Finding No. 1411

Complaint Counsel has no specific response.

1412. [redacted]

Response to Finding No. 1412

[redacted]

1413. [redacted]

Response to Finding No. 1413

[redacted]

[redacted]

[redacted]

C. Freedom's Auditors Had Substantial Doubt That Freedom Could Continue As A Going Concern In April 2017

1414. [redacted]

Response to Finding No. 1414

[redacted]

[redacted]

1415. [redacted]

Response to Finding No. 1415

[redacted]

[redacted]

1416. [redacted]

Response to Finding No. 1416

[redacted]

[redacted]

1417. [redacted]

[redacted]

Response to Finding No. 1417

[redacted]

1418. [redacted]

Response to Finding No. 1418

[redacted]

[redacted]

[redacted]

1419. [redacted]

Response to Finding No. 1419

[redacted]

[redacted]

1420. [redacted]

Response to Finding No. 1420

[redacted]

[redacted]

1421. [redacted]

Response to Finding No. 1421

1422.

Response to Finding No. 1422

[redacted]

1423. [redacted]

Response to Finding No. 1423

[redacted]

. . .

[redacted]

1424. [redacted]

Response to Finding No. 1424

[redacted]

1425. [redacted]

Response to Finding No. 1425

[redacted]

1426. [redacted]

Response to Finding No. 1426

[redacted]

[redacted]

1427. [redacted]

Response to Finding No. 1427

[redacted]

[redacted]

[redacted]

1428. [redacted]

Response to Finding No. 1428

[redacted]

[redacted]

1429. [redacted]

Response to Finding No. 1429

[redacted]

1430. [redacted]

Response to Finding No. 1430

The proposed finding is vague. [redacted]

1431. [redacted]

Response to Finding No. 1431

[redacted]

[redacted]

1432. [redacted]

Response to Finding No. 1432

[redacted]

1433. [redacted]

Response to Finding No. 1433

The proposed finding is unsupported, misleading, and contrary to the weight of the evidence. [redacted]

[redacted]

[redacted]

1434. [redacted]

Response to Finding No. 1434

The proposed finding is unclear, unsupported, and misleading. [redacted]

[redacted]

[redacted]

1435. [redacted]

Response to Finding No. 1435

[redacted]

1436. [redacted]

Response to Finding No. 1436

[redacted]

[redacted]

1437. [redacted]

Response to Finding No. 1437

[redacted]

[redacted]

1438. [redacted]

Response to Finding No. 1438

[redacted]

[redacted]

[redacted]

1439. [redacted]

Response to Finding No. 1439

[redacted]

[redacted]

1440. [redacted]

Response to Finding No. 1440

[redacted]

[redacted]

1441. [redacted]

Response to Finding No. 1441

[redacted]

[redacted]

1442. [redacted]

Response to Finding No. 1442

[redacted]

1443. [redacted]

Response to Finding No. 1443

[redacted]

1444. [redacted]

Response to Finding No. 1444

[redacted]

[redacted]

1445. [redacted]

Response to Finding No. 1445

[redacted]

1446. [redacted]

Response to Finding No. 1446

[redacted]

[redacted]

1447. [redacted]

Response to Finding No. 1447

[redacted]

1448. [redacted]

Response to Finding No. 1448

[redacted]

[redacted]

D. Freedom Exhausted Good Faith Efforts To Obtain Reasonable Alternatives To The Acquisition

1449. [redacted]

Response to Finding No. 1449

[redacted]

1450. [redacted]

Response to Finding No. 1450

[redacted]

[redacted]

1451. [redacted]

Response to Finding No. 1451

[redacted]

1452. Freedom's search for potential alternatives was robust, exhaustive, and consistent with typical sale and refinancing processes employed by similar companies. (RX-1048-0031 ¶ 75-76).

Response to Finding No. 1452

The proposed finding is not a finding of fact, but a legal conclusion. Further, the proposed finding is also irrelevant because 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 and sell itself to a clearly anticompetitive purchaser. *Greater Buffalo Press*, 402

U.S. at 555; *FTC v. Harbour Grp. Invs., L.P.*, 1990 WL 198819, at *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"). To the extent the proposed finding implies that Freedom made unsuccessful good-faith efforts to elicit reasonable alternative offers or refinance the business, the proposed finding is misleading and contrary to the evidence. (*See* Responses to RPFF ¶¶ 1450, 1453, 1470-72).

The proposed finding is also unsupported by the cited evidence, the report of James Peterson, Respondent's financial expert. The cited evidence does not describe Freedom's search as being "robust" or "exhaustive," and it does not mention "similar companies." (RX-1048 at 31 (¶¶ 75-76) (Peterson Expert Report)).

1. Freedom Engaged In Extensive Efforts To Attract Refinancing Partners

1453. [redacted]

Response to Finding No. 1453

[redacted]

[redacted]

[redacted]

[redacted]

1454. [redacted]

Response to Finding No. 1454

[redacted]

1455. [redacted]

Response to Finding No. 1455

[redacted]

1456. [redacted]

Response to Finding No. 1456

1457.

Response to Finding No. 1457

1458.

Response to Finding No. 1458

[redacted]

1459. [redacted]

Response to Finding No. 1459

[redacted]

1460. [redacted]

Response to Finding No. 1460

[redacted]

1461. [redacted]

Response to Finding No. 1461

[redacted] (*See* PX05122 (Smith (HEP) Dep. at 29-31) (*in camera*)). [redacted]

[redacted]

(Respondent's Post-Trial Brief at 115). [redacted]

[redacted]

1462. [redacted]

Response to Finding No. 1462

[redacted]

1463. [redacted]

Response to Finding No. 1463

[redacted]

1464. [redacted]

Response to Finding No. 1464

[redacted]

[redacted]

1465. [redacted]

Response to Finding No. 1465

[redacted]

1466. [redacted]

Response to Finding No. 1466

[redacted]

1467. [redacted]

Response to Finding No. 1467

[redacted]

1468. [redacted]

Response to Finding No. 1468

[redacted]

1469. "[G]iven Freedom's small size and financial condition, . . . the outcome of the Moelis process, bids from strategic players, was the most reasonable, expected and obvious outcome." (RX1048-0038 ¶ 94).

Response to Finding No. 1469

The proposed finding is misleading, irrelevant, and contradicted by the weight of the evidence. The proposed finding is misleading and irrelevant because Mr. Peterson's use of the term "reasonable" appears different from the legal requirement that a firm availing itself of the failing firm defense make unsuccessful good-faith efforts to elicit "reasonable" alternative offers. (*See* Responses to RPFF ¶¶ 1468, 1470). Further, the proposed finding is contrary to the weight of the evidence to the extent it implies that Freedom made unsuccessful good-faith efforts to elicit reasonable alternative offers or explore opportunities to refinance. (*See* Responses to RPFF ¶¶ 1453, 1470-72). Instead, Freedom focused on a sale to Otto Bock. (*See* Responses to RPFF ¶¶ 1453, 1470-72).

2. Freedom's Formal Sale Process Was Robust And Far-Reaching

1470. [redacted]

Response to Finding No. 1470

[redacted]

[redacted]

[redacted]

[redacted]

1471. Moelis conducted a formal sale bidding process for Freedom that began in May 2017 and continued until the Acquisition closed in September 2017. (Hammack, Tr. 6063-65).

Response to Finding No. 1471

The proposed finding is unsupported, unclear, and incorrect. The term "formal sales process" is vague and neither the finding nor the underlying testimony define the term. Mr. Hammack testified that Moelis was formally engaged in "May of 2017," to "[s]erve as [Freedom's] financial adviser in exploring the sale of the company" and to "help[] them and advise[] them on potential refinancing alternatives" but in the cited portion of the testimony he did not specify when any "formal sale bidding process" for Freedom began. (Hammack (Moelis) Tr. 6063-6065). [redacted]

The proposed finding is incorrect to the extent the term "formal sales process" means that efforts to sell Freedom began in May 2017. Rather, Freedom's sales process began in 2016 and focused on Otto Bock to the exclusion of other options. (CCFF ¶¶ 2075-2099). [redacted]

[redacted]

(CCFF ¶¶ 2077-79). [redacted] (CCFF ¶¶ 2085-86, 2093-97); *see also* (CCFF ¶¶ 2091-92) [redacted]

1472. [redacted]

Response to Finding No. 1472

[redacted]

[redacted]

1473. [redacted]

Response to Finding No. 1473

[redacted]

[redacted]

1474. [redacted]

Response to Finding No. 1474

[redacted]

[redacted]

[redacted]

1475. [redacted]

Response to Finding No. 1475

[redacted]

1476. [redacted]

Response to Finding No. 1476

[redacted]

[redacted]

1477. [redacted]

Response to Finding No. 1477

[redacted]

[redacted]

[redacted]

1478. [redacted]

Response to Finding No. 1478

[redacted]

1479. [redacted] Willow Wood was aware that Freedom was for sale in 2017, but declined to submit a bid to acquire Freedom. (Arbogast (Willow Wood), Tr. 4979).

Response to Finding No. 1479

[redacted]

[redacted]

1480. [redacted] is a small competitor with revenues of approximately [redacted] in 2017. (PX-5105 (Fillauer, Dep. at 25). However, a company would need at least $100 million in annual revenue to finance a purchase of Freedom. (Hammack, Tr. 6091; RX-1048-0037 ¶ 93.a).

Response to Finding No. 1480

[redacted]

[redacted]

1481. Hanger: [redacted] In addition, it could have had "really damaging consequences" for Freedom to alert Hanger, an important customer, of its precarious financial condition and that it was for sale. (PX-5110 (Hammack Dep., Tr. 182)).

Response to Finding No. 1481

[redacted]

1482. Nabtesco: On September 7, 2017, Carkhuff emailed Smith stating that "I was just approached by Nabtesco regarding their interest in acquiring Freedom." (PX-1288-002). [redacted]

Response to Finding No. 1482

[redacted]

[redacted]

[redacted]

1483. [redacted]

Response to Finding No. 1483

[redacted]

1484. The decision not to contact certain companies also proved appropriate because the evidence suggests they would not have even attempted to bid. For example, Willow Wood knew that Freedom was going through a sale process before the Acquisition closed in September 2017 and chose not to make an offer. (Arbogast (Willow Wood), Tr. 4979;

Response to Finding No. 1484

The portion of the finding that states that both

Moreover, when asked if Ohio Willow Wood had bid, Mr. Arbogast testified that he did not bid "*because* [he] learned that two of the largest companies in the field were already bidding against each other for it. Reasonably that put me out of contention." (Arbogast (Willow Wood), Tr. 4979). Ultimately, whether or not Ohio Willow Wood and Hanger executives testified,

a year after the fact, that they would not have submitted bids *if* they had been invited, is irrelevant to the legal issue of whether Freedom made good-faith efforts to elicit reasonable alternative offers.

1485. [redacted]

Response to Finding No. 1485

[redacted]

1486. [redacted]

Response to Finding No. 1486

[redacted]

[redacted]

1487. "[S]ale processes do not involve direct contact with every conceivable potential financial or strategic buyer, including every participant within a relevant industry." (RX-1048-00038 ¶ 94).

Response to Finding No. 1487

This proposed finding is not a finding of fact, but a legal conclusion. Further, the proposed finding is misleading the extent it implies Complaint Counsel's position regarding Respondent's burden to assert successfully the failing firm defense. Complaint Counsel does not assert that Respondent must demonstrate that it made "direct contact with every conceivable potential or strategic buyer," nor is that the standard that is set forth in the Merger Guidelines or case law. (CCCL ¶¶ 109, 113). However, as explained in Response to RPFF ¶ 1486, Freedom's sale process does not constitute "unsuccessful good-faith efforts to elicit reasonable alternative offers," as

demonstrated by the evidence of Freedom's failure to even reach out to prosthetics companies that would have been interested in acquiring Freedom.

1488. [redacted]

Response to Finding No. 1488

[redacted]

1489. [redacted]

Response to Finding No. 1489

[redacted]

[redacted]

1490. [redacted]

Response to Finding No. 1490

Complaint Counsel has no specific response.

1491. [redacted]

Response to Finding No. 1491

[redacted]

[redacted]

1492. However, Freedom's management had significant concerns regarding Össur's sincerity and willingness to actually close an acquisition for the following reasons:

- [redacted]

Response to Finding No. 1492

[redacted]

[redacted]

[redacted]

[redacted]

1493. [redacted]

Response to Finding No. 1493

[redacted]

[redacted]

1494. [redacted]

[redacted]

Response to Finding No. 1494

[redacted]

1495. [redacted]

Response to Finding No. 1495

[redacted]

[redacted]

1496. [redacted]

Response to Finding No. 1496

[redacted]

[redacted]

1497. [redacted]

Response to Finding No. 1497

[redacted]

1498. [redacted]

Response to Finding No. 1498

[redacted]

[redacted]

1499. Even if Össur had made a real offer to purchase Freedom, an acquisition of Freedom by Össur at any price would have posed a greater danger to competition, if any, than the Acquisition by Ottobock. (RX-1049-0081 ¶ 176).

Response to Finding No. 1499

[redacted]

[redacted]

1500. [redacted]

Response to Finding No. 1500

[redacted]

[redacted]

1501. [redacted]

Response to Finding No. 1501

[redacted]

[redacted]

1502. [redacted]

Response to Finding No. 1502

[redacted]

[redacted]

[redacted]

[redacted]

1503. [redacted]

Response to Finding No. 1503

The proposed finding is unclear, unreliable, and unsupported. The proposed finding's use of a "K-3/K-4 foot market" is unclear and unsupported by Dr. Argue's analysis. (*See* Response to RPFF ¶ 1502.) The HHIs are unreliable and unsupported for the reasons discussed in Response to RPFF ¶ 1502.

1504. [redacted]

Response to Finding No. 1504

[redacted]

[redacted]

1505. Accordingly, if Össur were to have acquired Freedom, it would likely have created a more significant threat of harm to competition than the Ottobock-Freedom transaction. (RX-1049-0083 ¶ 176).

Response to Finding No. 1505

[redacted]

3. The Ottobock Acquisition Was A Last Resort For Freedom

1506. [redacted]

Response to Finding No. 1506

The proposed finding is unclear, unsupported, incomplete, incorrect, and contradicted by the weight of the evidence. [redacted]

[redacted] (Smith (HEP) Tr. 6483-84 (*in camera*)).

[redacted]

[redacted] (CCFF ¶¶ 2164-93 (*in camera*)). [redacted] (CCFF ¶¶ 2122-2134 (*in camera*)). [redacted] (CCFF ¶¶ 2119-2163 (*in camera*); Response to RPFF ¶ 1453).

[redacted] (CCFF ¶¶ 2044-2047; *see also* Responses to RPFF ¶¶ 1392, 1439, 1527).

1507. [redacted]

Response to Finding No. 1507

[redacted]

1508. [redacted]

[redacted]

Response to Finding No. 1508

[redacted]

1509. [redacted]

Response to Finding No. 1509

[redacted]

1510. [redacted]

Response to Finding No. 1510

The proposed finding is unsupported, incorrect, misleading, and contradicted by the weight of the evidence. The proposed finding is unsupported because it is based solely on the self-serving testimony of Mr. Smith. [redacted]

[redacted] (CCFF ¶¶ 2044-2047; *see also* Responses to RPFF ¶¶ 1392, 1439, 1527). [redacted] (CCFF ¶¶ 2027-36, 2044-47 (*in camera*)).

[redacted] (CCFF ¶¶ 2164-93 (*in camera*)). [redacted] (CCFF ¶¶ 2122-2134 (*in camera*)). [redacted] (CCFF ¶¶ 2119-2163 (*in camera*); Response to RPFF ¶ 1453).

1511. [redacted]

Response to Finding No. 1511

[redacted]

[redacted]

[redacted]

1512. Smith would have presented a refinancing option to the board even if it would have been harmful to existing investors. (Smith, Tr. 6467).

Response to Finding No. 1512

The proposed finding is unclear, contradicted by the weight of the evidence, and irrelevant.

[redacted] (*See* Response to RPFF ¶ 1453).

1513. [redacted]

Response to Finding No. 1513

[redacted]

1514. [redacted]

Response to Finding No. 1514

[redacted]

1515. [redacted]

Response to Finding No. 1515

[redacted]

1516. Moelis also performed third-party valuations of Freedom that estimated value on a discounted cash flow ("DCF") basis. The February 2017 Management Case valued Freedom as between $100 million to $130 million without synergies and between $280 million and $355 million with synergies. (PX-3002-2; PX-3060-003) The March 2017 Upside Case valued Freedom as between $135 million and $170 million without synergies and as between $300 million and $370 million with synergies. (PX-3060-003). The valuation with synergies is the amount that Moelis would have expected a strategic buyer, like Ottobock, to pay for the company based on Freedom's projected financial performance. (PX-3060-003).

Response to Finding No. 1516

Complaint Counsel has no specific response for the first three sentences of the proposed finding, except to note that the proposed finding is misleading to the extent it implies that Freedom's estimated value on a discounted cash flow basis has any relation to Freedom's liquidation value. Liquidation value is "what a willing buyer would pay and a willing seller would accept for individual assets assuming the business has been terminated and the assets are going to be used outside the relevant market." (PX06002 at 050 (¶ 125) (Hammer Expert Report)).

The last sentence of the proposed finding is unsupported by the cited evidence, a May 2017 Moelis presentation to Freedom's Board. The presentation does not mention what "Moelis would have expected a strategic buyer" to pay for Freedom.

1517. [redacted]

Response to Finding No. 1517

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1518. [redacted]

Response to Finding No. 1518

[redacted]

1519. [redacted]

Response to Finding No. 1519

[redacted]

1520. [redacted]

Response to Finding No. 1520

[redacted]

1521. [redacted]

Response to Finding No. 1521

[redacted]

[redacted]

1522. [redacted]

Response to Finding No. 1522

[redacted]

[redacted]

1523. [redacted]

Response to Finding No. 1523

[redacted]

[redacted]

1524. [redacted]

Response to Finding No. 1524

[redacted]

[redacted]

1525. In order to reorganize under Chapter 11, Freedom would have needed to obtain financing in order to operate as a stand-alone business. (RX1048-0042). However, given the position of the existing Lenders and Freedom's inability to secure additional financing, there was no reasonable prospect for Freedom to obtain the financing necessary to survive Chapter 11. (RX1048-0042; [redacted] Indeed, Freedom's YTD17 Leverage Ratio far exceeded the risk profile of lenders. (RX1048-0042 ¶ 103).

Response to Finding No. 1525

[redacted]

1526. [redacted]

Response to Finding No. 1526

[redacted]

1527. [redacted]

Response to Finding No. 1527

[redacted]

1528. Therefore, "[t]o the extent Freedom had filed for protection under Chapter 11 of the U.S. Bankruptcy Code . . . it is unlikely that a reorganization would have been successful." (RX1048-00039 ¶ 99). Thus, liquidation would have been the most likely outcome for Freedom absent an acquisition. (RX1048-0040 ¶ 99; [redacted]

Response to Finding No. 1528

[redacted]

[redacted]

[redacted]

[redacted]

1529. [redacted]

Response to Finding No. 1529

[redacted]

1530. [redacted]

Response to Finding No. 1530

[redacted]

1531. [redacted]

Response to Finding No. 1531

[redacted]

VI. EFFICIENCIES

1532. Ottobock began its integration planning process, identifying synergy and efficiency opportunities, prior to its acquisition of Freedom. [redacted] PX05170 (Schneider Dep. at 16-18)).

Response to Finding No. 1532

Complaint Counsel does not disagree that Otto Bock began its integration planning process prior to its acquisition of Freedom, but the proposed finding is incomplete and misleading because it omits that the integration planning process was halted before any cognizable, merger-specific, non-speculative efficiencies were identified. (CCFF ¶¶ 1733-34, 1747-1815). Although an integration team comprised of personnel from Otto Bock, Freedom, and A.T. Kearney began efforts to estimate potential synergies both prior to and following the Merger, all work on integration planning and synergies estimation stopped in [redacted] (CCFF ¶¶ 1737, 1748, 1756). Dr. Juerg Baggenstoss, the A.T. Kearney consultant who led the integration team, 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"). To track progress on its work on synergies, the integration team used five "Hardness Levels." (CCFF ¶ 1749). Tellingly, when Dr. Baggenstoss, the leader of the integration team, was asked at his deposition which identified synergies opportunities had progressed to "Hardness Level 2" (setting a synergy target), Dr. Baggenstoss replied, "*None of them*." (CCFF ¶ 1751) (emphasis added).

1533. [redacted]

Response to Finding No. 1533

[redacted]

1534. One week after the Merger, Ottobock engaged AT Kearney to assist in merger integration planning activities. (RX-0616).

Response to Finding No. 1534

Complaint Counsel has no specific response.

1535. AT Kearney's responsibilities included, but was not limited to: (1) establishing an integration program; and (2) defining and identifying synergy opportunities, targets, and capture plans. (RX-0616 –00004).

Response to Finding No. 1535

Complaint Counsel has no specific response, except to note that the proposed finding is misleading to the extent it suggests A.T. Kearney completed its assigned responsibilities. A.T. Kearney employed a five step process, [redacted] (CCFF ¶ 1749). Dr. Baggenstoss testified that, with respect to the first Hardness Level—identifying an opportunity—the integration team identified synergy opportunities relating to sales, manufacturing facilities, back office, procurement, European organization, and manufacturing process. (CCFF ¶ 1750). Dr. Baggenstoss testified, however, that "none" of the synergy opportunities progressed to the second Hardness Level, "setting a synergy target," and that when integration planning stopped in [redacted] these "were initial estimates on the opportunity, but a proper target setting was not done[.]" (CCFF ¶ 1751). In particular, Dr. Baggenstoss noted that none of the identified synergy opportunities progressed to the second Hardness Level of setting a synergy target because Otto Bock "did not come to that stage where this made sense." (CCFF ¶ 1752). Ms. Christine Hammer, Complaint Counsel's Efficiencies Expert, concluded that the lack of definitive synergy targets indicates that the potential efficiencies identified are preliminary and speculative. (CCFF ¶ 1754).

1536. Ottobock and AT Kearney identified numerous efficiencies to be gained from the Merger, including cost reductions in back office, distribution, and sales and marketing functions. (PX05170 (Schneider Dep. at 90-92, 168)).

Response to Finding No. 1536

The proposed finding is unclear and misleading. The term "numerous" is unclear and misleading in the proposed finding because A.T. Kearney and Otto Bock only identified three alleged merger-specific efficiencies. (CCFF ¶ 1740). In addition, by the time integration planning stopped, Dr. Baggenstoss testified that "none" of the synergy opportunities had progressed to the second Hardness Level of "setting a synergy target," (CCFF ¶ 1751), and the work to identify synergies opportunities was "all early stage" and "incomplete." (CCFF ¶¶ 1738, 1748; *see also* Response to RFPP ¶ 1532).

1537. Ottobock analyzed the efficiencies from the Merger and determined that the [redacted] for both Ottobock and Freedom. (PX05170 (Schneider Dep at 91)).

Response to Finding No. 1537

[redacted]

1538. [redacted] (PX05138 (Reissfelder Dep. at 129)).

Response to Finding No. 1538

[redacted]

1539. After the Merger, and before the Hold Separate Agreement, Ottobock and Freedom collaborated to identify additional synergies, such as the consolidation of manufacturing and distribution, and leveraging its increased purchasing power to obtain lower supply costs. (PX05138 (Reissfelder Dep. at 132-133)).

Response to Finding No. 1539

The proposed finding is unsupported, misleading, and irrelevant. The proposed finding is unsupported because it relies solely on the self-serving testimony of Freedom's current CEO. The proposed finding is also unsupported and misleading because [redacted]

(PX05138 (Reissfelder (Freedom) Dep. at 132-133)).

The proposed finding is irrelevant because Freedom's management alleged participation in analyses to identify and quantify synergies and efficiencies does not change the fact 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* Response to RFPP ¶ 1532). By the time integration planning stopped, Dr. Baggenstoss testified that "none" of the synergy opportunities had progressed to the second Hardness Level of "setting a synergy target," (CCFF ¶ 1751).

The proposed finding is also misleading and contradicted by Respondent's own expert. Respondent cites the proposed finding in support of the proposition that Ottobock and Freedom both analyzed the efficiencies created by the Acquisition, and determined that the Acquisition would result in cognizable efficiencies that are specific to the Acquisition, ranging from [redacted] *See* Respondent's Post-Trial Brief at 78. However, a number of the claimed cost reductions specified by Respondent were recognized by Respondent's efficiencies expert as being not merger-specific. (CCFF ¶ 1739 (indicating that

[redacted]

1540. [redacted] (RX-0724; Schneider, Tr. 4414, [redacted] Kim, Tr. 2668).

Response to Finding No. 1540

[redacted]

[redacted]

[redacted]

1541. If Össur acquired Freedom, it would have shut down Freedom's operations, and the Plié would likely no longer be available to amputees. (Smith, Tr. 6481; PX05122 (Smith Dep. at 179)).

Response to Finding No. 1541

The proposed finding is unsupported. First, the proposed finding is unsupported because it is based solely on the testimony of David Smith, the former CEO of Freedom, without any evidence from Össur about its plans for the Merger. In addition, Mr. Smith *only* testified that he believed Össur was "firing everyone" if they acquired Freedom, (Smith (HEP), Tr. 6481; *see also* (PX05122 (Smith (HEP), Dep. at 179) (stating that Össur was "going to fire everybody"), *not* that Plié would likely no longer be available on the market.

The proposed finding is misleading to the extent it implies that an Össur acquisition of Freedom would pose a more severe danger to competition. The weight of the evidence shows that Respondent has not demonstrated that an acquisition by Össur would pose a more severe danger to competition than Otto Bock's acquisition of Freedom. (CCFF ¶¶ 2194-2240).

1542. [redacted]

Response to Finding No. 1542

[redacted]

1543. [redacted]

Response to Finding No. 1543

[redacted]

[redacted]

1544. [redacted]

Response to Finding No. 1544

[redacted]

[redacted]

1545. [redacted] (RX-0724; RX-0616; PX01011; PX03185).

Response to Finding No. 1545

[redacted]

[redacted]

1546. [redacted]

Response to Finding No. 1546

[redacted]

1547. [redacted]

Response to Finding No. 1547

[redacted]

[redacted]

1548. [redacted] (RX-0724; RX-0616; PX01011; PX03185).

Response to Finding No. 1548

[redacted]

[redacted]

1549. (RX-0724).

Response to Finding No. 1549

[redacted]

[redacted]

[redacted]

[redacted]

1550. Ottobock has not realized any efficiencies because it has complied with the terms of the hold-separate agreement. (Schneider, Tr. 4413).

Response to Finding No. 1550

Complaint Counsel has no specific response, except to note that the proposed finding is misleading to the extent it suggests that the existence of the hold separate agreement absolves Respondent of the burden of demonstrating that its alleged efficiencies are cognizable.

1551. [redacted]
(PX05138 (Reissfelder Dep. at 147-149)).

Response to Finding No. 1551

[redacted]

[redacted]

1552. [redacted]

Response to Finding No. 1552

[redacted]

[redacted]

[redacted]

1553. [redacted]

Response to Finding No. 1553

[redacted]

[redacted]

1554. The merger-specific efficiencies would result in New Freedom's and Ottobock's gross margin improvements allowing both companies to: (1) improve the quality of their products through increased spending on research and development; (2) maintain and/or lower the prices of their current prosthetic products, including their MPKs; and (3) develop new technology for future prosthetic devices, which it can then afford to sell at affordable prices. [redacted] PX05170 (Schneider Dep. at 52-53, 91, 123)).

Response to Finding No. 1554

The proposed finding is incorrect, contradicted by the weight of the evidence, unsupported, misleading, and irrelevant. The proposed finding is premised on an assumption—that "merger-specific efficiencies would result"—that is incorrect and contradicted by the weight of the evidence. The weight of the evidence demonstrates that Respondent's claimed efficiencies are speculative, not verifiable, not merger-specific, and not likely to be passed on to U.S. consumers. (*See* Response to RPFF ¶ 1549). The proposed finding is unsupported in that it only cites to the financial model, which as discussed in Response to RPFF ¶¶ 1546-48 was preliminary and unfinished, (*see* Responses to RPFF ¶¶ 1546-48), and self-serving testimony from Otto Bock's Scott Schneider. Respondent does not even cite to its own efficiencies expert, Mr. Peterson, in support of this claim. In fact, [redacted] (CCFF ¶ 1771).

The portion of the proposed finding asserting that the alleged efficiencies would result in increased research and development and lower MPK prices is contradicted by the weight of the evidence. Respondent's ordinary course documents and testimony from Respondent executives confirm that implementation of a dual brand strategy would likely result in price increases and harm to innovation. (*See* Response to RPFF ¶ 1039). Indeed, neither of Respondent's experts

concluded that any efficiencies would be passed on to consumers. 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] Dr. Argue, Respondent's other expert, testified that he did not analyze whether any of the claimed efficiencies identified by Mr. Peterson would be passed through to customers or result in lower prices for MPK customers. (CCFF ¶¶ 1801-02).

1555. Expert James Peterson also analyzed the cognizable, merger-specific efficiencies resulting from an Ottobock-Freedom Merger. (RX-1048 – 0045-0053).

Response to Finding No. 1555

The proposed finding is unclear, incomplete, misleading, and contradicted by the weight of the evidence. It is unclear what the meaning, or significance of, "analyzed" is in the proposed finding. The proposed finding is incomplete and misleading because it omits that Mr. Peterson admitted that certain potential efficiencies identified by Otto Bock in the financial model are non-merger specific; [redacted] (CCFF ¶ 1746).

The proposed finding is misleading and contradicted by the weight of the evidence to the extent it suggests that Mr. Peterson *demonstrated* that cognizable, merger-specific efficiencies would result because Mr. Peterson's methodology is flawed, relied on preliminary synergies estimates, and did not analyze whether any would be pass through to consumers. (*See* Responses to RPFF ¶¶ 1549, 1562).

Mr. Peterson failed to even consider alternative arrangements that cut against the alleged merger specificity of these purported efficiencies. (CCFF ¶¶ 1785, 1787-88, 1795, 1797). First, Mr. Peterson failed to evaluate whether any of Respondent's claimed efficiencies could be achieved from a less anticompetitive transaction, such as an alternative acquisition or a licensing arrangement. (CCFF ¶¶ 1795, 1797). Instead of evaluating alternative arrangements, Mr. Peterson makes only vague assertions that the claimed efficiencies are [redacted] (CCFF ¶¶ 1785, 1787-89). Mr. Peterson admits, however, that the claimed [redacted] making it clear that Freedom could achieve some, if not all, of these improvements independently, without the Merger. (CCFF ¶ 1786).

In addition to failing to show merger-specificity and verifiability of the claimed efficiencies, Respondent falls short of demonstrating the likelihood that the claimed efficiencies would be passed on to consumers. At trial, Respondent's expert, Mr. Peterson, admitted that [redacted] *see also* (CCFF ¶ 1799) (Mr. Peterson admitted at his deposition that [redacted] Dr. Argue, Respondent's other expert, testified that he did not analyze whether any of the claimed efficiencies

identified by Mr. Peterson would be passed through to customers or result in lower prices for MPK customers. (CCFF ¶¶ 1801-02).

1556. Peterson's expert opinion is that Ottobock management and AT Kearney performed significant work to attempt to quantify the efficiencies of the Transaction and economic benefits of the Dual Brand Strategy; and through the process identified a number of efficiencies. (RX-1048 –0048).

Response to Finding No. 1556

The proposed finding is unclear, irrelevant, contradicted by the weight of the evidence, and misleading. The term "significant work" is vague, and, whether or not the work performed by Otto Bock management and A.T. Kearney is "significant" is irrelevant. Instead, the relevant question is whether the kinds of efficiencies being urged by Respondent "represent more than mere speculation and promises about post-merger behavior," (CCCL ¶ 97), and whether it is "possible to 'verify by reasonable means the likelihood and magnitude of each asserted efficiency[.]" (CCCL ¶ 99.) The weight of the evidence demonstrates that the work never advanced beyond the first step of identifying synergy opportunities and therefore its claimed efficiencies are speculative. (Responses to RPFF ¶¶ 1532, 1535, 1546-48; CCFF ¶¶ 1748-50; *see also* CCFF ¶¶ 1733-34, 1747-1815).

The portion of the proposed finding claiming that the work resulted in a number of "efficiencies" is contradicted by the weight of the evidence to the extent "efficiencies" is intended to mean cognizable efficiencies. The weight of the evidence demonstrates that Respondent's claimed efficiencies are speculative, not verifiable, not merger-specific, and not likely to be passed on to U.S. consumers. (*See* Response to RPFF ¶¶ 1549, 1555).

The term "economic benefits" in reference to the dual brand strategy is vague, as it is unclear whether economic benefits refers to benefits for Respondent, cognizable efficiencies passed on to consumers, or some other undefined "benefit." This portion of the proposed finding

is contradicted by the weight of the evidence to the extent it implies that these "economic benefits" are cognizable efficiencies rather than anticompetitive effects resulting from the Merger. Respondent's ordinary course documents confirm that implementation of a dual brand strategy is entirely consistent with price increases and harm to innovation. (*See* Response to RPFF ¶ 1039). For that reason, the proposed finding is also misleading because the weight of the evidence shows that the dual brand strategy will likely result in anticompetitive effects. (*See, e.g.*, Responses to RPFF ¶¶ 1039-40).

1557. [redacted]

Response to Finding No. 1557

[redacted]

[redacted]

1558. Peterson's expert opinion is that only Ottobock had the ability to achieve and fully implement certain synergies such as gross margin improvements, reduction of European sales force, and quality improvements. (RX-1048 at 0051-0052).

Response to Finding No. 1558

The proposed finding is misleading and contradicted by the weight of the evidence. According to Mr. Peterson, the three categories of claimed merger-specific efficiencies are [redacted] (CCFF ¶ 1740). In his attempt to demonstrate merger specificity, Mr. Peterson states that, [redacted] (CCFF ¶ 1784). [redacted] (CCFF ¶ 1786).

However, Mr. Peterson failed to consider alternative arrangements that cut against the alleged merger specificity of these purported efficiencies. (CCFF ¶¶ 1785, 1787-88, 1795, 1797). First, Mr. Peterson failed to evaluate whether any of Respondent's claimed efficiencies

could be achieved from a less anticompetitive transaction, such as an alternative acquisition or a licensing arrangement. (CCFF ¶¶ 1795, 1797). When asked at trial if he considered whether Otto Bock could have achieved a portion of the claimed [redacted] through any other type of arrangement, Mr. Peterson replied, [redacted] (CCFF ¶ 1795). Instead of evaluating alternative arrangements, Mr. Peterson makes only vague assertions that the claimed efficiencies are [redacted] (CCFF ¶¶ 1784, 1796). Second, Mr. Peterson did not address whether Otto Bock could have achieved its claimed efficiencies through independent cost-savings initiatives or through implementing non-proprietary best practices. (CCFF ¶¶ 1785, 1787-89). Mr. Peterson admits, however, that the claimed [redacted] making it clear that Freedom could achieve some, if not all, of these improvements independently, without the Merger. (CCFF ¶ 1786). The entirety of support Respondent has for this claim is Mr. Peterson's self-serving claim that "those synergies that only Otto Bock had the ability to achieve and fully implement," (RX-1048 (Peterson Expert Report) at 051), but as discussed, Mr. Peterson did not evaluate or consider alternative arrangements that would call into question the merger-specificity of the claimed efficiencies.

1559. Freedom was operating well below the guideline public companies ("GPCs") with operations similar to Freedom in terms of gross margin and SG&A as a percentage of revenue. (RX-1048 at 0049).

Response to Finding No. 1559

The proposed finding is irrelevant. It is irrelevant whether or not Freedom was operating well below GPCs as to the question of whether Freedom qualifies as a failing firm under the case law and the Merger Guidelines. To the extent the proposed finding implies that Freedom is a

failing firm, the weight of the evidence demonstrates that Respondent did not demonstrate that Freedom was unable to meet its financial obligations in the near term. (CCFF ¶¶ 1819-2240).

1560. [redacted]

Response to Finding No. 1560

[redacted]

1561. [redacted]

Response to Finding No. 1561

[redacted]

1562. Peterson concluded that the Ottobock merger-specific efficiencies included gross margin improvements, [redacted] and quality improvements. (RX-1048 –0051 & 0052).

Response to Finding No. 1562

Complaint Counsel agrees that Respondent's expert made that assertion, but the proposed finding is incorrect because Mr. Peterson's bases for that conclusion are contradicted by the weight of the evidence. First, Respondent's expert did not independently verify Respondent's early-stage estimates. (*See, e.g.*, Responses to RFPP ¶ 1554). The Financial Model's synergies estimates were based on numerous assumptions, but Mr. Peterson failed to test any of them in formulating his opinion. (CCFF ¶¶ 1766-1772). Moreover, [redacted] 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). [redacted] not only fails to assess the impact of the financial model's assumptions, but also fails to provide "a reasonably derived estimate of the future efficiency." (CCFF ¶¶ 1775-76).

Second, the weight of the evidence shows that Mr. Peterson did not demonstrate that the claimed efficiencies are merger specific. (*See, e.g.*, Responses to RFPP ¶¶ 1555, 1558). Finally, neither of Respondent's experts concluded that the claimed efficiencies will likely be passed on to consumers. 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]

[redacted] Dr. Argue, Respondent's expert, testified that he did not analyze whether any of the claimed efficiencies identified by Mr. Peterson, Respondent's other expert, would be passed through to customers or result in lower prices for MPK customers. (CCFF ¶¶ 1801-02).

1563. Peterson calculated that the merger-specific efficiencies [redacted] (RX-1048 at 0050).

Response to Finding No. 1563

[redacted]

1564. Peterson performed an Efficiencies Sensitive Analysis ("Sensitivity Analysis") for the efficiency benefits expected from the Merger. (RX-1048 –0052-0053).

Response to Finding No. 1564

The proposed finding is misleading and contrary to the evidence. Respondent's use of the phrase "Sensitivity Analysis" is misleading and contradicted by the evidence because [redacted] 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). [redacted] not only fails to assess the impact of the financial model's assumptions, but also fails to 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—cannot compensate for his failure to independently verify those estimates. (CCFF ¶ 1770).

1565. To be conservative, for his Sensitivity Analysis, Peterson discounted the potential merger-specific efficiencies for [redacted] (RX-1048 at 0052-0053).

Response to Finding No. 1565

[redacted]

[redacted]

[redacted]

[redacted]

1566. [redacted]

Response to Finding No. 1566

[redacted]

1567. [redacted]

Response to Finding No. 1567

[redacted]

1568. Peterson also concluded that, due to Freedom's history of not meeting financial projections, violating terms of debt covenants, and diminishing cash balances, Peterson was not surprised that Ottobock was able to identify material and achievable efficiencies through its due diligence and development of the Financial Model. (RX-1048 at 0053).

Response to Finding No. 1568

The proposed finding is unclear, irrelevant, unsupported, misleading, and contradicted by the weight of the evidence. The proposed finding is vague and irrelevant because the mere identification of "efficiencies" is irrelevant to the issue of whether the efficiencies are merger-specific, verified, and do not arise from anticompetitive reductions in output or service, as defined by the Merger Guidelines. (PX08040 (Merger Guidelines) at 032-034 (§ 10). The mere fact that possible efficiencies may have been initially identified during due diligence also is irrelevant as that does not make them merger specific as defined by the case law and Merger Guidelines. (*See* Response to RFPP ¶ 1546).

The portion of the proposed finding implying that Freedom had a "history of not meeting financial projections", violated debt covenants, and had diminished cash balances is unsupported by the cited evidence. The cited portion of Mr. Peterson's report does not support those claims, as it does not discuss them or any bases for those assertions. Moreover, each of those claims are contradicted by the weight of the evidence. The weight of the evidence shows that Freedom had a history of *meeting* its financial projections once David Smith became CEO in April 2016 and took over responsibility for creating projections. (CCFF ¶¶ 1839-1908; *see also* Response to RPFF ¶ 1315). Similarly, the claim that Freedom had diminishing cash balances is contradicted by evidence in the record demonstrating that [redacted] (CCFF ¶¶ 1982, 2020-21, 2024; *see also* Response to RFPP ¶¶ 1306-07).

Finally, the proposed finding is misleading and contradicted by the weight of the evidence to the extent it suggests that Otto Bock would realize cognizable merger-specific efficiencies, as the weight of the evidence demonstrates that it likely would not because it has not shown that the

claimed efficiencies are verifiable, merger-specific, and likely to be passed on to consumers. (*See, e.g.*, Responses to RFPP ¶¶ 1532, 1535, 1549, 1555).

1569. Based on Peterson's analysis, his expert opinion is that the Transaction offered material and achievable efficiencies. (RX-1048 at 0054).

Response to Finding No. 1569

The proposed finding is vague, incomplete, irrelevant, and contradicted by the weight of the evidence. The term "material and achievable" is vague, and its significance, if any, is unclear. Further, it is irrelevant whether efficiencies are "material and achievable" if they are not merger-specific, verified, and do not arise from anticompetitive reductions in output or service, as defined by the Merger Guidelines. (PX08040 (Merger Guidelines) at 032-034 (§ 10). The proposed finding is unclear and incomplete because it omits that Mr. Peterson concluded that many of the alleged efficiencies were not merger-specific. (CCFF ¶¶ 1784-1797; *see also* Response to RPFF ¶ 1555). It is also incomplete because it omits that neither of Respondent's experts concluded that any of the claimed efficiencies would be passed on to consumers. (CCFF ¶ 1798-99, 1801-02; *see also* Response to RPFF ¶ 1554).

The proposed finding is misleading and contradicted by the weight of the evidence to the extent it suggests that Otto Bock would realize cognizable merger-specific efficiencies, as the weight of the evidence demonstrates that it likely would not because it has not shown that the claimed efficiencies are verifiable, merger-specific, and likely to be passed on to U.S. consumers. (*See, e.g.*, Responses to RFPP ¶¶ 1532, 1535, 1547, 1549, 1555).

1570. [redacted]

Response to Finding No. 1570

[redacted]

1571. [INTENTIONALLY LEFT BLANK]

VII. REMEDIES

A.

1572.

Response to Finding No. 1572

1573.

Response to Finding No. 1573

1574.

Response to Finding No. 1574

[redacted]

1575. [redacted]

Response to Finding No. 1575

[redacted]

1576. [redacted]

Response to Finding No. 1576

[redacted]

1577. [redacted]

Response to Finding No. 1577

[redacted]

1578. [redacted]

Response to Finding No. 1578

[redacted]

[redacted]

1579. [redacted]

Response to Finding No. 1579

[redacted]

[redacted]

B. [redacted]

1580. [redacted]

Response to Finding No. 1580

[redacted]

1581. [redacted]

Response to Finding No. 1581

[redacted]

[redacted]

1582. [redacted]

Response to Finding No. 1582

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1583. [redacted]

Response to Finding No. 1583

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1584. [redacted]

Response to Finding No. 1584

[redacted]

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1585. [redacted]

Response to Finding No. 1585

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1586. [redacted]

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1587. [redacted]

Response to Finding No. 1587

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1588. [redacted]

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1589. [redacted]

Response to Finding No. 1589

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1590. [redacted]

Response to Finding No. 1590

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1591. [redacted]

Response to Finding No. 1591

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1592. [redacted]

Response to Finding No. 1592

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1593. [redacted]

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1594. [redacted]

Response to Finding No. 1594

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1595. [redacted]

Response to Finding No. 1595

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1596. [redacted]

Response to Finding No. 1596

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1597. [redacted]

Response to Finding No. 1597

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1598. [redacted]

Response to Finding No. 1598

[redacted]

1599. [redacted]

Response to Finding No. 1599

[redacted]

[redacted]

C. [redacted] **om**

1600. [redacted]

Response to Finding No. 1600

Complaint Counsel has no specific response to this finding.

1601. [redacted]

Response to Finding No. 1601

Complaint Counsel has no specific response to this finding.

1602. [redacted]

Response to Finding No. 1602

1603.

Response to Finding No. 1603

1604.

Response to Finding No. 1604

1605.

Response to Finding No. 1605

[redacted]

1606. [redacted]

Response to Finding No. 1606

[redacted]

1607. [redacted]

Response to Finding No. 1607

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1608. [redacted]

Response to Finding No. 1608

[redacted]

1609. [redacted]

Response to Finding No. 1609

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1610. [redacted]

Response to Finding No. 1610

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1611. [redacted]

Response to Finding No. 1611

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1612. [redacted]

Response to Finding No. 1612

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1613. **[INTENTIONALLY LEFT BLANK]**

D. [redacted]

1614. [redacted]

Response to Finding No. 1614

[redacted]

1615. [redacted]

Response to Finding No. 1615

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1616. [redacted]

Response to Finding No. 1616

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1617. [redacted]

Response to Finding No. 1617

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1618. [redacted]

Response to Finding No. 1618

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1619. [redacted]

Response to Finding No. 1619

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1620. [redacted]

Response to Finding No. 1620

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1621. [redacted]

Response to Finding No. 1621

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1622. [redacted]

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1623. [redacted]

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1624. [redacted]

Response to Finding No. 1624

[redacted]

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E. [redacted]

1625. [redacted]

Response to Finding No. 1625

[redacted]

1626. [redacted]

Response to Finding No. 1626

[redacted]

1627. [redacted]

Response to Finding No. 1627

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1628. [redacted]

Response to Finding No. 1628

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1629. [redacted]

Response to Finding No. 1629

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1630. [redacted]

Response to Finding No. 1630

[redacted]

1631. [redacted]

Response to Finding No. 1631

[redacted]

1632. [redacted]

Response to Finding No. 1632

[redacted]

1633. [redacted]

Response to Finding No. 1633

1634.

Response to Finding No. 1634

[redacted]

RESPONDENT'S PROPOSED CONCLUSIONS OF LAW

I. APPLICABLE LEGAL STANDARD AND BURDEN OF PROOF

1635. Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" and provides for proceedings by the FTC. The same legal standards apply to evaluate a claim under Section 7 of the Clayton Act and Section 5 of the FTC Act. *See In re Polypore Int'l,* 149 F.T.C. 486, 798 (F.T.C. March 1, 2010) (Chappell, A.L.J.).

Response to Proposed Conclusion of Law No. 1635

Complaint Counsel has no specific response.

1636. The "analytical approach to Section 7 cases . . . has traditionally consisted of a burden shifting exercise with three parts." *Polypore,* 149 F.T.C. at 798 (citing *United States v. Baker Hughes, Inc.,* 908 F.2d 981, 982-83 (D.C. Cir. 1990)).

Response to Proposed Conclusion of Law No. 1636

The proposed conclusion is incomplete. Under the established legal framework, Complaint Counsel bears the burden of establishing a *prima facie* case that the merger may substantially lessen competition in a relevant market. If Complaint Counsel shows the proposed "transaction will lead to undue concentration in the market," it "establish[es] a presumption of anticompetitive effect." *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) (citing *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990)). This presumption establishes a *prima facie* case that the merger is unlawful. *See Baker Hughes,* 908 F.2d at 983.

Respondents, then, bear the burden of production to rebut the presumption of anticompetitive effects. "The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Anthem*, 855. F.3d at 349-350 (internal citations omitted); *see also FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 23 (D.D.C. 2015). Respondents bear the burden of demonstrating that entry or expansion would be "'timely, likely, and sufficient in its

magnitude, character, and scope to deter or counteract the competitive effects of concern.'" *United States v. H&R Block*, 833 F. Supp. 2d 36, 73 (D.D.C. 2011) (quoting *Merger Guidelines* § 9); *see also FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 47 (D.D.C. 2009). Respondents also bear the burden of proving cognizable efficiencies of a character and magnitude sufficient to ensure that the merger is not likely to be anticompetitive in any relevant market. *See H&R Block*, 833 F. Supp. 2d at 89; *Horizontal Merger Guidelines* § 10.

If Respondents present evidence sufficient to rebut the presumption, then the burden of producing additional evidence of anticompetitive effects shifts back to the government and merges with the ultimate burden of persuasion, which remains with Complaint Counsel at all times. *Anthem*, 855 F.3d at 350.

1637. "First, the government must establish a prima facie case that an acquisition is unlawful." *Id.* (citing *Baker Hughes*, 908 F.2d at 982; *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001)).

Response to Proposed Conclusion of Law No. 1637

Complaint Counsel has no specific response.

1638. It is not enough for Complaint Counsel to show some effect on competition. Instead, Complaint Counsel "has the burden of showing that the acquisition is reasonably likely to have 'demonstrable and substantial anticompetitive effects.'" *New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321, 358 (S.D.N.Y. 1995) (quoting *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1066 (S.D.N.Y. 1969)).

Response to Proposed Conclusion of Law No. 1638

The Proposed Conclusion of law is incomplete. To establish a Section 7 claim, Complaint Counsel "need not show that the challenged merger or acquisition *will* lessen competition, but only that the loss of competition is a 'sufficiently probable and imminent' result of the merger or acquisition." *CCC Holdings*, 605 F. Supp. 2d at 35 (emphasis in original) (citations omitted). For the Government to prevail in a Section 7 case, "certainty, even a high

probability, need not be shown," and "[d]oubts are to be resolved against the transaction." *FTC v. Elders Grain*, 868 F.2d 901, 906 (7th Cir. 1989); *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). "As the statutory language suggests, Congress enacted Section 7 to curtail anticompetitive harm in its incipiency." *In re Polypore Int'l, Inc.*, No. D-9327, 150 F.T.C. 586, at 598 (F.T.C. Nov. 5, 2010) (citing *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008)). "Congress used the words '*may be* substantially to lessen competition' … to indicate that its concern was with probabilities, not certainties[.]" *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016) (emphasis in original) (quoting *Brown Shoe*, 370 U.S. at 323); *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 564 (6th Cir. 2014) (quotation omitted). A merger violates Section 7 if it "create[s] an appreciable danger of" anticompetitive consequences "in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir 2001). As a result, "Section 7 does not require that competitive harm be established with certainty." *Polypore*, 150 F.T.C. at 598 (citations omitted).

1639. "Second, once the government establishes the prima facie case, the respondent may rebut it by producing evidence to cast doubt on the accuracy of the government's statistical evidence as predictive of future anticompetitive effects." *Id.* (citing *Baker Hughes,* 908 F.2d at 982; *Chicago Bridge & Iron Co. N.V. v. Federal Trade Commission,* 534 F.3d 410, 423 (5th Cir. 2008)).

Response to Proposed Conclusion of Law No. 1639

The Proposed Conclusion of law is incomplete, vague and not accurate. It is incomplete as Respondent has neglected to explain the high standard it is required to meet in order to rebut a *prima facie* case. The stronger the *prima facie* case, the greater Respondent's burden of production is on rebuttal. *Polypore*, 150 F.T.C. at *9 (citing *H.J. Heinz Co.*, 246 F.3d at 725; *Baker Hughes*, 908 F.2d at 991).

The citation is also vague and inaccurate because that quote does not appear in either *New York v. Kraft General Foods, Inc.* or *United States v. Atlantic Richfield Co.*, the two cases to which the "*Id.*" citation refers.

1640. "This second step of the analysis requires that the merger be 'functionally viewed, in the context of its particular industry.'" *Id.* (quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 321-22 (1962) and citing *In re Weyerhaeuser Co.,* 106 F.T.C 172, *215 (F.T.C. Sept. 26, 1985)). "Nonstatistical evidence which casts doubt on the persuasive quality of the statistics to predict future anticompetitive consequences may be offered to rebut the prima facie case made out by the statistics." *Id.* (quoting *Kaiser Aluminum & Chem. Corp.,* 652 F.2d 1324, 1341 (7th Cir. 1980)).

Response to Proposed Conclusion of Law No. 1640

Complaint Counsel has no specific response.

1641. "Third, and finally, if the respondent successfully rebuts the prima facie case, the burden of production shifts back to the government and merges with the ultimate burden of persuasion, which is incumbent on the government at all times." *Id.* at 801 (citing *Baker Hughes,* 908 F.2d at 983; *Chicago Bridge,* 534 F.3d at 423; *FTC v. University Health, Inc.,* 938 F.2d 1206, 1218-19 (11th Cir. 1991); *Kaiser Aluminum,* 652 F.2d at 1340); *see also FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004) ("[P]laintiffs have the burden on every element of their Section 7 challenge."). The legal standards for evaluating Complaint Counsel's claim under Section 5 of the FTC Act are the same. *See Polypore,* 149 F.T.C. at 798.

Response to Proposed Conclusion of Law No. 1641

The Proposed Conclusion is misleading. As the Commission has explained, the traditional burden-shifting framework is not the only way to establish that a merger is anticompetitive, because "the legal framework for analyzing a Section 7 claim is and should be a flexible tool that enables the factfinder to credibly and efficiently organize evidence in a manner that sheds light on the likely competitive effects of a merger." *Polypore*, 150 F.T.C. at *10. The case Respondent cites basically agrees with that premise two paragraphs after the above quotation. *Polypore*, 149 F.T.C. at 802 ("The Commission also recognizes a more flexible approach to the evidentiary analysis, stating: Although the courts discuss merger analysis as a step-by-step" process, the steps

are, in reality, interrelated factors, each designed to enable the fact-finder to determine whether a transaction is likely to create or enhance existing market power. *In re Evanston Northwestern Healthcare Corp.*, No. 9315, 2007 FTC LEXIS 210, at *141-42 (F.T.C. Aug. 6, 2007) (*citing Baker Hughes*, 908 F.2d at 984 (Section 7 inquiry is of a "comprehensive nature")).

II. COMPLAINT COUNSEL HAS FAILED TO SATISFY ITS BURDEN TO ESTABLISH A CLEARLY DEFINED RELEVANT ANTITRUST MARKET.

A. Complaint Counsel Bears The Burden Of Establishing A Clearly Defined Relevant Antitrust Market

1642. "The first step in analyzing a Section 7 case is to determine the 'line of commerce' and the 'section of the country.'" *Polypore*, 149 F.T.C. at 799 (quoting 15 U.S.C. § 18).

Response to Proposed Conclusion of Law No. 1642

Complaint Counsel has no specific response.

1643. "In other words, the first step is to determine the relevant product and geographic markets." *Id.* (citing *United States v. Oracle Corp.,* 331 F. Supp. 2d 1098, 1110 (N. D. Cal. 2004); *In re R.R. Donnelley & Sons,* 120 F.T.C. 36, 1995 FTC LEXIS 450, at *37-38 (F.T.C. July 21, 1995); *United States v. General Dynamics Corp*., 415 U.S. 486, 510 (1974)).

Response to Proposed Conclusion of Law No. 1643

The Proposed Conclusion of law is incomplete to the extent that it implies that the only way that a transaction can be shown to violate Section 7 of the Clayton Act is by defining relevant product and geographic markets. As the Court of Appeals for District of Columbia explained, "Although the framework we have developed for a prima facie § 7 case rests on defining a market and showing undue concentration in that market, *United States v. Baker Hughes Inc.*, 285 U.S. App. D.C. 222, 908 F.2d 981, 982-83 (D.C.Cir.1990), this analytical structure does not exhaust the possible ways to prove a § 7 violation on the merits, *see, e.g., United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 660, 84 S. Ct. 1044, 12 L. Ed. 2d 12

(1964)." *FTC v. Whole Foods*, 548 F.3d 1028, 1036 (D.C.Cir 2008) (Opinion of Brown, J.) The U.S. DOJ and FTC *Horizontal Merger Guidelines* (2010) observe that some analytical tools to assess competitive effects do not rely on market definition and that direct evidence of competitive effects can reduce the role of inferences from market definition alone. *See Merger Guidelines* at§ 4.

1644. "Complaint Counsel bears 'the burden of proving a relevant market within which anticompetitive effects are likely as a result of the acquisition.'" *Id.* at 799-800 (quoting *In re R.R. Donnelley & Sons,* 1995 FTC LEXIS 450, at *38); *see also United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 183, 190-91 (N.D. Ill. 2001) (finding that DOJ failed to carry its burden of establishing the relevant product market where customer testimony was found to be at best "equivocal").

Response to Proposed Conclusion of Law No. 1644

The Proposed Conclusion is incomplete because it fails to state that Complaint Counsel's burden is to establish a relevant market by the preponderance of the evidence. *New York v. Kraft Gen. Foods*, 926 F. Supp. 321, 358 (S.D.N.Y. 1995). The most recent *Merger Guidelines* note that direct evidence of competitive effects can reduce the role of inferences from market definition alone. *See Merger Guidelines* at § 4.

B. Courts Consider The Reasonable Interchangeability Of Use Or The Cross-Elasticity Of Demand In Defining A Product Market

1645. "A properly defined or relevant product market identifies the products with which the defendants' products compete and should include those producers that have the actual or potential ability to take significant business from each other." *Polypore*, 149 F.T.C. at 802-03 (citing *FTC v. CCC Holdings,* 605 F. Supp. 2d 26, 37 (D.D.C. 2009); *SmithKline Corp. v. Eli Lilly & Co.,* 575 F.2d 1056, 1063 (3d Cir. 1978)).

Response to Proposed Conclusion of Law No. 1645

The Proposed Conclusion is misleading and incomplete to the extent that it implies that the test for relevant market definition is whether a product has the "actual or potential ability to take significant business." In actuality, the relevant question in market definition is whether "a slight

decrease in the price of [a product] causes a considerable number of customers of the other [product] to switch." *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956); *accord Horizontal Merger Guidelines* § 4 (stating that "[m]arket definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase").

1646. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325; *see also United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956).

Response to Proposed Conclusion of Law No. 1646

The Proposed Conclusion is misleading and incomplete to the extent that it implies that "reasonable interchangeability of use" and the "cross-elasticity of demand" are two alternative tests for determining the scope of the relevant market. In actuality, the tests are the same: the "cross-elasticity of demand" between the product itself and substitutes for it is a measure of the "extent to which consumers will change their consumption of one product in response to a price change in another," *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 469 (1992), while the chief consideration in determining "reasonable interchangeability" is the "sensitivity of customers . . . to price or quality changes. *Du Pont de Nemours & Co.*, 351 U.S. at 400; accord, *United States v. Microsoft Corp.*, 253 F.3d 34, 53 (D.C. Cir. 2001) (en banc) (stating that "[t]he test of reasonable interchangeability, however, required the District Court to consider only substitutes that constrain pricing"). These two articulations of the relevant issue in market definition are unified in the hypothetical monopolist test, which "queries whether a hypothetical monopolist who has control over the products in an alleged market could profitably raise prices on those products." *FTC v. Staples*, 190 F. Supp. 3d 100, 121 (D.D.C. 2016) (hereinafter "*Staples II*"); *see also FTC v. Arch Coal*, 329 F. Supp. 2d 109, 120 (D.D.C. 2004) (noting that the Merger

Guidelines hypothetical monopolist test "set[s] forth an analytical framework for considering the issues of interchangeability and cross-elasticity of demand by defining a product market"); *see also Horizontal Merger Guidelines* §§ 4.1.1-4.1.3. If imposing a SSNIP would not divert enough sales to sources outside the candidate market to render the price increase unprofitable, then the candidate market passes the test and comprises a relevant product market. *See Staples II*, 190 F. Supp. 3d at 22; *CCC Holdings*, 605 F. Supp. 2d at 38 n.12. Courts frequently have relied on the *Horizontal Merger Guidelines* framework to assess how acquisitions impact competition. *See*, *e.g.*, *Chicago Bridge*, 534 F.3d at 431 n.11; *Heinz*, 246 F.3d at 716 n.9; *FTC v. Univ. Health Inc.*, 938 F.2d 1206, 1211 n.12 (11th Cir. 1991).

1647. Courts have "traditionally emphasized" two factors in defining a product market: "'the reasonable interchangeability of use and the cross-elasticity of demand between the product itself and substitutes for it.'" *Polypore*, 149 F.T.C. at 803 (quoting *Arch Coal,* 329 F. Supp. 2d at 119 and *Brown Shoe,* 370 U.S. at 325). "These factors address the question of '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.'" *Id.* (quoting *FTC v. Staples, Inc.,* 970 F. Supp. 1066, 1074 (D.D.C. 1997)).

Response to Proposed Conclusion of Law No. 1647

The Proposed Conclusion is misleading and incomplete to the extent that it implies that "reasonable interchangeability of use" and the "cross-elasticity of demand" are two alternative tests for determining the scope of the relevant market. In actuality, there is only one test for product market in this case: the extent to which 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. (*See* Response to RPCL ¶ 1646).

1648. "If products can be used for the same purpose, the products are deemed 'functionally interchangeable.'" *Polypore*, 149 F.T.C. at 804 (quoting *United States v. Chas. Pfizer & Co.,* 246 F. Supp. 464, 468 (E.D.N.Y. 1965) and citing *Arch Coal,* 329 F. Supp. 2d at 119).

Response to Proposed Conclusion of Law No. 1648

Complaint Counsel has no specific response.

1649. "Courts generally place functionally interchangeable products in the same product market." *Id.* (citing *Arch Coal,* 329 F. Supp. 2d at 119). "However, products are only included in the same market if they are both functionally and reasonably interchangeable." *Id.* (citing *Pfizer*, 246 F. Supp. at 468 n.3); *see also United States v. E.I. Du Pont de Nemours & Co.,* 351 U.S. 377, 399, 404 (1956)).

Response to Proposed Conclusion of Law No. 1649

The Proposed Conclusion is incomplete and misleading. The Proposed Conclusion is misleading to the extent that it implies that "functional interchangeability" is a test for product market determination. Some courts have used "functional interchangeability" as a screen before applying the actual market definition test, which is whether the products are economic substitutes. See *United States v. Chas. Pfizer & Co.,* 246 F. Supp. 464, 468 (E.D.N.Y. 1965) (emphasizing that "Having found one or more products functionally interchangeable . . ., the next question to be resolved is one of purchaser reaction—the willingness or readiness to substitute one for the other"); *see also Polypore*, 149 F.T.C. at 804.

The Proposed Conclusion is incomplete to the extent that it excludes the specific language in *Polypore* explaining that reasonable interchangeability "depends not only on the ease and speed with which customers can substitute it and the desirability of doing so, but also on the cost of substitution, which depends most sensitively on the price of the products." *Polypore*, 149 F.T.C. at 804 (citations omitted). Since "functional interchangeability" plays a screening role in market definition, it is neither remarkable nor even helpful that functionally interchangeable products are often economic substitutes, and hence included in a single relevant market. Respondent, however, elevates what it calls functional substitutability above all other considerations, without even attempting to demonstrate whether there is price sensitivity between MPKs and other types of prosthetic knees.

1650. "Customer preferences for one product versus another do not negate reasonable interchangeability." *Id.* at 830 (quoting *Oracle,* 331 F. Supp. 2d at 1130-31) (brackets omitted). "[T]he issue is not what solutions the customers would like or prefer for their . . . needs; the issue is what they could do in the event of an anticompetitive price increase by [the merged entity]." *Id.* (quoting *Oracle,* 331 F. Supp. 2d at 1131) (substitutions and omission in original).

Response to Proposed Conclusion of Law No. 1650

The Proposed Conclusion is misleading and incomplete to the extent that it implies that the appropriate test is "what [customers] could do in the event of an anticompetitive price increase." It is improper to include any possible substitute in the relevant market, since the product market "need only include 'reasonable substitutes.'" *U.S. v. Anthem*, 236 F. Supp. 3d 171, 194-95 (D.C.D.C. 2017) (quoting *Sysco*, 113 F. Supp. 3d at 26). Thus, the relevant product market "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, *only a limited number of buyers will turn*…." *See Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 n.31 (emphasis added). The Proposed Conclusion is also incomplete to the extent that it omits that a relevant market "does not need to include all of the firm's competitors; it needs to include the competitors that would 'substantially constrain [the firm's] price-increasing ability.'" *FTC v. Advocate Health Care Network*, 841 F.3d 460, 469 (7th Cir. 2016) (citations omitted); *see also Rebel Oil Co., Inc. v. Atlantic Richfield*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("[A] 'market' is the group of sellers or producers who have the 'actual or potential ability to deprive each other of significant levels of business.'").

1651. A product market may "be determined by examining such practical indicia as industry or public recognition of the submarket 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." *Polypore*, 149 F.T.C. at 809 (quoting *Brown Shoe,* 370 U.S. at 325).

Response to Proposed Conclusion of Law No. 1651

Complaint Counsel has no specific response.

1652. The hypothetical monopolist test is a leading test used by economists, and is set forth in the 2010 Horizontal Merger Guidelines (the "Merger Guidelines"). The test asks whether a hypothetical monopolist who has control over all of the products in an alleged market could profitably raise prices on those products, by imposing a SSNIP. *Oracle*, 331 F. Supp. 2d at 1111-12). If enough customers would switch to products outside of the proposed relevant market so that the price increase would not be profitable, the proposed relevant market is too narrow. Merger Guidelines § 4.1.3. The number of customers that must switch in order to defeat a price increase is referred to as "critical loss." *Id.*

Response to Proposed Conclusion of Law No. 1652

The Proposed Conclusion is incomplete and misstates the hypothetical monopolist test. Under the *Horizontal Merger Guidelines* the hypothetical monopolist test requires that the hypothetical "likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms." *Horizontal Merger Guidelines* §§ 4.1.1. This is the test that Complaint Counsel's expert undertook to evaluate the "cross-elasticity of demand" between MPKs and mechanical knees, which requires evaluating "the responsiveness of the sales of one product to price changes of the other." *du Pont 1956*, 351 U.S. at 400. The hypothetical monopolist test is an iterative one, starting with at least one product from each of the merged firms and adding products as necessary until a hypothetical monopolist controlling all of them could profitably impose a price increase on "at least one product sold by one of the merging firms" to clinics. *Merger Guidelines* § 4.1.1.; *see also Advocate*, 841 F.3d at 468. Neither Respondent nor its testifying economic expert, Dr. Argue, ever performed this exercise. (CCFF ¶¶ 2936-2945) (describing numerous flaws of Dr. Argue's critical loss analysis, including several unsupported or inappropriate assumptions and failure to calculate any predicted loss).

C. There Is No Relevant Market That Consists Solely Of MPKs That Does Not Also Include Any Non-MPKs

1653. Complaint Counsel has failed to prove that the relevant product market is no broader than the manufacture and sale of microprocessor prosthetic knees to prosthetic clinics in the United States.

Response to Proposed Conclusion of Law No. 1653

The Proposed Conclusion is unsupported, improper and conclusory argument. Respondent offers no support whatsoever for its bald and inaccurate factual assertion. The Proposed Conclusion is also contradicted by a vast amount of record evidence, which shows that, whether applying the hypothetical monopolist test or the practical indicia test, the relevant product market is no broader than MPKs. *See* CCFF ¶¶ 607-828; Responses to RPFF ¶¶ 113-564; *See also* CCCOL ¶¶ 31-44.

1654. Complaint Counsel's proffered market definition is contradictory to significant evidence that patients, prosthetists, physicians, and payers consider Sophisticated Non-MPKs to be in the same market as certain MPKs as they are all medically appropriate options for the same patient population. (FOF ¶¶ 335-509).

Response to Proposed Conclusion of Law No. 1654

The Proposed Conclusion is a conclusory argument and an inaccurate factual assertion. The Proposed Conclusion is also contradicted by a vast amount of record evidence, which shows that Respondent, Freedom, clinics and other market participants all consider MPKs to be a distinct market. *See* Responses to RPFF ¶¶ 335-509.

1655. Complaint Counsel's proffered market definition also incorrectly includes High-End MPKs that are only available to a very small patient population. (FOF ¶¶ 496-509).

Response to Proposed Conclusion of Law No. 1655

The Proposed Conclusion is a conclusory argument and an inaccurate factual assertion. The Proposed Conclusion is also contradicted by a vast amount of record evidence. *See* Responses to RPFF ¶¶ 496-509.

1656. All MPKs are not functionally or reasonably interchangeable. (FOF ¶¶ 350-391).

Response to Proposed Conclusion of Law No. 1656

The Proposed Conclusion is a conclusory argument and an inaccurate factual assertion. The Proposed Conclusion is also contradicted by a vast amount of record evidence. *See* Responses to RPFF ¶¶ 350-391.

1657. At the same time, some MPKs are functionally and reasonably interchangeable with Non-MPKs, particularly Sophisticated Non-MPKs. (FOF ¶¶ 392-468).

Response to Proposed Conclusion of Law No. 1657

The Proposed Conclusion is a conclusory argument and an inaccurate factual assertion. The Proposed Conclusion is also contradicted by a vast amount of record evidence. *See* Responses to RPFF ¶¶ 392-468. The Proposed Conclusion also is incorrect as a matter of law because Respondent fails to apply the "smallest market" principle, which requires that the hypothetical monopolist iterative test stop when a profitable SSNIP can be imposed. *See H&R Block,* 833 F. Supp. 2d. at 59 (citing *Merger Guidelines* §4.1.1); *see also Sysco*, 113 F. Supp. 3d at 26-27 (noting that "market definition is guided by the 'narrowest market' principle") (quoting *Arch Coal*, 329 F. Supp. 2d at 120). Market participants would not respond to a price change for MPKs by switching to mechanical knees, CCFF ¶¶ 795-806, which proves that a relevant market, excluding mechanical knees, exists. *See e.g.*, *du Pont*, 351 U.S. at 400 ("An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other."); *Merger Guidelines* § 4.

1658. Complaint Counsel's product market definition includes practical indicia establishing that any relevant market must be broader than Complaint Counsel suggests, including evidence of financial incentives; patient and provider preferences; and classification of product within the industry.

Response to Proposed Conclusion of Law No. 1658

The Proposed Conclusion is unclear, unsupported, improper and conclusory argument. The Proposed Conclusion is unclear in that it does not explain what is meant by "financial incentives," "patient and provider preferences," and "classification of product within the industry." The Proposed Conclusion is unsupported because Respondent offers no support whatsoever for its bald and inaccurate factual assertions in the Proposed Conclusion. The Proposed Conclusion is an incorrect statement of the law because "financial incentives" are not practical indicia used in market definition. *Cf. Brown Shoe,* 370 U.S. at 325. The Proposed Conclusion is contradicted by a vast amount of record evidence showing that the price and demand for MPKs do not respond to changes in price of non-MPK products, and price and demand for individual MPK products, including the C-Leg 4 and the Plie 3, are heavily influenced by changes in their respective prices and demand. *See* CCFF ¶¶ 712-716, 1026-1136. Practical indicia – including customer perceptions, distinct pricing, distinct characteristics and uses, industry recognition, etc. – also strongly support an MPK product market. *See* CCFF ¶¶ 608, 613, 688-96.

1659. The hypothetical monopolist test confirms that the relevant product market is broader than an MPK-only market. (FOF ¶¶ 514, 1661-1665).

Response to Proposed Conclusion of Law No. 1659

The Proposed Conclusion is a conclusory argument, an incorrect statement of the law, and contradicted by a vast amount of record evidence. Because the hypothetical monopolist test "is iterative, meaning it should be repeated with ever-larger candidates until it defines a [relevant market]," a relevant market is properly defined once a candidate set of products passes the test, the analysis can stop. *Advocate*, 841 F.3d at 468 (internal citation omitted). Record evidence, including the testimony of customers and other market participants, Respondent's own documents, and the testimony of Professor Scott Morton, Complaint Counsel's economic expert, all demonstrate that, applying the hypothetical monopolist test, the relevant product market is no

broader than MPKs. *See* CCFF ¶¶ 767-828. The acquisition has not and will not harm competition in any alleged relevant market.

III. THE ACQUISITION HAS NOT AND WILL NOT HARM COMPETITION IN ANY ALLEGED RELEVANT MARKET

1660. "The second step in analyzing a Section 7 case is to determine whether the effect of the acquisition 'may be substantially to lessen competition, or to tend to create a monopoly.'" *Polypore*, 149 F.T.C. at 800 (quoting 15 U.S.C. § 18).

Response to Proposed Conclusion of Law No. 1660

Complaint Counsel has no specific response.

1661. "After determining the relevant product and geographic markets, an analysis of the likely competitive effects of an acquisition requires a determination of the transaction's probable effects on competition in those markets." *Id*. at 849 (citing *CCC Holdings*, 605 F. Supp. 2d at 37 (citing *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618-23 (1974); *Gen'l Dynamics*, 415 U.S. at 510-11)).

Response to Proposed Conclusion of Law No. 1661

The Proposed Conclusion of law is incomplete and misleading because it omits that once the relevant markets are properly defined, the next step is to assess market concentration and the shares of the merging parties. *Polypore*, 149 F.T.C. at 849 (stating that "the analysis first evaluates the evidence presented on market shares and concentration"). A transaction that results in "undue concentration" in the relevant market is presumed to "substantially lessen competition." *Id.*, citing *Baker Hughes*, 908 F.2d at 982; *U.S. v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963) (holding that where a transaction "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration . . ., [it] is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects").

1662. "[T]o satisfy section 7, the government must show a reasonable probability that the proposed transaction would substantially lessen competition in the future." *Id*. (quoting *FTC v. University Health*, 938 F.2d 1206, 1218 (11th Cir. 1991); *FTC v. Warner Communs. Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984)).

Response to Proposed Conclusion of Law No. 1662

The Proposed Conclusion is incomplete and misleading. It is incomplete because it omits that the government can establish a presumption that a transaction has the effect proscribed by Section 7 by showing that it produces undue concentration. *See* Response to RPCL ¶ 1661. The proposed finding is misleading to the extent that it implies that the government must show that the transaction would substantially lessen competition in the future. Section 7 prohibits mergers "'when a 'tendency' toward monopoly or a *'reasonable likelihood'* of a substantial lessening of competition in the relevant market is shown . . . ." *United States v. Marine Bancorp.*, 418 U.S. 602, 622 (1974) (emphasis added)(citation omitted). "[C]ertainty, even a high probability, need not be shown," and any "doubts are to be resolved against the transaction." *Elders Grain, Inc.*, 868 F.2d at 906 (citing *Phila. Nat'l Bank*, 374 U.S. at 362-363); *see also Brown Shoe*, 370 U.S. at 323. "Congress used the words '*may* be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties." *H.J. Heinz Co.*, 246 F.3d at 713 (citing *Brown Shoe*, 370 U.S. at 323); *see Merger Guidelines*, §1.0 ("Given this inherent need for a prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.").

1663. Complaint Counsel has the burden of proving a "reasonable probability" of substantial competitive harm; a mere possibility will not suffice. *United States v. Marine Bancorporation, Inc*., 418 U.S. 602, 622-23 (1974); *United States v. Sungard Sys. Inc*., 172 F. Supp. 2d 172, 180 (D.D.C. 2001); *New York v. Kraft General Foods, Inc*., 926 F. Supp. 321, 358-59 (S.D.N.Y. 1995).

Response to Proposed Conclusion of Law No. 1663

The Proposed Conclusion is incomplete because it omits that the government can establish a presumption that a transaction has the effect proscribed by Section 7 by showing that it produces undue concentration. *See* Response to RPCL ¶ 1661. Once the government establishes the presumption, the burden shifts to Respondent. *Baker Hughes*, 908 F.2d at 982. Only if Respondent successfully rebuts the presumption does the burden shift back to the government to produce additional evidence of anticompetitive effect. *Id.*

A. Market Concentration Is Not A Useful Indicator Of Likely Anticompetitive Effects In The Prosthetics Industry

1664. Section 2.1.3 of the Merger Guidelines states that "mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power."

Response to Proposed Conclusion of Law No. 1664

Complaint Counsel has no specific response.

1665. However, calculating market shares and market concentration is "not an end in itself," but rather "one useful indicator of likely anticompetitive effects." Merger Guidelines §§ 4, 5.3. Market concentration is not to be used to "provide a rigid screen to separate competitively benign mergers from anticompetitive ones," but rather to provide one way to distinguish competitively benign mergers from those that warrant closer scrutiny. *Id.* § 5.3. Market "shares may not fully reflect the competitive significance of firms in the market or the impact of a merger." *Id.*

Response to Proposed Conclusion of Law No. 1665

The Proposed Conclusion is misleading and incomplete. The Proposed Conclusion is incomplete because it omits that the government can establish a presumption that a transaction has lessened competition substantially by showing that it produces undue concentration. *See* Response to RPCL ¶ 1661. The Proposed Conclusion is misleading because fails to mention that the Merger Guidelines specifically state that "[m]arket concentration is often one useful indicator of likely competitive effects of a merger" and "high levels of concentration do raise concerns." *Merger Guidelines* § 5.3. While there are other ways of showing that a merger is

anticompetitive, "The higher the post-merger HHI and the increase in the HHI, the greater are the Agencies' potential competitive concerns . . ." *Id.*

1666. "[M]arket share and concentration data provide only the starting point for analyzing the competitive impact of a merger . . . . [The government] also will assess the other market factors that pertain to competitive effects." *Polypore*, 149 F.T.C. at 849 (quoting Merger Guidelines § 2.1 and citing *In re Weyerhauser Co.,* 1985 FTC LEXIS 26, at *215 (F.T.C. Sept. 26, 1985)) (substitutions and omission in original).

Response to Proposed Conclusion of Law No. 1666

The Proposed Conclusion is incomplete and misleading because it omits that a transaction produces undue concentration is presumed to have lessened competition substantially. *See* Response to RPCL ¶ 1661. The Proposed Conclusion omits that once the government establishes this presumption, "[t]he burden of producing evidence to rebut this presumption then shifts to the defendant." *Baker Hughes*, 908 F.2d at 982.

1667. Beyond "market share and concentration," a court must consider the "structure, history and probable future" of the market to determine whether high market shares indicate there are likely to be anticompetitive effects from the transaction." *General Dynamics*, 415 U.S. at 498 (quoting *Brown Shoe*, 770 U.S. at 322 n.38); *see also Baker Hughes*, 908 F.2d at 992 ("The Herfindahl-Hirschman Index cannot guarantee litigation victories.")

Response to Proposed Conclusion of Law No. 1667

The Proposed Conclusion is incomplete and misleading. The Proposed Conclusion is incomplete and misleading because it omits that a transaction produces undue concentration is presumed to have lessened competition substantially, s*ee* Response to RPCL ¶ 1661, and omits that once the government establishes this presumption, "[t]he burden of producing evidence to rebut this presumption then shifts to the defendant." *Baker Hughes*, 908 F.2d at 982.

1668. Complaint Counsel bases its case entirely on alleged unilateral effects on competition.

Response to Proposed Conclusion of Law No. 1668

The Proposed Conclusion is and unsupported conclusory argument, not a conclusion of law, and is incomplete and misleading. The Proposed Conclusion is improper because it is an unsupported argument, not a conclusion of law. The Proposed Conclusion is misleading and incomplete because it mischaracterizes Complaint Counsel's case, which is based on the testimony of seventy-three witnesses who were deposed, including employees of Freedom and Otto Bock, thirty-one days of trial, the testimony of two expert witnesses, and thousands of exhibits demonstrating that the effect of the transaction may be substantially to lessen competition. (CCFF ¶¶ 179-182, 253-256, JX-2).

1669. However, the evidence at trial established that the high market shares of the parties do not accurately reflect the current competitive environment and are not an accurate indicator of the likely effects of the Acquisition on competition and consumers. (FOF ¶¶ 565-1290). *See*, *e.g.*, *General Dynamics*, 415 U.S. 486.

Response to Proposed Conclusion of Law No. 1669

The Proposed Conclusion is incomplete and misleading because it omits that a transaction produces undue concentration is presumed to have lessened competition substantially, s*ee* Response to RPCL ¶ 1661, and omits that once the government establishes this presumption, "[t]he burden of producing evidence to rebut this presumption then shifts to the defendant." *Baker Hughes*, 908 F.2d at 982.

1670. Complaint Counsel has failed to establish a presumption that Ottobock could exercise market power post-Acquisition.

Response to Proposed Conclusion of Law No. 1670

The Proposed Conclusion is an unsupported conclusory argument, not a conclusion of law, and is incomplete and misleading. The Proposed Conclusion is improper because it is an unsupported argument, not a conclusion of law. The proposed finding is incorrect as a matter of law because a transaction that produces undue concentration is presumed to have lessened

competition substantially. *See* Response to RPCL ¶ 1661. The Proposed Conclusion is misleading to the extent that it implies that it is the government's burden to show that Otto Bock could exercise market power post-Acquisition, when in actuality, once the government establishes a presumptive case by showing undue concentration, "[t]he burden of producing evidence to rebut this presumption then shifts to the defendant." *Baker Hughes*, 908 F.2d at 982. The Proposed Conclusion is contradicted by a vast body of record evidence showing that Otto Bock has and will continue to be able to exercise market power post-Acquisition. *See* CCFF ¶¶ 991-1479.

B. Strong Evidence Rebuts Complaint Counsel's *Prima Facie* Case

1671. In addition, a respondent may rebut a prima facie case of anticompetitive effects. "Factors which may be considered to rebut a prima facie case include 'ease of entry into the market, the trend of the market either toward or away from concentration, and the continuation of active price competition.'" *Polypore*, 149 F.T.C. at 801 (quoting *Kaiser Aluminum*, 652 F.2d at 1341).

Response to Proposed Conclusion of Law No. 1671

The Proposed Conclusion is incomplete because it omits that once the government establishes its prima facie case, "[t]he burden of producing evidence to rebut this presumption then shifts to the defendant." *Baker Hughes*, 908 F.2d at 982. The Proposed Conclusion also omits that to the extent that Respondent seeks to rebut the prima facie case, Respondent must "provide evidence that the likelihood of entry reaches a threshold ranging from 'reasonable probability' to 'certainty.'" *Chicago Bridge*, 534 F.3d at 430, n.10; *see also* CCCOL ¶¶ 88-95 (explaining requirements that entry be "timely, likely, and sufficient").

1672. "The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral effects." *ProMedica*, 749 F.3d, at 569; *see also FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000) ("[A] unilateral price increase . . . is likely after the acquisition because it will eliminate one of Swedish Match's primary direct competitors."); *Staples*, 970 F. Supp. at 1083 (finding unilateral anticompetitive

effects when the transaction "would eliminate significant head-to-head competition" between the merging parties; *Merger Guidelines* § 6.1.

Response to Proposed Conclusion of Law No. 1672

Complaint Counsel has no specific response.

1673. "A merger is unlikely to generate substantial unilateral price increases if non-merging parties offer very close substitutes for the products offered by the merging firms." *Merger Guidelines* § 6.1.

Response to Proposed Conclusion of Law No. 1673

The Proposed Conclusion is incomplete because it omits that once the government establishes its prima facie case, "[t]he burden of producing evidence to rebut this presumption then shifts to the defendant." *Baker Hughes*, 908 F.2d at 982. Thus, it is Respondent's burden to show that other firms offer such close substitutes that merged firm would not have the incentive to increase prices.

1674. A merger is not likely to enhance market power if expansion in the alleged market is so easy that respondent and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise prices or otherwise reduce competition compared to the level that would have prevailed in the absence of the acquisition. Merger Guidelines § 9.1.

Response to Proposed Conclusion of Law No. 1674

The Proposed Conclusion is incomplete and unsupported. The Section 9.1 of the Merger Guidelines states that "[i]n order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect. . . . The Agencies will not presume that an entrant can have a significant impact on prices before that entrant is ready to provide the relevant product to customers unless there is reliable evidence that anticipated future entry would have such an effect on prices." *Merger Guidelines* § 9.1.

The Proposed Conclusion is incomplete because it omits that "[t]he prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if . . . [it] would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." *Merger Guidelines* § 9. The Proposed Conclusion is incomplete because it omits that once the government establishes its prima facie case, "[t]he burden of producing evidence to rebut this presumption then shifts to the defendant." *Baker Hughes*, 908 F.2d at 982. Thus, it is Respondent's burden to show that entry would be 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.

1675. "The Agencies consider whether repositioning would be sufficient to deter or counteract what otherwise would be significant anticompetitive unilateral effects from a differentiated products merger." Merger Guidelines § 6.1. The evidence must be sufficient to demonstrate the ability of other suppliers to fill the competitive void that could potentially result post-Acquisition. *See Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000).

Response to Proposed Conclusion of Law No. 1675

The Proposed Conclusion is incomplete and misleading. The Proposed Conclusion is incomplete because it omits that "repositioning is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency." *Merger Guidelines* § 6.1; *See* Response to RPCL ¶ 1674. The Proposed Conclusion is incomplete because it omits that once the government establishes its prima facie case, "[t]he burden of producing evidence to rebut this presumption then shifts to the defendant." *Baker Hughes*, 908 F.2d at 982. Thus, it is Respondent's burden to show that entry would be 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. To carry its burden, Respondent must do more than show that expansion would replace "some of

the competition" lost to the Merger. *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 170 (D.D.C. 2000).

1676. The existence of a powerful buyer may mitigate the anticompetitive effects of a merger. In particular, "[t]he 'power buyer' defense is grounded in the theory that large, sophisticated buyers may have the bargaining power to resist anticompetitive price increases and, thereby, counter anticompetitive effects of a merger." *Polypore*, 149 F.T.C. at 899 (citing *Baker Hughes,* 908 F.2d at 986-87) (brackets omitted); *see also Archer-Daniels-Midland*, 781 F. Supp. at 1416 ("The existence of large, powerful buyers of a product mitigates against the ability of sellers to raise prices."); *FTC v. RR Donnelley & Sons Co.*, No. 90-1619, 1990 U.S. Dist. LEXIS 11361, at *10-11 (D.D.C. Aug. 27, 1990) (holding that powerful customers exerted economic power that "make any anti-competitive consequences very unlikely."); *United States v. Country Lake Foods*, 754 F. Supp. 669, 679 (D. Minn. 1990) ("The market power of buyers is demonstrated in the declarations of fluid milk purchasers . . . in which they described their swift and aggressiveResponse to a price increase unrelated to normal market conditions as well as their willingness to seek out suppliers who would sell fluid milk at lower prices."); Merger Guidelines § 8.

Response to Proposed Conclusion of Law No. 1676

The proposed conclusion is incomplete and incorrect as a matter of law to the extent that it implies that Respondent can successfully rebut a *prima facie* case by demonstrating that one of the customers is large. "[C]ourts have not yet found that power buyers alone enable a defendant to overcome the government's presumption of anti-competitiveness. . . ." *Chi. Bridge*, 534 F.3d at 440 (quoting *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 58 (D.D.C. 1998)). Indeed, "the economic argument for even *partially* rebutting a presumptive case because a market is dominated by large buyers, is weak." *Chi. Bridge*, 534 F.3d at 440 (emphasis added) (citations omitted). The mere existence of "powerful buyers" that can "negotiate favorable terms with their suppliers" does not eliminate the possibility of anticompetitive effects. *Merger Guidelines* § 8 ("Even buyers that can negotiate favorable terms may be harmed by an increase in market power."); *see also Polypore*, 150 F.T.C. at 636. The relevant question is "whether the merger will cause such a significant increase in the [merging firms'] bargaining leverage that they will be able to profitably impose" a price increase. *Penn State Hershey*, 838 F.3d at 346. Where a

merger "eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage," the merger is likely to cause competitive harm. *Chi. Bridge*, 534 F.3d at 440; *In re ProMedica Health Sys., Inc.,* Docket No. 9346, Comm'n Op. at 36-37 (finding that "an increase in the hospital provider's bargaining leverage translates to an increase in its reimbursement rates"). Additionally, "even if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers." *Merger Guidelines* § 8; *Polypore*, 150 F.T.C. at 637-38 (stating that "smaller buyers would not be protected by [any] resistance offered by larger, more powerful customers."); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1085 (D. Del. 1991) (stating that large customers that could protect themselves 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)).

1677. An acquisition does not reduce competition where the acquired entity's weakened position makes it of little competitive significance. In *General Dynamics*, the Supreme Court explained that the acquired firm, a coal company, "had no coal reserves and was unable to obtain additional ones. Thus, . . . the acquired company was an insignificant factor as a competitor and the merger did not have an anticompetitive impact on the market." *FTC v. National Tea Co.*, 603 F.2d 694, 699-700 (8th Cir. 1979) (citing *General Dynamics*, 415 U.S. 486, and affirming district court's consideration of acquired firm's probable exit from the market).

Response to Proposed Conclusion of Law No. 1677

The Proposed Conclusion is incomplete, misleading and misstates the law to the extent that it implies that the financial condition of a company is a viable rebuttal to the *prima facie* case. "Financial weakness, while perhaps relevant in some cases, is probably the weakest ground of all for justifying a merger," and "certainly cannot be the primary justification" for permitting 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 1156, 1164 (9th Cir. 1984).

The weakness of the acquired firm is only relevant if the defendant demonstrates that this weakness undermines the predictive value of the government's market share statistics. Respondent does not explain the actual requirements to prove a flailing firm defense. 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. The so-called flailing-firm defense requires a "substantial showing that the acquired firm's weakness, which cannot be resolved by any competitive means, would cause that firm'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). But the "more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully." *Arch Coal*, 329 F. Supp. 2d at 129 (quoting *Baker Hughes*, 908 F.2d at 991) (finding that financial weakness, combined with high costs, low reserves, and no realistic prospects for other buyers overcame a "not strong" *prima facie* with an HHI increase of just 49. This is "not one of those 'rare cases' where . . . financial weakness rebuts the presumption of illegality," *Promedica*, 2012 WL 1155392, at *25, *30, since Otto Bock now controls over [redacted] of the U.S. MPK market and the Merger increased concentration by [redacted] points, CCFF ¶ 964, Table 6, and an overwhelming amount of record evidence demonstrates that the transaction was anticompetitive. *See* CCFF ¶¶ 991-1479.

1678. The "weakened competitor" defense may be satisfied even where an element of failing firm defense is technically lacking in some respect. *See Arch Coal*, 329 F. Supp. at 157.

Response to Proposed Conclusion of Law No. 1678

The proposed conclusion is misleading, incomplete and a misstatement of the law. "Financial weakness, while perhaps relevant in some cases, is probably the weakest ground of all for justifying a merger," and "certainly cannot be the primary justification" for permitting one. *Kaiser Aluminum & Chemical Corp.*, 652 F.2d at 1339, 1341; *see also Univ. Health*, 938 F.2d at

1221; *Warner Commc'ns*, 742 F.2d at 1164. The weakness of the acquired firm is only relevant if the defendant demonstrates that this weakness undermines the predictive value of the government's market share statistics. Respondent does not explain the actual requirements to prove a flailing firm defense. In fact, "courts have imposed an extremely heavy burden on defendants seeking to rebut the structural presumption on this ground." *ProMedica*, 2012 WL 1155392, at *25. The so-called flailing-firm defense requires a "substantial showing that the acquired firm's weakness, which cannot be resolved by any competitive means, would cause that firm's market share to reduce to a level that would undermine the government's *prima facie* case." *Tenet Healthcare Corp.*, 17 F. Supp. 2d at 947 (internal citations omitted). But the "more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully." *Arch Coal*, 329 F. Supp. 2d at 129 (quoting *Baker Hughes*, 908 F.2d at 991) (finding that financial weakness, combined with high costs, low reserves, and no realistic prospects for other buyers overcame a "not strong" *prima facie* with an HHI increase of just 49). Here, Otto Bock now controls over [redacted] of the U.S. MPK market and the Merger increased concentration by [redacted] points, CCFF ¶ 964, Table 6, and an overwhelming amount of record evidence demonstrates that the transaction was anticompetitive. *See* CCFF ¶¶ 991-1479.

1679. "[C]ourts and the [FTC] typically consider 'efficiencies, including quality improvements, after the government has shown that the transaction is likely to reduce competition.'" *Polypore*, 149 F.T.C. 486 (quoting *In re Evanston Northwestern Healthcare Corp.*, No. 9315, 2007 FTC LEXIS 210, at *191 (F.T.C. Aug. 6, 2007)). "The defendant 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 *In re Evanston Northwestern Healthcare Corp.*, No. 9315, 2007 FTC LEXIS 210, at *191 (F.T.C. Aug. 6, 2007)); *see also FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054 (8th Cir. 1999) (enhanced efficiencies should be considered "in the context of the competitive effects of the merger."); *Country Lake Foods*, 754 F. Supp. at 674, 680 (efficiencies involving "lower plant and transportation costs and other savings" found as "further evidence that the proposed acquisition will enhance competition.")

Response to Proposed Conclusion of Law No. 1679

The Proposed Conclusion is incomplete and misleading. A demonstration that a merger may produce efficiencies alone is insufficient. "[A] defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers." *University Health*, 938 F.2d at 1223. Respondent bears the burden of proving efficiencies, like other rebuttal arguments, overcome the *prima facie* case. The stronger the *prima facie* case, the more evidence defendants must present to rebut the presumption of anticompetitive effects. *Sysco*, 113 F. Supp. 3d at 23. Proof of extraordinary efficiencies is required to rebut the high market concentration levels present in this case. *H.J. Heinz Co.*, 246 F.3d at 719. Courts have rarely, if ever, permitted an otherwise unlawful transaction to proceed based on claimed efficiencies. *See, e.g.*, *FTC v. Wilh. Wilhelmsen Holding ASA*, 2018 U.S. Dist. LEXIS 169049, 2018 WL 4705816, at *23 (D.D.C. Oct. 1, 2018) (citing *CCC Holdings*, 605 F. Supp. at 72); *Sysco*, 113 F. Supp. 3d at 82 ("The court is not aware of any case, and Defendants have cited none, where the merging parties have successfully rebutted the government's *prima facie* case on the strength of the efficiencies.").

1680. The evidence established the following facts, which are sufficient to rebut any *prima facie* case of anticompetitive effects and to demonstrate that the Acquisition is actually beneficial to competition:

    a. Ottobock and Freedom are not close competitors and there is little evidence of direct competition with respect to pricing or innovation between Ottobock's MPKs, on the one hand, and Freedom's Plie. (FOF ¶¶ 577-746).

Response to Proposed Conclusion of Law 1680.a

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, and is contradicted by a vast amount of record evidence. Ottobock and Freedom are two of the top three suppliers of MPKs in the United States that compete directly and closely on both price

and innovation, and were poised to compete even more vigorously when Freedom launches its "C-Leg Killer," the Quattro MPK. CCFF ¶¶ 991-1497.

b. Ottobock's closest competitor, Össur, and other manufacturers selling MPKs, are willing and able to expand to compete for share of MPK sales. (FOF ¶¶ 777-940).

Response to Proposed Conclusion of Law 1680.b

The Proposed Conclusion is a misstatement of the law, an improper conclusory argument, not a conclusion of law, and is contradicted by a vast amount of record evidence. The Proposed Conclusion is a misstatement of the law to the extent that it implies that the applicable legal standard is whether fringe suppliers are "willing and able to expand." To meet its burden, Respondent must demonstrate that expansion would be "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* Response to RPCL ¶¶ 1674-75. It is insufficient to demonstrate that expansion would replace only "some of the competition" lost to the Merger. *Swedish Match*, 131 F. Supp. 2d at 170. The Proposed Conclusion is contracted by a vast amount of record evidence showing that Össur and other MPK manufacturers collectively account for less than 20 percent of MPK sales and have limited ability to take share from the merged entity because customers perceive their products to be functionally different, have reliability issues, are unproven or are otherwise comparatively unappealing to customers. *See* CCFF ¶¶ 1480-1626.

c. Hanger and other sophisticated customers have significant buying power and have promoted expansion and innovation. These buyers have to discipline and constrain manufacturers from raising the prices of MPKs and to prevent any reasonably likely anticompetitive effects. (FOF ¶¶ 967-1003).

Response to Proposed Conclusion of Law 1680.c

The Proposed Conclusion is unclear, a misstatement of the law, an improper conclusory argument, not a conclusion of law, and contradicted by a vast amount of record evidence. The Proposed Conclusion is unclear in that it does not explain what is meant by "sophisticated customers" or why "these buyers have to have to discipline and constrain manufacturers." The Proposed Finding is a misstatement of the law to the extent that it implies that it is sufficient to demonstrate that some "sophisticated buyers have significant buying power." To overcome the *prima facie* case, Respondent must demonstrate that the merger does not affect the bargaining position of buyers and that, as a result, all customers are shielded from anticompetitive effects. See Response to RPCL ¶ 1676. The Proposed Conclusion is contradicted by record evidence that shows that the Merger enables Otto Bock to raise prices to all customers, including "Hanger and other sophisticated customers," and that smaller clinics would not be protected from price increases by the existence of other customers that have greater bargaining leverage. *See* CCFF ¶¶ 3089-3110.

d. The third-party payer reimbursement system in the United States severely constrains the ability of prosthetic knee manufacturers to raise prices. (FOF ¶¶ 962-66).

Response to Proposed Conclusion of Law 1680.d

The Proposed Conclusion is unclear, an improper conclusory argument, not a conclusion of law, and is contradicted by record evidence. The Proposed Conclusion is unclear in that it does not explain what is meant by "constrains the ability . . . to raise prices." The Proposed Conclusion is contradicted by a vast amount of record evidence that shows that price and non-price competition between MPK manufacturers yields benefits for prosthetic clinic customers and that the elimination of that competition would produce higher prices and reduced margins for prosthetic clinic customers. *See* CCFF ¶¶ 3050-53

e. Freedom was a "flailing firm" at the time of the Acquisition as a result of insurmountable debt obligations, terrible financial performance, and gross mismanagement, and as a result of these circumstances, posed no significant competitive threat in the alleged market. (FOF ¶¶ 1291-1531).

Response to Proposed Conclusion of Law 1680.e

The Proposed Conclusion is improper conclusory argument, not a conclusion of law, and a misstatement of the law and contradicted by record evidence. The Proposed Conclusion misstates the law to the extent that it implies that the "flailing firm" defense requires anything other than Respondent proving that the weakness of the acquired firm, which cannot be resolved by other means, undermines the predictive value of the government's market share statistics. *See* Response to RPCL ¶¶ 1677-78. The Proposed Conclusion is contradicted by a vast amount of record evidence that shows Freedom's position in the market remained steady and was poised to grow with the introduction of the next-generation Quattro MPK, CCFF ¶¶ 967-984, 1178, 1230-1383, 1405-1411, and that its financial performance had exceeded plan in each of the ten months preceding the Merger. CCFF ¶¶ 1851-1908.

f. The Acquisition will promote competition through a "Dual Brand Strategy" that would allow Freedom to exist and compete independent of Ottobock, and there has been no evidence of anticompetitive conduct post-Acquisition. (FOF ¶¶ 1039-1073).

Response to Proposed Conclusion of Law 1680.f

The Proposed Conclusion is improper conclusory argument, a misstatement of the law and is contradicted by record evidence. The Proposed Conclusion is a misstatement of the law because it implies that Section 7 requires evidence of anticompetitive conduct post-acquisition. The decision to forestall anticompetitive behavior, even if true, would not legalize a transaction, since the focus in a Section 7 case "is in probabilities, not in what later transpired." *FTC v. Consolidated Foods Corp.,* 380 U.S. 592, 598 (1965). The Proposed Conclusion is contradicted

by record evidence. 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, began handling Freedom's international distribution, CCFF ¶ 150, and new MPK product launches were delayed or terminated. CCFF ¶¶ 1446-68.

g. The Acquisition will generate substantial cognizable, merger-specific efficiencies that will benefit consumers. (FOF ¶¶ 1532-1570).]

Response to Proposed Conclusion of Law 1680.g

The Proposed Conclusion is improper conclusory argument, not a conclusion of law, a misstatement of the law and contradicted by record evidence. The Proposed Conclusion misstates the law to the extent that it implies that an efficiencies defense requires anything other than Respondent proving that the Merger generated "extraordinary efficiencies" that "ultimately would benefit competition and, hence, consumers." *See* Response to RPCL ¶ 1679. The Proposed Conclusion is contradicted by record evidence. Respondent's claimed efficiencies are unverifiable, not merger specific and unlikely to benefit consumers. CCFF ¶¶ 1762, 1767-81, 1783-89, 1798-1805; *See* Responses to RPFF ¶¶ 1532-1570.

IV. THE ACQUISITION SUBJECT TO THE MPK DIVESTITURE WILL HAVE NO ADVERSE EFFECT ON COMPETITION AND ANY REMEDY OUTSIDE THE ALLEGED MARKET WOULD BE PUNITIVE

A. The Acquisition Coupled With The MPK Divestiture Will Not Harm Competition In Any Relevant Market.

1681. As established in *FTC v. Arch Coal, Inc.*, No. 1:04-cv-00534, ECF No. 67 at 7 (D.D.C. July 7, 2004) (attached as Exhibit D), the proper analysis under *General Dynamics* where merging parties have agreed to divest assets is whether the merger with the divestiture will

have a substantially adverse effect on competition. The entire transaction, including the divestiture, must be considered in assessing competitive effects. *Id*.

Response to Proposed Conclusion of Law No. 1681

The Proposed Conclusion misstates the law. 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 involved *unconsummated* mergers. *Id* at 4. The Commission distinguished those cases from 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.

1682. Where a defendant proposes a curative divestiture or other modification to the original transaction, courts will consider the divestment or other modification in assessing whether the government has met its burden of proving anticompetitive effects. *See, e.g., Arch Coal, Inc.*, No. 1:04-cv-00534, at 7 (D.D.C. July 7, 2004) (where defendant proposed curative divestiture, court held that it was required "to review the *entire* transaction in question."); *White Consol. Indus., Inc. v. Whirlpool Corp.*, 781 F.2d 1224 (6th Cir. 1986) (affirming vacating injunctive relief after curative divestiture occurred); *United States v. Conn. Nat'l Bank*, 362 F. Supp. 240 (D. Conn. 1973).

Response to Proposed Conclusion of Law No. 1682

The Proposed Conclusion is incomplete, misleading and misstates the law. The Proposed Conclusion is incomplete because it omits that "a curative divestiture or other modification to the original transaction" can only address competitive harm that occurs after the divestiture takes place. *See* Response to RPCL ¶ 1681. The Proposed Conclusion is misleading and misstates the law to the extent that it implies that it is the government's burden to show that the transaction, inclusive of the alleged "curative divestiture," was anticompetitive. Whether offered as a remedy for a violation or in rebuttal, Respondent bears the burden of showing that the remedy negates the anticompetitive effects of the transaction. *United States v. Aetna*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017); *Staples II*, 190 F. Supp. 3d at 138 n. 15. For divestitures raised in rebuttal, the more "compelling the [government's] prima facie case, the more evidence the defendant must present to rebut it successfully." *Baker Hughes*, 908 F.2d at 991.

1683. "In rebuttal, a defendant may introduce evidence that a proposed divestiture would 'restore the competition' lost by the merger counteracting the anticompetitive effects of the merger." *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (punctuation omitted) (citing *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 72 (D.D.C. 2015)).

Response to Proposed Conclusion of Law No. 1683

The Proposed Conclusion is incomplete because it omits that the more "compelling the [government's] prima facie case, the more evidence the defendant must present to rebut it successfully." *Baker Hughes*, 908 F.2d at 991.

1684. This is consistent with the FTC's April 18, 2018 opinion and order denying Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense (the "April 18, 2018 Order"). Although the Commission held that the planned divestiture was not properly characterized as an affirmative defense, it held that the divestiture "could potentially be relevant to rebut a showing of likely anticompetitive effects [redacted], and Respondent remains entitled to develop and present relevant evidence regarding [redacted]. Moreover, in support of its denial, Respondent may develop and present relevant evidence regarding the [redacted]

[redacted] for any violation found." April 18, 2018 Order at 6.

Response to Proposed Conclusion of Law No. 1684

Complaint Counsel has no specific response.

1685. The FTC's conclusion that the divestiture does not constitute an affirmative defense is based on its reasoning that "the planned divestiture cannot eliminate the potential for demonstrating likely anticompetitive effects during the intervening period" before the divestiture. April 18, 2018 Order at 4.

Response to Proposed Conclusion of Law No. 1685

The Proposed Conclusion is misleading. The "planned divestiture" that Respondent averred in its Answer "addresses any conceivable anticompetitive effect" of the Merger still has not occurred more than a year after the Merger was consummated. As the Commission observed when it rejected this averral as an affirmative defense, a "planned divestiture," by its terms, "cannot eliminate the potential for demonstrating likely anticompetitive effects" before it takes place. Opinion and Order of the Commission, *Otto Bock HealthCare North America*, Docket No. 9378 (April 18, 2018) at 4.

1686. Ottobock entered into a Hold Separate Agreement. Complaint Counsel has introduced no evidence of anticompetitive effects from the Acqisition either before or after the Hold Separate Agreement was entered. To the contrary, the evidence shows that Freedom has continued to operate independently. (FOF ¶¶ 1155-1166). As such, despite the FTC's refusal to characterize the divestiture as an "affirmative defense" – a distinction that was appropriate before trial – at this point, it is clear that to the extent that the divestiture would restore any competition lost by the merger, it is a complete defense to the complaint.

Response to Proposed Conclusion of Law No. 1686

The Proposed Conclusion is incomplete, misstates the law and is contradicted by record evidence. The Proposed Conclusion is incomplete and misstates the law to the extent that it implies that Complaint Counsel bears the burden of showing that anticompetitive effects occurred following the Merger. Even if it were true that anticompetitive effects had not occurred, the private

decision to forestall anticompetitive behavior would not legalize a transaction, since the focus in a Section 7 case "is in probabilities, not what later transpired." *Consolidated Foods Corp.*, 380 U.S. at 598. As the Supreme Court cautioned, "[i]f 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." *United States v. General Dynamics Corp.*, 415 U.S. 486, 504-05 (1974). In this case, the Commission has already determined that even if Respondent has refrained from price increases 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.

The Proposed Conclusion is contradicted by record evidence to the extent that it states that there is no evidence that the Merger has resulted in anticompetitive effects. 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, [redacted] CCFF ¶¶ 1446-68. Before the hold separate went into effect, top Otto Bock officials were concerned about aggressive promotions and discounting on the Plié 3 and recommended Freedom "stop doing it." CCFF ¶ 1477.

1687. "A divestiture must 'effectively preserve competition in the relevant market.'" *Aetna*, 240 F. Supp. 3d at 60 (quoting U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* 1 (2011)). "In other words, the divestiture must 'replace the competitive intensity lost as a result of the merger.'" *Id.* (quoting *Sysco*, 113 F. Supp. 3d at 72) (punctuation omitted). "In order to be accepted, 'curative divestitures' must be made to a new competitor that is 'in fact . . . a willing, *independent* competitor capable of effective production in the . . . market." *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26 (D.D.C.

2009) (quoting *White v. Consol. Indus. v. Whirlpool Corp.*, 781 F.2d 1224, 1228 (6th Cir. 1986)).

Response to Proposed Conclusion of Law No. 1687

Complaint Counsel has no specific response.

1688. "Defendants in a merger challenge bear the burden of producing evidence tending to rebut the government's *prima facie* case. Part of that burden of production includes producing evidence that the divestiture will actually occur . . . . But, of course, antitrust deals in 'probabilities, not certainties.' Hence, the divestiture need not be iron clad for a court to consider it. Rather, once the divestiture is sufficiently non-speculative for the court to evaluate its effects on future competition, then further evidence about the likelihood of the divestiture goes to the weight of the evidence regarding the divestiture's effects." *Aetna*, 240 F. Supp. 3d at 61 (citations omitted, quoting *Brown Shoe*, 370 U.S. at 323); *see also United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969) (rejecting as "speculation" the government's contention that a divestiture may not occur.").

Response to Proposed Conclusion of Law No. 1688

Complaint Counsel has no specific response.

1689. The evidence establishes that [redacted] will be a more successful competitor than Freedom. As a result, with [redacted] acquiring Freedom's MPK business, there would absolutely no increase in the Herfindahl-Hirschman Index ("HHI") for the market alleged by Complaint Counsel. (FOF ¶¶ 1238).

Response to Proposed Conclusion of Law No. 1689

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, and is contradicted by record evidence. [redacted]

[redacted]

1690. The divestiture to [redacted] would restore any alleged lost competition in the alleged market.

Response to Proposed Conclusion of Law No. 1690

The Proposed Conclusion is an unsupported improper conclusory argument, not a conclusion of law, and is contradicted by record evidence. The proposed conclusion relies on no citation for its conclusory statement. The Proposed Conclusion is contradicted by vast amount record evidence. [redacted]

[redacted]

1691. [redacted] As such, the divestiture would cause no harm to competition. To the contrary, because [redacted] is likely to be a more effective competitor than Freedom, the divestiture will likely promote competition. (FOF ¶¶ 1238).

Response to Proposed Conclusion of Law No. 1691

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, and is incorrect and contradicted by record evidence. The Proposed Conclusion is incorrect to the extent that it implies that the sale of selected MPK assets to a buyer that lacks complementary products and expertise cannot increase the already-extraordinarily high HHI for the U.S. MPK market. [redacted]

1692. Likewise, [redacted] will allow it to innovate more effectively than Freedom. This will also have the effect of enhancing competition. (FOF ¶¶ 1239-1248).

Response to Proposed Conclusion of Law No. 1692

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, and is contradicted by record evidence. [redacted]

[redacted]

1693. The APA provides [redacted] (FOF ¶¶ 1249-1282).

Response to Proposed Conclusion of Law No. 1693

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, and is contradicted by record evidence. [redacted]

1694. It is not necessary that the divestiture have been consummated for a court to consider it as part of a transaction. In this case, the evidence shows that the parties will consummate the divestiture if they are permitted to do so. (FOF ¶¶ 1081, 1167-1248).

Response to Proposed Conclusion of Law No. 1694

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, misstates the law, is unsupported, and is contradicted by record evidence. Respondent cites no

legal authority for the proposition that its planned divestiture should be considered part of the Merger, which it consummated over a year ago. The Proposed Conclusion misstates the law. As the Commission has already determined, the proposed divestiture cannot be considered part of the acquisition because the Merger has already been consummated and the divestiture has not yet occurred. *See* Response to RPCL ¶ 1681. The Proposed Conclusion is contradicted by record evidence to the extent that it implies that the only obstacle to completing the divestiture is that they be "permitted to do so." [redacted]

1695. The Acquisition, considered with a divestiture to [redacted] will cause no harm to competition.

Response to Proposed Conclusion of Law No. 1695

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, and unsupported and contradicted by record evidence. [redacted]

1696. [redacted]

Response to Proposed Conclusion of Law No. 1696

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, incomplete and contradicted by record evidence. The Proposed Conclusion is incomplete because it omits that a basic requirement that a divestiture proposal be "sufficiently non-speculative for the court to evaluate its effects on future competition." *Aetna*, 240 F. Supp. 3d at 60; *see also* Transcript of Prehearing Conference at 29:10-22, *FTC v. Ardagh Group*, 13-CV- 1021 (D.D.C. Sept. 24, 2013) (refusing to consider evidence of a planned divestiture because "the negotiations are [not] far enough along").

B. The Court May Find Partial Divestiture As An Appropriate Remedy

1697. As to issues of remedy for any possible violation, "[t]he key to the whole question of an antitrust remedy is of course the discovery of measures effective measures to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961); *see also Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-30 (1962).

Response to Proposed Conclusion of Law No. 1697

The Proposed Conclusion misstates the law. The benchmark for assessing any remedy is whether it replaces the "competitive intensity lost as a result of the merger." *Aetna*, 240 F. Supp. 3d at 60 (quoting *Sysco*, 113 F. Supp. 3d at 72). The "natural remedy" for a Section 7 violation is to undo the acquisition by divesting the existing business entity. *du Pont* 1961, 366 at 329; *see 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. v. FTC*, 602 F.2d 1317, 1326 n.5 (9th Cir. 1979) (stating that "complete divestiture of all pre-merger assets is the usual remedy for a Section 7 violation").

One of the reasons complete divestiture is appropriate is that it is typically 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 (internal citations omitted); *see also* Fed'l Trade Comm'n, The Evolving Approach to Merger Remedies, 2000 WL 739461, at *18 (May 1, 2000) (stating that "divestiture of an ongoing business is strongly preferred over more limited forms of divestiture"). The divestiture of anything less than an ongoing business presents enhanced risk. *See* The FTC's Merger Remedies 2006-2012 (January 2017) at 11, 32-33 (showing that a divestiture of less than an ongoing business poses enhanced risk and that both acquirer and respondent must be prepared to demonstrate why a more limited asset package is likely to maintain or restore competition).

1698. Because a proposed divestiture is adequate to restore any alleged lost competitive intensity, unwinding the entire Acquisition, or ordering a divestiture of all assets acquired in the Acquisition, is not supportable as a remedy.

Response to Proposed Conclusion of Law No. 1698

The Proposed Conclusion is unclear and an unsupported conclusory argument, not a conclusion of law, misstates the law and is contradicted by a vast amount of record evidence. The Proposed Conclusion is unclear because it does not explain what is meant by "a proposed divestiture." [redacted] The Proposed Conclusion misstates the law to the extent that it implies that "complete divestiture" is "not supportable" as a remedy. On the contrary, "complete divestiture of all premerger assets is the usual remedy for a Section 7 violation." *RSR Corp.*, 602 F.2d at 1326 n.5; *see* Response to RPCL ¶ 1697.

1699. Because the MPK Divestiture would cure any harm claimed by Complaint Counsel, any broader remedy would be punitive and wholly unnecessary to achieve Complaint Counsel's only legitimate objective of restoring competition.

Response to Proposed Conclusion of Law No. 1699

The Proposed Conclusion is unclear and an unsupported conclusory argument, not a conclusion of law, misstates the law and is contradicted by a vast amount of record evidence. The Proposed Conclusion is unclear because it does not explain what is meant by "the MPK Divestiture." [redacted]

[redacted] 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). That is why "[c]omplete divestiture of all premerger assets is the usual remedy for a Section 7 violation." *RSR Corp*, 602 F.2d at 1326 n.5; *see* Response to RPCL ¶ 1697.

1700. Courts frequently approve settlements involving a remedy of less than total divestment. *See, e.g., United States v. US Airways Group*, 38 F. Supp. 3d 69 (D.D.C. 2014) (approving a proposed consent decree resolving a civil antitrust suit against two merging airlines requiring the divestiture of slots, gates, and ground facilities at seven airports); *United States v. SBC Communications, Inc.*, 489 F. Supp. 2d 1, 7 (D.D.C. 2007), (approving proposed settlements of civil antitrust cases against telecommunications companies with fiber optic connections to commercial buildings requiring the defendants to divest indefeasible rights of use for last-mile connections to certain buildings in certain metropolitan areas, along with transport facilities to use them); *United States v. Abitibi-Consolidated, Inc.*, 584 F. Supp. 2d 162, 164 (D.D.C. 2008) (approving a consent decree resolving an antitrust action involving merging newsprint producers required the merged firm to divest a particular newsprint mill); *United States v. Newpage Holdings, Inc.*, No. 14-cv-2216, 2015 U.S. Dist. LEXIS 175650, at *7 (D.D.C. Dec. 11, 2015) (approving a settlement of a civil enforcement action against two merging producers of certain paper products requiring the divestment of two mills); *United States v. Sinclair Broadcast Group, Inc.*, 74 F. Supp. 3d 468, 473-74 (D.D.C. 2014) (approving settlement of a civil action against two broadcasting corporations requiring divestiture of assets required to operate a particular TV station).

Response to Proposed Conclusion of Law No. 1700

The Proposed Conclusion is incomplete and misstates the law. The proposed Conclusion is incomplete because it omits that Courts regularly order complete divestiture as a remedy in Section 7 cases. *See, e.g., du Pont*, 366 U.S. at 329; *Ford Motor Co.*, 405 U.S. at 573; *RSR Corp.,* 602 F.2d at 1326 n.5; *Polypore*, WL9434806 at *256. The Proposed Conclusion misstates the law because each of the cases Respondent cites involve consent decrees reached between the DOJ and private parties as a result of a negotiated settlement. The courts are merely going through the Tunney Act proceeding, where the proposed Final Judgment need only be "settlements [that] are reasonably adequate remedies for the alleged harms." *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 17 (D.D.C. 2007). The standard is not the same as here, when a full trial on the merits of the transaction has occurred. Instead, both this court and the Supreme Court have declared complete divestiture as "the usual and proper remedy where a violation of Section 7 has been found." *Polypore*, WL9434806 at *256 (citing *du Pont*, 366 U.S. at 329; *Ford Motor Co.*, 405 U.S. at 573).

V. THE FAILING FIRM DEFENSE APPLIES TO THE ACQUISITION AS A COMPLETE DEFENSE TO COMPLAINT COUNSEL'S CLAIMS

1701. The "failing firm" defense has existed as a defense to a Section 7 monopolization action since the Supreme Court's decision in *International Shoe Co. v. FTC*, 280 U.S. 291, 299-303 (1930); *see also, e.g., United States v. Black & Decker Mfg. Co.,* 430 F. Supp. 729, 776 (D. Md. 1976) (citing *International Shoe*). The defense "was preserved by explicit references in the legislative history of the modern amendments to § 7." *General Dynamics*, 415 U.S. at 506; *see also California v. Sutter Health Sys.*, 84 F. Supp. 2d 1057, 1081-83 (N.D. Cal. 2000).

Response to Proposed Conclusion of Law No. 1701

The Proposed Conclusion is unclear because it does not explain what is meant by a "Section 7 monopolization action."

1702. Thus, it is a complete defense to a Section 7 claim that the acquired entity is "a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure." *International Shoe*, 280 U.S. at 777.

Response to Proposed Conclusion of Law No. 1702

The Proposed Conclusion is incomplete misstates the law. The "failing company defense" requires that the allegedly failing company have "resources so depleted" and "the prospect of rehabilitation so remote that it faced the grave probability of a business failure," but also that there be "no other prospective purchaser," *International Shoe Co. v. FTC*, 280 U.S. 291, 302 (1930), and that "the prospects of reorganization . . . be dim or nonexistent." *United States v. Citizen Publishing Co., Inc.*, 394 U.S. 131, 138 (1969). Further, "[t]he burden of proving that the conditions of the failing company doctrine have been satisfied is on those who seek refuge under it." *Id.* at 138-39.

1703. Numerous courts have held that acquired firms were "failing" under the failing firm defense. *See, e.g., Reilly v. Hearst Corp.*, 107 F. Supp. 2d 1192, 1203-05 (N.D. Cal. 2000); *California v. Sutter Health Sys.*, 84 F. Supp. 2d 1057, 1081-83 (N.D. Cal. 2000); *FTC v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 96-98 (N.D. Ill. 1981); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 778-81 (D. Md. 1976); *In re SKF Indus.*, 94 F.T.C. 6, 1979 F.T.C. LEXIS 292, at *77-85 (F.T.C. 1976); *United States v. M.P.M. Inc.*, 397 F. Supp. 78, 98-101 (D. Colo. 1975); *United States v. Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 799, 808 (D.D.C. 1958).

Response to Proposed Conclusion of Law No. 1703

The Proposed Conclusion is incomplete and misleading. In actuality, the failing company "doctrine is 'narrow in scope,' [and] it 'rarely succeeds.'" *United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 444 (D. Del. 2017) (internal citations omitted)).

1704. The failing firm defense is also recognized in the most recent version of Section 11 of the Merger Guidelines, which state that the failing firm defense applies in cases where Respondent establishes 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." S*ee also Dr. Pepper / Seven-Up Cos. v. FTC*, 991 F.2d 859, 864-65 (D.C. Cir. 1993).

Response to Proposed Conclusion of Law No. 1704

Complaint Counsel has no specific response.

1705. The Acquisition satisfies each element of the failing firm defense as articulated in the Merger Guidelines and applicable law.

Response to Proposed Conclusion of Law No. 1705

The Proposed Conclusion is an unsupported and improper conclusory argument, not a conclusion of law, is a misstatement of the law and is contradicted by a vast amount of record evidence. The failing company is "narrow in scope," *Citizen Publishing*, 394 U.S. at 139, and "has strict limits." *Warner Commc'ns*, 742 F.2d at 1164. "The 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. The Proposed Conclusion is contradicted by a vast amount of record evidence. Respondent has not shown that Freedom was facing imminent failure or liquidation. *See* Response to RPCL ¶ 1706. Respondent has not shown that Freedom could not have been successfully reorganized. *See* Response to RPCL ¶ 1708. And Respondent has not shown that it tried and failed to seek alternative offers above the liquidation value of Freedom. *See* Response to RPCL ¶ 1710.

1706. **First**, the evidence establishes that, but for the Acquisition, Freedom would have been unable to meet its financial obligations in the near future. Freedom had long suffered serious management and financial difficulties and new management was unable to turn it around. (FOF ¶¶ 1291-1448).

Response to Proposed Conclusion of Law No. 1706

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, and is contradicted by record evidence. Respondent has not demonstrated that Freedom would have been liquidated but for the Merger. *See* Responses to RPFF ¶¶ 1291-1448.

1707. Freedom had significant and rapidly maturing debt with no way to repay it. (FOF ¶¶ 1369-1413); *United States v. Black & Decker Mfg. Co.,* 430 F. Supp. 729, 781 (D. Md. 1976) (indicia of a failing firm include that its "assets were pledged as collateral for debt, the company was seriously in default of its Bank obligations, its trade debts were severely past due, and new sources of capital were non-existent.").

Response to Proposed Conclusion of Law No. 1707

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, and is contradicted by record evidence. Respondent has not demonstrated that Freedom would have been liquidated but for the Merger. *See* Responses to RPFF ¶¶ 1291-1448.

1708. **Second**, Freedom would not have been able to successfully reorganize under Chapter 11 of the Bankruptcy Act because it lacked the resources to successfully emerge from that process. (FOF ¶¶ 1521-1528).

Response to Proposed Conclusion of Law No. 1708

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, and is contradicted by record evidence. Freedom's financial difficulties were a result of corporate debt, making it a prime candidate for reorganization under Chapter 11. *See* CCFF ¶¶ 2061-2071.

1709. Further, "[t]he weight of authority suggests that dim prospects for bankruptcy reorganization are not essential to successful assertion of the failing company defense." *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 778 (D. Md. 1976).

Response to Proposed Conclusion of Law No. 1709

The Proposed Conclusion misstates the law. The Supreme Court has clearly held that to qualify for the failing company defense, defendant must prove that the "the prospects of reorganization . . . be dim or nonexistent." *Citizen Publishing Co., Inc.*, 394 U.S. at 138; accord *Merger Guidelines* § 11.

1710. **Third**, Freedom exhausted good faith efforts to obtain reasonable alternatives to the Acquisition. (FOF ¶¶ 1449-1505).

Response to Proposed Conclusion of Law No. 1710

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, and is contradicted by record evidence. Freedom rejected a reasonable formal offer, ignored expressions of interest, and avoided even gauging the interest of smaller firms in the industry. *See* Responses to RPFF ¶¶ 1449-1505; CCFF ¶¶ 2072-2193.

1711. The third prong of the failing firm defense does not impose an obligation to contact every possible financing partner or strategic alternative; only good faith efforts to obtain reasonable alternative offers are required. "The failing firm should not be required to do more than make a canvass sufficient to indicate that further efforts would be unlikely to bear fruit." IV Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 954d (4th ed. 2016).

Response to Proposed Conclusion of Law No. 1711

The Proposed Conclusion is unclear and misstates the law. The Proposed Conclusion is unclear in that it does not explain what is meant by "every possible" alternative. The Proposed Conclusion misstates the law to the extent that it implies that limited searches for alternatives like the one that Respondent conducted can meet the requirements of the failing company defense. To qualify for immunity under the failing company defense, a firm must demonstrate that "that there was no other prospective purchaser for it." *United States v. Greater Buffalo Press, Inc*., 402 U.S. 549, 555 (1971). Respondent can demonstrate that there was no other prospective purchaser by showing that it had made "good faith efforts to elicit reasonable alternative offers . . . that would both keep it in the market and pose a less severe danger to competition." *Energy Sols. Inc.*, 265 F. Supp. 3d at 445 (internal citations omitted). 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. Inc.*, 265 F. Supp. 3d at 446 (citing H*orizontal Merger Guidelines* § 11 n. 16). To qualify as a "good-faith effort," Respondent, at a minimum, 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); *FTC v. Harbour Grp. Invs., L.P.,* 1990 U.S. Dist. LEXIS 15542, *19-20, 1990-2 Trade Cas. ¶69,247 (D.D.C. 1990) (requiring failing business to contact companies in its own industry to successfully invoke failing firm defense). Where, as here, Freedom rejected a reasonable formal offer, ignored expressions of interest, and avoided even gauging the interest of smaller firms in the industry, its search does not qualify as a "reasonable, good-faith effort" to seek less anticompetitive alternatives. Areeda & Hovenkamp, ¶ 954d1; *see* Responses to RPFF ¶¶ 1449-1505.

1712. In addition, "the law has some obligation to waive its preference for an alternative purchaser where necessary to protect the failing firm against 'unreasonably' low offers." Areeda & Hovenkamp ¶ 954d. An offer that is too low raises questions about whether the acquirer intends to keep the purchased assets in the market. For that reason, in the context of determining whether a divestiture is an appropriate remedy, the government "will not approve a purchaser if the purchase price clearly indicates that the purchaser is unable or unwilling to compete in the relevant market. A purchase price that is 'too low' may suggest that the purchaser does not intend to keep the assets in the market." U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* at 30-31 (June 2011).

Response to Proposed Conclusion of Law No. 1712

The proposed conclusion is misstates the law. A "reasonable alternative offer" is one that is above the liquidation value of the company, even if it is below what the company believes is the fair value." *Energy Sols. Inc.*, 265 F. Supp. 3d at 446; accord, *Merger Guidelines* § 11, n. 6; Areeda & Hovenkamp ¶ 954e. The fact that a "too low" purchase price of divested assets may suggest a deeper issue with a proposed divestiture is irrelevant to the question of whether the offer meets the "strict limits" of the failing company defense.

1713. "A 'preferred purchaser' is an acquirer (1) who would remain in the market; and (2) whose acquisition would be lawful a) even if the acquired firm were not failing, or b) simply on proof that [failure was impending]." Areeda & Hovenkamp ¶ 954c (emphasis added). "A 'preferred purchaser' should be significantly more attractive from a competitive standpoint than the proposed acquirer. Slight differences would not justify intervention even if the offers seemed comparable and private interests are equally well served; determining comparability would raise difficult judgmental questions that should be avoided if at all

possible." *Id.* "As a basic premise, [an] alternative acquirer should be deemed preferable only when its market share is substantially less than that of other acquirers, including the proposed acquirer." *Id*. ¶ 954c3.

Response to Proposed Conclusion of Law No. 1713

The proposed conclusion misstates the law. The Supreme Court has required that to meet the strict criteria of the failing company, a firm must demonstrate that there is "no other prospective purchaser." *Greater Buffalo Press*, 402 U.S. at 555. That is, Respondent must show that no other prospective purchaser "would both keep it in the market and pose a less severe danger to competition." *Energy Sols. Inc.*, 265 F. Supp. 3d at 445 (citations omitted).

1714. Freedom's efforts to attract refinancing partners and its formal sale process were appropriate and robust. (FOF ¶¶ 1449-1505).

Response to Proposed Conclusion of Law No. 1714

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, and is contradicted by record evidence. Freedom rejected a reasonable formal offer, ignored expressions of interest, and avoided even gauging the interest of smaller firms in the industry. *See* Responses to RPFF ¶¶ 1449-1505.

1715. Össur's non-binding indication of interest was not a reasonable alternative offer because (i) Össur's indication of interest does not qualify as an "offer"; (ii) Össur was not serious about closing an acquisition of Freedom; (iii) [redacted]; and (iv) an Össur acquisition does not pose a less severe danger to competition than the Acquisition by Ottobock, because an Össur acquisition would have been presumed to be likely to enhance market power not only in a market for MPKs, but also in a market for feet. (FOF ¶¶ 1490-1505).

Response to Proposed Conclusion of Law No. 1715

The Proposed Conclusion is an improper conclusory argument, not a conclusion of law, is unclear, misstates the law, and is contradicted by record evidence. The Proposed Conclusion is unclear to the extent that it does not explain what is meant by an "offer." The Proposed

Conclusion misstates the law to the extent that it implies that that an alternative purchaser must make a formal offer to qualify as a "reasonable alternative." On the contrary, it is Respondent's burden to prove that its search was "exhaustive," *Olin Corp. v. FTC*, 986 F.2d 1295, 1307 (9th Cir. 1993), which it clearly cannot do when it rejects an actual expression of interest from an alternative purchaser. The Proposed Conclusion is contradicted by record evidence to the extent that it states that Össur was not a reasonable, less anticompetitive alternative to Otto Bock. Respondent has not demonstrated that Össur's substantial bid was below liquidation, could not be closed quickly, or poses a more significant risk to competition. *See* Responses to RPFF ¶¶ 1490-1505.

CERTIFICATE OF SERVICE

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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*