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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of

Otto Bock HealthCare North America, Inc.,
a corporation.

Docket No. 9378

REDACTED PUBLIC VERSION

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Respondent Otto Bock HealthCare North America, Inc., ("Respondent Otto Bock") acquired FIH Group Holdings, LLC ("Freedom Innovations" or "Freedom"), in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I.

NATURE OF THE CASE

1. Respondent Otto Bock is the leading manufacturer and supplier of microprocessor prosthetic knees in the United States. On September 22, 2017, Respondent Otto Bock acquired Freedom Innovations, its closest competitor in the market for microprocessor prosthetic knees (the "Merger"). The Merger eliminated direct and substantial competition between Respondent Otto Bock and its most significant and disruptive competitor, further entrenching Respondent Otto Bock's position as the dominant supplier of microprocessor prosthetic knees.

2. Head-to-head competition between Otto Bock's C-Leg and Freedom's Plié microprocessor prosthetic knees has resulted in substantially lower prices to prosthetic clinics for microprocessor prosthetic knees, and has provided amputees with significant improvements in the microprocessor prosthetic knees they use.

3. Prosthetic legs are used by individuals who have had a transfemoral, or above-knee, amputation. Amputation is possible in any age group, but the prevalence is highest among people sixty-five years and older. Approximately 70 percent of above-knee amputations are required due to diseases, like vascular complications or cancer, and 20 percent are due to trauma, as is the case with amputations resulting from combat injuries to soldiers.

4. Respondent Otto Bock views Freedom as a direct and serious competitive threat. From Otto Bock's perspective, [redacted]

5. Freedom has provoked a vigorous battle with Respondent Otto Bock to win microprocessor prosthetic knee customers by employing a [redacted] offering various discounting promotions, and regularly launching product upgrades. For example, Freedom launched the Plié 3 in 2014, and according to its CEO the Plié 3 became the [redacted] and gained significant market share. In July 2015, "Otto Bock introduced the C-leg 4 [redacted] and took significant business away from the Plié 3. In response, Freedom quickly launched marketing initiatives specifically [redacted] and successfully won back significant business from Otto Bock.

6. Competition between Respondent Otto Bock and Freedom was poised to increase in the near future. Part of Freedom's competitive response to the success of the C-leg 4 was to develop a next-generation microprocessor prosthetic knee, named [redacted], which it planned to launch in [redacted]. Freedom's Board of Directors expected that [redacted] would be [redacted] and Freedom's former CEO called [redacted] a [redacted] Customers who have tested [redacted] are enthusiastic about its features and anticipated price point. Freedom planned to pitch [redacted] as a better product, for a lower price, than Otto Bock's C-Leg 4. Freedom expected Otto Bock to quickly complete development of a fifth generation of C-Leg, with which the [redacted] would compete directly.

7. Respondent Otto Bock learned about the [redacted] during its due diligence before the Merger, repeatedly referred to it as a [redacted] to the market-leading C-Leg 4. Otto Bock viewed the Freedom acquisition a [redacted]

8. Competition between Respondent Otto Bock and Freedom has provided substantial benefits to amputees in the United States. The two companies have each responded to the other's introduction of new models of microprocessor prosthetic knees with improved features and functions of their own that have increased the safety, health, and quality of life for amputees. The intense competition between Respondent Otto Bock and Freedom also has resulted in significantly lower prices for microprocessor prosthetic knees purchased by prosthetic clinics, which fit amputees with microprocessor prosthetic knees.

The savings generated by that competition have allowed prosthetic clinics to offer amputees better care and service. These competitive benefits likely would have increased with the impending launch of the [redacted].

9. With the Merger, Otto Bock's share of the U.S. market for microprocessor prosthetic knees exceeds [redacted]. 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").

10. New entry or expansion by other manufacturers of microprocessor prosthetic knees is not likely to be timely or sufficient to offset the anticompetitive effects of the Merger. It routinely takes firms in excess of two years just to develop a microprocessor prosthetic knee even when they are building on their own existing microprocessor prosthetic knee technology. For example, Freedom spent [redacted] developing its next-generation microprocessor prosthetic knee and was [redacted] from introducing it at the time of the Merger. For potential entrants with no prior experience in the market, developing a competitive microprocessor prosthetic knee likely would take significantly longer.

11. The Merger will not result in merger-specific efficiencies sufficient to outweigh the competitive harm caused by the Merger.

II.

BACKGROUND

A.

Jurisdiction

12. Respondent, and each of its relevant operating entities and parent entities are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

13. The Merger constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

B.

Respondent

14. Respondent Otto Bock is a Minnesota corporation, with its U.S. headquarters in Austin, Texas. Otto Bock's parent company, Otto Bock HealthCare GmbH, is headquartered in Duderstadt, Germany. Respondent Otto Bock is a leading global provider of upper and lower limb prosthetics, orthotics, mobility solutions, and medical care. Respondent Otto Bock currently markets the C-Leg 4 microprocessor prosthetic knee, as well as other prosthetic knees, ankles, and feet. The company was founded in 1919, has over 7,000 employees worldwide, and operates in fifty countries.

15. Freedom, now owned by Respondent Otto Bock, was founded in 2002. Prior to the Merger, Freedom had been privately owned and headquartered in Irvine, California, and specialized in the manufacture and sale of lower limb prosthetics. Among the many prosthetic knee, ankle, foot, and related products it sold were the Plié 3 microprocessor prosthetic knee and the Kinnex microprocessor prosthetic foot. Pre-Merger, Freedom designed and manufactured prosthetic products at facilities in California and Utah and employed approximately 150 people. Health Evolution Partners Fund I (AIV I), LP ("Health Evolution Partners"), a private equity firm, was the majority shareholder of Freedom at the time of the Merger.

C.

The Merger

16. Pursuant to an Agreement and Plan of Merger ("Merger Agreement"), Respondent Otto Bock acquired Freedom from Health Evolution Partners for [redacted] on September 22, 2017. Respondent Otto Bock and Health Evolution Partners simultaneously signed the Merger Agreement and consummated the Merger.

III.

THE RELEVANT MARKET

17. The relevant market in which to analyze the effects of the Merger is no broader than the manufacture and sale of microprocessor prosthetic knees to prosthetic clinics in the United States.

A.

Relevant Product Market

18. Prosthetists fit amputees with two general types of prosthetic knees: prosthetic knees with microprocessors, and prosthetic knees that do not have microprocessors. Microprocessor prosthetic knees sense variations in walking rhythm and ground conditions and make thousands of adjustments per second to the stiffness and positioning of the joint using complex algorithms to create a stable platform for amputees. "Mechanical knees," or "non-microprocessor knees," do not have microprocessors and thus do not make such adjustments.

19. The most significant difference between microprocessor and mechanical prosthetic knees is that, for certain types of amputees, microprocessor prosthetic knees reduce the likelihood of falls that can occur if the knee is in the wrong position. Because they do not sense and adjust, mechanical prosthetic knees are less responsive than microprocessor prosthetic knees to sudden movements, and, hence, lead to a greater risk of falling. Microprocessor prosthetic knees also have other benefits, such as reducing pain in other parts of the body and promoting the health and function of the sound limb. The health, safety, and comfort advantages of microprocessor prosthetic knees over mechanical prosthetic knees have been demonstrated in numerous clinical studies.

20. Prosthetists and physicians determine whether to prescribe and fit a microprocessor prosthetic knee or a mechanical knee for an amputee based on the amputee's physical condition and expected mobility and the likelihood that insurance will cover the prescribed prosthetic.

21. The K-Level rating system—developed by Medicare and used throughout the prosthetics industry—classifies amputees into five ascending mobility levels, K-0 to K-4. A K-0 amputee is generally non-ambulatory. K-1 amputees are "household ambulators" who have the ability or potential to walk at a fixed cadence and slow speed and to traverse flat surfaces. K-2 amputees are "limited community ambulators" who can walk at fixed cadences and slow speeds and traverse low-level environmental barriers, like curbs. K-3 amputees are "unrestricted community ambulators" who have the ability or potential to walk with variable cadences and traverse most environmental barriers. K-4 amputees are considered "highly active" ambulators who have the ability or potential to engage in activities requiring high levels of impact or stress, such as running or hiking.

22. Under the common standards of practice, physicians and prosthetists typically prescribe microprocessor prosthetic knees only for amputees with K-3 and K-4 mobility levels because amputees with this level of activity significantly benefit from the increased safety and stability of microprocessor prosthetic knees.

23. The L-Code system, created by Medicare and followed by most private insurers, establishes the reimbursement clinics receive for prosthetics, including microprocessor prosthetic knees and mechanical prosthetic knees. The Centers for Medicare & Medicaid Services ("CMS"), as well as most private insurers, generally only provide reimbursement for microprocessor prosthetic knees for K3 and K4 amputees. K2 amputees generally can only receive reimbursement for mechanical knees.

24. Respondent Otto Bock, Freedom, and other microprocessor prosthetic knee manufacturers target K3 and K4 amputees to use their microprocessor prosthetic knee products. K2 amputees—who cannot generally be fitted with microprocessor prosthetic knees—are targeted by manufacturers of mechanical knees, which, as the former CEO of Freedom explained, are [redacted]

25. Once a prosthetist has determined that a microprocessor prosthetic knee is medically optimal for an amputee, typically with K3 or K4 mobility, the prosthetic clinic submits a claim for reimbursement to the amputee's insurance. Prosthetics with similar characteristics and functions generally have the same L-Codes and reimbursement amounts. Because of their differing features and functionality, the L-Code system distinguishes between microprocessor prosthetic knees and mechanical prosthetic knees. Prosthetic clinics typically receive approximately $25,000 in reimbursement for microprocessor prosthetic knees, whereas clinics generally receive reimbursement of only up to $10,000 for mechanical prosthetic knees.

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.

27. Microprocessor prosthetic knee manufacturers, including Respondent Otto Bock and Freedom, regularly offer lower prices to prosthetic clinic customers to compete against other microprocessor prosthetic knee products. Periodically, they also offer discounts, inducements, and other promotions to increase sales. Manufacturers constantly work to improve their products and frequently launch upgraded microprocessor prosthetic knees to make their offerings more attractive than competing products to amputees and their prosthetists.

28. Mechanical knees are not a substitute for microprocessor prosthetic knees for prosthetists seeking to fit certain K3 and K4 amputees with medically appropriate knees because mechanical knees are mechanically and functionally quite different. Mechanical knees provide less responsiveness and stability than microprocessor prosthetic knees for certain amputees, and they are less effective at reducing pain. That microprocessor and mechanical prosthetic knees do not compete is also evidenced by their completely different price points: microprocessor prosthetic knees cost two to three-times more than mechanical knees. Consequently, reimbursement is substantially more for microprocessor prosthetic knees than for mechanical knees.

29. In negotiations with prosthetic clinic customers, manufacturers of microprocessor prosthetic knees do not respond to changes in prices of mechanical knees or other products—they focus on setting attractive prices relative to other microprocessor prosthetic knees. The many advancements in microprocessor prosthetic knee technology that have occurred in recent years have been driven by responses to innovations by rival microprocessor prosthetic knee competitors, not developments in the mechanical knee market. The rivalry between the microprocessor prosthetic knee businesses of Respondent Otto Bock and Freedom (not competition from other types of products) has resulted in several new microprocessor prosthetic knee advancements and aggressive price competition that has benefitted prosthetists and amputees. Internal analyses of Otto Bock and Freedom demonstrate microprocessor and mechanical prosthetic knees are in separate markets.

30. The appropriate product market in which to analyze the effects of the Merger is the one for which a hypothetical monopolist could profitably impose a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market. A hypothetical monopolist of microprocessor prosthetic knees could profitably impose a SSNIP on prosthetic clinic customers because they would not likely switch to mechanical knees or other products to avoid paying higher prices.

B.

Relevant Geographic Market

31. The United States is the relevant geographic market in which to assess the competitive effects of the Merger.

32. Prosthetic manufacturers must have U.S. sales representatives and support capabilities to provide their prosthetic clinic customers assistance with fitting, service, and repair of microprocessor prosthetic knees. Sales representatives also typically visit prosthetists to demonstrate products, provide educational materials, and develop relationships that are important to driving sales of microprocessor prosthetic knee products. Manufacturers must also have an established and strong reputation among U.S. customers for producing high-quality microprocessor prosthetic knees to compete effectively. Because of these considerations, the options of U.S. customers are limited to microprocessor prosthetic knee manufacturers with a U.S. presence and strong reputations in this country.

33. Otto Bock's internal strategy documents, as well as those of Freedom, refer to a "U.S." market for microprocessor prosthetic knees.

34. A hypothetical monopolist of all microprocessor prosthetic knees sold in the United States could profitably impose a SSNIP on U.S. prosthetic clinic customers because those customers could not turn to suppliers outside the United States to avoid paying higher prices.

IV.

MARKET STRUCTURE AND THE MERGER'S PRESUMPTIVE ILLEGALITY

35. Before it acquired Freedom, Respondent Otto Bock was already the dominant manufacturer of microprocessor prosthetic knees for sale in the United States, with a market share of approximately [redacted] percent. Freedom was one of the top three manufacturers of microprocessor prosthetic knees for sale in the United States, with an approximate market share of [redacted] percent. Freedom's Plié 3 was the microprocessor prosthetic knee that competed most closely with Otto Bock's market-leading C-Leg 4. Post-Merger, Otto Bock's share of the microprocessor prosthetic knee market increased to approximately [redacted] percent. Össur Americas, Inc. ("Össur") and Endolite USA ("Endolite") also manufacture microprocessor prosthetic knees for sale in the United States. Össur's approximate market share is [redacted] percent. Endolite's market share is just [redacted] percent. Fringe competitors Nabtesco and DAW each make up less than [redacted] percent of the market.

36. The Merger Guidelines and courts measure concentration using the Herfindahl-Hirschman Index ("HHI"). HHI levels are calculated by totaling the squares of the market shares of each firm in the relevant market. A relevant market is "highly concentrated" if it has an HHI level of 2,500 or more. A merger is presumed likely to create or enhance market power—and is presumptively illegal—when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

37. Post-Merger market concentration, and the change in concentration caused by the Merger, exceed, by a wide margin, the thresholds established in the Merger Guidelines. Pre-Merger, the market for microprocessor prosthetic knees in the United States was highly concentrated, with an approximate HHI of [redacted]. The Merger increased the HHI of the microprocessor prosthetic knee market in the United States by approximately [redacted]. Post-Merger, the HHI of the microprocessor prosthetic knee market in the United States is [redacted].

38. The Merger is presumptively unlawful under the Merger Guidelines and relevant case law.

V.

ANTICOMPETITIVE EFFECTS

39. The Merger eliminated significant and close competition between Respondent Otto Bock and Freedom in the U.S. market for microprocessor prosthetic knees, harming consumers substantially. Prior to the Merger, Respondent Otto Bock and Freedom engaged in vigorous, sustained price and innovation competition to the benefit of prosthetic clinics and amputees.

40. Manufacturers of lower-limb prosthetic components compete to win the business of prosthetic clinic customers. Prosthetists select and purchase microprocessor prosthetic knees and other components from manufacturers and provide them to their amputee patients. Under Medicare's L-Code system, prosthetic clinics are reimbursed similar amounts for most microprocessor prosthetic knees, regardless of the manufacturer.

41. Competition between manufacturers of microprocessor prosthetic knees to win the business of prosthetic clinics results in cost savings and other benefits. Microprocessor prosthetic knees manufactured by Otto Bock and Freedom are the first and second choices for many prosthetic clinic customers.

42. Manufacturers of microprocessor prosthetic knees compete to win the business of prosthetic clinics by improving their products. Competition between Otto Bock and Freedom has led to advancements in microprocessor prosthetic knees. Freedom and Respondent Otto Bock both have responded to the other's innovations in product features and functionality of their microprocessor prosthetic knees. These innovations have had a direct impact on the health and welfare of amputees, who rely on these prosthetics for their mobility and quality of life.

43. Otto Bock introduced C-Leg in the United States in 1999. C-Leg was the first microprocessor prosthetic knee on the market. Since its introduction, Otto Bock has been the market leader in terms of sales.

44. Since it launched the Plié microprocessor prosthetic knee in 2008, Freedom's strategy has been to offer customers a similar, but lower-priced, alternative to Otto Bock's microprocessor prosthetic knees. Freedom introduced the Plié 3, its third-generation microprocessor prosthetic knee, in 2014. For that product, Freedom adopted a [redacted] strategy, setting the average sales price of the Plié 3 lower than Otto Bock's C-Leg 3. Additionally, the Plié 3 offered innovative new features over Otto Bock's (and others') microprocessor prosthetic knees, including water resistance. According to Freedom's CEO, when Freedom launched the Plié 3, it set the industry standard for microprocessor prosthetic knees.

45. When Freedom introduced Plié 3 in 2014, customers shifted purchases from Otto Bock's C-Leg to the Plié because the Plié offered similar or better functions at a discounted price. Competition between Respondent Otto Bock and Freedom has resulted in lower

prices for microprocessor prosthetic knees. Prosthetists have been able to increase the amount and quality of the services they offer to their patients using the savings that competition between the Plié and C-Leg have generated.

46. In response to the launch of the Plié 3, Otto Bock developed its next-generation microprocessor prosthetic knee—the C-Leg 4—in order to [redacted] When Otto Bock designed the C-Leg 4, it specifically included [redacted] At the same time, Otto Bock engaged in marketing efforts targeted at medical directors of CMS and private insurers, [redacted]

47. When Otto Bock introduced the C-Leg 4 in mid-2015, it had an immediate and significant impact on Freedom's Plié 3 sales. That impact was significant enough that Freedom discussed it with both its Board of Directors and its creditors.

48. Freedom responded to the introduction of the C-Leg 4 by engaging in increased sales and marketing efforts, offering discounts and promotions, and making quality improvements to the Plié 3. For example, in its marketing materials for the Plié 3, Freedom touted key benefits of the Plié 3 over the C-Leg 4, and analyzed "Ottobock Claims vs Reality." In November 2015, Freedom reported that [redacted]

49. In the fall of 2015, Freedom also initiated development of a new microprocessor prosthetic knee branded the [redacted] Internally, Freedom's [redacted] According to Freedom documents, the [redacted] In its [redacted] Freedom only compared [redacted] against Otto Bock's C-Leg 4—not the microprocessor prosthetic knees of any other manufacturer.

50. The [redacted] design ultimately included numerous technological advancements over Otto Bock's C-Leg 4: [redacted] Freedom planned to use a [redacted] against Otto Bock's C-Leg, positioning [redacted] in the market as [redacted] and an [redacted] Freedom planned to use the pricing and marketing strategy it had used successfully in its prior Plié launches, expecting to price [redacted] at a [redacted] per unit discount to the C-Leg 4.

51. While Freedom's engineers worked to develop the [redacted], Respondent Otto Bock and Freedom continued to compete vigorously to secure business from prosthetic clinics for their respective microprocessor prosthetic knees, with sales shifting back and forth as each company made product improvements and offered pricing discounts. For example, when Freedom decreased its Plié 3 price to a large prosthetic clinic in 2016, Freedom's Plié 3 sales increased and Otto Bock's C-Leg 4 sales decreased.

52. Freedom's enthusiasm about the market potential for the [redacted] grew after it performed initial patient test fittings. In April 2017, after [redacted] test fittings of [redacted], Freedom's Board of Directors noted that [redacted] and that [redacted] and concluded that [redacted]

53. By September 2017, [redacted] were complete. According to Freedom's Vice President of R&D, [redacted] was [redacted] and Freedom had [redacted] was [redacted] Freedom's investment banker remarked that [redacted] was [redacted] and Freedom's CEO said that [redacted] was [redacted] Freedom was on pace to begin manufacturing the product for [redacted] in the [redacted], and launch the product in the [redacted]. Freedom believed that the company was [redacted] a long-term period of increased sales through the introduction of the [redacted] microprocessor prosthetic knee.

54. By that time, Otto Bock had conducted due diligence on Freedom, and closely analyzed the [redacted] through that process. Otto Bock concluded that, absent an acquisition of Freedom, [redacted] represented a [redacted] because [redacted] Respondent Otto Bock forecast that C-Leg could lose [redacted] to [redacted] unit sales (roughly [redacted] percent of its 2016 U.S. unit sales) to [redacted] within the first year of its launch. While it was evaluating a potential acquisition of Freedom, Respondent Otto Bock also was working on a product that would improve the performance of the C-Leg 4, called the [redacted] which Otto Bock targeted launching in [redacted].

55. An Otto Bock due diligence report also recognized the ongoing competitive threat posed by Freedom's Plié, stating that:

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

56. Ultimately, Otto Bock decided to acquire Freedom, reasoning that the transaction was justified as a [redacted] since it would give it [redacted] With the acquisition, Respondent Otto Bock believed it [redacted]

57. Respondent Otto Bock's acquisition of Freedom eliminated the competition between them and has already harmed consumers. The harm from the Merger is ongoing. The elimination of an independent Freedom has removed from the market a maverick firm that had competed against Otto Bock (and other suppliers of microprocessor prosthetic knees) by offering low prices and attractive promotions to clinic customers to win sales. Under common ownership, Otto Bock and Freedom sales personnel no longer have an incentive to compete against each other for sales. Every day that passes under the *status quo*, the acquisition deprives prosthetic clinics and amputees of the benefits that competition between Otto Bock and Freedom provided pre-Merger.

58. In addition, Respondent Otto Bock will likely affect ongoing product development programs. Prior to the Merger, Freedom had plans to launch both the Plié 4 and [redacted] microprocessor prosthetic knees [redacted], and Otto Bock planned to launch a fifth generation of its C-Leg product, which would have significantly benefitted customers. Under common ownership and without the incentive to introduce innovations to take and defend sales from each other, Respondent Otto Bock does not have the same incentive to launch these products on the same timeline or in the same form as Otto Bock and Freedom had independently pre-Merger. The [redacted] would likely cannibalize each other's business, as well as sales of the Plié 3 and C-Leg 4. Delays or alterations to these programs may permanently affect the timing and impact of the launch of each product, even if the Court ultimately unwinds the Merger.

VI.

BARRIERS TO ENTRY AND EXPANSION

59. New entry or expansion by existing firms would not be timely, likely, or sufficient to offset the anticompetitive effects of the Merger.

60. Potential entrants in the U.S. market for microprocessor prosthetic knees face significant barriers, including those related to intellectual property, designing and developing a competitive product with the strong reputation required to succeed in the market, and constructing a nationwide network of knowledgeable sales and service representatives to generate and maintain business. Additionally, microprocessor knee manufacturers typically offer a broad portfolio of lower-limb prosthetics, including feet, to compete effectively, and support these products with related research and development and marketing and sales.

61. The process of developing and launching a microprocessor prosthetic knee is expensive and takes at least several years for existing manufacturers, and longer for those without prior experience. Freedom's timeline for the [redacted] project shows that design and development takes approximately three years. It has similarly taken other manufacturers three years or longer to design and develop microprocessor prosthetic knees.

VII.

EFFICIENCIES

62. Respondent Otto Bock cannot show that merger-specific efficiencies would result from the Merger that will offset the anticompetitive effects. Freedom's CEO admitted that, prior to the Merger, he had discussed possible synergies of the Merger with Respondent Otto Bock and that Otto Bock concluded that [redacted] Respondent Otto Bock admits that the only cost savings it expects to achieve come from the consolidation of general and administrative functions. These cost savings are not merger-specific.

VIII.

FAILING FIRM

63. A failing firm defense does not immunize the Merger. Health Evolution Partners did not make good-faith efforts to elicit offers for Freedom or its assets from numerous prosthetic product manufacturers. Health Evolution Partners rejected a reasonable alternative offer, substantially exceeding liquidation value, for Freedom. Furthermore, Freedom was [redacted] on a positive financial trajectory with a promising outlook.

IX.

VIOLATIONS

COUNT I—ILLEGAL AGREEMENT

64. The allegations of Paragraphs 1 through 63 above are incorporated by reference as though fully set forth.

65. The Merger Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II—ILLEGAL ACQUISITION

66. The allegations of Paragraphs 1 through 63 above are incorporated by reference as though fully set forth.

67. The Merger may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondent that the twenty-second day of May, 2018, at 10 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that this administrative proceeding shall be conducted as though the Commission, in an ancillary proceeding, has also filed a complaint in a United States District Court, seeking relief pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), as provided by Commission Rule 3.11(b)(4), 16 CFR 3.11(b)(4). You are also notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after Respondent files its answer. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.2l(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after Respondent files its answer). Rule 3.3l(b) obligates counsel for each party, within five (5) days of receiving the Respondent's answer, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Merger challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant market, with the ability to offer such products as Respondent Otto Bock and Freedom were offering and planning to offer prior to the Merger.

2. A prohibition against any transaction between Respondent Otto Bock and Freedom that combines their businesses in the relevant market, except as may be approved by the Commission.

3. A requirement that, for a period of time, Respondent Otto Bock and Freedom provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating in the relevant market.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the Merger or to restore Freedom as a viable, independent competitor in the relevant market.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this twentieth day of December, 2017.

By the Commission.

Donald S. Clark
Secretary

SEAL: