PUBLIC

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

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

ORIGINAL

RESPONDENT'S REPLY TO COMPLAINT COUNSEL'S POST-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Dated: December 20, 2018

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I. THE PARTIES TO THE ACQUISITION

A. THE ACQUIRING COMPANY

1. Otto Bock HealthCare North America

1. Otto Bock is a "Minnesota corporation, with its U.S. headquarters in Austin, Texas." (PX07049 at 008 (¶ 14) (Otto Bock Amended Answer); JX001 at 001 (¶5); PX05010 (Schneider (Otto Bock) IHT at 36)). Otto Bock moved its U.S. headquarters in 2014 from Minneapolis, Minnesota to Austin, Texas. (PX05010 (Schneider (Otto Bock) IHT at 36)).

Response to Finding No. 1:

"Otto Bock" is not defined. To the extent this proposed Finding refers to Respondent, Otto Bock HealthCare North America, Inc., Respondent has no specific response.

2. Otto Bock has locations in Austin, Texas; Salt Lake City, Utah; Louisville, Kentucky; Sacramento, California; and Southern California. (PX05010 (Schneider (Otto Bock) IHT at 31-32)).

Response to Finding No. 2:

Respondent has no specific response.

3. Otto Bock has approximately 600 employees in the United States. (PX05010 (Schneider (Otto Bock) IHT at 35-36)).

Response to Finding No. 3:

Respondent has no specific response.

4. Otto Bock provides "upper and lower limb prosthetics, orthotics, mobility solutions, and medical-related services to customers" in the United States and around the world. (PX07049 at 008 (¶ 14) (Otto Bock Amended Answer)). Its lower-limb prosthetics include mechanical knees and MPKs. (Solorio (Otto Bock) Tr. 1632, 1637).

Response to Finding No. 4:

Respondent has no specific response.

5. [redacted] (Asar (Hanger) Tr. 1385-1387 (*in camera*)).

Response to Finding No. 5:

Respondent has no specific response.

6. Otto Bock launched its C-Leg 4 MPK in the United States in 2015. (JX001 at 003 (¶ 36)). Today, Otto Bock sells the C-Leg 4 in the United States. (JX001 at 003 (¶ 34)).

Response to Finding No. 6:

Respondent has no specific response.

7. Otto Bock is the leading manufacturer and supplier of microprocessor prosthetic knees in the United States. [redacted] (*See* CCFF ¶ 964, below (*in camera*) (U.S. MPK market share estimated by Complaint Counsel's expert economist, Dr. Fiona Scott Morton); *see also* CCFF ¶¶ 967-980, below (*in camera*) (Respondent's ordinary course share estimates)).

Response to Finding No. 7:

Complaint Counsel's proposed finding is inaccurate and should not be adopted by the Court because Respondent's share estimates are based on assumptions, and incomplete and outdated information, and should be afforded no weight whatsoever when superior information about actual unit sales is available to make such market calculations.

8. In 2016, Matthew Swiggum became regional president and CEO of Otto Bock. (Swiggum (Otto Bock) Tr. 3310).

Response to Finding No. 8:

Respondent has no specific response.

9. Mr. Swiggum served as regional president and CEO of Otto Bock at the time of the Merger and was personally involved in meetings regarding the integration of Freedom after it was acquired by Otto Bock. (Swiggum (Otto Bock) Tr. 3309-10).

Response to Finding No. 9:

Complaint Counsel's proposed finding is misleading. Matt Swiggum, whose employment was terminated in early 2018, was regional president and CEO at Respondent at the time of the Merger. But he played "very little" role in the due diligence and decision to acquire Freedom. (RFOF ¶ 956 (citing Schneider, Tr. 4408)).[1] He had only two or three comments during due diligence—Schneider authored the diligence report, and Swiggum just put his name on it. (RFOF ¶ 956 (citing Schneider, Tr. 4408)). [redacted]

10. After Matthew Swiggum left the company, Brad Ruhl "was elevated to the top position" of Otto Bock. (Schneider (Otto Bock) Tr. 4762). Today, Brad Ruhl is the managing director of Otto Bock North America. (Kannenberg (Otto Bock) Tr. 1925).

Response to Finding No. 10:

Respondent has no specific response other than to state that Mr. Swiggum's employment was terminated..

[1] Citations to the parties respective Post-Trial Briefs and Proposed Findings of Fact are as follows: (i) Respondent's Post-Trial Brief ("R. Br."); (ii) Respondent's Proposed Findings of Fact ("RFOF"); (iii) Complaint Counsel's Post-Trial Brief ("C.C. Br."); (iv) Complaint Counsel's Proposed Findings of Fact ("CCFF"); and (v) Respondent's Responses to Complaint Counsel's Proposed Findings of Fact ("Response to CCFF").

2. The Parent Company of Otto Bock HealthCare North America

a) Otto Bock HealthCare GmbH

11. Otto Bock's parent company, Otto Bock HealthCare GmbH, was founded in 1919. (PX07049 at 008 (¶ 14) (Otto Bock Amended Answer)). It is headquartered in Duderstadt, Germany. (PX07049 at 008 (¶ 14) (Otto Bock Amended Answer)).

Response to Finding No. 11:

Complaint Counsel's proposed finding is inaccurate. Respondent is a subsidiary of Otto Bock Healthcare SE & Co. KGaA. (RFOF ¶ 1 (citing PX05155 (Ehrich, Dep. at 60))). Otto Bock HealthCare GmbH was Respondent's parent company at the time of the merger. Complaint Counsel appears to recognize this in CCFF ¶¶ 18-19, duplicated below. Otherwise, Respondent has no specific response.

12. Otto Bock HealthCare GmbH has over 7,000 employees worldwide and operates in 50 countries. (PX07049 at 008 (¶ 14) (Otto Bock Amended Answer)).

Response to Finding No. 12:

Complaint Counsel's proposed finding is inaccurate. Respondent is a subsidiary of Otto Bock Healthcare SE & Co. KGaA. (RFOF ¶ 1 (citing PX05155 (Ehrich, Dep. at 60))). Otto Bock HealthCare GmbH was Respondent's parent company at the time of the merger. Complaint Counsel appears to recognize this in CCFF ¶¶ 18-19, duplicated below. Otherwise, Respondent has no specific response.

13. Otto Bock GmbH has overarching managerial responsibility over Otto Bock. (PX05101 (Schneider (Otto Bock) Dep. at 13-14, 20-21)). [redacted] (PX05101 (Schneider (Otto Bock) Dep. at 33-34 (*in camera*))).

Response to Finding No. 13:

Complaint Counsel's proposed finding is inaccurate. Respondent is a subsidiary of Otto Bock Healthcare SE & Co. KGaA. (RFOF ¶ 1 (citing PX05155 (Ehrich, Dep. at 60))). Otto Bock HealthCare GmbH was Respondent's parent company at the time of the merger. Complaint Counsel appears to recognize this in CCFF ¶¶ 18-19, duplicated below. Otherwise, Respondent has no specific response.

14. Otto Bock employees report to executives at Otto Bock HealthCare GmbH. For example, Matthew Swiggum, former head of Otto Bock HealthCare North America, reported to Ralf Stuch, head of Global Sales and Marketing at Otto Bock HealthCare GmbH. (PX05101 (Schneider (Otto Bock) Dep. at 108)). Likewise, the CFO of Otto Bock HealthCare North America reports to the CFO of Otto Bock HealthCare GmbH. (PX05101 (Schneider (Otto Bock) Dep. at 108)).

Response to Finding No. 14:

Complaint Counsel's proposed finding is inaccurate. Respondent is a subsidiary of Otto Bock Healthcare SE & Co. KGaA. (RFOF ¶ 1 (citing PX05155 (Ehrich, Dep. at 60))). Otto Bock HealthCare GmbH was Respondent's parent company at the time of the merger. Complaint Counsel appears to recognize this in CCFF ¶¶ 18-19, duplicated below. Otherwise, Respondent has no specific response.

15. [redacted] (PX05101 (Schneider (Otto Bock) Dep. at 22-23 (*in camera*))). [redacted] (PX05101 (Schneider, Dep. at 21 (*in camera*))).

Response to Finding No. 15:

Complaint Counsel's proposed finding is inaccurate. Respondent is a subsidiary of Otto Bock Healthcare SE & Co. KGaA. (RFOF ¶ 1 (citing PX05155 (Ehrich, Dep. at 60))). Otto Bock HealthCare GmbH was Respondent's parent company at the time of the merger. Complaint

Counsel appears to recognize this in CCFF ¶¶ 18-19, duplicated below. Otherwise, Respondent has no specific response.

16. [redacted] (PX05101 (Schneider (Otto Bock) Dep. at 26 (*in camera*))).

Response to Finding No. 16:

Respondent is a subsidiary of Otto Bock Healthcare SE & Co. KGaA. RFOF ¶ 1 (citing PX05155 (Ehrich, Dep. at 60)). Otto Bock HealthCare GmbH was Respondent's parent company at the time of the merger. Complaint Counsel appears to recognize this in CCFF ¶¶ 18-19, below. Otherwise, Respondent has no specific response.

17. [redacted] (PX05101 (Schneider (Otto Bock) Dep. at 26-27 (*in camera*))), and directed the subsequent integration of Freedom into Otto Bock. (PX05104 (Rössing (Otto Bock) Dep. at 92-93); PX01084 (Otto Bock) at 009).

Response to Finding No. 17:

Respondent is a subsidiary of Otto Bock Healthcare SE & Co. KGaA. (RFOF ¶ 1 (citing PX05155 (Ehrich, Dep. at 60))). Otto Bock HealthCare GmbH was Respondent's parent company at the time of the merger. Complaint Counsel appears to recognize this in CCFF ¶¶ 18-19, duplicated below. Otherwise, Respondent has no specific response.

b) Otto Bock SE & Co. KGaA

18. Post-Merger, Otto Bock HealthCare GmbH underwent a restructuring. (PX05101 (Schneider (Otto Bock) Dep. at 86)). Dr. Oliver Scheel became the new CEO of Otto Bock HealthCare GmbH. (PX05101 (Schneider (Otto Bock) Dep. at 87)). He reduced the number of executives that report to him and restructured the top management. He also integrated global sales and marketing under one head. (PX05101 (Schneider (Otto Bock) Dep. at 87-88)).

Response to Finding No. 18:

Respondent has no specific response.

19. Otto Bock HealthCare GmbH also changed its legal designation and name to Otto Bock "SE & Co. KGaA." (PX05155 (Ehrich (Otto Bock) Dep. at 60)).

Response to Finding No. 19:

Respondent has no specific response.

B. THE ACQUIRED COMPANY

1. Freedom

20. FIH Group Holdings, LLC ("Freedom") was founded in 2002. (Carkhuff (Freedom) Tr. 293; PX07049 at 008 (¶ 15) (Otto Bock Amended Answer); PX05103 (Kim (Freedom) Dep. at 17)). Freedom was founded by Roland Christensen and Rick Meyers. (Carkhuff (Freedom) Tr. 304). It is headquartered in Irvine, California. (Carkhuff (Freedom) Tr. 330).

Response to Finding No. 20:

Respondent has no specific response.

21. Freedom began by selling carbon fiber foot products. (Carkhuff (Freedom) Tr. 293).

Response to Finding No. 21:

Respondent has no specific response.

22. "Freedom has a history of innovation," so after its founding "there were new products introduced at least every year." (Carkhuff (Freedom) Tr. 293-294).

Response to Finding No. 22:

Complaint Counsel's proposed finding of fact is inaccurate and should not be adopted by the Court because [redacted]

[redacted]

23. Freedom introduced its first MPK, the Plié, in 2007. (Carkhuff (Freedom) Tr. 293-294). Its next generation MPK, the Plié 2, was introduced in 2010, and its Plié 3 was introduced in 2014. (Carkhuff (Freedom) Tr. 294). The Plié 3 is manufactured in Gunnison Utah, and "is the only American-made [MPK] product." (Carkhuff (Freedom) Tr. 328-329).

Response to Finding No. 23:

Respondent has no specific response.

24. Today, Freedom "manufactures and sells lower limb prosthetics, including the Plié 3 microprocessor prosthetic knee and the Kinnex microprocessor prosthetic foot." (PX07049 at 008 (¶ 15) (Otto Bock Amended Answer); JX001 at 002 (¶ 11)). These prosthetic products are designed and manufactured at facilities in California and Utah. (PX07049 at 008 (¶ 15) (Otto Bock Amended Answer)).

Response to Finding No. 24:

Respondent has no specific response.

25. Prior to the Merger, Freedom was "privately owned and headquartered in Irvine, California." (PX07049 at 008 (¶15) (Otto Bock Amended Answer); JX-001 at 002 (¶ 10)). [redacted] (PX05007 (Carkhuff (Freedom) IHT at 26 (*in camera*))). Freedom employed approximately 150 people. (PX07049 at 008 (¶ 15) (Otto Bock Amended Answer)).

Response to Finding No. 25:

Respondent has no specific response.

26. [redacted] (PX05007 (Carkhuff (Freedom) IHT at 25 (*in camera*)); PX05103 (Kim (Freedom) Dep. at 17-18)). [redacted] (PX05103 (Kim (Freedom) Dep. at 17-18 (*in camera*); Carkhuff (Freedom) Tr. 304). [redacted] (PX05103 (Kim (Freedom) Dep. at 18-19 (*in camera*); Carkhuff (Freedom) Tr. 310)).

Response to Finding No. 26:

Respondent has no specific response.

27. At the time of the Merger, HEP was the majority shareholder of Freedom, and Parker Hannifin was the minority shareholder. (Carkhuff (Freedom) Tr. 311).

Response to Finding No. 27:

Respondent has no specific response.

28. At the time of the Merger, Freedom's only prosthetic knee on the market was the Plié 3. (Carkhuff (Freedom) Tr. 323). Freedom had no mechanical knees. (Carkhuff (Freedom) Tr. 323).

Response to Finding No. 28:

Respondent has no specific response.

29. [redacted] (PX01623 (Otto Bock) at 010 (*in camera*); PX01003 (Otto Bock) at 009 (*in camera*)).

Response to Finding No. 29:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because Respondent's share estimates are based on assumptions, and incomplete and outdated information, and should be afforded no weight whatsoever when superior information about actual unit sales is available to make such market calculations.

30. Freedom's next-generation MPK, the Quattro, was in development at the time of the Merger. (PX05111 (Prince (Freedom) Dep. at 58); PX07049 at 005 (Otto Bock Amended Answer)). [redacted] (*See* CCFF ¶¶ 1207-1209, below). Freedom planned to manufacture the Quattro MPK in Irvine, California. (Carkhuff (Freedom) Tr. 330).

Response to Finding No. 30:

Respondent has no specific response.

31. [redacted] (PX01318 (Freedom) at 060 (*in camera*)) [redacted] (PX05114 (Ferris (Freedom) Dep. at 96-97 (*in camera*))).

Response to Finding No. 31:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because Respondent's share estimates are based on assumptions, and incomplete and outdated information, and should be afforded no weight whatsoever when superior information about actual unit sales is available to make such market calculations. [redacted]

32. [redacted]

Response to Finding No. 32:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

2. Freedom's Shareholders

a) Health Evolution Partners

33. [redacted] (PX05007 (Carkhuff (Freedom) IHT at 25 (*in camera*)); PX05103 (Kim (Freedom) Dep. at 17-18 (*in camera*))). [redacted] (PX05103 (Kim (Freedom) Dep. at 17-18 (*in camera*); Carkhuff (Freedom) Tr. 304). [redacted] (PX05103 (Kim (Freedom) Dep. at 18-19 (*in camera*); Carkhuff (Freedom) Tr. 310)).

Response to Finding No. 33:

Respondent has no specific response.

34. At the time of the Merger, HEP was the majority shareholder of Freedom, and Parker Hannifin was the minority shareholder. (Carkhuff (Freedom) Tr. 311).

Response to Finding No. 34:

Respondent has no specific response.

35. At the time of the Merger, HEP employees Braden Kelly and Ned Brown were on the board of directors of Freedom. (PX05113 (Chung (HEP) Dep. at 32-33)).

Response to Finding No. 35:

Respondent has no specific response.

b) Parker Hannifin

36. At the time of the Merger, HEP was the majority shareholder of Freedom, and Parker Hannifin was the minority shareholder. (Carkhuff (Freedom) Tr. 311).

Response to Finding No. 36:

Respondent has no specific response.

37. At the time of the Merger, Parker Hannifin employee Achilleas Dorotheou was on the board of directors of Freedom. (PX05103 (Kim (Freedom) Dep. at 113-114)). Mr. Dorotheou's position at Parker Hannifin is Vice President of the Human Motion Control Business Unit. (PX05103 (Kim (Freedom) Dep. at 113-114)).

Response to Finding No. 37:

Respondent has no specific response.

II. THE SALES PROCESS, ACQUISITION, AND POST-TRANSACTION PROCEDURAL HISTORY

A. FREEDOM SALES PROCESS

1. Freedom's Early Discussions with Otto Bock about an Acquisition

a) October 2016 Meetings in Berlin and New York

38. [redacted] (Carkhuff (Freedom) Tr. 649 (*in camera*)).

Response to Finding No. 38:

Respondent has no specific response.

39. [redacted] (Carkhuff

(Freedom) Tr. 519, 522, 525-26, 649 (*in camera*)). [redacted] (Carkhuff (Freedom) Tr. 520-21 (*in camera*); PX01068 (Freedom) (*in camera*)).

Response to Finding No. 39:

Respondent has no specific response.

40. [redacted]

Response to Finding No. 40:

Complaint Counsel's proposed finding is incomplete. [redacted]

b) March 2017 Meeting in Berlin

41. [redacted] (Carkhuff (Freedom) Tr. 541-42 (*in camera*); Smith (HEP) Tr. 6491-92 (*in camera*); PX02034 (HEP) at 001 (*in camera*)).

Response to Finding No. 41:

Respondent has no specific response.

42. [redacted] (Carkhuff (Freedom) Tr. 542-43 (*in camera*)).

Response to Finding No. 42:

Respondent has no specific response.

43. [redacted] (Carkhuff (Freedom) Tr. 543 (*in camera*); PX02034 (HEP) at 021 (*in camera*)).

Response to Finding No. 43:

Respondent has no specific response.

44. [redacted] (Carkhuff (Freedom) Tr. 544, 547 (*in camera*); PX02034 (HEP) at 021 (*in camera*)).

Response to Finding No. 44:

Complaint Counsel's proposed finding is incomplete. [redacted]

45. [redacted] (Carkhuff (Freedom) Tr. 545 (*in camera*); Smith (HEP) Tr. 6495 (*in camera*); PX02034 (HEP) at 024 (*in camera*)).

Response to Finding No. 45:

Complaint Counsel's proposed finding is incomplete and misleading. [redacted]

[redacted]

46. [redacted] (Smith (HEP) Tr. 6496-6497 (*in camera*); PX02034 (HEP) at 024 (*in camera*)).

Response to Finding No. 46:

Complaint Counsel's description of an alleged "turnaround" at Freedom is inaccurate and misleading.

47. [redacted] (Smith (HEP) Tr. 6500-02 (*in camera*); PX02034 (HEP) at 031 (*in camera*)).

Response to Finding No. 47:

Complaint Counsel's proposed finding is incomplete because it ignores the fact that [redacted]

48. [redacted]

Response to Finding No. 48:

[redacted]

[redacted]

2. Moelis Search Process

49. [redacted] (PX03136 (Moelis) at 002 (*in camera*)). Moelis is an independent investment bank. (Hammack (Moelis) Tr. 6062).

Response to Finding No. 49:

Complaint Counsel's proposed finding is misleading because it ignores the fact that [redacted]

50. Jon Hammack, a Managing Director of Moelis, was the lead person from Moelis engaged by Freedom. (Hammack (Moelis) Tr. 6063-64).

Response to Finding No. 50:

Respondent has no specific response.

51. [redacted] (Hammack (Moelis) Tr. 6091) (*in camera*).

Response to Finding No. 51:

Complaint Counsel's proposed finding is incomplete because it ignores the reason why Mr. Hammack did not reach out to companies without access to at least $75 million. Mr. Hammack testified that he did not reach out to companies without access to at least $75 million because they

were "too small and in our opinion lacked the ability to move quickly and to finance a transaction of the size we thought it would be." (RFOF ¶¶ 1473-1486; Hammack, Tr. 6090).

52. [redacted] (PX03264 (Moelis) at 002 (*in camera*); *see also* PX05110 (Hammack (Moelis) Dep. at 34-35, 41-42)).

Response to Finding No. 52:

[redacted]

53. [redacted] (PX03264 (Moelis) at 001 (*in camera*); *see also* PX05110 (Hammack (Moelis) Dep. at 34-35, 41-42)).

Response to Finding No. 53:

Complaint Counsel's proposed finding is false. [redacted]

54. [redacted] (PX05110 (Hammack (Moelis) Dep. at 41-42); PX03264 (Moelis) at 001 (*in camera*)).

Response to Finding No. 54:

Complaint Counsel's proposed finding is incomplete because it ignores the fact that [redacted]

55. Jon Hammack testified that only Össur and Permobil were told that Freedom was the name of the potential target company. (PX05110 (Hammack (Moelis) Dep. at 57)).

Response to Finding No. 55:

Complaint Counsel's proposed finding is false. [redacted]

56. No prosthetics companies were contacted other than Össur and Otto Bock. (PX07051 (Otto Bock) at 003 (¶ 2) (Respondent's Answers to Complaint Counsel's First Set of Interrogatories); *see also* CCFF ¶¶ 2098, 2102-2104, 2121-2162, below).

Response to Finding No. 56:

Complaint Counsel's proposed finding is incomplete and misleading. Prosthetic companies were aware that Freedom was potentially for sale. (RFOF ¶ 1484 (citing Arbogast (Willow Wood), Tr. 4979)).

57. [redacted] (PX03056 (Moelis) at 003 (*in camera*); PX05110 (Hammack (Moelis) Dep. at 79)). No other companies received a process letter to submit an indication of interest. (PX05110 (Hammack (Moelis) Dep. at 79)).

Response to Finding No. 57:

Respondent has no specific response.

58. [redacted] (PX03057 (Moelis) at 002 (*in camera*); PX05110 (Hammack (Moelis) Dep. at 48-49); PX02033 (HEP) at 021; Smith (HEP) Tr. 6550-51 (*in camera*)).

Response to Finding No. 58:

Respondent has no specific response.

59. [redacted]

Response to Finding No. 59:

Complaint Counsel's proposed finding is misleading because companies such as Ohio 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. (RFOF ¶ 1484 (citing Arbogast, Tr. 4979)).

3. Initial Bids for Freedom

60. [redacted] (Carkhuff (Freedom) Tr. 660-61 (*in camera*)).

Response to Finding No. 60:

Respondent has no specific response.

61. [redacted] (Carkhuff (Freedom) Tr. 660 (*in camera*)).

Response to Finding No. 61:

Respondent has no specific response.

62. [redacted] PX03102 (Össur) (Project Roosevelt – Non-Binding Proposal) (*in camera*); (De Roy (Össur) Tr. 3606-07 (*in camera*)).

Response to Finding No. 62:

Complaint Counsel's proposed finding is incomplete and misleading because it [redacted]

[redacted]

63. [redacted] (PX05005 (Smith (HEP) IHT at 183-84)); (De Roy (Ossur) Tr. 3709-10 (*in camera*)).

Response to Finding No. 63:

Respondent has no specific response.

64. [redacted] (PX05005 (Smith (HEP) IHT at 184-86) (*in camera*)).

[redacted] (PX05005 (Smith (HEP) IHT at 185) (*in camera*)).

Response to Finding No. 64:

Complaint Counsel's proposed finding is misleading as it [redacted]

[redacted]

65. Freedom subsequently assigned Moelis to continue acting as the go-between with both Otto Bock and Össur to try to "get valuation up." (PX05005 (Smith (HEP) IHT) at 186-87).

Response to Finding No. 65:

Complaint Counsel's proposed finding is misleading because it mischaracterizes David Smith's Investigational Hearing testimony. David Smith testified only that "Moelis recommended how to go back; you know, what the communication plan going back to them would be; how we attacked the valuation to try to get valuation up, et cetera." (PX05005 (Smith, IHT at 186-187)). He later testified that Freedom assigned Moelis to be the contact person to go back and talk to both parties, but not for the purpose of getting "valuation up." (PX05005 (Smith, IHT at 186-187)).

4. Due Diligence by Otto Bock and Össur

a) Due Diligence by Otto Bock

(1) Initiation of Otto Bock Due Diligence

66. [redacted] (Schneider (Otto Bock) Tr. 4578 (*in camera*)).

Response to Finding No. 66:

Respondent has no specific response.

67. The due diligence process began after Moelis informed Otto Bock that Freedom would be sold (rather than refinanced) and formally solicited initial bids in June 2017. (PX05131 (Gück (Otto Bock) Dep. at 61)).

Response to Finding No. 67:

Complaint Counsel's proposed finding is false. The testimony cited by Complaint Counsel does not support the proposition. In fact, Alexander Gück testified that he believed that Freedom would be sold, rather than refinanced, purely based on speculation. (PX05131 (Gück Dep. at 58-59)).

68. [redacted] (Swiggum (Otto Bock) Tr. 3322 (*in camera*)).

Response to Finding No. 68:

Respondent has no specific response.

69. Dr. Sönke Rössing, Chief Strategy and Human Resource Officer for Otto Bock HealthCare GmbH, led Project Roosevelt. (Swiggum (Otto Bock) Tr. 3322-23). Other Otto Bock executives who worked on Project Roosevelt included Matthew Swiggum, Otto Bock North America's CEO at the time of the Merger; Dr. Falk Berster, Head of Business Unit, Prosthetics, Lower Limb; Ralf Stuch, Global Vice President of Sales; Andreas Eichler, Head of Business Unit, Prosthetics, Lower Limb Mechatronic Systems; Dr. Helmut Pfuhl, Head of Strategic Business Unit, Prosthetics; and Alexander Gück, Director of Strategy and M&A. (Swiggum (Otto Bock) Tr. 3322-26).

Response to Finding No. 69:

Complaint Counsel's proposed finding is misleading because it falsely states that Swiggum worked on Project Roosevelt. Scott Schneider testified that Swiggum played a "very little" role in Ottobock's decision to acquire Freedom, and that Swiggum made two or three comments during the entire process. (RFOF ¶ 956 (citing Schneider, Tr. 4408)). Further, Schneider testified that Mr. Swiggum did not participate in any commercial due diligence efforts with respect to Ottobock's acquisition of Freedom, nor did Swiggum participate in any team meetings for Project Roosevelt. (Schneider, Tr. 4408-4411). Additionally, Complaint Counsel's proposed finding is incomplete because the list of Ottobock personnel that worked on Project Roosevelt due diligence efforts included Scott Schneider, Dr. Kannenberg, Scott Weber, Walter Governor, Sebastian Küch, and Kimberly Hanson. (Schneider, Tr. 4409).

70. Matthew Swiggum, Otto Bock's CEO at the time of the Merger, and others on his team were responsible for reviewing Freedom's sales and marketing activities relating to North America. (Swiggum (Otto Bock) Tr. 3326). Mr. Swiggum was also involved in discussions about Freedom's Plié 3 and Quattro, should they be acquired by Otto Bock. (Swiggum (Otto Bock) Tr. 3327-28).

Response to Finding No. 70:

Complaint Counsel's proposed finding is misleading because it falsely states that Swiggum worked on Project Roosevelt. Scott Schneider testified that Swiggum played a "very little" role in Ottobock's decision to acquire Freedom, and that Swiggum made two or three comments during the entire process. (RFOF ¶ 956 (citing Schneider, Tr. 4408)). Further, Schneider testified that Swiggum did not participate in any commercial due diligence efforts with respect to Ottobock's acquisition of Freedom, nor did Swiggum participate in any team meetings for Project Roosevelt. (Schneider, Tr. 4408-4411). Moreover, Schneider testified that he would author reports, and put Swiggum's name on the reports, so that Mr. Swiggum could forward them up the chain of command. (Schneider, Tr. 4408-4411).

71. Scott Schneider, Vice President of Government, Medical Affairs and Future Development, led Otto Bock's U.S. due diligence team looking at the commercial market and reimbursement for Freedom's products, reporting to Mr. Swiggum. (Schneider (Otto Bock) Tr. 4407-4408). This team included Andreas Kannenberg, Executive Medical Director; Scott Weber, North America Market Manager; Walter Governor, Senior Director of Sales and Clinical Services, Prosthetics; Sebastian Küch, Business Analyst, Sales and Marketing; and Kimberly Hanson, Director of Reimbursement. (Schneider (Otto Bock) Tr. 4409). [redacted] (PX01091 (Otto Bock) (*in camera*); Schneider (Otto Bock) Tr. 4450-52 (*in camera*)).

Response to Finding No. 71:

Respondent has no specific response.

72. Alexander Gück, Director of Strategy and M&A, and Linus Cremer, Manager, Corporate Strategy and M&A, drafted a memo to Otto Bock owner Professor Näder on July 25, 2017 to update Näder on the status of the Freedom due diligence and sales process. (PX01017 (Otto Bock); PX05131 (Gück (Otto Bock) Dep. at 62)).

Response to Finding No. 72:

Respondent has no specific response.

73. Due diligence activities included reviewing materials provided by Freedom in a digital data room, including "[i]nformation about the functions of Freedom, customers, products, and their market views." (PX05127 (Rössing (Otto Bock) Dep. at 42-43). Review of these materials was overseen by Mr. Rössing, Chief Strategy and Human Resource Officer, but was conducted by individuals within Otto Bock as well as its consultants, Rödl & Partners. (PX05127 (Rössing (Otto Bock) Dep. at 43-44).

Response to Finding No. 73:

Respondent has no specific response.

(2) Otto Bock's August 2017 Due Diligence on Freedom

74. [redacted] (Swiggum (Otto Bock) Tr. 3345 (*in camera*); PX05127 (Rössing (Otto Bock) Dep. at 118)).

Response to Finding No. 74:

Respondent has no specific response.

75. Alexander Gück (Director of Strategy and M&A)'s team prepared materials for the Otto Bock participants in advance of the meeting, including an agenda, which appears at PX01300. (PX01300 (Otto Bock) (*in camera*); PX05131 (Gück (Otto Bock) Dep. at 75-76; PX05127 (Rössing (Otto Bock) Dep. at 126)).

Response to Finding No. 75:

Respondent has no specific response.

76. [redacted] (PX01300 (Otto Bock) at 006 (*in camera*). See also PX05127 (Rössing (Otto Bock) Dep. at 124) (confirming that this was a list of the attendees of the meetings in Irvine, California)).

Response to Finding No. 76:

Respondent has no specific response.

77. [redacted] (Swiggum (Otto Bock) Tr. 3346-47 (*in camera*)).

Response to Finding No. 77:

Respondent has no specific response.

78. [redacted] (Swiggum (Otto Bock) Tr. 3347-48 (*in camera*)).

Response to Finding No. 78:

Complaint Counsel's proposed finding is misleading because it ignores testimony by Scott Schneider (Vice President of Government, Medical Affairs, and Future Development at Ottobock) that Swiggum (former Ottobock CEO) played "very little" role in the due diligence and decision to acquire Freedom. (RFOF ¶956 (citing Schneider, Tr. 4408)). Swiggum had only two or three comments during due diligence. (RFOF ¶956 (citing Schneider, Tr. 4408)). Swiggum did not participate in any commercial due diligence meetings related to the Acquisition. (RFOF ¶¶ 956-957 (citing Schneider, Tr. 4408-4411)).

79. [redacted] (Swiggum (Otto Bock) Tr. 3348-49 (*in camera*)).

Response to Finding No. 79:

Complaint Counsel's proposed finding is misleading because it ignores testimony by Scott Schneider that Swiggum played "very little" role in the due diligence and decision to acquire Freedom. (RFOF ¶956 (citing Schneider, Tr. 4408)). Swiggum had only two or three comments during due diligence. (RFOF ¶956 (citing Schneider, Tr. 4408)). Swiggum did not participate in any commercial due diligence meetings related to the Acquisition. (RFOF ¶¶ 956-957 (citing Schneider, Tr. 4408-4411)). Complaint Counsel's proposed finding is also misleading because it ignores evidence that the primary strategic rationale for Ottobock's acquisition of Freedom was to [redacted] (RFOF ¶ 941 (citing PX01003 at 003)). [redacted] (RFOF ¶¶ 942, 960 (citing PX01003 at 008; Schneider, Tr. 4759)).

80. [redacted] (PX01091 (Otto Bock) (*in camera*); Schneider (Otto Bock) Tr. 4450-52 (*in camera*)).

Response to Finding No. 80:

Complaint Counsel's proposed finding is incomplete because it ignores testimony by [redacted]

81. [redacted] (PX01091 (Otto Bock) at 002 (*in camera*)).

Response to Finding No. 81:

Complaint Counsel's proposed finding is incomplete because it ignores the fact that [redacted]

82. [redacted] (PX01462 (Otto Bock) at 001 (*in camera*)).

Response to Finding No. 82:

Complaint Counsel's proposed finding is misleading because it ignores testimony by [redacted] In addition, PX01462, which states that it is a "Draft," was not used at trial, despite that Complaint Counsel called Swiggum to testify in their Case in Chief.

83. [redacted] (PX01003 (Otto Bock) (*in camera*); PX01473 (Otto Bock) (*in camera*); PX05131 (Gück (Otto Bock) Dep. at 103-05)).

Response to Finding No. 83:

Respondent has no specific response other than to state that the document states that it is a [redacted]

84. [redacted] (PX01473 (Otto Bock) at 004 (*in camera*)).

Response to Finding No. 84:

Complaint Counsel's proposed finding is incomplete and misleading. [redacted]

85. [redacted] (PX01004 (Otto Bock) (*in camera*); Schneider (Otto Bock) Tr. 4479-80 (*in camera*); PX05104 (Rössing (Otto Bock) Dep. at 112-14).

Response to Finding No. 85:

Respondent has no specific response.

86. [redacted] (Schneider (Otto Bock) Tr. 4461, 4591 (*in camera*)).

Response to Finding No. 86:

Respondent has no specific response.

87. [redacted]

[redacted] (PX01004 (Otto Bock) at 064 (*in camera*)).

Response to Finding No. 87:

Complaint Counsel's proposed finding is incomplete and misleading. [redacted]

(3) Otto Bock's August-September Quattro Due Diligence

88. [redacted] (PX01296 (Otto Bock) at 003-04 (*in camera*)).

Response to Finding No. 88:

Respondent has no specific response.

89. [redacted] (PX01296 (Otto Bock) at 003 (emphasis in original) (*in camera*); PX05131 (Gück (Otto Bock) Dep. at 91-95) (*in camera*)).

Response to Finding No. 89:

Complaint Counsel's proposed finding is incomplete and misleading. Complaint Counsel ignores an [redacted]

[redacted]

90. [redacted] (Schneider (Otto Bock) Tr. 4491-92, 4608 (*in camera*); PX01471 (Otto Bock)).

Response to Finding No. 90:

Respondent has no specific response.

91. [redacted] (*See* CCFF ¶¶ 1373-1375, below) (*in camera*).

Response to Finding No. 91:

Complaint Counsel's proposed finding is misleading because Freedom's CEO is not Freedom's clinical prosthetist.

92. [redacted] (Swiggum (Otto Bock) Tr. 3388-89 (*in camera*); PX01471 (Otto Bock) at 001)).

Response to Finding No. 92:

Complaint Counsel's proposed finding is misleading because it ignores testimony from [redacted]

[redacted] In addition, Sven Zarling is not the global head of research and development – that title belongs to Sven *Ehrich*. (PX05155 (Ehrich, Dep. at 5)).

93. Following the in-person evaluation of the Quattro, Scott Schneider on September 19, 2017 circulated to Alexander Gück (Director of Strategy and M&A), Linus Cremer (Manager, Corporate Strategy and M&A), Helmut Pfuhl (Head of Strategic Business Unit, Prosthetics), Sönke Rössing (Chief Strategy and Human Resource Officer), and others a "Roosevelt Q Product Summary," signed on behalf of the four Otto Bock attendees of the in-person Quattro testing. (PX01471 (Otto Bock) at 001)).

Response to Finding No. 93:

Respondent has no specific response.

94. [redacted] (Schneider (Otto Bock) Tr. 4638 (*in camera*); PX01471 (Otto Bock) at 003)).

Response to Finding No. 94:

Respondent has no specific response.

95. The "RISKS IF WE DO NOT CONTROL QUATTRO" included "Will have to put more Genium functions into C-Leg," "Össur 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." PX01471 (Otto Bock) at 003 (Roosevelt Q Product Summary)).

Response to Finding No. 95:

Complaint Counsel's proposed finding is incomplete. Complaint Counsel ignores the [redacted]

b) Due Diligence by Össur

96. [redacted] (De Roy (Ossur) Tr. 3607 (*in camera*)).

Response to Finding No. 96:

Respondent has no specific response.

97. [redacted] (De Roy (Ossur) Tr. 3608 (*in camera*)).

Response to Finding No. 97:

Complaint Counsel's proposed finding is incomplete. [redacted]

98. [redacted]. (De Roy (Össur) Tr. 3712 (*in camera*)). [redacted] (De Roy (Ossur) Tr. 3608-09 (*in camera*)).

Response to Finding No. 98:

Complaint Counsel's proposed finding is incomplete. [redacted]

[redacted]

99. [redacted] (De Roy (Ossur) Tr. 3612 (*in camera*)).

Response to Finding No. 99:

[redacted]

100. [redacted] (De Roy (Ossur) Tr. 3610 (*in camera*)). [redacted] (De Roy (Ossur) Tr. 3612 (*in camera*); PX05124 De Roy (Ossur) Dep. at 120-21)).

Response to Finding No. 100:

Complaint Counsel's proposed finding is misleading because it ignores the fact that [redacted]

[redacted]

101. Mr. De Roy categorized the due diligence it was able to conduct before the final round of bidding as "quite limited." (PX05124 (De Roy (Össur) Dep. at 209)).

Response to Finding No. 101:

Complaint Counsel's proposed finding is misleading and incomplete because it ignores [redacted]

5. Second-Round Bids for Freedom

102. [redacted] (PX05005 (Smith (HEP) IHT at 200-207) (in *camera*); PX03239 (Moelis) at 007-10; PX03238 (Moelis) at 008-11).

Response to Finding No. 102:

Respondent has no specific response other than to state that Össur's proposal was non-binding.

103. [redacted] (*See* CCFF ¶¶ 2180, 2183, below).

Response to Finding No. 103:

Respondent has no specific response.

104. [redacted] (RX-0531 (Ossur) at 001, 003 (*in camera*)).

Response to Finding No. 104:

Complaint Counsel's proposed finding is misleading because it ignores [redacted]

105. [redacted] (RX-0531 (Ossur) at 002 (*in camera*)).

Response to Finding No. 105:

Respondent has no specific response.

106. [redacted] (De Roy (Ossur) Tr. 3610-11 (*in camera*)).

Response to Finding No. 106:

Complaint Counsel's proposed finding is incomplete. Complaint Counsel ignores an [redacted]

[redacted]

107. [redacted] (De Roy (Ossur) Tr. 3612 (*in camera*)).

Response to Finding No. 107:

Respondent has no specific response.

6. Otto Bock Exclusivity Period and Final Bid

108. [redacted] (PX02054 (HEP) at 002-003; (PX05005 (Smith (HEP) IHT at 207) (*in camera*)).

Response to Finding No. 108:

Respondent has no specific response.

B. THE CONSUMMATION OF OTTO BOCK'S ACQUISITION OF FREEDOM

109. On September 22, 2017, Otto Bock acquired Freedom (the "Merger"). (PX07049 at 003 (¶ 1) (Otto Bock Amended Answer); JX001 at 001 (¶ 4)). The acquisition price was approximately $80 million. (PX05010 (Schneider, IHT at 177); (PX05122 (Smith (HEP) Dep. at 179)).

Response to Finding No. 109:

Respondent has no specific response

110. The Merger was not reportable under the HSR Act. (Complaint Counsel's Opening Statement, Tr. 13).

Response to Finding No. 110:

Respondent has no specific response

111. Upon consummation of the Merger, Freedom became a wholly owned subsidiary of Otto Bock. (JX001 at 002 (¶ 9)).

Response to Finding No. 111:

Respondent has no specific response.

112. Otto Bock purchased Freedom from its majority shareholder, Health Evolution Partners, and its minority shareholders including Parker Hannifin and various employees and individuals, pursuant to a share tender which followed a shareholder vote. (Carkhuff (Freedom) Tr. 311-13).

Response to Finding No. 112:

Respondent has no specific response.

113. [redacted] (PX05005 (Smith (HEP) IHT at 208-09) (*in camera*)).

Response to Finding No. 113:

Complaint Counsel's proposed finding is incomplete. [redacted]

[redacted]

C. FTC INVESTIGATION

1. Initiation of FTC Investigation

114. In September 2017, the FTC began its preliminary investigation into the Merger and its potential effects on competition for the sale of MPKs in the United States.

Response to Finding No. 114:

Complaint Counsel cites to no evidence in the record for Respondent to dispute or confirm.

115. Hanger's outside counsel contacted the FTC near the onset of the investigation. (Asar (Hanger) Tr. 1462).

Response to Finding No. 115:

Complaint Counsel's proposed finding is incomplete because it does not state whether

[redacted]

116. On November 3, 2017, the Commission issued a resolution authorizing the use of compulsory process for the FTC to obtain relevant information for the investigation. The authorized use of compulsory process included issuing Subpoenas *Duces Tecum* ("SDTs"), Subpoenas *Ad Testificandum* ("SATs"), and Civil Investigation Demands ("CIDs").

Response to Finding No. 116:

Complaint Counsel cites to no evidence in the record for Respondent to dispute or confirm.

117. On November 9, 2017, the Commission issued SATs, SDTs, and CIDs to Otto Bock, Freedom, and HEP, as well as an SAT to Freedom's CEO at the time of the acquisition, David Smith. The Commission also issued SATs to Otto Bock and Freedom's customers, Hanger, Inc. ("Hanger"), The Center for Orthotics & Prosthetic Care ("COPC"), Jonesboro Prosthetic & Orthotic Laboratory ("Jonesboro"), and Empire Medical ("Empire"), in addition to other relevant third parties. The Commission also issued CIDs to MPK manufacturers including Össur Americas, Inc., Endolite USA, and a subsidiary of Nabtesco Corporation, as well as an additional SAT to Össur. Lastly, the Commission issued SDTs to Össur, Moelis & Company ("Moelis"), and Madison Capital Funding LLC ("Madison Capital").

Response to Finding No. 117:

Respondent has no specific response.

118. On November 30, 2017, the Commission issued additional CIDs to Hanger and Fillauer Companies, Inc. ("Fillauer").

Response to Finding No. 118:

Respondent has no specific response.

2. Investigational Hearings of Respondent Officials

119. From November 27, 2017 to December 8, 2017, Complaint Counsel conducted 10 investigational hearings ("IHs") during its investigation.

Response to Finding No. 119:

Respondent has no specific response.

120. From Freedom, Complaint Counsel conducted IHs of John Robertson (Vice President of R&D and Mechatronics Manufacturing), Maynard Carkhuff (Chairman), and David Smith (CEO at the time of the Merger). (PX05006 (Robertson (Freedom) IHT); PX05007 (Carkhuff (Freedom) IHT); PX05005 (Smith (HEP) IHT)).

Response to Finding No. 120:

Respondent has no specific response.

121. From Otto Bock, Complaint Counsel conducted an IH of Scott Schneider (Vice President of Government, Medical Affairs and Future Development). (PX05010 (Schneider (Otto Bock) IHT)).

Response to Finding No. 121:

Respondent has no specific response.

122. Complaint Counsel also conducted six IHs of Respondents' customers and other relevant third-parties, including Jonathan Endrikat from Empire Medical, Vinit Asar from Hanger, Rob Yates from Jonesboro P&O Laboratory, Keith Senn from COPC, and Dr. Kenton Kaufman from Mayo Clinic. (PX05001 (Endrikat (Empire) IHT); PX05002 (Asar (Hanger) IHT); PX05003 (Yates (Jonesboro) IHT); PX05004 (Senn (COPC) IHT); PX05008 (Kaufman (Mayo Clinic) IHT)).

Response to Finding No. 122:

Respondent has no specific response.

D. OTTO BOCK AND FREEDOM OPERATIONS POST-CLOSING UNTIL HOLD SEPARATE AGREEMENT

1. Otto Bock Replaced Freedom's CEO and Some Freedom Employees Left the Company

123. At the time of the Merger, Freedom's Chairman and CEO was David Smith. (PX05007 (Carkhuff (Freedom) IHT at 26)).

Response to Finding No. 123:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

124. Freedom terminated David Smith as Chairman and CEO at the time of the Merger. Smith resigned three days before the Merger closed, after being informed that he would not be retained by Otto Bock. (PX05122 (Smith (HEP) Dep. at 7); PX05005 (Smith (HEP) IHT at 211-12)).

Response to Finding No. 124:

Complaint Counsel's proposed finding of fact is inaccurate. Mr. Smith resigned prior to the Acquisition. (PX05122 (David Smith, Dep. at 7)). [redacted]

125. [redacted] (Carkhuff (Freedom) Tr. 582 (*in camera*)).

Response to Finding No. 125:

Complaint Counsel's proposed finding of fact is incomplete and vague. David Reissfelder testified that he has been the CEO of Freedom Innovations since September 27, 2017. (PX05138 (Reissfelder, Dep. at 4, 8)). Prior to joining Freedom Innovations, Reissfelder was the Vice President and General Manager for Bionics Medical Technologies in Bedford, Massachusetts. (PX05138 (Reissfelder, Dep. at 8)).

126. On December 19, 2017, Otto Bock and the FTC entered into a Hold Separate and Asset Maintenance Agreement ("Hold Separate Agreement").

Response to Finding No. 126:

Respondent has no specific response.

127. During his investigational hearing on December 5, 2017, Mr. Carkhuff, Freedom's current Chairman, testified that from the time of the Merger until early December 2017, he estimated up to five employees had left Freedom, including an engineer who he believed had been performing test validations on the Quattro. (PX05007 (Carkhuff (Freedom) IHT at 305-06)).

Response to Finding No. 127:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Mr. Carkhuff testified that Freedom Innovations employed approximately 160 people and that between fifteen and twenty employees were working on the Quattro project at the time of the Acquisition. (PX05007 (Carkhuff, IHT at 292, 305)). According to Carkhuff, between the date of the Acquisition and the date of his investigational hearing on December 5, 2017, only "maybe five" employees had left Freedom Innovations. (PX05007 (Carkhuff, IHT at 305)). Carkhuff recalled that an "engineer" had left Freedom Innovations but could not recall what he was working on specifically. (PX05007 (Carkhuff, IHT at 305-306)). Carkhuff believed that the engineer was

working on a number of products and believed the Quattro may have been one of them. (PX05007 (Carkhuff, IHT at 306)).

Moreover, a loss of "maybe five" employees after the Acquisition is quite small relative to previous losses sustained by Freedom pre-Acquisition. [redacted] Armstrong now works at Proteor, Inc. helping to sell Nabtesco's Allux. (Mattear, Tr. 5564-5566).

2. Changes in Freedom's Operations

a) Post-Merger, Otto Bock Halted Freedom's Pre-Merger Plan to Launch the New Plié 4 in October 2017

128. After the Merger, Freedom "shared business plans both domestically and internationally prior to the Hold Separate Agreement" with its former rival, Otto Bock. (PX05109 (Carkhuff (Freedom) Dep. at 15-16).

Response to Finding No. 128:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Carkhuff testified at his deposition that some business plans were shared between Freedom and Ottobock executives prior to the Hold Separate Agreement, but he also testified that Freedom never had discussions with Ottobock executives about promotions or discounts related to the Plié. (PX05109 (Carkhuff, Dep. at 14-15)). He testified as follows:

> Q. Just so the record is clear, let me ask this question again because I think there was some confusion. After the merger but

> before the Hold Separate Agreement was executed, did you have discussions with Ottobock executives about what the promotions or discounts related to the Plié would be in the marketplace?
> A. No.

(PX05109 (Carkhuff, Dep. at 15)).

129. [redacted] *See* CCFF ¶¶ 1456-1569, below (*in camera*).

Response to Finding No. 129:

Complaint Counsel's proposed finding of fact is vague and misleading. [redacted]

[redacted]

[redacted]

130. [redacted] *See* CCFF ¶¶ 1461, 1464, below (*in camera*).

<u>Response to Finding No. 130:</u>

Complaint Counsel's proposed finding of fact is misleading, vague, and incomplete. [redacted]

[redacted]

131. [redacted] *See* CCFF ¶ 1468, below (*in camera*).

Response to Finding No. 131:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

b) Otto Bock Executives Monitored and Sought to Influence Freedom MPK Pricing Decisions Post-Merger

132. [redacted] *See* CCFF ¶¶ 1474-1475, below (*in camera*).

Response to Finding No. 132:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

133. [redacted] *See* CCFF ¶¶ 1476-1477, below (*in camera*).

Response to Finding No. 133:

Complaint Counsel's proposed finding of fact is misleading. Every Freedom employee that testified at trial stated that Ottobock never directed anyone at Freedom to do anything regarding pricing or promotions of the Plié after the Acquisition. ([redacted]; Testerman, Tr. 1299-1300, 1304-1305; Ferris, Tr. 2477-2478; *see also* Responses to CCFF ¶¶ 1476-1477, below).

134. [redacted] *See* CCFF ¶ 1478, below (*in camera*).

Response to Finding No. 134:

Complaint Counsel's proposed finding is not supported by the record evidence. At trial, prosthetic clinic employees testified that the Acquisition has not had any impact on their prosthetic businesses and has not impacted any patients of their clinics. (Ell, Tr. 1799-1800; [redacted], 1065-1066 (testifying neither POA nor any other clinic that Ford is aware of has been impacted by the Acquisition); Sabolich, Tr. 5866-5867; [redacted]; Senn, Tr. 264-265 (testifying that the Acquisition did not impact COPC's business, its customers, or the price it pays for the Plié 3); *see also* Responses to CCFF ¶ 1478, below).

c) November 2017 Meeting and Action Items

135. [redacted] (*See* Carkhuff (Freedom) Tr. 576, 578-84 (*in camera*); PX01306 (Otto Bock) at 002, 004) (*in camera*)). [redacted] (Carkhuff (Freedom) Tr. 576 (*in camera*); *see also* (PX01304 (Otto Bock) at 004 (Freedom Integration: Sales Workshop Meeting Minutes); PX01302 (Otto Bock) at 081-083 (*in camera*); (Swiggum (Otto Bock) Tr. 3398-3399 (*in camera*)).

Response to Finding No. 135:

Respondent has no specific response other than to state that this was a brainstorming meeting. (Schneider, Tr. 4652).

136. [redacted] (PX01306 (Otto Bock) at 002 (*in camera*); (Carkhuff (Freedom) Tr. 578-81 (*in camera*)).

Response to Finding No. 136:

Respondent has no specific response.

137. [redacted] (PX01306 (Otto Bock) at 002 (*in camera*); (Carkhuff (Freedom) Tr. 581-82) (*in camera*)).

Response to Finding No. 137:

Respondent has no specific response.

138. [redacted] (PX01306 (Otto Bock) at 002 (*in camera*); (Carkhuff (Freedom) Tr. 582 (*in camera*)).

Response to Finding No. 138:

Respondent has no specific response.

139. [redacted] (PX01306 (Otto Bock) at 001 (*in camera*)).

Response to Finding No. 139:

Respondent has no specific response.

140. [redacted] (Swiggum (Otto Bock) Tr. 3405) (*in camera*); (PX01302 (Otto Bock) at 003 (*in camera*)).

Response to Finding No. 140:

Respondent has no specific response.

141. [redacted] (PX01302 (Otto Bock) at 081 (*in camera*); PX05148 (Swiggum (Otto Bock) Dep. at 175-176) (*in camera*)). [redacted] (PX01302 (Otto Bock) at 081 (*in camera*)).

Response to Finding No. 141:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted], [redacted]

[redacted],

1065-1066 (testifying neither POA nor any other clinic that Ford is aware of has been impacted by the Acquisition; Sabolich, Tr. 5866-5867; [redacted]), and [redacted]

[redacted]}

142. [redacted] (PX01306 (Otto Bock) at 004 (*in camera*)).

Response to Finding No. 142:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

143. [redacted] (PX01306 (Otto

Bock) at 004) (*in camera*); Swiggum (Otto Bock) Tr. 3404 (*in camera*); Carkhuff (Freedom) Tr. 584 (*in camera*)).

Response to Finding No. 143:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

3. Otto Bock and Freedom Halt All Integration Planning Work in Early December 2017

144. Otto Bock and Freedom stopped all integration and integration planning work in early December shortly after the investigational hearing of Scott Schneider, Vice President of Government, Medical Affairs and Future Development, on December 7, 2017. (PX05127 (Rössing (Otto Bock) Dep. at 186); *see also* PX05010 (Schneider (Otto Bock) IHT)).

Response to Finding No. 144:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Ottobock and Freedom stopped all integration and integration planning work on December 8, 2017, after Complaint Counsel notified counsel for Ottobock and Freedom that it had decided to file suit to unwind the transaction. (PX05127 (Rössing, Dep. at 186 ("We stopped integration work the after Scott [Schneider's] first deposition", which occurred on December 7, 2017 (see PX05010)))).

E. AGREEMENT BETWEEN OTTO BOCK AND FTC TO HOLD SEPARATE

145. On December 19, 2017, Otto Bock and the FTC entered into a Hold Separate and Asset Maintenance Agreement ("Hold Separate Agreement").

Response to Finding No. 145:

Respondent has no specific response.

146. Pursuant to the Hold Separate Agreement, Otto Bock agreed 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.

Response to Finding No. 146:

Respondent has no specific response.

147. Otto Bock, appointed Joe Martin, Freedom's former COO, as its Hold Separate Monitor. (Carkhuff (Freedom) Tr. 313).

Response to Finding No. 147:

Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel, Freedom, and Ottobock jointly agreed that Joe Martin, Freedom's former COO, would serve as Freedom's Hold Separate Monitor under the Hold Separate Agreement. (Carkhuff, Tr. 313).

148. Mr. Martin "writes periodic reports to the FTC." (Carkhuff (Freedom) Tr. 314-15).

Response to Finding No. 148:

Respondent has no specific response.

149. Otto Bock appointed Maynard Carkhuff as the "manager of the Hold Separate Agreement and Asset Maintenance Agreement." (PX05109 (Carkhuff (Freedom) Dep. at 9)).

Response to Finding No. 149:

Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel, Freedom, and Ottobock jointly agreed that Maynard Carkhuff would serve as Freedom's Manager under the Hold Separate Agreement. (PX05109 (Carkhuff, Dep. at 9)).

150. Under the hold-separate agreement, "Otto Bock is required to provide [Freedom] certain assistance, such as providing cash resources to fund the business and some – and legal assistance and distribution assistance internationally." (Carkhuff (Freedom) Tr. 314).

Response to Finding No. 150:

Complaint Counsel's proposed finding is incomplete. Ottobock is required to provide financial assistance to Freedom Innovations under the Hold Separate Agreement. (Carkhuff, Tr. 314). [redacted]; Smith, Tr. 6464-6465 [redacted]

151. [redacted] (PX05109 (Carkhuff (Freedom) Dep. at 192-93) (*in camera*)).

Response to Finding No. 151:

Respondent has no specific response.

F. OTTO BOCK AND FREEDOM OPERATIONS POST-HOLD SEPARATE

1. Otto Bock

a) Otto Bock Global Corporate Restructuring

152. [redacted] (Schneider (Otto Bock) Tr. 4658 (*in camera*)).

Response to Finding No. 152:

Respondent has no specific response.

153. Post-Merger, Otto Bock HealthCare GmbH underwent a restructuring. (PX05101 (Schneider (Otto Bock) Dep. at 86)). Dr. Oliver Scheel became the new CEO of Otto Bock HealthCare GmbH. (PX05101 (Schneider (Otto Bock) Dep. at 87)). He reduced the number of executives that report to him and restructured the top management. He also integrated global sales and marketing under one head. (PX05101 (Schneider (Otto Bock) Dep. at 87-88)).

Response to Finding No. 153:

Respondent has no specific response.

154. Otto Bock HealthCare GmbH also changed its legal designation and name to Otto Bock "SE & Co. KGaA." (PX05155 (Ehrich (Otto Bock) Dep. at 60)).

Response to Finding No. 154:

Respondent has no specific response.

155. [redacted] (Schneider (Otto Bock) Tr. 4658 (*in camera*)).

Response to Finding No. 155:

Respondent has no specific response, other than that [redacted]

b) Otto Bock Personnel Changes

156. Mr. Swiggum was the regional president and CEO of Otto Bock Healthcare North America from 2016 through February 2018 when he was terminated. (Swiggum (Otto Bock) Tr. 3310, 3313-14). [redacted] (Schneider (Otto Bock) Tr. 4659 (*in camera*)). Mr. Stuch was Otto Bock Healthcare GmbH's global Sales Leader. (Swiggum (Otto Bock) Tr. 3323).

Response to Finding No. 156:

Respondent has no specific response.

157. Mr. Swiggum testified that he was fired because "[t]here was a desire to reduce operating costs [$]1.5 million at the expense of headcount." (Swiggum (Otto Bock) Tr. 3314). [redacted] (Swiggum (Otto Bock) Tr. 3366 (*in camera*)). Mr. Swiggum was directed to fire Brad Ruhl, Scott Schneider, Frank Oschelle, Chris Nolan and Mark Agro. (Swiggum (Otto Bock) Tr. 3366 (*in camera*)).

Response to Finding No. 157:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it comes from an unreliable source. [redacted]

158. Mr. Swiggum was given two reasons for his termination: (1) because "we missed the number in 2017" and (2) "they didn't believe I was going to let the people go." (Swiggum (Otto Bock) Tr. 3430).

Response to Finding No. 158:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it comes from an unreliable source. [redacted]

159. In February of 2018, after the corporate reorganization, Brad Ruhl became the Managing Director of North America, "which is really the CEO role." (Schneider (Otto Bock) Tr. 4274).

Response to Finding No. 159:

Respondent has no specific response.

2. Held-Separate Freedom

a) Held-Separate Freedom's Continued Plié 3 Sales

160. After the Hold Separate Agreement was executed on December 19, 2017, Freedom continued to sell the Plié 3 in the United States. PX05138 (Reissfelder (Freedom) Dep. at 22-23 (Plié sales in the U.S. in 2018 have been relatively flat, largely due to the departure of a key sales manager).

Response to Finding No. 160:

Respondent has no specific response, other than that Freedom has continued to sell the Plié 3 in the United States since it was launched in 2014. (PX05138 (Reissfelder Dep. at 22-23)).

161. Jeremy Mathews, Freedom's Senior VP of Sales and Marketing, testified that Plié sales "continued to increase even after the acquisition." (PX05137 (Mathews (Freedom) Dep. at 196)).

Response to Finding No. 161:

Respondent has no specific response.

b) Held-Separate Freedom's Quattro Development Efforts

162. [redacted] (*See* CCFF ¶¶ 1207-1209, below).

Response to Finding No. 162:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

[redacted]

[redacted]

163. [redacted] (PX01117 (Freedom) at 014 (*in camera*).

Response to Finding No. 163:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

164. [redacted] (PX05006 (Robertson (Freedom) IHT at 39 (*in camera*))).

Response to Finding No. 164:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

165. [redacted] (*See* CCFF ¶¶ 1290, 1294 below).

Response to Finding No. 165:

Respondent has no specific response, other than that [redacted]

166. [redacted] (PX05111 (Prince (Freedom) Dep. at 75 (*in camera*)).

Response to Finding No. 166:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

167. [redacted] (Prince (Freedom) Tr. 2786 (*in camera*)).

Response to Finding No. 167:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

168. [redacted]
(Prince (Freedom) Tr. 2791 (*in camera*)).

Response to Finding No. 168:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

[redacted]

169. [redacted] (*See* CCFF ¶¶ 1224, 1225, below).

Response to Finding No. 169:

Respondent has no specific response, other than that [redacted]

170. [redacted] (*See* CCFF ¶¶ 1228, 1229, below).

Response to Finding No. 170:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

c) Held-Separate Freedom's Personnel Changes

171. Since the transaction, Mr. Carkhuff has found it "challenging" to "maintain the business as a growing, competitive company in the marketplace, as is required by the hold-separate agreement." (Carkhuff (Freedom) Tr. 318).

Response to Finding No. 171:

Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel's investigation and litigation is not evidence of anticompetitive effects resulting from the Acquisition. Freedom Innovations would have gone out of business but for the Acquisition.

(RFOF ¶¶ 1291-1531 (Respondent's Failing Firm section)). Also, Carkhuff specifically testified that:

> The competition has trumpeted this hold-separate agreement and has tried to create fear and uncertainty and doubt with both our customers as to whether Freedom will be around to service its warranties, which we have three-year warranties on virtually all of our products, and from a payer standpoint, they have been alerted that Freedom may or may not be around and may not be able to service these warranties.
>
> And you can imagine from a competitive standpoint, that causes concern in the practitioners' minds, and we spend a lot of time answering these type concerns and trying to assuage those concerns when we really should be selling our products and teaching clinicians and really trying to provide access to this technology to patients.
>
> So it's an increasing challenge that has had a negative impact on our business.

(Carkhuff, Tr. 318-319).

172. Some employees have left Freedom "because they are concerned about the future of their jobs." (Carkhuff (Freedom) Tr. 318). Freedom has had "challenges" with employee morale as a result. (Carkhuff (Freedom) Tr. 318).

Response to Finding No. 172:

Complaint Counsel's proposed finding of fact is misleading and should not be adopted by the Court. The government's investigation and litigation is not evidence of anticompetitive effects resulting from the Acquisition. Carkhuff specifically testified that: "Some [employees] have become spooked about that uncertainty, and certainly you have either been receptive to phone calls or been active in seeking employment. They certainly are receptive to the phone call, and there are a lot of opportunities in this environment with low unemployment, so we have had challenges in -- with morale." (Carkhuff, Tr. 318-319). [redacted]

[redacted]

173. Since the Merger, 32 employees left the company. (Carkhuff (Freedom) Tr. 321). At the time of his trial testimony on July 19, 2018, Mr. Carkhuff explained that Freedom had seven open positions that it was attempting to fill. (Carkhuff (Freedom) Tr. 322). One of those positions is a domestic regional sales manager who resigned recently. (Carkhuff (Freedom) Tr. 322).

Response to Finding No. 173:

Complaint Counsel's proposed finding of fact is misleading and should not be adopted by the Court. The government's investigation and litigation is not evidence of anticompetitive effects resulting from the Acquisition. Carkhuff specifically testified that: "Some [employees] have become spooked about that uncertainty, and certainly you have either been receptive to phone calls or been active in seeking employment. They certainly are receptive to the phone call, and there are a lot of opportunities in this environment with low unemployment, so we have had challenges in -- with morale." (Carkhuff, Tr. 318-319). [redacted]

174. Erin Myers, a sales representative, also left Freedom in either December of 2017 or January 2018 to work at Fillauer. (PX05114 (Ferris (Freedom) Dep. at 190-191).

Response to Finding No. 174:

Respondent has no specific response.

175. Since the Hold Separate Agreement was put in place, customers are experiencing "fear and uncertainty and doubt . . . as to whether Freedom will be around to service its warranties[.]" (Carkhuff (Freedom) Tr. 318). This "causes concern in the practitioners' minds[,]" which requires Freedom employees to "spend a lot of time answering these type concerns and trying to assuage those concerns when [they] really should be selling [Freedom's] products and teaching clinicians[.]" (Carkhuff (Freedom) Tr. 319). This "increasing challenge . . . has had a negative impact on [Freedom's] business." (Carkhuff (Freedom) Tr. 319).

Response to Finding No. 175:

Complaint Counsel's proposed finding of fact is misleading and should not be adopted by the Court. The government's investigation and litigation is not evidence of anticompetitive effects resulting from the Acquisition. Carkhuff specifically testified that: "Some [employees] have become spooked about that uncertainty, and certainly you have either been receptive to phone calls or been active in seeking employment. They certainly are receptive to the phone call, and there are a lot of opportunities in this environment with low unemployment, so we have had challenges in -- with morale." (Carkhuff, Tr. 318-319). [redacted]

G. PART 3 LITIGATION

1. Complaint Issuance

176. The administrative complaint, filed by the FTC on December 20, 2017, alleges that the Merger substantially lessened competition in the relevant market—MPKs—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. (Commission Complaint at ¶ 67).

Response to Finding No. 176:

Complaint Counsel's proposed finding of fact is inaccurate because it does not accurately quote the Complaint. The Complaint alleges that the Merger "may substantially lessen competition in relevant markets . . ." (Commission Complaint ¶ 67) (emphasis added).

177. The FTC alleges that the relevant market in which to analyze the effects of the Merger is no broader than the manufacture and sale of MPKs to prosthetic clinics in the United States. (Commission Complaint at ¶ 17).

Response to Finding No. 177:

Respondent has no specific response.

178. On January 10, 2018, Otto Bock submitted an answer and affirmative defenses to the FTC's December 20, 2017 Complaint. (Otto Bock Answer). On February 15, 2018, Otto Bock submitted an amended answer and affirmative defenses to the FTC's Complaint. (PX07049 (Otto Bock Amended Answer)).

Response to Finding No. 178:

Respondent has no specific response.

2. Discovery

179. During discovery, Complaint Counsel conducted 73 depositions—27 depositions of Otto Bock and Freedom executives, 42 third-party depositions, and 4 expert depositions.

Response to Finding No. 179:

Respondent has no specific response.

180. Complaint Counsel submitted two expert reports and two expert rebuttal reports in this matter. (PX06001A (Morton Expert Report); PX06002 (Hammer Expert Report); PX06003 (Morton Rebuttal Report); PX06004 (Hammer Rebuttal Report)).

Response to Finding No. 180:

Respondent has no specific response.

181. Fiona Scott Morton's expert report was submitted on May 8, 2018, and her rebuttal report was submitted on June 1, 2018. (PX06001A (Morton Expert Report); PX06003 (Morton Rebuttal Report)). Dr. Scott Morton was tasked with, among other things, "assess[ing] the likely effects on competition due to the acquisition of FIH Group Holdings, LLC ('Freedom' or 'Freedom Innovations') by Otto Bock HealthCare North America ('Otto Bock')." (PX06001A at 006 (¶ 10) (Morton Expert Report)).

Response to Finding No. 181:

Respondent has no specific response.

182. Christine Hammer's expert report was submitted on May 8, 2018, and her rebuttal report was submitted on June 1, 2018. (PX06002 (Hammer Expert Report); PX06004 (Hammer Rebuttal Report)). Ms. Hammer was tasked with "analyz[ing] and provid[ing] expert opinions and conclusions relating to whether Freedom qualifies as a 'failing firm'" and "relating to what, if any, efficiencies are likely to result from Otto Bock's acquisition of Freedom and be cognizable under the Merger Guidelines." (PX06002 at 005 (¶6) (Hammer Expert Report)).

Response to Finding No. 182:

Respondent has no specific response.

183. Respondent submitted two expert reports in this matter. (RX1048 (Peterson Expert Report); RX1049 (Argue Expert Report)).

Response to Finding No. 183:

Respondent has no specific response

3. Respondent's Post-Discovery [redacted]

184. [redacted] (PX07049 at 030 (Otto Bock Amended Answer) (*in camera*)).

Response to Finding No. 184:

Respondent has no specific response.

185. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5088 (*in camera*)).

Response to Finding No. 185:

Respondent has no specific response.

186. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5088 (*in camera*)). [redacted] (Arbogast (Ohio Willow Wood) Tr. 5088 (*in camera*)).

Response to Finding No. 186:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

187. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5089 (*in camera*)).

Response to Finding No. 187:

Respondent has no specific response.

188. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5089 (*in camera*)).

Response to Finding No. 188:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that [redacted]

[redacted]

a) [redacted]

189. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5095 (*in camera*); PX03022 (Otto Bock) at 001 (Term Sheet)).

Response to Finding No. 189:

Respondent has no specific response.

190. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5095 (*in camera*)). [redacted] (Arbogast (Ohio Willow Wood) Tr. 5095 (*in camera*)).

Response to Finding No. 190:

[redacted]

191. [redacted] (Arbogast (Ohio Willow Wood) Tr. 4993 (*in camera*)).

Response to Finding No. 191:

Respondent has no specific response.

192. FTC staff deposed Mr. Arbogast on March 6, 2018 and April 6, 2018. (Arbogast (Ohio Willow Wood) Tr. 5068; PX05106 (Arbogast (Ohio Willow Wood)); PX05159 (Arbogast (Ohio Willow Wood))).

[redacted]

Response to Finding No. 192:

Respondent has no specific response.

193. [redacted] (PX05106 (Arbogast (Ohio Willow Wood) Dep. at 100-101)).

Response to Finding No. 193:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

[redacted]

194. [redacted] (PX05106 (Arbogast (Ohio Willow Wood) Dep. at 137-38)).

Response to Finding No. 194:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

195. [redacted] (PX05159 (Arbogast (Ohio Willow Wood) Dep. at 141) (*in camera*)).

Response to Finding No. 195:

Complaint Counsel's proposed finding of fact is irrelevant and misleading. [redacted]

[redacted]

196. On April 4, 2018, Complaint Counsel deposed Linda Wise, Chief Marketing Officer of Ohio Willow Wood. (PX05152 (Wise (Ohio Willow Wood) Dep. at 004)).

Response to Finding No. 196:

Respondent has no specific response.

197. On April 5, 2018, Complaint Counsel deposed John Matera, Chief Operations Officer of Ohio Willow Wood. (PX05156 (Matera (Ohio Willow Wood) Dep. at 004).

Response to Finding No. 197:

Respondent has no specific response.

b) Ohio Willow Wood [redacted]

198. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5089-95 (*in camera*)).

Response to Finding No. 198:

Respondent has no specific response.

199. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5089-90 (*in camera*)).

Response to Finding No. 199:

Respondent has no specific response.

200. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5090-91 (*in camera*)).

Response to Finding No. 200:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

201. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5091 *(in camera)*).

Response to Finding No. 201:

Complaint Counsel's proposed finding of fact is misleading to the extent it [redacted]

[redacted]

202. [redacted] (PX01408 (Otto Bock) (*in camera*) (Quattro Presentation); PX01407 (Otto Bock) (*in camera*) (Plié Presentation); Arbogast (Ohio Willow Wood) Tr. 5092, 5116, 5118, 5142 (*in camera*)).

Response to Finding No. 202:

Respondent has no specific response.

203. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5102-03 (*in camera*); *see* Matera (Ohio Willow Wood) Tr. 5322 (*in camera*)).

Response to Finding No. 203:

Complaint Counsel's proposed finding of fact is misleading to the extent it [redacted]

204. Freedom's Chairman Maynard Carkhuff, CEO David Reissfelder, CFO Lee Kim, Chief of Engineering John Robertson, engineers Stephen Prince and Hugo Quintero, and Director of Operations Ross Wiberg were present at the Irvine visit. (PX05159 (Arbogast (Ohio Willow Wood) Dep. at 15-16); PX05156 (Matera (Ohio Willow Wood) Dep. at 137)). Aside from these Freedom employees, Ohio Willow Wood executives only said "casual hellos" to any other Freedom employee. (PX05159 (Arbogast (Ohio Willow Wood) Dep. at 16)).

Response to Finding No. 204:

Complaint Counsel's proposed finding of fact is misleading to the extent that it [redacted]

205. [redacted] (PX05159 (Arbogast (Ohio Willow Wood) Dep. at 170 (*in camera*))).

Response to Finding No. 205:

Complaint Counsel's proposed finding of fact does not properly characterize [redacted]

206. Freedom's Director of Operations, Ross Wiberg, was present at the Gunnison visit. (PX05159 (Arbogast (Ohio Willow Wood) Dep. at 17); PX05156 (Matera (Ohio Willow Wood) Dep. at 63-64)).

Response to Finding No. 206:

Respondent has no specific response, other than that [redacted]

207. [redacted] (Matera (Ohio Willow Wood) Tr. 5315-16 (*in camera*)).

Response to Finding No. 207:

Complaint Counsel's proposed finding of fact is misleading to the extent it [redacted]

208. [redacted] (Matera (Ohio Willow Wood) Tr. 5317 (*in camera*)).

Response to Finding No. 208:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

209. [redacted] (PX01408 (Freedom) at 005 (Quattro) (*in camera*); PX05138 (Reissfelder (Freedom) Dep. at 202-03); Arbogast (Ohio Willow Wood) Tr. 5092 (*in camera*)). [redacted] (PX01408 (Freedom) at 005 (Quattro) (*in camera*)). [redacted]

Response to Finding No. 209:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

[redacted]

210. [redacted]

[redacted] (PX01392 (Freedom) at 001 (*in camera*)).

Response to Finding No. 210:

Complaint Counsel's proposed finding is misleading because the referenced document does not indicate that the [redacted]

[redacted]

211. [redacted] (PX01409 (Freedom) at 004-09 (*in camera*)). [redacted] (PX01409 (Freedom) at 004 (*in camera*)). [redacted] (PX01409 (Freedom) at 001 (*in camera*)).

Response to Finding No. 211:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

[redacted]

212. [redacted]

Response to Finding No. 212:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

213. [redacted]

[redacted]

Response to Finding No. 213:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

214. [redacted]

Response to Finding No. 214:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

215. [redacted] Arbogast (Ohio Willow Wood) Tr. 5164 (*in camera*); PX01392 (Freedom) at 013 (*in camera*)).

Response to Finding No. 215:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

216. [redacted]; PX01392 (Freedom) at 013 (*in camera*); Arbogast (Ohio Willow Wood) Tr. 5160-62 (*in camera*)).

Response to Finding No. 216:

Complaint Counsel's proposed finding of fact is misleading. Nothing useful about these

[redacted]

[redacted]

217. [redacted]; PX01392 (Freedom) at 013 (*in camera*); Arbogast (Ohio Willow Wood) Tr. 5162 (*in camera*)).

Response to Finding No. 217:

Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel omits [redacted]

218. [redacted] (PX01407 (Otto Bock) 010-11 (*in camera*); Arbogast (Ohio Willow Wood) Tr. 5142 (*in camera*)). [redacted] (PX01407 (Otto Bock)

010 (*in camera*)). [redacted] (PX01407 (Otto Bock) 011 (*in camera*)).

Response to Finding No. 218:

Respondent has no specific response.

219. [redacted] **((RX-1043 (Otto Bock/OWW) at 00051 (Disclosure Letter to APA between Ohio Willow Wood and Otto Bock) (*in camera*); RX-1042 (Otto Bock/OWW) at 00032 (APA between Ohio Willow Wood and Otto Bock) (*in camera*)).**

Response to Finding No. 219:

Complaint Counsel's finding is misleading. No evidence suggests that Otto Bock possesses [redacted]

220. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5142-43 (*in camera*); PX01407 (Otto Bock) at 010 (Plié Manufacturing Process Presentation) (*in camera*)).

Response to Finding No. 220:

Complaint Counsel's proposed finding is misleading. It omits relevant parts of [redacted]

[redacted]

221. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5143 (*in camera*)).

Response to Finding No. 221:

Complaint Counsel's proposed finding of fact is misleading because it omits that [redacted]

222. [redacted] (PX01409 (Freedom) at 007 (*in camera*)). [redacted] (PX01407 (Otto Bock) at 011 (*in camera*)).

Response to Finding No. 222:

Complaint Counsel's proposed finding is misleading. [redacted]

[redacted]

223. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5145-46 (*in camera*)).

Response to Finding No. 223:

Respondent has no specific response.

224. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5143-48 (*in camera*); PX01407 (Otto Bock) at 010-11 (Plié Manufacturing Process Presentation) (*in camera*)). Freedom's CEO, Mr. Reissfelder, testified that these employees have "historical knowledge about how to do things maybe more quickly[.]" (PX05138 (Reissfelder (Freedom) Dep. at 193)). "They know how to do things a little faster, even if it's not necessarily in the work instruction." (PX05138 (Reissfelder (Freedom) Dep. at 193)).

Response to Finding No. 224:

Complaint Counsel's proposed finding is misleading. It omits the text that directly follows

[redacted]

225. (Arbogast (Ohio Willow Wood) Tr. 5143-48 (*in camera*)).

Response to Finding No. 225:

Complaint Counsel's proposed finding of fact is misleading.

226. (Arbogast (Ohio Willow Wood) Tr. 5103 (*in camera*)). (Arbogast (Ohio Willow Wood) Tr. 5094 (*in camera*)).

Response to Finding No. 226:

Respondent has no specific response.

227. Arbogast (Ohio Willow Wood) Tr. 5186-87 (*in camera*)).

Response to Finding No. 227:

Complaint Counsel's proposed finding of fact is inaccurate. When asked whether [redacted]

[redacted]

228. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5033, 5185 (*in camera*)).

Response to Finding No. 228:

Respondent has no specific response.

229. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5184 (*in camera*)).

Response to Finding No. 229:

Complaint Counsel's proposed finding of fact is misleading because it [redacted]

230. Ms. Wise testified during her deposition that she also does not know how Freedom markets its Plié, including whether Freedom's foot portfolio helps it sell its knees. (PX05152 (Wise (Ohio Willow Wood) Dep. at 52)).

Response to Finding No. 230:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons described above in Respondent's Response to CCFF ¶ 227. In addition, Complaint Counsel's proposed finding of fact is incomplete because [redacted]

231. Ms. Wise testified that, if Freedom's bundling of the Kinterra and the Plié helps drive its Plié sales, acquiring the Kinterra would help Ohio Willow Wood match Freedom's Plié sales. (PX05152 (Wise (Ohio Willow Wood) Dep. at 55-56)).

Response to Finding No. 231:

Complaint Counsel's proposed finding of fact is not credible [redacted]

[redacted]

232. Ms. Wise also testified that acquiring the Kinterra would help improve Ohio Willow Wood's chances of competing as successfully as Freedom does today in the MPK market. (PX05152 (Wise (Ohio Willow Wood) Dep. at 56)).

Response to Finding No. 232:

Complaint Counsel's proposed finding of fact is not credible [redacted]

233. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5186-87 (*in camera*)).

Response to Finding No. 233:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons given in the Response to CCFF ¶ 227.

234. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5187 (*in camera*)).

Response to Finding No. 234:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons given in the Response to CCFF ¶ 227.

235. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5187 (*in camera*)).

Response to Finding No. 235:

Complaint Counsel's proposed finding of fact is incomplete because it omits that [redacted]

Complaint Counsel's proposed finding of fact is irrelevant for the reasons given in the Response to CCFF ¶ 227.

c) [redacted]

236. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5096 (*in camera*); Schneider (Otto Bock) Tr. 4689 (*in camera*); RX-1042 (Otto Bock/OWW) (**APA between Ohio Willow Wood and Otto Bock) (*in camera*)**). [redacted] (RX-1043 (Otto Bock/OWW) (**Disclosure Letter to APA between Ohio Willow Wood and Otto Bock**) (*in camera*); Arbogast (Ohio Willow Wood) Tr. 4992 (*in camera*)). This was 28 days after Respondent Counsel provided its final proposed exhibit list, including depositions, which were due May 1, 2018. (Third Revised Scheduling Order at 001, April 23, 2018). This was 53 days after the close of fact discovery, which occurred on April 6, 2018. (First Revised Scheduling Order at 002, January 18, 2018).

Response to Finding No. 236:

Complaint Counsel's proposed finding of fact should be rejected by the Court, because Complaint Counsel improperly cites to an out-of-date scheduling order to claim that Ottobock [redacted] *after* the exhibit list was due, when in fact Respondent provided [redacted] to Complaint Counsel *with the rest of its exhibits* and in accordance with the Fourth Revised Scheduling Order. (*See* Fourth Revised Scheduling Order (setting deadline for exhibit lists to May 29, 2018)).

237. [redacted]

[redacted] .} (Arbogast (Ohio Willow Wood) Tr. 5150-51 (*in camera*)).

Response to Finding No. 237:

Complaint Counsel's proposed finding of fact because the [redacted]

238. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5097-98 *(in camera)*).

Response to Finding No. 238:

Respondent has no specific response.

239. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5061, 5097 (*in camera*)).

Response to Finding No. 239:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

[redacted]

240. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5098 (*in camera*)).

Response to Finding No. 240:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

241. [redacted]

Response to Finding No. 241:

Complaint Counsel's proposed finding of fact is irrelevant because Complaint Counsel has alleged anticompetitive effects only in a market for MPKs. (Compl. ¶ 17).

242. [redacted] (Schneider (Otto Bock) Tr. 4706-08 (*in camera*); Arbogast (Ohio Willow Wood) Tr. 5096 (*in camera*).

Response to Finding No. 242:

Complaint Counsel's proposed finding of fact is irrelevant because Complaint Counsel has alleged anticompetitive effects only in a market for MPKs. (Compl. ¶ 17)

243. (PX05138 (Reissfelder (Freedom) Dep. at 138-39); (PX01681 (Freedom) at 011 (Operating Committee Meeting Presentation dated February 2016) (*in camera*)).

Response to Finding No. 243:

Complaint Counsel's proposed finding of fact is incomplete.

244. (Arbogast (Ohio Willow Wood) Tr. 5121 (*in camera*);

Response to Finding No. 244:

Complaint Counsel's proposed finding of fact is misleading and incomplete because there are only

245. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5137-39 (*in camera*); Schneider (Otto Bock) Tr. 4703-04 (*in camera*)).

Response to Finding No. 245:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

246. [redacted]

Response to Finding No. 246:

Complaint Counsel's proposed finding of fact is incomplete to the extent it suggests that [redacted]

247. [redacted]

Response to Finding No. 247:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

248. [redacted] (PX01409 (Freedom) at 005-008 (*in camera*)).

Response to Finding No. 248:

Complaint Counsel's proposed finding of fact is not supported by the cited evidence. The cited exhibit consists of a [redacted]

249. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5174 (*in camera*); [redacted]

Response to Finding No. 249:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

250. [redacted] (PX01409 (Freedom) at 005-008 (*in camera*); PX01392 (Freedom) at 013 (*in camera*); [redacted]

Response to Finding No. 250:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that

[redacted]

[redacted]

251. [redacted] PX01409 (Freedom) at 005-008 (*in camera*); PX01392 (Freedom) at 013 (*in camera*); [redacted]

Response to Finding No. 251:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

[redacted]

252. [redacted] PX01409 (Freedom) at 005-008(*in camera*); PX01392 (Freedom) at 013 (*in camera*); [redacted]

Response to Finding No. 252:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that [redacted]

4. Administrative Trial

253. The administrative trial began on Tuesday, July 10, 2018. (Tr. 04).

Response to Finding No. 253:

Respondent has no specific response.

254. During Complaint Counsel's case-in-chief, 19 fact witnesses and two experts testified. (Tr. 143-4253).

Response to Finding No. 254:

Respondent has no specific response.

255. During Respondent's case, 10 fact witnesses and two experts testified. (Tr. 4259-6887).

Response to Finding No. 255:

Respondent has no specific response.

256. The last day of the administrative trial was October 4, 2018. (Tr. 6894).

Response to Finding No. 256:

Respondent has no specific response.

H. RESPONDENT'S [redacted] POST-TRIAL COMMENCEMENT

1. [redacted]

257. **Brian Stephen Blatchford is Executive Chairman of Charles A. Blatchford & Sons Limited, also known as Endolite ("Endolite"), a prosthetics company. (Blatchford (Endolite) Tr. 2089, 2091, 2099).**

Response to Finding No. 257:

Respondent has no specific response.

258. [redacted] **(Blatchford (Endolite) Tr. 2180-82 (*in camera*)).** [redacted] **(Blatchford (Endolite) Tr. 2183 (*in camera*)).** [redacted] **(Blatchford (Endolite) Tr. 2184 (*in camera*)).**

Response to Finding No. 258:

Respondent has no specific response.

259. **Sönke Rössing is Chief Strategy and Human Resources Officer at Otto Bock HealthCare GmbH. (PX05127 (Rössing (Otto Bock) Dep. at 4).** [redacted]

[redacted] **(PX05127 (Rössing (Otto Bock) Dep. at 58 (*in camera*)).**

Response to Finding No. 259:

[redacted]

260. [redacted] **(PX05127 (Rössing (Otto Bock) Dep. at 61) (*in camera*)).**

Response to Finding No. 260:

Complaint Counsel's proposed finding of fact is misleading. When asked why Ottobock [redacted]

261. [redacted] **(Blatchford (Endolite) Tr. 2279 (*in camera*)).** [redacted] **(Blatchford (Endolite) Tr. 2280 (*in camera*)).** [redacted] **(Blatchford (Endolite) Tr. 2287-88 (*in camera*)).**

Response to Finding No. 261:

Complaint Counsel's proposed finding of fact is incomplete because it omits the rest of [redacted]

[redacted]

262. [redacted] **(Complaint Counsel's Motion in Limine to Exclude All Evidence Related to Respondent's Possible Divestiture to Endolite, Docket No. 9378 at 003 (*in camera*)). This was two days after Respondent Counsel provided its final proposed exhibit list, including depositions, which were due May 1, 2018. (Third Revised Scheduling Order at 001, April 23, 2018). This was twenty-seven days after the close of fact discovery, which occurred on April 6, 2018. (First Revised Scheduling Order at 002, January 18, 2018).**

Response to Finding No. 262:

Complaint Counsel's proposed finding of fact should be rejected by the Court, becaue Complaint Counsel improperly cites to an out-of-date scheduling order to claim that [redacted] *after* the exhibit list was due, when in fact it was before. (*See* Fourth Revised Scheduling Order (setting deadline for exhibit lists to May 29, 2018)).

263. [redacted] **(Blatchford (Endolite) Tr. 2280 *(in camera)*).**

Response to Finding No. 263:

Respondent has no specific response.

a) [redacted]

264. [redacted] **This was three and a half months after Respondent Counsel provided its final proposed exhibit list, including depositions, which were due May 1, 2018. (Third Revised Scheduling Order at 001, April 23, 2018). This was four months**

and twelve days after the close of fact discovery, which occurred on April 6, 2018. (First Revised Scheduling Order at 002, January 18, 2018).

Response to Finding No. 264:

Complaint Counsel's proposed finding of fact should be rejected by the Court, because Complaint Counsel improperly cites to an out-of-date scheduling order to [redacted] (*See* Fourth Revised Scheduling Order (setting deadline for exhibit lists to May 29, 2018)). [redacted]

265. [redacted]

Response to Finding No. 265:

Respondent has no specific response.

266. [redacted]

Response to Finding No. 266:

Respondent has no specific response.

267. [redacted]

Response to Finding No. 267:

Respondent has no specific response.

268. [redacted]

[redacted]

Response to Finding No. 268:

Respondent has no specific response.

269. [redacted] **(Schneider (Otto Bock) Tr. 4720-21 (*in camera*)).**

Response to Finding No. 269:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

270. [redacted]

Response to Finding No. 270:

Respondent has no specific response.

271. [redacted]

Response to Finding No. 271:

Complaint Counsel's proposed finding of fact is inaccurate in its statement that there is [redacted]

272. [redacted] **Schneider (Otto Bock) Tr. 4721 (*in camera*)).**

Response to Finding No. 272:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

273. [redacted] **(Schneider (Otto Bock) Tr. 4721 (*in camera*)).**

Response to Finding No. 273:

Complaint Counsel's proposed finding of fact is incomplete because it omits that the [redacted]

[redacted]

b) [redacted]

274. [redacted] **Schneider (Otto Bock) Tr. 4721-22 (*in camera*)).**

Response to Finding No. 274:

Complaint Counsel's proposed finding of fact mischaracterizes [redacted]

[redacted]

[redacted]

275. [redacted]
(Blatchford (Endolite) Tr. 2289 (*in camera*))

Response to Finding No. 275:

Complaint Counsel's proposed finding of fact mischaracterizes [redacted]

2. [redacted]

276. [redacted] **(Mattear (Proteor) Tr. 5519 (*in camera*)).** [redacted] **(Mattear (Proteor) Tr. 5520 (*in camera*)).** [redacted] **(Mattear (Proteor) Tr. 5521 (*in camera*)).**

Response to Finding No. 276:

Respondent has no specific response.

277. [redacted] **(Mattear (Proteor) Tr. 5523 (*in camera*)).**

Response to Finding No. 277:

Respondent has no specific response.

a) [redacted]

278. [redacted] **The Otto Bock/Endolite Term Sheet was signed by Jean Francois Cantero of Proteor France. (RX-1100 (Otto Bock) at 001, 006 (Otto Bock/Proteor Term Sheet) (*in camera*); Mattear (Proteor) Tr. 5698 (*in camera*)). This was two and a half months after Respondent Counsel provided its final proposed exhibit list, including depositions, which were due May 1, 2018. (Third Revised Scheduling Order at 001, April 23, 2018). This was three months and six days after the close of fact discovery, which occurred on April 6, 2018. (First Revised Scheduling Order at 002, January 18, 2018). Mr. Mattear was deposed by Complaint Counsel on April 6, 2018. (PX05161 (Mattear (Proteor) Dep. at 01).**

Response to Finding No. 278:

Complaint Counsel's proposed finding of fact should be rejected by the Court, becaue Complaint Counsel improperly cites to an out-of-date scheduling order to [redacted] (*See* Fourth Revised Scheduling Order (setting deadline for exhibit lists to May 29, 2018)). Moreover, the Court found that there was good cause to allow Ottobock to [redacted]

279. [redacted] **(Mattear (Proteor) Tr. 5747 (*in camera*)).**

Response to Finding No. 279:

Respondent has no specific response.

280. [redacted] **(Mattear (Proteor) Tr. 5747-48 (*in camera*)).** [redacted] **(Mattear (Proteor) Tr. 5699 (*in camera*)).**

Response to Finding No. 280:

Respondent has no specific response.

281. [redacted]

[redacted]

Response to Finding No. 281:

Respondent has no specific response, other than that [redacted]

b) [redacted]

282. [redacted] **(Mattear (Proteor) Tr. 5759 (*in camera*)).** [redacted]

Response to Finding No. 282:

Complaint Counsel's proposed finding of fact is incomplete because it does not fully [redacted]

[redacted]

283. [redacted] **(Mattear (Proteor) Tr. 5759 (*in camera*)).**

Response to Finding No. 283:

Complaint Counsel's proposed finding of fact lacks credibility because [redacted]

284. [redacted] **(Mattear (Proteor) Tr. 5703 (*in camera*)).**

Response to Finding No. 284:

Complaint Counsel's proposed finding of fact is inaccurate to the extent [redacted]

285. [redacted] **(Mattear (Proteor) Tr. 5693-94, 5748-49 (*in camera*)).**

Response to Finding No. 285:

Respondent has no specific response.

286. [redacted] **(Mattear (Proteor) Tr. 5756-57 (*in camera*)).**

Response to Finding No. 286:

Complaint Counsel's proposed finding of fact is inaccurate because it omits that [redacted]

287. [redacted] **(Mattear (Proteor) Tr. 5751 (*in camera*)).**

Response to Finding No. 287:

Respondent has no specific response

288. [redacted] **(Mattear (Proteor) Tr. 5764 (*in camera*)).** **(Mattear (Proteor) Tr. 5764 (*in camera*)).** [redacted] **(Mattear (Proteor) Tr. 5764-65 (*in camera*)).**

Response to Finding No. 288:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

289. [redacted] **(Mattear (Proteor) Tr. 5766-67 (*in camera*)).** [redacted]

[redacted] **(Mattear (Proteor) Tr. 5766-67 (*in camera*)).**

Response to Finding No. 289:

Complaint Counsel's proposed finding of fact is misleading. Although Complaint Counsel characterized [redacted]

290. [redacted] **(Mattear (Proteor) Tr. 576-7 (*in camera*)).**

Response to Finding No. 290:

Respondent has no specific response, other than that the citation should be to pages 5766-5767, not pages 576-7.

291. [redacted] **(Mattear (Proteor) Tr. 5767-68 (*in camera*)).**

Response to Finding No. 291:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

292. [redacted] **(Mattear (Proteor) Tr. 5764, 5766-68 (*in camera*)).**

Response to Finding No. 292:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

293. [redacted] **(RX-1100 (Otto Bock) at 001 (Proteor Term Sheet) (*in camera*)).**

[redacted]

Response to Finding No. 293:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

3. [redacted]

294. [redacted]

Response to Finding No. 294:

Complaint Counsel's proposed finding of fact is misleading. It omits that [redacted]

295. [redacted] **(PX05127 (Rössing (Otto Bock) Dep. at 60) (*in camera*)).**

Response to Finding No. 295:

Complaint Counsel's proposed finding of fact is misleading. No evidence suggests that [redacted]

[redacted]

a) [redacted]

296. [redacted] **} This was two and a half months after Respondent Counsel provided its final proposed exhibit list, including depositions, which were due May 1, 2018. (Third Revised Scheduling Order at 001, April 23, 2018). This was three months and six days after the close of fact discovery, which occurred on April 6, 2018. (First Revised Scheduling Order at 002, January 18, 2018).**

Response to Finding No. 296:

Complaint Counsel's proposed finding of fact should be rejected by the Court, becaue Complaint Counsel improperly cites to an out-of-date scheduling order to [redacted] (*See* Fourth Revised Scheduling Order (setting deadline for exhibit lists to May 29, 2018)). Moreover, the Court found that there was good cause to allow Ottobock to [redacted]

297. [redacted]

Response to Finding No. 297:

Respondent has no specific response.

298. [redacted]

Response to Finding No. 298:

Complaint Counsel's proposed finding of fact is inaccurate because the [redacted]

299. [redacted]

Response to Finding No. 299:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

b) [redacted]

300. [redacted]

Response to Finding No. 300:

Respondent has no specific response.

301. **Mr. Fillauer, Fillauer's CEO, did not testify at the trial in this case. (Tr. 143-6895).**

Response to Finding No. 301:

Respondent has no specific response.

302. [redacted]

Response to Finding No. 302:

Respondent has no specific response.

III. GENERAL PROSTHETICS INDUSTRY BACKGROUND

A. PATIENTS THAT RECEIVE AND USE PROSTHETIC KNEES

1. Causes of Amputation or Need for a Prosthetic Knee

303. An estimated 1.9 million individuals in the United States live with the loss of a limb, including slightly more than 350,000 individuals (or 18.5 percent) who are transfemoral, or above-the-knee, amputees. (PX08004 (RAND Report) at 007).

Response to Finding No. 303:

Complaint Counsel's proposed finding of fact misstates the RAND Report, which states only that "[i]t is estimated that 1.9 million individuals in the United States are living with the loss of a limb. Of that number, 18.5 percent are transfemoral amputees." (PX08004 (RAND Report) at 007).

304. Congenital deformities or diabetes, vascular disease, and traumatic injury cause patients to lose their lower limbs. (Asar (Hanger) Tr. 1334; Ell (Mid-Missouri O&P) Tr. 1677).

Response to Finding No. 304:

Complaint Counsel's proposed finding of fact misstates the record. Vinit Asar testified that amputees come to Hanger Clinics as the result of "some vascular disease, likely because of diabetes or something that then gets vascular disease," as well as because of traumatic events, workplace accidents, and congenital birth defects. (Asar, Tr. 1334). Tracy Ell testified that "[a]n above-the-knee amputation might result from a traumatic incident or from a vascular episode subsequent from diabetes or cancer." (Ell, Tr. 1677). Neither individual testified that congenital deformities cause patients to lose their lower limbs, as Complaint Counsel's proposed finding of fact states. (Asar, Tr. 1334; Ell, Tr. 1677). Indeed, lower limb amputations occur because of vascular diseases, like diabetes; other causes include trauma, cancer, and flesh-eating bacteria. (Schneider, Tr. 4287; Senn, Tr. 163; Doug Smith, Tr. 5982-5983; *see also* RFOF ¶ 95 (describing the conditions which result in lower limb amputations)).

305. Approximately 78 percent of lower-limb amputations were due to dysvascular disease, approximately 20 percent were due to trauma, and approximately two percent were due to cancer. (PX08072 at 004 (Kathryn Ziegler-Graham, et al., Estimating the Prevalence of Limb Loss in the United States: 2005 to 2050, 89 Archives of Physical and Med. Rehab. 422, 425 (2008)).

Response to Finding No. 305:

Complaint Counsel's proposed finding of fact misstates the record. In 2005, of the 623 major lower limb losses, 504 were due to dysvascular disease, 106 were due to trauma, and 13 were due to cancer. (PX08072 at 004 (Kathryn Ziegler-Graham, et al., Estimating the Prevalence of Limb Loss in the United States: 2005 to 2050, 89 Archives of Physical and Med. Rehab. 422, 425 (2008))). Additionally, in 2005, of the 404 minor lower-limb losses, 302 were due to dysvascular disease, 101 were due to trauma, and 1 was due to cancer. (PX08072 at 004).

2. Types of Amputation

306. Lower-limb amputees are grouped according to the location of their amputation—above-the-knee, below-the-knee, or knee disarticulation. (PX05164 (Highsmith (Dep't of Veterans Affairs) Dep. at 54)).

Response to Finding No. 306:

Complaint Counsel's proposed finding of fact misstates the record. Dr. Highsmith testified that "the predominant levels of amputation around the knee: Transfemoral, possible to the knee; disarticulation is removing the bones distal to the femur, so the tibia/fibula, that would be a knee disarticulation; and then below the knee, obviously the transtibial level where the surgeon is cutting the tibia and the fibula." (PX05164 (Highsmith, Dep. at 54))

307. Above-the-knee amputees, or "transfemoral" amputees, have an amputation through the femur. (JX001 at 002 (¶¶ 14-15); Potter (Walter Reed) Tr. 754; Smith (Retired) Tr. 5988).

Response to Finding No. 307:

Respondent has no specific response.

308. Knee-disarticulation amputees receive an amputation through the knee joint. (PX05164 (Highsmith Dep. at 54)).

Response to Finding No. 308:

Complaint Counsel's proposed finding of fact misstates the record. Dr. Highsmith testified that "disarticulation is removing the bones distal to the femur, so the tibia/fibula, that would be a knee disarticulation . . . . So the knee disarticulation is literally leaving the femur, plus or minus the patella, or part of the patella." (PX05164 (Highsmith, Dep. at 54)). Indeed, Dr. Doug Smith testified that a knee disarticulation is an "amputation [that] happens between the femur and the tibia." (PX05143 (Doug Smith, Dep. at 40)). Dr. Smith further testified that in a knee disarticulation, "you divide through the soft tissues between the femur and the tibia, so you actually separate the two bones." (Doug Smith, Tr. 5985).

309. Below-the-knee amputees, or "transtibial" amputees, have an amputation below the knee. (PX05164 (Highsmith (Dep't of Veterans Affairs) Dep. at 54)).

Response to Finding No. 309:

Respondent has no specific response.

310. Transfemoral amputees make up the largest percentage of knee amputation patients. Surgeons in the United States perform substantially more transfemoral amputations than knee disarticulation amputations. (PX05143 (Smith (Retired) Dep. at 40-42)). A former surgeon for the U.S. Department of Veteran Affairs estimated that surgeons perform roughly 20 times more transfemoral amputations than knee disarticulation amputations. (PX05143 (Smith (Retired) Dep. at 40-42)).

Response to Finding No. 310:

Complaint Counsel's proposed finding of fact misstates the record. Dr. Doug Smith did not testify that transfemoral amputees make up the largest percentage of knee amputation patients; he was asked to compare the number of transfemoral amputees to knee disarticulations. (PX05143 (Doug Smith, Dep. at 40-42)). Dr. Doug Smith testified that "there are vastly more transfemoral, probably -- and this is just a very rough estimate --probably less than one-twentieth the number of knee disarticulations, maybe even one-thirtieth. Transfemoral is much more common." (PX05143 (Doug Smith, Dep. at 41)).

311. MPKs are used by both above-the-knee amputees and knee-disarticulation amputees. On Otto Bock's website, under FAQs, it states: "Is a microprocessor knee system right for me? Most microprocessor knees can be used by people with amputation at the knee (knee disarticulation) and above the knee (transfemoral). They provide the same benefits to double amputees (bilateral limb deficiency) and people with an amputation at the hip (hip disarticulation). They also can be used by people with a hemipelvectomy amputation and good walking ability. Check each knee system to see their recommended 'indications,' or ask your prosthetist." (PX08013 (Otto Bock) at 003).

Response to Finding No. 311:

Respondent has no specific response.

3. K-Levels of Patients that Use Prosthetic Knees

312. The K-level designations were developed by the Centers for Medicare and Medicaid Services ("CMS"), a United States Federal Agency in the United States Department of Health and Human Services. (JX001 at 002 ¶¶ 16-17)).

Response to Finding No. 312:

Respondent has no specific response.

313. The K-Level definitions are used throughout the orthotic and prosthetics industry in the United States to classify amputees into five ascending mobility levels, K-Level 0 to K-Level 4. (JX001 at ¶ 18; PX05108 (Yates (Jonesboro P&O Lab) Dep. at 44-46); PX05143 (Smith (Retired) Dep. at 77-78); PX08068 (Michael S. Orendurff, et al., Functional level assessment of individuals with transtibial limb loss: Evaluation in the clinical setting versus objective community ambulatory activity, 3 Journal of Rehab. and Assistive Tech. Engineering 1, 2 (2016)) (table showing K level descriptions)).

Response to Finding No. 313:

Respondent has no specific response.

314. 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." (JX001 at 002 (¶ 19)).

Response to Finding No. 314:

Respondent has no specific response.

315. K-Level 1 is described by CMS as a Household Ambulator: "Has the ability or potential to use a prosthesis for ambulation on level surfaces at fixed cadence." (JX001 at 002 (¶ 20)).

Response to Finding No. 315:

Respondent has no specific response.

316. 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." (JX001 at ¶ 21).

Response to Finding No. 316:

Respondent has no specific response.

317. 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 ambulatory who has the ability to traverse most environmental barriers and may have vocational, therapeutic, or exercise activity that demands prosthetic utilization beyond simple locomotion." (JX001 at 003 (¶ 22); *see also* PX05166 (Watson (Fourroux) Dep. at 35)).

Response to Finding No. 317:

Respondent has no specific response.

318. 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." (JX001 at ¶ 23; *see also* PX05166 (Watson (Fourroux) Dep. at 35-36).

Response to Finding No. 318:

Respondent has no specific response.

B. PATH OF AN ABOVE-THE-KNEE AMPUTEE FROM SURGERY TO RECOVERY

1. Amputation Surgery

319. A transfemoral amputation is an amputation that is performed transosseously through the femur. (Potter (Walter Reed) Tr. 754). This involves cutting part of the thighbone to remove the rest of the extremity. (Potter (Walter Reed) Tr. 754) In lay terms, this is known as an above-knee amputation. (Potter (Walter Reed) Tr. 754).

Response to Finding No. 319:

Respondent has no specific response.

320. A bilateral transfemoral amputation is an amputation that is performed transosseously through both of the patient's femurs. (Potter (Walter Reed) Tr. 755).

Response to Finding No. 320:

Respondent has no specific response.

321. Assuming that the patient enters the operating room with an intact limb, the amputation begins with adequate anesthesia. (Potter (Walter Reed) Tr. 756).

Response to Finding No. 321:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it does not specify what type of amputation Dr. Benjamin Potter is discussing. Indeed, Dr. Potter is describing the procedure that generally occurs during a transfemoral amputation. (Potter, Tr. 756). Dr. Potter's testimony is based upon his experiences, including as 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; *see also* RFOF ¶¶ 68-69 (discussing Dr. Potter's background)).

322. The patient's leg is prepped sterilely and a skin incision is made, the level of which would vary based upon the pathology. (Potter (Walter Reed) Tr. 756). Generally, the incision is made just above the knee level. (Potter (Walter Reed) Tr. 756).

Response to Finding No. 322:

Respondent has no specific response.

323. Next, the surgeon would reflect the skin flaps towards the hip, dissect down and divide the muscle so that it would be available to fold over the bone for both residual limb control and padding. (Potter (Walter Reed) Tr. 756). The muscle is transected at that level. (Potter (Walter Reed) Tr. 756).

Response to Finding No. 323:

Respondent has no specific response.

324. The femur is isolated and transected with a saw. (Potter (Walter Reed) Tr. 756).

Response to Finding No. 324:

Respondent has no specific response.

325. After blood vessels and nerves are identified and dealt with, the surgeon proceeds with getting the limb closed up properly. (Potter (Walter Reed) Tr. 757).

Response to Finding No. 325:

Complaint Counsel misstates the record. Dr. Potter testified that after the transection, the muscles of the posterior leg are divided so that the surgeon can get control of the blood vessels and tie off the bigger blood vessels, which require isolation and ligation. (Potter, Tr. 756). Then, the sciatic nerve must be identified and appropriately dealt with, "[t]ypically, at a minimum, it's trimmed back to not be at the bottom of the residual limb when a patient is going to be walking." (Potter, Tr. 757). Then, the skin in the back is cut, the amputation is complete, and "[y]ou're ready to sort of handle them off the field." (Potter, Tr. 757). After the amputation is complete, the surgeon proceeds with getting the limb closed up properly, "to put the amputation back together in the most functional possible status." (Potter, Tr. 757). The process typically consists of tying some critical muscle groups into the bone, and anchoring the rest of the muscle groups to those muscle groups to provide additional padding and make sure that there is stability over the bone. (Potter, Tr. 757). Then, the skin edges are trimmed, a drain is placed in the leg to prevent hematoma or extra fluid from accumulating, and the skin is closed with sutures. (Potter, Tr. 757-758; *see also* RFOF ¶¶ 97-98).

326. Dr. Potter testified that the most important thing a surgeon can do during amputation is making sure that the residual limb heals. (Potter (Walter Reed) Tr. 758).

Response to Finding No. 326:

Complaint Counsel misstates the record. Dr. Potter testified that "I think the most important thing you can do is make sure that it heals. Sometimes that's beyond our control, but the steps that I mentioned with regard to securing the muscles or tendons to the bone are very important for a patient's ability to control and manipulate a prosthesis well and can affect . . . how well they're able to walk. And then the patient having adequate padding over the terminal bone

for a socket-based prosthesis is very important in terms of preventing pain, ulceration or breakdown, a slew of problems that can develop once a patient is trying to bear weight on a prosthesis." (Potter, Tr. 758; *see also* RFOF ¶¶ 97-98).

2. Rehabilitation Process

327. After surgery is complete, the patient stays inpatient for a period of a few days. (Potter (Walter Reed) Tr. 758). The average stay is approximately five days. (Potter (Walter Reed) Tr. 759).

Response to Finding No. 327:

Complaint Counsel misstates the record. Dr. Potter stated that "[t]hey always stay inpatient for a period of a few days. You know, in a simple scenario where we are only dealing with an isolated transfemoral amputation, there's no other injury or complicated medical problems, you're still probably looking at a minimum of three nights in a hospital but sometimes up to a week or longer. I would say an average of about five days." (Potter, Tr. 758-759; *see also* RFOF ¶¶ 97-98).

328. Much of the time spent in the hospital is to "achieve adequate pain control and gradually get the patient weaned off of any regional anesthetic catheters or epidural catheters or any intravenous narcotics they are receiving and ultimately get the patient on an acceptable oral pain regimen." (Potter (Walter Reed) Tr. 759).

Response to Finding No. 328:

Respondent has no specific response.

329. The hospital further ensures that the patient is "eating, peeing and pooping appropriately." (Potter (Walter Reed) Tr. 759). Once the patient has met the criteria for discharge, they are safe to be an outpatient. (Potter (Walter Reed) Tr. 759).

Response to Finding No. 329:

Respondent has no specific response.

330. After the patient leaves the hospital, surgeons conduct additional evaluations to ensure proper recovery from the surgery. (Potter (Walter Reed) Tr. 760-62).

Response to Finding No. 330:

Complaint Counsel misstates the record. Dr. Potter noted that the surgeons inquire how the patient's surgery went, ensure that there's adequate pain control, and "discuss the patient's anticipated rehab course from there in terms of some of timelines and milestones." (Potter, Tr. 759-760). Dr. Potter also noted that, 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. 760-761). 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; *see also* RFOF ¶ 99).

331. Then, after the patient begins the rehabilitation and fitting process, the surgeon will see the patient on an informal basis. (Potter (Walter Reed) Tr. 762-63).

Response to Finding No. 331:

Respondent has no specific response.

332. After ensuring a patient is ready for a prosthetic fitting, a surgeon or a physiatrist provides a patient with a prescription to receive an initial prosthesis. (Potter (Walter Reed) Tr. 762, 764); Ell (Mid-Missouri O&P) Tr. 1681-82; Ford (POA) Tr. 919; PX05002 (Asar (Hanger Inc.) IHT at 16)).

Response to Finding No. 332:

Respondent has no specific response.

3. Referral to the Prosthetic Clinic

333. To start the fitting process, a patient visits a clinic upon referral from a physician. (PX05002 (Asar (Hanger Inc.) IHT at 16)).

Response to Finding No. 333:

Complaint Counsel misstates the record. Vinit Asar, speaking from his experience as the Chief Executive Officer of Hanger, Inc., testified that "[w]hen a patient comes to us, that patient comes to us referred to by a physician, and the physician can be an orthopedic surgeon, a vascular surgeon, in some cases a PM&R doc, and they would evaluate the patient and then determine what sort of knee that patient would get, and they would write a script and send it in to us." (PX05002 (Asar, IHT at 16)). Therefore, 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; *see also* RFOF ¶ 100).

334. When evaluating a patient to be fit with a prosthetic leg, a prosthetist is "determining a lot of different factors about the patient, what is – what is their limb shape, what is their current activity level, what are the things that we want to be able to do in the future, do they have caregivers, are they mobile at all." (Ford (POA) Tr. 981). Furthermore, the initial visit includes a medical history review. (Ford (POA) Tr. 981).

Response to Finding No. 334:

Complaint Counsel mischaracterizes the record. Mr. Ford was providing a brief overview of the fitting process of an MPK, not the fitting process for a prosthetic knee generally. (Ford, Tr. 981) ("Q. Can you provide a brief overview of the fitting process of an MPK starting with the first step of the process"). Further, Complaint Counsel's proposed finding regarding patient evaluation relies upon the testimony of Mr. Ford, who is not a prosthetist, has never been a prosthetist, and is not personally involved in providing patient care. (Ford, Tr. 918-919). Mr. Ford is the President and Managing Partner of Prosthetic and Orthotic Associates (POA). (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; *see also* RFOF ¶ 60).

335. When evaluating a patient to be fit with a prosthetic leg, the prosthetist will focus in part on the patient's "activities of daily living" to determine the needs of the patient. These activities include "[w]ashing clothes, driving, cooking, taking kids to school, walking pets, taking care of pets. Anything you do in your day-to-day routine, or sometimes your weekly routine, or monthly routine that you choose to do or want to do." (PX05119 (Kahle (Prosthetics Design and Research) Dep. at 38-40).

Response to Finding No. 335:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Mr. Kahle stated that, when fitting a patient with a prosthetic leg, he listens to the patient's concerns, activities of daily living, and needs. (PX05119 (Kahle, Dep. at 38)). The patient's needs include "what they want out of their prosthesis. I'd like to walk further. I would like to not fall. I would like to not stumble. I would like to walk with more confidence. I would like to walk more normally. Whatever they say." (PX05119 (Kahle, Dep. at 39)). At trial, at least one witness testified that while the prosthetist will consider a patient's "activities of daily living" to determine the needs of the patient, other important decision criteria for selecting a definitive prosthesis include health, insurance coverage, and vocation. (Schneider, Tr. 4306-4307). The decision of which prosthetic knee to fit depends on the collaboration between the patient, the prosthetist, the payer, and the physician. (Schneider, Tr. 4306; *see also* RFOF ¶¶ 102-105).

336. **A prosthetist's evaluation of a patient to be fit with a prosthetic leg, includes measuring the patient's range of motion, determining the patient's ambulatory capabilities, performing objective tests on the patient's functional potential as divided by K-level classifications, and discussing the patient's specific functional needs. To determine a patient's specific functional needs, a prosthetist will ask a patient about his or her typical day before the amputation, work life, hobbies, and living environment.** (PX05108 (Yates (Jonesboro P&O Lab) Dep. at 38-40)).

Response to Finding No. 336:

Respondent has no specific response.

337. **Rob Yates, President and CEO of Jonesboro P&O Lab, testified, "Anything that would inform the design of the prosthesis to ensure comfort, safety, and function for**

the patient in their desired activities of daily living would be considered and then objectively what is their ability to use a prosthesis to accomplish those tasks." (PX05108 (Yates (Jonesboro P&O Lab) Dep. at 40)).

Response to Finding No. 337:

Respondent has no specific response.

338. The prosthetist also will take measurements and impressions for use during the fabrication process. (Ford (POA) Tr. 983-84).

Response to Finding No. 338:

Complaint Counsel's proposed finding lacks foundation because it relies upon the testimony of Mr. Ford, who is not a prosthetist, has never been a prosthetist, and is not personally involved in providing patient care. (Ford, Tr. 918-919). Mr. Ford is the President and Managing Partner of Prosthetic and Orthotic Associates (POA). (Ford, Tr. 902). As the President of POA, Mr. Ford oversees the business operations, manages the partner team, and oversees operations at POA facilities. (Ford, Tr. 902; *see also* RFOF ¶ 60).

339. To construct an above-the-knee prosthesis, prosthetists most often design a liner, suspension system, a socket, a prosthetic knee, a pylon, and a prosthetic foot. (Ford (POA) Tr. 986-87; Ell (Mid-Missouri O&P) Tr. 1677-78).

Response to Finding No. 339:

Complaint Counsel's proposed finding regarding lower-limb prosthesis is incomplete. 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 cosmetic covering. (Schneider, Tr. 4303-4304; Senn, Tr. 171). To construct an above-the-knee prosthesis, a prosthetist may fabricate certain components themselves, such as sockets. (Oros, Tr. 4778-4779).

340. **The process for fitting a new transfemoral patient with an above-the-knee prosthesis can take between 10 to 20 visits spread out over six months to a year.** (PX05108 (Yates (Jonesboro P&O Lab) Dep. at 43-44)).

Response to Finding No. 340:

Complaint Counsel's proposed finding is inaccurate, and represents information from only one witness who did not testify at trial. Michael Oros, a certified prosthetist and orthotist and the president and CEO of Scheck & Siress, testified at trial that a patient will typically require at least three follow up visits in the first year, and as many as 24 visits. (Oros, Tr. 4787).

341. [redacted] (PX05140 (Weott (Orthotic Prosthetic Center Inc.) Dep. at 14-16) (*in camera*)).

Response to Finding No. 341:

Complaint Counsel's proposed finding of fact is incomplete. More specifically, about sixty days after amputation surgery, a new amputee's physician typically refers the patient to a prosthetist to be evaluated for an initial prosthesis, which is also known as a temporary prosthesis. (Sabolich, Tr. 5841). 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).

4. The Mechanics of Walking for an Above-the-Knee Amputee

342. According to Otto Bock's website: "The gait cycle is divided into two major phases: stance phase and swing phase. The stance phase happens when your foot is on the ground, when you are applying weight to your leg. The swing phase is when your foot is in the air and swinging forward." (PX08013 (Otto Bock) at 001).

Response to Finding No. 342:

Complaint Counsel's proposed finding of fact relies on a document that was never presented at trial and thus was not subject to cross-examination before the Court. (*See also* Schneider, Tr. 4309; Carkhuff, Tr. 342-343; RFOF ¶¶ 131-134). Further, PX08013 is a portion of Ottobock's website that addresses microprocessor knees (MPKs).

343. According to Otto Bock's website: "When your foot is in contact with the ground, your leg normally flexes, or bends, sometimes even when you are standing still. The amount of flexion (bending) is relatively small – you don't want your knee to buckle under you! The muscles of a biological leg are adding resistance, or support, to prevent buckling. When you take a step and put weight on your foot, your knee flexes a little, acting like a shock absorber. This is another time that your muscles are active to stabilize your knee. This also helps take stress off the rest of the body." (PX08013 (Otto Bock) at 001) .

Response to Finding No. 343:

Complaint Counsel's proposed finding of fact relies on a document that was never presented at trial and thus was not subject to cross examination before the Court. (*See also* Schneider, Tr. 4309; Carkhuff, Tr. 342-343; RFOF ¶¶ 131-134). Further, PX08013 is a portion of Ottobock's website that addresses MPKs.

344. According to Otto Bock's website: "When you are in swing phase (your leg swinging forward as you take a step), your knee is also flexed, or bent. But in this case you don't need as much support or resistance, and in fact you want the knee to swing more freely when your foot is off the ground, so you can take that step forward." (PX08013 (Otto Bock) at 002).

Response to Finding No. 344:

Complaint Counsel's proposed finding of fact relies on a document that was never presented at trial and thus was not subject to cross examination before the Court. (*See also* RFOF ¶¶ 131-134). Further, PX08013 is a portion of Ottobock's website that addresses MPKs.

345. "Fear of falling causes many people with lower limb amputations to compensate with changes in their walking style, like keeping their prosthetic knee straight with each step." (PX08013 (Otto Bock) at 002).

Response to Finding No. 345:

Complaint Counsel's proposed finding of fact relies on a document that was never presented at trial and thus was not subject to cross examination before the Court. (*See also* RFOF ¶¶ 131-134). Further, PX08013 is a portion of Ottobock's website that addresses MPKs.

346. "Compensating motions for a stiff-knee gait create unnatural stresses in the ankle, hip, lower back and other leg that can result in long-term effects." (PX08013 (Otto Bock) at 002).

Response to Finding No. 346:

Complaint Counsel's proposed finding of fact relies on a document that was never presented at trial and thus was not subject to cross examination before the Court. (*See also* RFOF ¶¶ 131-134). Further, PX08013 is a portion of Ottobock's website that addresses MPKs.

347. "When you receive a microprocessor knee, your physician usually prescribes additional therapy and gait training. If you have worn a mechanical knee for years, you may have to unlearn some compensating motions to achieve a smoother walking movement." (PX08013 (Otto Bock) at 002).

Response to Finding No. 347:

Complaint Counsel's proposed finding of fact relies on a document that was never presented at trial and thus was not subject to cross examination before the Court. (*See also* RFOF ¶¶ 131-134). Further, PX08013 is a portion of Ottobock's website that addresses MPKs.

5. Long-Term Recovery Process

a) Temporary Prosthesis

348. When a transfemoral amputee gets their first, provisional prosthesis, it is traditionally a mechanical knee with stance friction (or a "safety knee") because the patient is learning to

walk on their amputated stump, a part of the body that was never designed for bearing so much weight. (Smith (Retired) Tr. 5999-6000).

Response to Finding No. 348:

When a transfemoral amputee gets their first, provisional prosthesis, it is traditionally a mechanical knee with stance friction (or a "safety knee") because the patient is learning to walk on their amputated stump, a part of the body that was never designed for bearing so much weight. (Doug Smith, Tr. 5999-6000).

349. During this time period, "goals can be set, habits can be formed, [and] the patient can work with a therapist" while wearing a mechanical knee, with the goal that the patient is "going to progress into an MPK." (PX05149 (Brandt (Ability) Dep. at 41-42)).

Response to Finding No. 349:

Complaint Counsel's proposed finding of fact is misleading to the extent that it suggests that the goal for patients is "to progress into an MPK." Not all above-the-knee amputees wear MPKs. Indeed, U.S. reimbursement requires that a patient be classified as K-3 or K-4 to receive an MPK. (DeRoy, Tr. 3630). 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). 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).

Additionally, of those above-the-knee amputees eligible to wear an MPK, not all patients choose to wear an MPK. (*See* RFOF ¶¶ 392–419). Indeed, 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). 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). [redacted]

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. (DeRoy, Tr. 3554). 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). For instance, 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).

350. "Usually patients have mechanical knees first before you think about providing them with a microprocessor knee. It's pretty tough to convince and insurance company to pay for a microprocessor knee as the first knee after an amputation . . . . [I]nsurance companies usually say the patient has to try a mechanical knee first, and only if that is functionally and safety-wise insufficient, then we may discuss if a microprocessor knee is medically necessary." (PX05150 Kannenberg (Otto Bock) Dep. at 54-55).

Response to Finding No. 350:

Complaint Counsel's proposed finding of fact is misleading to the extent that it suggests that all patients wear MPKs. Indeed, as set forth in response to CCFF ¶ 349, not all above-the-knee amputees wear MPKs for a variety of reasons ranging from lack of reimbursement to preference.

b) Permanent (Definitive) Prosthesis

351. Prosthetists fit a final, definitive prosthesis following physical rehabilitation and training on a prepatory prosthesis. (Sanders (United) Tr. 5472-74).

Response to Finding No. 351:

Respondent has no specific response.

352. After a period of three to six months on a temporary prosthesis, some patients on a mechanical knee progress to a microprocessor knee for their permanent prosthesis. (PX05149 (Brandt (Ability) Dep. at 41-42)).

Response to Finding No. 352:

Complaint Counsel's proposed finding of fact is incomplete. While some patients on a mechanical knee do choose to utilize a microprocessor knee for their permanent prosthesis, not all above-the-knee amputees wear an MPK. (*See* RFOF ¶¶ 392–419). Indeed, U.S. reimbursement requires that a patient be classified as K-3 or K-4 to receive an MPK. (DeRoy, Tr. 3630). Further, 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). When selecting between an MPK and non-MPK, there is simply no clear right or wrong choice, and it comes down to the preference of the patient or the prosthetist. (Sabolich, Tr. 5851; Oros, Tr. 4787; Senn, Tr. 263). [redacted] 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. (DeRoy, Tr. 3554). 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). For instance, 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).

353. A prosthetic clinic seeks reimbursement from payers only after a prosthetist completes the fitting process and the patient signs a "delivery acknowledgement" affirming receipt of the prosthesis. (Senn (COPC) Tr. 171-172).

Response to Finding No. 353:

Complaint Counsel's proposed finding of fact is incomplete because it does not fully describe the process by which prosthetists submit requests for reimbursement. Specifically, in order to be reimbursed, 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, after the prosthetist and the patient have selected the components that will comprise the patient's definitive prosthesis, (Sabolich, Tr. 5837; [redacted] The treating physician must sign off on the Detailed Written Order. [redacted]

c) Follow-up Visits and Changes to Prosthesis

354. **A prosthetist will fit the prosthesis on the patient once the fabrication process is complete. Following the fitting, the prosthetist will continue to provide follow-up care as necessary for the patient.** (PX05108 (Yates (Jonesboro P&O Lab) Dep. at 37-39)).

Response to Finding No. 354:

Respondent has no specific response.

355. One clinic executive testified that his clinic asks patients to return every two weeks after the fitting of a prosthesis in order to check on the patient's progress with the device. The patient will return for visits every three approximately three months after the fitting of the device. One year after the fitting, the clinic asks patients to return every six months or as needed. (Senn (COPC) Tr. 181)

Response to Finding No. 355:

Complaint Counsel's proposed finding is incomplete and misleading because it represents information from only one witness, Keith Senn, who is not a prosthetist, does not work directly with any prosthetists, does not provide any patient care and does not directly fit any prosthetics. (Senn, Tr. 152-154). However, Michael Oros, a certified prosthetist and orthotist and the president

and CEO of Scheck & Siress, testified at trial that a patient will typically require at least three follow up visits in the first year, and as many as 24 visits. (Oros, Tr. 4787).

C. TYPES OF PROSTHETIC KNEES FIT ON ABOVE-THE-KNEE AMPUTEES

356. According to Otto Bock's own website, "In general, there are two kinds of prosthetic knees: non-microprocessor (or 'mechanical') and microprocessor. Mechanical knees all use a mechanical hinge to replace your knee joint. How quickly or easily the hinge swings is often controlled by friction, some type of hydraulic system or a locking mechanism. Microprocessors, on the other hand, provide a more sophisticated method of control to a prosthetic knee. These more complex knee joints are designed to help you walk with a much more stable and efficient gait that more closely resembles a natural walking pattern." (PX08013 (Otto Bock) at 001).

Response to Finding No. 356:

Complaint Counsel's proposed finding of fact is unreliable because it relies solely upon a document that was never presented at trial and thus was not subject to cross examination before the Court. (*See also* RFOF ¶¶ 131-134). Further, PX08013 is a portion of Ottobock's website that addresses MPKs.

357. Prosthetic clinic customers similarly testified that there are two types of prosthetic knees used by above-the-knee amputees – mechanical knees and microprocessor knees. (Ell (Mid-Missouri O&P) Tr. 1675; Brandt (Ability) Tr. 3757).

Response to Finding No. 357:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Prosthetic knees are also sometimes referred to as non-MPKs and MPKs. Further, prosthetic knees are also grouped by whether they are constant friction or fluid-controlled knees. A constant friction knee provides a uniform resistance level in both the swing and stance phases of the gait cycle. (Ell, Tr. 1771-1772). 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).

1. Mechanical Knees

358. There are several types of mechanical knees. (Carver (College Park) Tr. 2019-20; Kaufman (Mayo Clinic) Tr. 819-20; PX05148 (Swiggum (Otto Bock) Dep. at 181-182).

Response to Finding No. 358:

Complaint Counsel's proposed finding of fact is incomplete. There several types of non-MPKs, which include constant-friction knees and fluid-controlled knees. (Ell, Tr. 1771-1772; Kannenberg, Tr. 1941-1942, 1966-1968; Blatchford, Tr. 2148-2150). Non-MPKs include polycentric knees, friction-brake knees, pneumatic knees with friction brakes in them, hydraulic knees, four bar knees, five bar knees, and six bar knees. (Carver, Tr. 2019-2020; Mattear, Tr. 5543-5544). Generally, non-MPKs have mechanical sensory features; for example, "if you're stumbling, instead of using a gyroscope or maybe a pressure sensor to determine that you're falling, it would say you're putting pressure on the toe, maybe clamp and prevent you from falling." (Carver, Tr. 2019-2020).

359. Mechanical knees are divided into subcategories based on their design and function. (Carver (College Park) Tr. 2019-20; PX05117 (Choi (ST&G) Dep. at 39)). The type of mechanism used to generate the force and resistance in the cylinder of a mechanical knee and the structure of the knee differentiate the types of mechanical knees. (Carver (College Park) Tr. 2019-21; PX05160 (Kaufman (Mayo Clinic) Dep. at 48-49)).

Response to Finding No. 359:

Complaint Counsel's proposed finding of fact is misleading, because it ignores the fact that both non-MPKs and MPKs are divided into subcategories based upon their characteristics. There several types of non-MPKs, which include constant-friction knees and fluid-controlled knees. (Ell, Tr. 1771-1772; Kannenberg, Tr. 1941-1942, 1966-1968; Blatchford, Tr. 2148-2150). Non-MPKs include polycentric knees, friction-brake knees, pneumatic knees with friction brakes in them, hydraulic knees, four bar knees, five bar knees, and six bar knees. (Carver, Tr. 2019-2020; Mattear, Tr. 5543-5544).

a) Friction Break and Spring

360. Mechanical knees that use friction to provide the resistance and stance are known as "friction-brake" mechanical knees. (PX05160 (Kaufman (Mayo Clinic) Dep. at 49)). "Friction-brake" mechanical knees are fit on K-2 patients more than K-3 patients. (PX05160 (Kaufman (Mayo Clinic) Dep. at 49)); *see* PX05117 (Choi (ST&G) Dep. at 40)). The design of "friction-brake" mechanical knees limits patients to a single walking speed because of the consistent resistance provided during swing phase. (PX05117 (Choi (ST&G) Dep. at 41)).

Response to Finding No. 360:

Complaint Counsel's proposed finding of fact is misleading. Non-MPKs are described in part based upon their characteristics; some non-MPKs are described as constant-friction knees and some are described as fluid-controlled knees. (Ell, Tr. 1771-1772; Kannenberg, Tr. 1941-1942, 1966-1968; Blatchford, Tr. 2148-2150).

b) Pneumatic and Hydraulic

361. Mechanical knees that use air to regulate the cylinder are known as "pneumatic" knees. (Carver (College Park) Tr. 2020; PX05160 (Kaufman (Mayo Clinic) Dep. at 49)). 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. (Carver (College Park) Tr. 2020).

Response to Finding No. 361:

Complaint Counsel's proposed finding of fact is misleading, because mechanical knees are not the only knees which utilize pneumatic technology. Indeed, [redacted]

362. Mechanical knees that use liquids to regulate the cylinder are known as "hydraulic" knees. (PX05160 (Kaufman (Mayo Clinic) Dep. at 48-49); Carver (College Park) Tr. 2020-21). Similar to the function of the air in a pneumatic knee, the pressure from the liquids in the cylinder of a hydraulic knee regulates the swing and stance phase of a user's gait. (Carver (College Park) Tr. 2020-21).

Response to Finding No. 362:

Complaint Counsel's proposed finding is misleading because it suggests that mechanical knees are the only knees that use liquids to regulate the cylinder and are known as "hydraulic" knees. Many MPKs and non-MPKs utilize a hydraulically controlled cylinder. In an MPK, the microprocessor aspect is controlling that hydraulically controlled cylinder, which means that the microprocessor is only an enhancement to independently-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].

2. Microprocessor Knees

363. MPKs use a microprocessor to regulate the movement and positioning of the knee. (De Roy (Össur) Tr. 3542-43; PX05117 (Choi (ST&G) Dep. at 42); PX05141 (Bright (North Bay P&O) Dep. at 45); PX05119 (Kahle (Prosthetic Design & Research) Dep. at 33-34).

Response to Finding No. 363:

Complaint Counsel's proposed finding is incomplete and misleading. MPKs use a microprocessor to control either the swing or stance, or both the swing and stance phase of the knee. A fluid-controlled knee with only 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). An MP-Stance knee uses a microprocessor to control the stance phase of the knee, but the swing phase is set manually. (Schneider, Tr. 4324; [redacted]). Then there are fluid-controlled knees with a microprocessor-controlled swing and stance phase control ("MP-Swing-and-Stance"). [redacted]; Schneider, Tr. 4350). 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]).

364. According to Otto Bock's website: "The internal computer monitors each phase of your walking pattern (your 'gait cycle') using a series of sensors. The continuous monitoring and control of fluid allows the processor to make adjustments in resistance so you can walk more efficiently at various speeds and walk more safely down ramps and stairs." PX08013-001.

Response to Finding No. 364:

Complaint Counsel's proposed finding of fact is misleading because it uses a single quote to purport to describe qualities to microprocessor knees as a whole.

365. MPKs adjust in real time, as a user walks, by using sensors located in the knee to transmit information to a microprocessor that directs the knee how to respond to a user's motions. (De Roy (Össur) Tr. 3542-43; Kannenberg (Otto Bock) Tr. 1946-47; Ell (Mid-Missouri O&P) Tr. 1704; Carver (College Park) Tr. 2018-19; Blatchford (Endolite) Tr. 2104; PX05111 (Prince (Freedom) Dep. at 96; PX05160 (Kaufman (Mayo Clinic) Dep. at 46); PX05107 (Carver (College Park) Dep. at 19-20); PX05119 (Kahle (Prosthetic Design & Research) Dep. at 34-36)).

Response to Finding No. 365:

Respondent has no specific response.

366. Össur's Executive Vice President of Research and Development, Kim DeRoy testified that an MPK "is a prosthetic knee that relies on a microprocessor or computer to monitor the activity of a patient and steer the function of the knee to ensure appropriate reaction and response of that knee to whatever situation the patient might find themselves in." (DeRoy (Össur) Tr. 3542).

Response to Finding No. 366:

Complaint Counsel's proposed finding of fact is misleading because it relies upon the testimony of only one individual.

367. Mr. De Roy further elaborated that MPKs have "the ability to sense, think and act . . . ." By "sensing," he testified MPKs have "embedded sensors" that read a user's motions and the positioning of the knee. The sensors then relay the information to the microprocessor

in the knee. Finally, the microprocessor uses the information received to adjust the knee to meet the user's needs. (De Roy (Össur) Tr. 3543).

Response to Finding No. 367:

Complaint Counsel's proposed finding of fact is misleading because it relies upon only one individual. It also misstates the record. Mr. DeRoy testified that "a microprocessor knee or bionic knee has the ability to sense, think and act, sensing meaning that the embedded sensors in the device are tracking things like load, are tracking the flexion angle of the knee and are tracking the actual movement of the knee. That is then interpreted by the microprocessor. That is the thinking part. The microprocessor will analyze the situation, analyze the data and take a decision on whether the knee needs to provide stability or allow for dynamics. And then the last step is to -- for that microprocessor to send a signal to the actuator, which will then provide the necessary resistance or free flow motion, depending on the activity of the patient." (DeRoy, Tr. 3543).

368. Mr. Carver, President and COO of College Park, testified that an MPK "tak[es] sensory feedback to anticipate the environment to make decisions for the patient to reduce the chances of trip and fall accidents [and] to change the variance in the patient's speed and how fast the leg swings forward." (PX05107 (Carver (College Park) Dep. at 19)).

Response to Finding No. 368:

Complaint Counsel's proposed finding of fact is misleading because it relies upon only one individual who is not a prosthetist.

D. OTHER COMPONENTS OF LOWER LIMB PROSTHESES FOR ABOVE-THE-KNEE AMPUTEES

369. According to Otto Bock's website, "Prosthetic knees are designed for people who have amputations above their knee, and thus lack the knee joint and lower leg. In reality, you need more than just the knee. For one thing, you need a socket, the bucket-shell that encases your limb and attaches to the prosthetic knee joint on top. You also need something that attaches to the prosthetic knee joint on the bottom (a metal tube known as a pylon) and a prosthetic foot. All of these put together are known as a prosthetic "system" or prosthesis. Your prosthetic system will be unique to you and your needs." (PX08013 (Otto Bock) at 001).

Response to Finding No. 369:

Complaint Counsel's proposed finding of fact relies on a document that was never presented at trial and thus was not subject to cross examination before the Court. (*See also* RFOF ¶¶ 131-134). Further, PX08013 is a portion of Ottobock's website that addresses MPKs.

370. A lower limb prosthesis for an above-the-knee amputee includes a socket, prosthetic knee, a foot, and a pylon, which connects the knee to the foot. (PX05010 (Schneider (Otto Bock) IHT at 47)).

Response to Finding No. 370:

Complaint Counsel's proposed finding of fact is incomplete. In addition to a socket, prosthetic knee, a foot, and a pylon, a lower limb prosthesis for an above-the-knee amputee also includes either a suspension or a liner, and a foot shell and any other cosmetic covering. (Schneider, Tr. 4303-4304; Senn, Tr. 171).

371. A socket attaches the prosthetic componentry to a patient, which most often includes a vacuum system and a liner to ensure a secure fit between the prosthetic and the patient's residual limb. (PX05106 (Arbogast (Ohio Willow Wood) Dep. at 26)).

Response to Finding No. 371:

Complaint Counsel's proposed finding of fact is incomplete. As the majority owner and CEO of the Ohio Willow Wood Company, Ryan Arbogast, noted at trial, sockets are hard plastic components that the prosthetist builds to fit over a liner. (Arbogast, Tr. 4929, 4942-4947). Additional prosthetic components attach to the liner and socket. (Arbogast, Tr. 4945; [redacted] **).** Willow Wood sells prosthetic components to over 90 percent of the prosthetic clinics in the United States. (Arbogast, Tr. 4937). [redacted].

E. INSURERS INVOLVED IN THE REIMBURSEMENT OF PROSTHETIC KNEES IN THE UNITED STATES

372. [redacted] (Brandt (Ability) Tr. 3772-73 (*in camera*)).

Response to Finding No. 372:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

373. To receive reimbursement, payers often require clinics to provide prior authorization or pre-determination of coverage based on a medical provider's written clinical assessment of the patient. (PX05165 (Sanders (United HealthCare) Dep. at44-46).

Response to Finding No. 373:

Respondent has no specific response.

1. Types of Insurers

374. [redacted] (PX01022 (Freedom) at 012; Senn (COPC) Tr. 198; Asar (Hanger) Tr. 1356-1358 (*in camera*); Oros (Scheck & Siress) Tr. 4812 (*in camera*), 4835 (*in camera*)).

Response to Finding No. 374:

Respondent has no specific response.

375. Medicare and private insurance are the largest payers, by number of reimbursement claims, in the United States. (PX01022 (Freedom) at 011-12 (pie graph showing that Medicare and private insurance make up 31% and 26%, respectively, of reimbursement claims in the United States).

Response to Finding No. 375:

Complaint Counsel's proposed finding of fact is incomplete. While Medicare and private insurance are the largest payers of reimbursements for prosthetic devices in the United States, DOD, VA, and WC are the next most common providers of reimbursement for prosthetic devices. (Schneider, Tr. 4296).

376. [redacted] Asar (Hanger) Tr. 1357 (*in camera*).

Response to Finding No. 376:

Complaint Counsel's proposed finding of fact is misleading to the extent it attempts to utilize the quote of a single witness to represent reimbursement information for the industry as a whole.

2. L-Codes

377. Prosthetic clinics submit requests for reimbursement to payers following the fitting of an above-the-knee prosthesis on a patient. (Senn (COPC) Tr. 171-172; PX05118 (Testerman (Freedom) Dep. at 84-85); PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 37-38)).

Response to Finding No. 377:

Complaint Counsel's proposed finding of fact is incomplete because it does not fully describe the process by which prosthetists submit requests for reimbursement. Specifically, in order to be reimbursed, 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, after the prosthetist and the patient have selected the components that will comprise the patient's definitive prosthesis. (Sabolich, Tr. 5837; [redacted]

378. The L-Code system "was generated by the Centers for Medicare and Medicaid to put a descriptor and code number on each part or subpart of every aspect of a prosthetic which then allows for itemized billing and exact ordering regulatory processes from the prosthetist and through communication with the physician so that what is ordered is them itemized out." (PX05129 (Ell (Mid-Missouri Orthotics & Prosthetics) Dep. at56-57)).

Response to Finding No. 378:

Complaint Counsel's proposed finding of fact is misleading, and only represents the testimony of a single individual. While the L-Code system was created by the Centers for Medicare and Medicaid Services (CMS), the L-Code system does not assign a descriptor and code number to each and every aspect of a prosthetic. For instance, there is no L-Code that describes the microprocessor-controlled switch ("MP-Switch") function. (Schneider, Tr. 4324). The only MP-Switch knee sold in the United States is the Freedom Plié. (Kannenberg, Tr. 1953-1954).

L-Codes generally have a four-digit number after them 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). Manufacturers apply for L-Codes and CMS determines whether or not to grant a new L-Code. (Schneider, Tr. 4292).

379. L-Codes affect the reimbursement amount a clinic receives when the clinic fits a patient covered by insurance. (PX05117 (Choi (ST&G) Dep. at 47-49)).

Response to Finding No. 379:

Complaint Counsel's proposed finding of fact mischaracterizes the record. Not only do L-Codes affect the reimbursement amount a clinic receives when the clinic fits a patient covered by *insurance*, but L-Codes also limit the amount of reimbursement that a particular prosthetic device is eligible for under Medicare. [redacted]

380. Each L-Code has a reimbursement range that is associated with the specific L-Code. (Choi (ST&G) Dep. at 47-49)

Response to Finding No. 380:

Respondent has no specific response.

381. [redacted] (PX05145 (Ford (Prosthetic & Orthotic Associates) Dep. at 45); PX05165 (Sanders (United HealthCare) Dep. at 31) (*in camera*)).

Response to Finding No. 381:

Complaint Counsel's proposed finding of fact is incomplete. It is true that private payers use L-Codes to provide reimbursement But more specifically, 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, IHT at 64-65); PX05002 (Asar, IHT at 13); PX05134 (Oros, Dep. at 183-184); PX05149 (Brandt, Dep. at 181); *see also* RFOF ¶¶ 121-126).

382. The L-Code definitions are not manufacturer-specific. (JX001 at 003 (¶ 29)).

Response to Finding No. 382:

Respondent has no specific response.

383. Clinics receive the same reimbursement for each L-Code, regardless of the manufacturer of the device provided to the patient. (PX05129 (Ell (Mid-Missouri O&P) Dep. at 65)).

Response to Finding No. 383:

Complaint Counsel's proposed finding of fact is incomplete. Not only will prostheses with the same L-Codes be reimbursed the same, even if they are from different manufacturers, but two different prostheses with the same L-Codes will be reimbursed the same even if the two manufacturers' prices to the clinic were different. (Senn, Tr. 203; 204; Schneider, Tr. 4352). By

way of example, as the President of the Kentucky and Indiana operations at Center for Orthotic and Prosthetic Care (COPC) testified at trial, "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).

384. 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. (PX05145 (Ford (Prosthetic & Orthotic Associates) Dep. at 45-46)).

Response to Finding No. 384:

Complaint Counsel's proposed finding of fact is incomplete. Not only are there no L-Codes for other parts of the prosthetic fitting process (PX05145 (Ford, Dep. at 45-46)), but L-Codes cover *all* costs, including acquisition cost and all fitting and servicing costs. (DeRoy, 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." (DeRoy, 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).

3. Audits

385. Medicare and other payers conduct Recovery Audit Contractor ("RAC") audits. (Senn (COPC) Tr. 210).

Response to Finding No. 385:

Complaint Counsel's proposed finding of fact is incomplete. It is true that Medicare and other payers conduct RAC audits, which 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). However,

these are not the only audits that are conducted. There are various other audits, including preauthorizations. (Blatchford, Tr. 2259). The various types of audits, including RAC audits and preauthorizations, are important factors in a prosthetist's knee selection. (Blatchford, Tr. 2259).

386. During a RAC audit, the payer reviews a patient file from a prosthetic clinic associated with a particular insurance reimbursement claim. (Senn (COPC) Tr. 210). If the patient's file does not contain the proper documentation, the payer may recoup the insurance reimbursement payment to the prosthetic clinic for that claim. (Senn (COPC) Tr. 210).

Response to Finding No. 386:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Medicare can recoup the full reimbursement amount from the prosthetic clinic if a prosthetic device is subjected to a RAC audit and the claim is denied. (Senn, Tr. 258-259; Ford, Tr. 973-974; Sabolich, Tr. 5828). During a 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). Further, 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). [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). During the time that an appeal is pending, many times the amputee goes without a knee. (Brandt, Tr. 3754).

387. RAC audits existed before the Merger and have continued after the Merger. (Carkhuff (Freedom) Tr. 717). The Merger has not changed anything about the way RAC audits are conducted. (Carkhuff (Freedom) Tr. 717-18).

Response to Finding No. 387:

Complaint Counsel's proposed finding of fact is misleading and incomplete. While the presence of RAC audits existed for every sale Freedom has made before the Merger, that does not underscore the fact that RAC audits are a frequent occurrence. (Senn, Tr. 210-211). [redacted]

388. Before the Merger, the presence of RAC audits existed for every sale that Freedom has made. (Carkhuff (Freedom) Tr. 718).

Response to Finding No. 388:

Complaint Counsel's proposed finding of fact is misleading and incomplete. While the presence of RAC audits existed for every sale Freedom has made before the Merger, that does not underscore the fact that RAC audits are a frequent occurrence. (Senn, Tr. 210-211). [redacted]

389. RAC audits started to intensify in 2011. (Schneider (Otto Bock) Tr. 4745).

Response to Finding No. 389:

Complaint Counsel's proposed finding of fact is incomplete. Not only did RAC audits start to intensify in 2011 (Schneider, Tr. 4745), [redacted]

390. "STEP 6: THE AUDIT RESPONSE/PREPAYMENT CLAIM REVIEW RESPONSE/APPEAL" of Össur's "step-by-step guide to a successful claim" states, "You've done everything you're supposed to do. And sometimes, despite that, you still get thrown into prepayment claim review, get subjected to an audit or receive a denial from the payer." (PX03242 (Össur) at 009). Össur's guide also states that, "Getting documentation from a physician confirming the prosthetist's findings and recommendations is an important Medicare requirement. A huge percentage of denied

claims since 2011 result from prosthetists' failure to make sure that the physician's records validate their own." (PX03242 (Össur) at 007).

Response to Finding No. 390:

Complaint Counsel's proposed finding of fact relies on a document that was never presented at trial and thus was not subject to cross examination before the Court. At trial, the President of the Kentucky and Indiana operations at Center for Orthotic and Prosthetic Care (COPC) testified that 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; *see also* RFOF ¶¶ 288 – 311).

391. Since 2011, U.S. prosthetic clinics have improved the processes they use to document patient need for MPKs, including ensuring that physician records are complete. *See* (See CCFF ¶¶ 2979-3006, below).

Response to Finding No. 391:

Complaint Counsel's proposed finding of fact does not include any citation other than a cross-citation to an entire subsection of Complaint Counsel's findings of fact, and it is misleading and inaccurate because the citations do not support the stated proposition regarding U.S. prosthetic clinics as a whole.

IV. FUNDAMENTALS OF THE PROCESS THAT DETERMINES WHETHER AN ABOVE-THE-KNEE AMPUTEE RECEIVES AN MPK OR MECHANICAL KNEE

A. PARTICIPANTS IN THE PROCESS OF DETERMINING WHETHER A PATIENT RECEIVES AN MPK OR MECHANICAL KNEE

392. **"[I]n an ideal setting, there's a collaboration between the physician, the physical therapist, the prosthetist and the patient to design the prosthesis to maximize their function."** (PX05108 (Yates (Jonesboro P&O Lab) Dep. at42)).

Response to Finding No. 392:

Complaint Counsel's proposed finding of fact is incomplete. In response to the question "Who makes the final decision in terms of what prosthetic device to fit on a patient," Yates responded that "there are a number of factors that contribute to that [decision]" and although "in an ideal setting, there's a collaboration between the physician, the physical therapist, the prosthetist, and the patient to design the prosthesis to maximize their function," sometimes "the payer gets in the way of that." (PX05108 (Yates, Dep. at 41-42)). Yates further testified that "the payer generally decides what prosthesis patients get based on their coverage and their authorization guidelines or their policies." (PX05108 (Yates, Dep. at 42)). Later, Yates testified that "Recommendations [as to which prosthetic component to select] are made at an individual level based on the clinician's own experience . . . to recommend a product that meets their specific needs, and to some extent which component would be most advantageous for the company." (PX05108 (Yates, Dep. at 147-148)).

393. Otto Bock's website states that, "Selecting a computerized knee system depends largely on your individual activity level, age, health and lifestyle. Another factor to take into consideration is your walking pattern, or gait cycle. If you are more active, you may find that a microprocessor knee system is more suitable for your activity level, since it offers more assistance with assessing movement. For others, the high level of stability (preventing falls) provided by C-Leg or Genium is also important. Your health care team will work closely with you to make the decision." (PX08013 (Otto Bock) at 003 ("Computer controlled knees")).

Response to Finding No. 393:

Complaint Counsel's proposed finding of fact is misleading to the extent that it attempts to take one quote from one manufacturer's website and apply it to all MPKs. (PX08013). At a minimum, this finding of fact should be limited to only Ottobock MPKs and MPKs that have similar functionality. There was significant evidence presented at trial regarding the range in functionality of various MPKs sold in the United States, and in particular the disparity between

Freedom's Plié and MPKs from other manufacturers, including Ottobock's C-Leg, Endolite's Orion, and Össur's Rheo. (*See* RFOF ¶¶ 164-239 (MPKs range in functionality based on level of microprocessor control and other features); RFOF ¶¶ 577-606 (Plié is functionally dissimilar from other MPKs)). Therefore, this proposed finding, which cites only to Ottobock's website, should not be extended broader than the source document allows.

394. Otto Bock's website also highlights the role that insurers and insurance coverage play in the decision to fit a patient with an MPK or mechanical knee. The FAQ section of Otto Bock's website states, "How do I get the cost of a microprocessor knee covered? Compared with mechanical knees, you'll find that computerized knees may be more expensive, but they take less energy to operate, which can be a huge benefit. Higher stability/fewer falls can also be demonstrated as an important contributor to maintaining good health. There are many ways to cover the cost. Again, work with your health care team, and check out the Financial Coverage section of this website." (PX08013 (Otto Bock) at 003 ("Computer controlled knees")).

Response to Finding No. 394:

Complaint Counsel's proposed finding of fact is misleading to the extent that it attempts to take one quote from one manufacturer's website and apply it to all MPKs. At a minimum, this finding of fact should be limited to only Ottobock MPKs. There was significant evidence presented at trial regarding the variation in functionality of MPKs sold in the United States. Therefore the finding proposed here, which cites only to Ottobock's website, should not be extended broader than the source document allows. (*See* RFOF ¶¶ 164-239 (MPKs range in functionality based on level of microprocessor control and other features); RFOF ¶¶ 577-606 (Plié is functionally dissimilar from other MPKs)). In particular, any finding regarding the benefits of MPKs should be limited to the specific MPK being discussed, and should not be construed more broadly than that. There is no evidence in the record, for example, that the Plié 3 "takes less energy to operate" than a non-microprocessor knee. (*See* Ferris, Tr. 2373 (noting that there are no clinical studies on the Plié)). In addition, this document was not discussed at trial, its contents lack clarity

and therefore it is of limited probative value. For example, the document itself does not identify exactly what types of non-microprocessor knees it is comparing to MPKs. (PX08013).

395. Össur's "Rheo Knee: The step-by-step guide to a successful claim" provides an overview for prosthetic clinics of the process by which medical professionals select and prescribe a prosthetic knee and how clinics obtain approval from a patient's insurer. (PX03242 (Össur) at 001). Össur's guide begins with "STEP 1: INSURANCE INTAKE ('KNOW YOUR PAYER')" which states, "Before you can do anything for new patients, you must first understand what their insurer will pay for and what the patients' financial responsibility is." (PX03242 (Össur) at 002).

Response to Finding No. 395:

Respondent has no specific response, other than that this proposed finding is consistent with the idea that there are multiple stakeholders in the product selection process, and there are pros and cons to each product, all of which compete head-to-head as mobility solutions for each patient.

396. "STEP 2: THE PATIENT'S STORY ('KNOW YOUR PATIENT')," of Össur's "step-by-step guide to a successful claim" for prosthetic clinics states, "Now that you understand the scope of your patients' insurance coverage you need to understand them. What's their story? What kind of life do they want to live with a prosthesis? What's their current and potential functional level? To accurately and completely tell your patient's story, you need both social and personal patient information on the one hand, and clinical information on the other." (PX03242 (Össur) at 003).

Response to Finding No. 396:

Respondent has no specific response, other than this proposed finding is consistent with the idea that there are multiple stakeholders in the product selection process, and there are pros and cons to each product, all of which compete head-to-head as possible mobility solutions for each patient.

397. "STEP 3: MATCHING THE PATIENT & PRODUCT," of Össur's "step-by-step guide to a successful claim" for prosthetic clinics states that, "Every patient has unique clinical needs. And every product offers unique clinical outcomes. Making sure that you map the

two to each other is essential if you want (a) a happy and functional patient, and (b) to process your claim successfully." (PX03242 (Össur) at 005).

Response to Finding No. 397:

Respondent has no specific response, other than this proposed finding is consistent with the idea that there are multiple stakeholders in the product selection process, and there are pros and cons to each product, all of which compete head-to-head as possible mobility solutions for each patient.

398. "STEP 4: GET PHYSICIAN CONFIRMATION" of Össur's "step-by-step guide to a successful claim" states that, "Getting documentation from a physician confirming the prosthetist's findings and recommendations is an important Medicare requirement. A huge percentage of denied claims since 2011 result from prosthetists' failure to make sure that the physician's records validate their own." (PX03242 (Össur) at 007).

Response to Finding No. 398:

Respondent has no specific response, other than this proposed finding of fact is consistent with the idea that there are multiple stakeholders in the product selection process, and there are pros and cons to each product, all of which compete head to head as mobility solutions for each patient. Further, it is consistent with the idea that the physician does not generally limit the prosthetist's selection, but that the prosthetist receives confirmation or "sign-off" on their plan from a physician.

399. "STEP 5: FINAL REVIEW BEFORE CLAIM SUBMISSION" of Össur's "step-by-step guide to a successful claim" for prosthetic clinics states, "You've collected all the necessary patient information. You've confirmed that other health care providers' notes corroborate yours. You're ready to proceed to delivery and filing the claim for reimbursement. But you still need to verify that: (1) your patient delivery sheet contains all of the required information, and (2) you have filled out the claim form completely." (PX03242 (Össur) at 008).

Response to Finding No. 399:

Respondent has no specific response.

1. Role of Surgeons

400. Surgeons perform lower-limb amputations on patients. (Potter (Walter Reed) Tr. 744-45).

Response to Finding No. 400:

Respondent has no specific response.

401. A surgeon may also work with a physiatrist to begin the rehabilitation process. (Ford (POA) Tr. 919). A physiatrist is a medical professional who analyzes a patient's mobility and functional capabilities. (Ell (Mid-Missouri O&P) Tr. 1680, 1682-83).

Response to Finding No. 401:

Complaint Counsel's proposed finding of fact is incomplete. A physiatrist is a physician who specializes in rehabilitation. (Sanders, Tr. 5381). Physiatrists are involved in an amputee's care in the "optimum setting" which is the rehabilitation clinic. (Oros, Tr. 4783). When a physiatrist is involved, the physiatrist develops a plan for the patient's rehabilitation. (Sanders, Tr. 5381). Though the physiatrist's role may include analyzing a patient's mobility and functional capabilities, the physiatrist does not have sole responsibility for that function because prosthetists are involved in every step of the process as well. (Oros, Tr. 4783-4784).

402. After ensuring a patient is ready for a prosthetic fitting, a surgeon or a physiatrist provides a patient with a prescription to receive an initial prosthesis. (Potter (Walter Reed) Tr. 762, 764); Ell (Mid-Missouri O&P) Tr. 1681-82; Ford (Prosthetic & Orthotic Assocs.) Tr. 919).

Response to Finding No. 402:

Respondent has no specific response.

403. The prescription for a prosthesis generally includes identifying information, such as name, date of birth, height, and weight, as well as the patient's mobility K-level and the "specific goals of and justification for the device." (Potter (Walter Reed) Tr. 766-767).

Response to Finding No. 403:

Complaint Counsel's proposed finding of fact is not supported by the record and it is incomplete. There are two instances where a prescription is written for a prosthetic knee: for a

patient's initial prosthesis and a patient's definitive prosthesis. (Sabolich, Tr. 5843; Potter, Tr. 764). In the transcript citation provided by Complaint Counsel in support of this proposed finding, it is not clear whether Dr. Potter is discussing the patient's initial or definitive prosthesis. In addition, the evidence in the record shows that the level of detail provided in a prescription for a prosthetic knee varies widely, and can be as basic as "transfemoral or above-knee amputee, fit with prosthesis" and can be more specific, depending on the level of knowledge that the physician has, and their level of involvement in the process. (Brandt, Tr. 3746-3747; Oros, Tr. 4782-4783; Sabolich, Tr. 5830, 5837-5838; Doug Smith, Tr. 6005-6006, 6014-6015).

404. Surgeons rarely include the specific brand of prosthetic knee in prescriptions for prosthetic knees. (Potter (Walter Reed) Tr. 767-68, 770-71.

Response to Finding No. 404:

Respondent has no specific response.

405. After the patient leaves the hospital, surgeons conduct additional evaluations to ensure proper recovery from the surgery. (Potter (Walter Reed) Tr. 760-62).

Response to Finding No. 405:

Respondent has no specific response.

406. Then, after the patient begins the rehabilitation and fitting process, the surgeon will see the patient on an informal basis. (Potter (Walter Reed) Tr. 762-63).

Response to Finding No. 406:

Respondent has no specific response.

407. If the referring physician is in a specialty like physical medicine or rehabilitation, he or she may be more well versed in the different types of prosthetics than a general surgeon, and may take more of a role in determining which prosthetic is appropriate for a particular patient. (Brandt (Ability) Tr. 3751-52).

Response to Finding No. 407:

Complaint Counsel's proposed finding of fact is incomplete. The physician's level of knowledge regarding prosthetic componentry is not dependent on whether or not the physician is a surgeon or some other specialty. For example, Dr. Douglas Smith is a surgeon, but testified regarding his significant experience working in an amputee clinic and working with prosthetic components, including the selection of components for particular amputees. (Doug Smith, Tr. 5976-5979).

2. Role of Prosthetists

408. A certified prosthetist is an individual who typically has obtained a certification or a masters-level degree in prosthetics, completed a one-year residency in prosthetics, and passed a board exam. (Senn (COPC) Tr. 167; Brandt (Ability) Tr. 3743-44; PX05129 (Ell (Mid-Missouri O&P) Dep. at 17-18)).

Response to Finding No. 408:

Respondent has no specific response.

409. Prosthetists are certified by the American Board for Certification. (Ell (Mid-Missouri O&P) Tr. 1663-64; Brandt (Ability) Tr. 3749).

Response to Finding No. 409:

Respondent has no specific response.

410. Prosthetic clinics typically employ one or more certified prosthetists to make and fit prostheses and manage patient care. These clinics provide comprehensive patient care for amputees, including the fitting of the prostheses. (Asar (Hanger) Tr. 1312-13; Ford (Prosthetic & Orthotic Assocs) Tr. 917-18; Senn (COPC) Tr. 152).

Response to Finding No. 410:

Respondent has no specific response.

411. A prosthetist designs and fits the prosthesis to fit on lower-limb amputees. (Asar (Hanger) Tr. 1314-15; Sanders (United) Tr. 5473-74). Prosthetists fabricate the socket component of a prosthesis. (Oros (Scheck & Siress) Tr. 4777).

Response to Finding No. 411:

Respondent has no specific response.

412. Although prosthetists do not write prescriptions for prosthetics, they help guide what the physician writes on the final prescription for a prosthetic. (PX05141 (Bright (North Bay) Dep. at 134); Ell (Mid-Missouri O&P) Tr. 1688)).

Response to Finding No. 412:

Complaint Counsel's proposed finding of fact is incomplete. The record indicates that in order for a prosthetist to begin examining a patient for a prosthetic, the patient must have a referring prescription from a physician. (Brandt, Tr. 3746-3747; Oros, Tr. 4782-4783). That referring prescription is typically very vague, and does not specify any particular componentry. [redacted]. After the components are selected, the prosthetist creates a Detailed Written Order which lists specific L-Codes that relate to the components he or she selected. (Sabolich, Tr. 5830; [redacted]) Then, the physician signs off on that Detailed Written Order and the prosthetist can fit the device. (Sabolich, Tr. 5830).

413. [redacted] (Ford (Prosthetic & Orthotic Assocs.) Tr. 924, 989; Asar (Hanger) Tr. 1334, 1381 (*in camera*), 1546-47 (*in camera*); Potter (Walter Reed) Tr. 770-71; Oros (Scheck & Siress) Tr. 4784-86, 4855-56, 4871; Brandt (Ability) Tr. 3751; 3799-3800 (*in camera*); Sanders (United) Tr. 5439 (*in camera*), 5401-02) (discussing PX03153); PX05119 (Kahle (Prosthetics Design and Research) Dep. at 38-39); PX05130 (Governor (Otto Bock) Dep. at 78); PX05144 (Blatchford (Endolite) Dep. at 151); PX05150 (Kannenberg (Otto Bock) Dep. at 23 (agreeing that prosthetists are the "direct customers")); PX05114 (Ferris (Freedom) Dep. at 48-49); PX05141 (Bright (North Bay) Dep. at 136-37); PX05128 (Senn (COPC) Dep. at 87); PX05108 (Yates (Jonesboro) Dep. at 42-43) (**explaining that prosthetists are the "subject-matter expert in terms of the specific componentry" who is "driving that conversation");** PX05118 (Testerman (Freedom) Dep. at 13, 85) (explaining that a physician may "write a note" a "few select times"); PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 108-10);

PX05116 (Endrikat (Empire Medical) Dep. at 147-48); PX05137 (Matthews (Freedom) Dep. at 152-53)).

Response to Finding No. 413:

Respondent has no specific response.

414. This includes decisions regarding prosthetics used on transfemoral amputees. A prosthetist designs and fits the prosthesis to fit on lower-limb amputees. (Asar (Hanger) Tr. 1314-15; Sanders (United) Tr. 5473-74).

Response to Finding No. 414:

Complaint Counsel's proposed finding of fact is imprecise and is, therefore, inaccurate. Prosthetists assist in making the decision regarding which components will comprise the patient's full prosthesis. (Sabolich, Tr. 5838). Many prosthetic components are purchased from manufacturers or distributors, with the exception of the socket, which the prosthetist frequently fabricates in-house. (Oros, Tr. 4777; Sabolich, Tr. 5835). The prosthetist takes the componentry of the prosthetic, then aligns those components to build a full prosthesis that is fit on the patient. (Sabolich, Tr. 5836-5837).

415. Dr. Benjamin Potter, a surgeon for the Department of Defense, testified that prosthetists are "expert technicians who make the socket and appropriately fit the prosthesis." (Potter (Walter Reed) Tr. 766).

Response to Finding No. 415:

Respondent has no specific response.

416. Mr. Sanders of United, an insurance company, testified that orthotic and prosthetic clinics "play an important role. So they work in concert with the prescribers and therapists that are providing the clinical direction, and they translate that into the actual device that the member will use to replace their missing body part." (Sanders (United) Tr. 5379).

Response to Finding No. 416:

Complaint Counsel's proposed finding of fact is incomplete. The record indicates that in order for a prosthetist to begin examining a patient for a prosthetic, the patient must have a referring prescription from a physician. (Brandt, Tr. 3746-3747; Oros, Tr. 4782-4783). That referring prescription is typically very vague, and does not specify any particular componentry. [redacted]. After the components are selected, the prosthetist creates a Detailed Written Order which lists specific L-Codes that relate to the components he or she selected. (Sabolich, Tr. 5830; [redacted]) Then, the physician signs off on that Detailed Written Order and the prosthetist can fit the device. (Sabolich, Tr. 5830).

417. Prosthetists have more specialized training than surgeons with respect to determining the type of knee that will be used in a prosthesis. "By training you can't expect every physician to know the make and model or technological features of a knee, a prosthetic knee. And that's where the prosthetist role is important, because while the physician will – will lay out the goal and the plan, it's the prosthetist who would use – if the physician is not familiar with them – would use their expertise to translate the physician's direction into a tangible product." (Sanders (United) Tr. 5401-02).

Response to Finding No. 417:

Complaint Counsel's proposed finding of fact is inaccurate, because it is an overgeneralization that is not supported by the record. The level of familiarity a surgeon has with respect to particular prosthetic componentry varies based on the training and interests of that surgeon. This range can be seen between the two surgeons who testified at trial, Dr. Benjamin Potter and Dr. Douglas Smith. Dr. Potter testified that he does not know the functionality of particular prosthetic components and is often the "dumbest guy in the room" on that subject. (PX05121 (Potter, Dep. at 89-90)); Potter, Tr. 785-786, 791). On the other hand, Dr. Smith testified

that he has significant experience with selecting prosthetic components and is "absolutely" familiar with the functionality of particular components. (Doug Smith, Tr. 5976-5979).

3. Role of Insurers

418. As "the person with the checkbook," the insurance company makes the final decision of whether it will pay for a patient to receive an MPK or mechanical knee. (Ford (Prosthetic & Orthotic Assocs.) Tr. 919-20; *see also* PX05141 (Bright (North Bay) Dep. at 144)).

Response to Finding No. 418:

Complaint Counsel's proposed finding of fact is misleading. The insurance company is not only determining whether it will pay for an MPK or a non-MPK, but also looks at the L-Codes submitted for each of the patient's prosthetic components and the documentation of the patient's mobility level, and decides whether to approve. This would also apply to a Sophisticated Non-MPK that has L-Codes that are approved only for K-3 patients. (Sanders, Tr. 5402-5403).

419. Insurance providers conduct two types of reviews relevant to MPK coverage: pre-fitting reviews and post-fitting reviews. Some insurance plans require prior authorization before a clinic fits a patient with a prosthetic. When prior authorization is required, the clinic will "take the bio requirement, submit all of the elements for someone at the health plan to say yes, that meets the benefit structure or it doesn't." (Sanders (United) Tr. 5374-75). Some clinics seek predetermination from insurance plans before fitting a prosthetic, even if prior authorization is not required. A predetermination occurs when a clinic "think[s] they have met the criteria, but they'll send it to the health plan to get sort of the validation that it does meet the benefits." (Sanders (United) Tr. 5375). Both of these are "preservice, prepayment" reviews. (Sanders (United) Tr. 5375). The second major type of review is a medical claims review, which is a "post-service" review and can be either prepayment or post-payment. (Sanders (United) Tr. 5375). During a post-service review, a claim is sometimes looked at by a nurse or doctor to ensure it is correct.. (Sanders (United) Tr. 5375).

Response to Finding No. 419:

Complaint Counsel's proposed finding of fact is incomplete. It takes the testimony of a single private payer, United, and extends it to include all payers. The evidence presented at trial shows that Medicare operates differently than private payers. For example, Michael Oros, a certified prosthetist and operator of one of the largest clinic networks in the United States, testified

that he does not typically submit paperwork affirmatively to Medicare, but rather that he keeps the documentation on file in the event that Medicare or an agent of Medicare later reviews the claim. (Oros, Tr. 4882-4883).

420. Insurers do not determine the functional needs of the patient. (Sanders (United) Tr. 5402) ("Q. And what role does United play, if any, in that determination of the functional needs of the beneficiary? A. We don't – United doesn't play a role in making that determination.").

Response to Finding No. 420:

Respondent has no specific response.

421. [redacted] (Sanders (United) Tr. 5435 (*in camera*)).

Response to Finding No. 421:

Respondent has no specific response.

422. [redacted] (Sanders (United) Tr. 5438-39 (*in camera*)).

Response to Finding No. 422:

Respondent has no specific response.

423. [redacted] (Sanders (United) Tr. 5444 (***in camera***)).

Response to Finding No. 423:

Complaint Counsel's proposed finding of fact is incomplete. Michael Oros testified that the people who are involved in the selection process for a patient's prosthetic knee varies based on

which clinical setting the patient is being seen in, and can vary case by case. In any scenario, the prosthetist is involved in the selection process. (Oros, Tr. 4783-4784). In addition, there was significant evidence presented at trial that the patient is very involved in the selection process for their own prosthetic knee based on their personal preferences. (RFOF ¶ 392 (citing Sabolich, Tr. 5845; Doug Smith, Tr. 6010; Senn, Tr. 263)).

4. Role of Patients

424. "Evidence-based practice includes that the patient should participate [in determining what prosthetic they receive], along with the provider and best evidence." (PX05164 (Highsmith (VA) Dep. at 150)).

Response to Finding No. 424:

Respondent has no specific response.

425. According to Dr. Douglas Smith, a former amputation surgeon, the patient and his or her family are primarily involved in deciding which prosthetic components the patient will receive. (Smith (Retired) Tr. 6002). The patient works with their physician, prosthetist, physical therapist, nurses, and potentially a mental health provider to decide which componentry is best for the particular patient. (Smith (Retired) Tr. 6003-04).

Response to Finding No. 425:

Respondent has no specific response.

426. The patient's input extends to the decision of whether an MPK or mechanical knee is best. (PX05166 (Watson (Fourroux Prosthetics) Dep. at 180)).

Response to Finding No. 426:

Complaint Counsel's proposed finding of fact is misleading and should not be considered. First, the cited page of this deposition testimony does not support the proposed finding of fact, because the cited testimony does not discuss a decision between MPKs as a group and non-MPKs as a group. As a result, this proposed finding of fact is misleading to the extent that it suggests that patients and prosthetists divide their choices into MPKs and non-MPKs. In fact, Keith

Watson, whom complaint counsel cites for this proposed finding of fact, specifically testified that he *does not* see the world in a MPK v. non-MPK lens, that those are not categories he had thought of before this litigation, and that he does not divide the world into MPKs and non-microprocessor knees. (PX05166 (Watson, Dep. at 147-149)).

5. Each Stakeholder Must Agree that an MPK is Appropriate or Else the Patient Typically Receives a Mechanical Knee

427. Patients only receive MPKs when multiple "filters" are satisfied. The patient's condition and activities of daily living must be appropriate for use of an MPK, they must have insurance coverage, which allows for MPKs and the financial ability to pay any co-pay, and they must, at least for Medicare patients, be K3 or K4, or have the ability to become a K3. (PX05010 (Schneider (Otto Bock) IHT at 85-87)).

Response to Finding No. 427:

Complaint Counsel's proposed finding of fact is misleading. Schneider's testimony cited by Complaint Counsel discusses several considerations that go into the ultimate decision as to what knee a patient is fit with – they include preferences, insurance coverage, activities of daily living, and finances. These are not fairly described as "filters" but rather are parameters that define the available choices for K-3 or K-4 patients.

428. Even when a prosthetist believes that an MPK would be appropriate for a patient, "you always have to look at the insurance situation of the patient." (PX05150 (Kannenberg (Otto Bock) Dep. at 78-79)).

Response to Finding No. 428:

Respondent has no specific response, other than that this proposed finding of fact is consistent with the idea that clinics consider finances when making their component selection decisions. Indeed, strength of insurance coverage matters and there is evidence in the record that clinics will consider the insurance reimbursement that a patient has when determining which knee to fit. [redacted]

[redacted] Also, this proposed finding of fact is consistent with the idea that a patient may prefer a non-MPK based on the out-of-pocket costs of each type of component. (RFOF ¶¶ 151; 401).

429. Otto Bock provides evidence to prosthetists to help them convince physicians of the benefits' of MPKs, because "when the prosthetist wants to fit a microprocessor knee and the physician of the patient is not on board, it's almost impossible to get an approval." (PX05150 (Kannenberg (Otto Bock) Dep. at 105-06)).

Response to Finding No. 429:

Respondent has no specific response, other than that this proposed finding of fact is consistent with the idea that MPKs compete directly with non-MPKs and the evidence provided to prosthetists and physicians regarding the alleged benefits of MPKs over non-MPKs reflects this competition.

B. HOW HEALTHCARE PROFESSIONALS DETERMINE THAT AN MPK IS THE BEST OPTION FOR A PATIENT FROM A MEDICAL PERSPECTIVE

1. Healthcare Professionals Engage in a Two-Step Process to Determine Whether an MPK is the Best Medical Option for a Patient

430. "[T]he way the system works is, a patient enters into a facility, a prosthetic and orthotic facility, usually with the prescription for a new prosthesis. That person will go through multiple evaluations to try to understand both the – the desired outcomes of the amputee, what they would like to try to accomplish. Also, they will try to determine what their K levels are by the basis of validated tests. They will also look at and ask questions about their socioeconomic positioning, where they live, what they do, how they do this, if there's barrier[s], steps, rocks, what those kind of environmental concerns will be as such, trying to get a full picture of what the individual will have to maneuver and navigate in their activities of daily life." (PX05010 (Schneider (Otto Bock) IHT at 46-47)).

Response to Finding No. 430:

Respondent has no specific response, other than that this proposed finding is consistent with the idea that the selection of which prosthetic components should comprise a patient's prosthetic device has multiple inputs and considerations, and entails weighing pros and cons of the various characteristics of each component.

a) Step 1: Determine a Patient's K-Level

431. To begin the fitting process, prosthetists evaluate the patient's current and potential mobility to determine his or her Medical Function Classification Level ("K-Level"). (JX001 at 002 (¶ 17); PX05145 (Ford (Prosthetic & Orthotic Assocs.) Dep. at 93-95); PX05010 (Schneider (Otto Bock) IHT at 46-48)).

Response to Finding No. 431:

Respondent has no specific response.

b) Step 2: For K3/K4 Patients, Use Patient-Specific Factors beyond K-Level to Determine Whether an MPK is More Beneficial Than a Mechanical Knee

432. Once a K-level is assigned, the clinician needs to look at "the specific needs of the individual patient, what are they looking to do in their daily lives, the requirements that the patient may have when it comes to weight, functionality for the entire prosthesis." (PX05145 (Ford (Prosthetic & Orthotic Assocs.) Dep. at 93-95)).

Response to Finding No. 432:

Respondent has no specific response, other than that this proposed finding is consistent with the idea that the selection of which prosthetic components should comprise a patient's prosthetic device has multiple inputs and considerations, and entails weighing pros and cons of the various characteristics of each component.

2. An Amputee's K-Level Determines Whether a Patient is a Candidate for an MPK or Must Receive a Mechanical Knee

a) Process of Evaluating a Patient's K-Level

433. "K levels are a system that CMS had proposed to subset amputee population, lower limb population. . . . K0 typically will not receive a prosthesis. K1 is a low household ambulatory. K2 is a household ambulatory with limited access, community ambulation. K3 is an unrestricted community ambulatory. K4 is a highly active individual." (PX05010 Schneider (Otto Bock) IHT at 45); *see also* JX001 at 002-003 (¶¶ 17-23)).

Response to Finding No. 433:

Complaint Counsel's proposed finding of fact is imprecise. The parties have stipulated to the definitions of K-Levels, at JX001, ¶¶ 17-23. (*See* Response to CCFF ¶¶ 314-318).

434. [redacted] (PX01054 (Otto Bock) at 005 (*in camera*)). [redacted] (PX03021 (Ohio Willow Wood) at 026 (*in camera*)).

Response to Finding No. 434:

Respondent has no specific response.

435. A patient's K-Level may change over time following rehabilitation because of an improvement or decline in mobility. (Carver (College Park) Tr. 2028).

Response to Finding No. 435:

Respondent has no specific response.

436. [redacted] (PX01052 (Freedom) at 001 (*in camera*); PX05107 (Carver (College Park) Dep. at 20-21); PX03027 (College Park) at 001 (*in camera*); PX05132 (Sabolich (Scott Sabolich Prosthetic and Research) Dep. at 47-49)).

Response to Finding No. 436:

Complaint Counsel's proposed finding of fact is misleading and is incomplete. The term "mechanical knee" is undefined and overbroad. To the extent that complaint counsel is referring to knees that do not contain a microprocessor, or non-MPKs, the overwhelming evidence at trial established that there are a range of non-MPKs. (RFOF ¶¶ 135-143). Non-MPKs range in functionality from very basic knees that are appropriate for K-1 and K-2 ambulators, to highly sophisticated non-MPKs, which are appropriate for K-3 and K-4 ambulators and provide significantly more functionality than those basic K-1 or K-2 knees. (RFOF ¶¶ 135-143, 335-336; *see also* Oros, Tr. 4791-4793; Doug Smith, Tr. 5991-5992, 5994; [redacted]; Ford, Tr. 1052; [redacted]). The evidence shows that when a new amputee receives an initial

prosthesis, he or she receives a basic non-MPK that is appropriate for a K-1 or K-2 patient. (RFOF ¶ 101 (citing Sabolich, Tr. 5841); *see also* Doug Smith, Tr. 5999-6000).

437. Hanger, the largest clinic group in the United States, uses a standard questionnaire called a PAVET form that helps the clinician determine first, what K-level the patient is, and second, whether a microprocessor knee is appropriate for the patient. (Asar (Hanger) Tr. 1340).

Response to Finding No. 437:

Complaint Counsel's proposed finding of fact is misleading and should be disregarded. Asar's testimony cited by Complaint Counsel does not discuss a two-step process. In reality, the PAVET form assesses a patient's mobility level, but does not help a clinician to determine whether or not to provide an MPK, aside from weeding out patients that are K-1 or K-2 ambulators. It is telling that Complaint Counsel does not cite to the PAVET form itself, PX03207. On Page 7 and 8 of PX03207, it can be seen that there is no additional screening for MPK beyond just a K-Level classification (PAVET scores 51 and above are K-3 and K-4 ambulators; PAVET scores 51 and above are candidates for MPKs). Consistent with the evidence presented at trial, for a given patient at a given mobility level (K-3 or K-4) either an MPK or a non-MPK may be clinically and medically appropriate, and the choice between knees depends on individual preferences and finances. (RFOF ¶¶ 392-406).

438. The PAVET form has three sections: the first section asks whether the patient can do the basic actions of daily living such as going in and out of a car or walking on flat terrain; the second section asks about the patient's functionality, such as whether they can ambulate their limb or navigate small barriers; the third section tests the strength of the patient. (Asar (Hanger) Tr. 1342; PX03207 (Hanger) at 001 (PAVET Form)).

Response to Finding No. 438:

Respondent has no specific response.

439. Each of the three sections contain several questions. (PX03207 (Hanger) at 001 (PAVET form)). The patients are graded on these questions and their scores are tallied, resulting in a K-level classification. (Asar (Hanger) Tr. 1346; PX03207 (Hanger) at 007 (PAVET form)).

Response to Finding No. 439:

Respondent has no specific response other than that Complaint Counsel's proposed finding of fact is consistent with Respondent's Response to CCFF ¶ 437.

b) K0, K1, or K2 Determination Typically Precludes a Patient from Receiving a Microprocessor Knee

440. If a patient is categorized as a K0, K1 or K2, CMS will not reimburse them for an MPK. (Ford (POA) Tr. 990-91). Some commercial payers or workers' compensation payers might reimburse for an MPK at those levels, but most insurers follow Medicare's guidelines. (Ford (POA) Tr. 990-91; PX05150 (Kannenberg (Otto Bock) Dep. at 56-57) ("limited community ambulators usually don't qualify for microprocessor knees")).

Response to Finding No. 440:

Complaint Counsel's proposed finding is incomplete. CMS and commercial payers that follow CMS guidelines do not reimburse for Sophisticated non-MPKs for K-1 or K-2 patients, either. (Sanders, Tr. 5402-5403).

441. 99 percent of insurance policies which consider MPKs medically necessary for some individuals do so only for K3 or K4 amputees. (PX05150 (Kannenberg (Otto Bock) Dep. at 57)).

Response to Finding No. 441:

Complaint Counsel's proposed finding is incomplete. Insurance companies that consider sophisticated non-MPKs medically necessary also do so only for K-3 or K-4 amputees. K-1 and K-2 patients do not usually qualify for sophisticated non-MPKs. (Sanders, Tr. 5402-5403)

442. If the patient is not a K3 or K4, the clinician knows he or she will have to fit the patient in a mechanical knee and will work on determining which mechanical knee is best. (Ford (POA) Tr. 990-91).

Response to Finding No. 442:

Complaint Counsel's proposed finding of fact is inaccurate and overbroad to the extent that "mechanical knee" refers to all non-MPKs. K-1 and K-2 patients are typically not eligible for Sophisticated Non-MPKs. (Sanders, Tr. 5402-5403). Therefore, the universe of possible knee choices for K-1 and K-2 patients typically does not include fluid-controlled knees like the Ottobock 3R80. (Sanders, Tr. 5402-5403). In addition, some K2 patients may be in a situation where they could receive an MPK. Ottobock makes an MPK specifically designed for the needs of K2 patients, called the Kenevo. (Solorio, Tr. 1634, 1639). As recognized by Complaint Counsel in CCFF ¶¶ 440-441, certain K2 patients can obtain access to MPK technology.

443. [redacted] (PX05165 (Sanders (United) Dep. at 51 (*in camera*)).

Response to Finding No. 443:

Complaint Counsel's proposed finding is imprecise, and misleading to the extent that it relies on the testimony of a witness who lacks the requisite experience and foundation to be knowledgeable and reliable on this subject from a clinical perspective. Sanders works for United Healthcare and testified that he has never been a prosthetist or worked in a prosthetic clinic. (Sanders, Tr. 5377). [redacted]

444. [redacted] (Sanders (United) Tr. 5484 (*in camera*)).

Response to Finding No. 444:

Respondent has no specific response.

c) K3 or K4 Determination Makes a Patient a Candidate for a Microprocessor Knee

445. Medicare and most third-party payers will only provide reimbursement for MPKs on K-3 or K-4 patients. (Kannenberg (Otto Bock) Tr. 1831, 1839; Ell (Mid-Missouri O&P) Tr. 1764; [redacted] PX05141 (Bright (North Bay) Dep. at 67)).

Response to Finding No. 445:

Respondent has no specific response.

446. In order for a patient to receive insurance reimbursement for an MPK, the prosthetist or clinic submits various categories of information on their behalf. (Kannenberg (Otto Bock) Tr. 1830). [redacted] (Kannenberg (Otto Bock) Tr. 1830-31; Kannenberg (Otto Bock) Tr. 1890-91 (*in camera*)).

Response to Finding No. 446:

Respondent has no specific response.

3. For K3/K4 Patients, an Evaluation of Additional Patient-Specific Factors Determines Whether an MPK is More Beneficial than a Mechanical Knee

447. Dr. Kaufman of the Mayo Clinic testified that "[f]or K-3 and K-4 amputees," "the preference is for a microprocessor knee, [but] it will depend on the individual patient's circumstances." (PX05160 (Kaufman (Mayo) Dep. at 130).

Response to Finding No. 447:

Complaint Counsel's proposed finding misrepresents Dr. Kaufman's testimony, as the full context of his testimony indicates he lacks the requisite knowledge to testify about those facts. In

fact, Complaint Counsel omitted a key phrase in the middle of the sentence it quotes in this proposed finding. Dr. Kaufman testifies that "for K-3 and K-4 amputees, **I think** that the preference is for a microprocessor knee, and it will depend on the individual patient's circumstances." (PX05160 (Kaufman, Dep. at 130)) (emphasis added)). The testimony surrounding this section further indicates lack of knowledge, as Dr. Kaufman could not provide any specifics as to what circumstances would cause a non-MPK to be fit on a patient. (PX05160 (Kaufman, Dep. at 131)).

448. After the K-level evaluation, a prosthetist will take into account a patient's "whole daily life" when deciding whether an MPK is appropriate. (Ford (POA) Tr. 995-96). This includes how much of their day is spent standing, whether they are going into and out of cars, and their daily environment. (Ford (POA) Tr. 995-96).

Response to Finding No. 448:

Complaint Counsel's proposed finding is misleading to the extent that Complaint Counsel attempts to paint Ford's testimony as a strictly medical decision, rather than a weighing of pros and cons by the patient and prosthetist based on their preferences, which is the essence of competition. Ford is not competent to testify regarding medical decisions (Ford, Tr. 918-919 (Ford is not a prosthetist, has never been a prosthetist, and is not personally involved in providing patient care)). Ford's cited testimony is consistent with the idea that once a K-Level is determined, then patients are presented with the appropriate options for their mobility level, and the prosthetist and patient decide on the appropriate knee after weighing a multitude of factors.

a) Overview of Evaluations of Patient-Specific Factors beyond K-Level to Determine Whether an MPK is Appropriate

449. To determine which prosthetic components to purchase, prosthetists must determine which components fit the amputee's lifestyle and activity goals after K-level testing is complete. (Ell (Mid-Missouri) Tr. 1768-70; Ford (POA) Tr. 995-96; *see also* Solorio (Otto Bock) Tr. 1640).

Response to Finding No. 449:

Complaint Counsel's proposed finding is misleading to the extent that Complaint Counsel attempts to suggest that this is a strictly medical decision, rather than a weighing of pros and cons by the patient and prosthetist based on their preferences, which is the essence of competition. In any event, the cited testimony does not support the idea that the decision to fit a knee is strictly medical. Further, Ford is not competent to testify regarding medical decisions (Ford, Tr. 918-919 (Ford is not a prosthetist, has never been a prosthetist, and is not personally involved in providing patient care)). In addition, Ell testified that he does not select prosthetic componentry. (Ell, Tr. 1723-1724).

450. This determination is "very patient-specific." (De Roy (Össur) Tr. 3554). Mr. De Roy, Össur's Executive Vice President of Research and Development, explained that the decision of whether a K-3 or K-4 level patient gets an Össur MPK or a mechanical knee is based on whether a user is "looking for that extra stability, the ability to change speeds, the adaptivity of the knee[,]" which is a decision that comes down to the particular user. (De Roy (Össur) Tr. 3554).

Response to Finding No. 450:

Respondent has no specific response, other than that this proposed finding is consistent with the idea that the selection of which prosthetic components should comprise a patients prosthetic device has multiple inputs and considerations, and entails weighing pros and cons of the various characteristics of each component. To the extent that Complaint Counsel attempts to suggest that this is a strictly medical decision, rather than a weighing of pros and cons by the patient and prosthetist based on their preferences, which is the essence of competition, this proposed finding is misleading.

451. "[T]he decision of what prosthetic components are most appropriate for an individual patient is always a very individual one." (Kannenberg (Otto Bock) Tr. 1985); *see also*

PX05166 (Watson (Fourroux) Dep. at 111 ("[e]ach individual patient's needs are different, and that's the way they're treated, on an individual basis."))

Response to Finding No. 451:

Respondent has no specific response, other than that this proposed finding of fact is consistent with the idea that the selection of which prosthetic components should comprise a patient's prosthetic device has multiple inputs and considerations, and entails weighing pros and cons of the various characteristics of each component.

452. Prosthetists typically must evaluate a patient's health, physical abilities, and need to engage in different physical activities regularly in order to establish what type of knee is most appropriate for them. (PX05132 (Sabolich (Scott Sabolich Prosthetics) Dep. at 27-28)).

Response to Finding No. 452:

Respondent has no specific response, other than that this proposed finding of fact is consistent with the idea that the selection of which prosthetic components should comprise a patient's prosthetic device has multiple inputs and considerations, and entails weighing pros and cons of the various characteristics of each component.

453. Dr. Kenton Kaufman of the Mayo Clinic emphasized that "you have to know all the circumstances regarding the patient's health, their living conditions, the status of the residual limb, any social demographic factors" to determine the appropriate prosthetic knee (e.g., an MPK or a mechanical knee) for a particular patient. (PX05160 (Kaufman (Mayo) Dep. at 129-30).

Response to Finding No. 453:

Respondent has no specific response, other than that this proposed finding of fact is consistent with the idea that the selection of which prosthetic components should comprise a patient's prosthetic device has multiple inputs and considerations, and entails weighing pros and cons of the various characteristics of each component.

454. Respondent's expert, Dr. Argue, agrees that a patient's living and working environment are factors that can influence the decision of whether a patient ultimately receives an MPK. (PX05173 (Argue (Respondent) Dep. at 135-136)).

Response to Finding No. 454:

Respondent has no specific response, other than that this proposed finding of fact is consistent with the idea that the selection of which prosthetic components should comprise a patient's prosthetic device has multiple inputs and considerations, and entails weighing pros and cons of the various characteristics of each component.

455. Hanger, the largest clinic group in the United States, uses a standard questionnaire called a PAVET form that helps the clinician determine first, what K-level the patient is, and second, whether a microprocessor knee is appropriate for the patient. (Asar (Hanger) Tr. 1340).

Response to Finding No. 455:

Complaint Counsel's proposed finding of fact is inaccurate and misleading and should be disregarded. Asar's testimony cited by Complaint Counsel does not discuss a two-step process. In reality, the PAVET form assesses a patient's mobility level, but does not help a clinician to determine whether or not to provide an MPK, aside from weeding out patients that are K-1 or K-2 ambulators. It is telling that Complaint Counsel does not cite to the PAVET form itself, PX03207. On Page 7 and 8 of PX03207, it can be seen that there is no additional screening for MPKs beyond simply a K-Level classification (PAVET scores 51 and above are K-3 and K-4 ambulators; PAVET scores 51 and above are candidates for MPKs). Consistent with the evidence presented at trial, for a given patient at a given mobility level (K-3 or K-4), either an MPK or a non-MPK may be clinically and medically appropriate, and the choice between knees depends on individual preferences and finances. (RFOF ¶¶ 392-406).

456. The PAVET form has three sections: the first section asks whether the patient can do the basic actions of daily living such as going in and out of a car or walking on flat terrain; the

second section asks about the patient's functionality, such as whether they can ambulate their limb or navigate small barriers; the third section tests the strength of the patient. (Asar (Hanger) Tr. 1342; PX03207 (Hanger) at 001 (PAVET Form)).

Response to Finding No. 456:

Respondent has no specific response.

457. [redacted] (Asar (Hanger) Tr. 1482 (*in camera*)).

Response to Finding No. 457:

Respondent has no specific response, other than that this proposed finding of fact is consistent with the idea that the selection of which prosthetic components should comprise a patient's prosthetic device has multiple inputs and considerations, and entails weighing pros and cons of the various characteristics of each component.

458. Mr. Watson of Fourroux, a prosthetic clinic company, testified as follows: "Q. . . . What factors do prosthetists at Fourroux consider when deciding whether to fit a patient with a microprocessor knee?" "A. Factors affecting prosthetists' clinical decisions concerning which type of prosthetic knee to fit on a particular patient are varied, numerous and interrelated. Medical necessity for a prosthetic knee is based on the patient's potential functional ability. Potential functional ability is based on the reasonable expectation of both the ordering physician and the prosthetist, considering factors including, but not limited to the patient's past history, including prior prosthetic use, if applicable, and the patient's current condition, including the status of their residual limb and the nature of other medical problems, comorbidities and the patient's desire to ambulate." (PX05166 (Watson (Fourroux) Dep. at 34-35).

Response to Finding No. 458:

Complaint Counsel's proposed finding of fact is misleading to the extent that it suggests that "potential functional ability" is different than assessing K-Level. It is also inaccurate and misleading because the cited testimony does not relate to choosing an MPK over a non-MPK. Watson makes clear in his testimony following the quoted passage that "Clinical assessments of the patient's prosthetic ambulatory potential when considering the microprocessor knee or non-

microprocessor hydraulic knee must fall within the [K-3 or K-4] classification levels." (PX05166 (Watson, Dep. at 35)).

459. In Össur's "Rheo Knee: The step-by-step guide to a successful claim" for prosthetic clinics seeking to fit an MPK on a patient, under "STEP 4: GET PHYSICIAN CONFIRMATION," there is a "PHYSICIAN DOCUMENTATION CHECKLIST" that includes, among other things: (1) "Documentation re. functional level of patient both before and after amputation?"; (2) "Explanation of current and potential functional level, including an explanation for the difference between the two, if any?"; (3) "History of present medical condition(s) and past history relevant to functional deficits?"; (4) "Symptoms limiting ambulation or dexterity?"; (5) "Diagnoses causing these symptoms?"; (6) "Documentation of ambulatory assistance (cane, walker, wheelchair, caregiver) currently being used by patient (either in addition to prosthesis or before amputation)?"; (7) "Description of activities of daily living and how impacted by deficit(s)?"; (8) "Physical examination that's relevant to the functional deficit(s)?"; (9) "Weight and height, including any recent weight loss/gain?"; (10) "Patient's desire to ambulate?"; (11) "Documentation confirming the patient's motivation to ambulate?"; and (12) "Documentation showing that the physician examined the patient recently?". The physician checklist notes that: "*Records of other health care professionals (e.g., other physicians and PT's) can become part of the prescribing physician's medical records if attested to, signed, and dated by her." (PX03242 (Össur) at 007).

Response to Finding No. 459:

Respondent has no specific response other than to state that PX03242 was not presented at trial and thus not subject to cross-examination.

460. North Bay Prosthetics conducts "a series of functional testing on the patient" to assess their K level and determine whether to fit the patient with an MPK or a mechanical knee. This testing includes walking tests, standing up tests, and the Ampro test, which involves "approximately 30 different events you have the patient attempt, and they test their balance, strength, ability to walk at varying cadences, there's many different things, and those all help us guide them to their functional level." (PX05141 (Bright (North Bay) Dep. at 146-47)).

Response to Finding No. 460:

Complaint Counsel's proposed finding is inaccurate and misleading, because the cited testimony of Michael Bright does not distinguish between assessing a patient's K-Level and determining whether to fit the patient with an MPK or non-MPK. Instead, Bright testified

regarding tests that help determine "K-Level" or "Functional Level." (PX05141 (Bright, Dep. at 146-147)). Beyond K-Level designations, Bright's testimony does not support the idea that there is a group of patients that benefits from an MPK and a group that does not.

b) Importance of the Patient's Age, Health, and Fitness

461. Physical characteristics such as height and especially weight can affect whether a patient is a good candidate for an MPK. (PX05141 (Bright (North Bay) Dep. at 69-70)).

Response to Finding No. 461:

Complaint Counsel's proposed finding is misleading because it is unclear. The proposed finding of fact is not clear how height and weight affect the decision that a patient is a good candidate for an MPK or not. Further, it is not clear whether Complaint Counsel is referring to the weight and height of the patient, or the weight and height of the prosthetic knee. The cited testimony discusses all of the following: patient weight, component weight, patient height, and component build height. (PX05141 (Bright, Dep. at 69-70)).

462. A factor in recommending a prosthetic device is the patient's health and activity level before the amputation. If a patient says they want a knee they can hike on, for example, the prosthetist will ask whether that was an activity they engaged in before their amputation. (PX05149 (Brandt (Ability) Dep. at 44-47)); *see also* PX05141 (Bright (North Bay) Dep. at 140-41)).

Response to Finding No. 462:

Complaint Counsel's proposed finding of fact is inaccurate and misleading, because the cited testimony of Jeffrey Brandt does not distinguish between assessing a patient's K-Level and determining whether to fit the patient with an MPK or non-MPK. Instead, Brandt's testimony relates to attempting to assess the patient's functional level, and he testified that "you always take into account the level of function the patient was before they had the amputation" (PX05149 (Brandt, Dep. at 46)). Additionally, the cited testimony from Bright does not support this finding

of fact, as his answers do not relate to what the patient did prior to their amputation. (PX05141 (Bright, Dep. at 140-141)).

463. A patient who is active enough that they would benefit from the stability factor a microprocessor knee offers, but is not athletic, is the "sweet spot" to benefit from an MPK. (PX05134 (Oros (Scheck & Siress) Dep. at 73-74)).

Response to Finding No. 463:

Complaint Counsel's proposed finding of fact is incomplete and misleading. At trial, Oros testified that he would not put the Plié 3 in the group of MPKs that would benefit patients in the "sweet spot" that he testified about in his deposition. (Oros, Tr. 4876). Oros testified that he would not put the Plié 3 in the same group as Rheo, C-Leg, Orion, and Allux. (Oros, Tr. 4876). [redacted]

Therefore, to the extent that Complaint Counsel attempts to use Oros's testimony regarding a "sweet spot" for MPKs to mean that a certain group of patients needs an MPK, the court should find that the Plié 3 is also not a substitute for C-Leg, Rheo, Orion, or Allux.

464. Prosthetists evaluate a patient's "overall health profile, age, weight, height, [and] strength." (PX05141 (Bright (North Bay) Dep. at 141-42); PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 50); *see also* PX05168 (Sprinkle (Sprinkle) Dep. at 27) (prosthetist evaluates strength, range of motion, among other factors)).

Response to Finding No. 464:

Respondent has no specific response, other than that it is notable that none of these clinic representatives indicate that there is any particular group of patients or particular criteria that make the only appropriate knee for that group an MPK.

465. As a person ages, their likelihood of falling increases. Because MPKs have been demonstrated to help reduce falls, age is a factor that a clinician considers in determining whether an MPK is appropriate. (PX05134 (Oros (Scheck & Siress) Dep. at 67-68); *see also* Kaufman (Mayo) Tr. 821-22 (testifying that Dr. Kaufman's articles have shown that MPKs reduce falls relative to mechanical knees)).

Response to Finding No. 465:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. Complaint Counsel wholly mischaracterizes Oros's testimony. The context of Oros's testimony, which is even apparent from the cited pages in support of this proposed finding, is that to Oros, microprocessor technology could benefit K-1 and K-2 patients, given some MPKs' demonstrated ability to reduce falls. It does not in any way indicate that there is a subset of K-3 patients for whom an MPK is the only option and a non-MPK is not a substitute. (PX05134 (Oros, Dep. at 67-68)). In addition, Oros testified at trial that he was not aware of any study that showed that the Plié 3 in particular helped to reduce falls, so this proposed finding of fact cannot support the idea that the Plié 3 is among the devices "demonstrated to reduce falls." (*See* Oros, Tr. 4916-4917 (Oros is not aware of a single clinical outcome study in the world that has been published that has used subjects fit with a Plié 3); [redacted]

466. Brian Hafner and Douglas Smith wrote an article titled "Differences in function and safety between Medicare Functional Classification Level-2 and -3 transfemoral amputees and influence of prosthetic knee joint control" that was published in November of 2009 in the Journal of Rehabilitation Research & Development. (PX08059 (Otto Bock) at 001). In the article, they explain that "[c]hoice of components is based on a number of factors, including the patient's age, weight, etiology of the amputation, physical health, history, functional goals, personal motivation, and medical coverage." (PX08059 (Otto Bock) at 002).

Response to Finding No. 466:

Complaint Counsel's proposed finding of fact is misleading. One of the authors of this study, Dr. Douglas Smith, testified at trial. Dr. Smith testified clearly that for K-3 patients, medical necessity could be established for an MPK or a non-MPK, and the decision comes down to patient and provider preferences. (Doug Smith, Tr. 6006-6011). He also testified that "medical necessity," as it relates to the selection of prosthetic componentry, is not the same as the need for an emergent or an urgent medical procedure. (Doug Smith, Tr. 6015-6017). This evidence cannot support the idea that there is a subset of K-3 patients for whom an MPK is the only solution and a non-MPK cannot be a substitute.

467. To choose the best prosthetic knee for an amputee, "you have to know all the circumstances regarding the patient's health, their living conditions, the status of the residual limb, [and] any social demographic factors. All that goes into the decision about the prosthesis, a provision of prosthetic care to an amputee." (PX05160 (Kaufman (Mayo) Dep. at 129-130)).

Response to Finding No. 467:

Respondent has no specific response, other than that this proposed finding of fact is consistent with the idea that the selection of which prosthetic components should comprise a patient's prosthetic device has multiple inputs and considerations, and entails weighing pros and cons of the various characteristics of each component. Dr. Scott Morton testified as follows, which comports with this idea as well:

JUDGE CHAPPELL: So you believe the average patient for a knee, if there is one, has thousands of choices?

THE WITNESS: They would have -- let's assume they're medically indicated for a microprocessor knee. They would have all the knees from Össur that are microprocessor, all the knees from Otto Bock that are microprocessor, and the knees from Plié, the Freedom knees, to choose among, along with the little ones, that would all be paid for by the insurance company.

JUDGE CHAPPELL: And you don't believe that the insurance company would also pay for a mechanical knee?

THE WITNESS: I think the insurance company would be delighted to do that because --

JUDGE CHAPPELL: So then that makes that an option for that patient; correct?

THE WITNESS: It does except the patients -- if it has a lower functionality, the patient is going to be unlikely to want it compared to the microprocessor knee.

JUDGE CHAPPELL: And you're talking about high-end mechanical knees or you're just talking about those thousands of knees you told me about.

THE WITNESS: Well, I think the -- it's likely that the prosthetist would be showing someone who's got the medical need for a microprocessor knee a high-end mechanical knee. I agree with you.

But if the -- if that high-end mechanical knee doesn't have the functionality of the microprocessor knee, then the patient and the prosthetist are going to be weighing the pros and cons, I mean, this one is resistant to saltwater, but yet it doesn't have as good a gait, or whatever the issue is for that patient. And if the microprocessor knees are better, which is what the record reflects, and the insurance company is paying for it, then I think the prosthetist and the patient together are going to want the better knee.

JUDGE CHAPPELL: So I believe I heard you say "microprocessor knees are better, which is what the record reflects," so your opinions are based on the fact that a microprocessor knee is better for every patient.

THE WITNESS: I would not say every, Your Honor, because there are the marathon runners, the fishermen, the people whose weight is incorrect for a microprocessor knee, the people who are too short for a

> microprocessor knee. There are people who will not find the knee to be better, definitely.

(Morton, Tr. 4045-4047).

c) Importance of Activities in which the Patient Engages or Desires to Engage

468. To assess whether a microprocessor knee is a medical necessity, a prosthetist will typically "have a consultant interview with the patient and ask[] questions around activities of daily living of how they ambulate in their neighborhood, what their neighborhood looks like, does it have an elevator, do they have to ascend or descend stairs, do they have uneven walking terrain that they incorporate in their activity of church or school or community." The prosthetist may also have the patient take one or more "validated tests like the stand up and go six-minute walk test." (PX05139 (Schneider (Otto Bock) Dep. at 89)). The insurance submission will then connect the patients' activities of daily living to peer-reviewed articles showing the benefits of microprocessor knees to patients engaging in those activities. (PX05139 (Schneider (Otto Bock) Dep. at 89-90)).

Response to Finding No. 468:

Complaint Counsel's proposed finding of fact is misleading and mischaracterizes Schneider's testimony. Schneider does not testify that engaging in any one of those activities makes an MPK a "medical necessity." Rather, in Schneider's testimony, he makes clear that "medical necessity" really references coverage criteria and coverage determination. Complaint Counsel omits the following from its proposed finding of fact:

> Q. When prosthetists submit claims for microprocessor knees, do they need to show that a microprocessor knee is a medical necessity for that patient?
>
> A. They should show that the microprocessor that they have selected is most appropriate for that patient, and that they need to fit the requirements of being in the appropriate K level, as one indication. (PX05139 (Schneider, Dep. at 89) (emphasis added)).

Nowhere in his answer does Schneider adopt the language of medical necessity. Schneider later makes it clear that medical necessity is really a term used with respect to coverage determinations.

> Q. And what activities in daily living would show that a microprocessor knee is a medical necessity?
>
> A. Several. It would really depend upon the person and also the payor. So you can write a letter of medical necessity even though the policy of that payor may not give coverage. So the letter of medical necessity could be an argument for the need of a person to have a certain type of device, such as a microprocessor knee. (PX05139 (Schneider, Dep. at 90)).

469. Activities of daily living that could indicate that a microprocessor knee is a medical necessity for a patient include "[a]mbulating uneven terrain, ambulating in very confined spaces, ambulating over a greater distance, the requirement of greater balance, the requirement of stress relief to the spine and/or hip on the sound side or on the amputated side[.]" (PX05139 (Schneider (Otto Bock) Dep. at 91)).

Response to Finding No. 469:

Complaint Counsel's proposed finding of fact is misleading and mischaracterizes Schneider's testimony. Schneider does not testify that engaging in any one of those activities make an MPK a "medical necessity." Rather, in Schneider's testimony, he makes clear that "medical necessity" really references coverage criteria and coverage determination. Complaint Counsel omits the following from its proposed finding of fact:

> Q. When prosthetists submit claims for microprocessor knees, do they need to show that a microprocessor knee is a medical necessity for that patient?
>
> A. They should show that the microprocessor that they have selected is most appropriate for that patient, and that they need to fit the requirements of being in the appropriate K level, as one indication. (PX05139 (Schneider, Dep. at 89) (emphasis added)).

Nowhere in his answer does Schneider adopt the language of medical necessity. Schneider later makes it clear that medical necessity is really a term used with respect to coverage determinations.

> Q. And what activities in daily living would show that a microprocessor knee is a medical necessity?

> A. Several. It would really depend upon the person and also the payor. So you can write a letter of medical necessity even though the policy of that payor may not give coverage. So the letter of medical necessity could be an argument for the need of a person to have a certain type of device, such as a microprocessor knee. (PX05139 (Schneider, Dep. at 90)).

Schneider also makes clear in testimony following the cited testimony that these "activities of daily living," which could be made easier with an MPK, are really about trying to navigate a K-3 or K-4 environment. (PX05139 (Schneider, Dep. at 91)).

470. A patient who has a moderately physically demanding occupation that encounters normal environmental barriers would be considered a good MPK candidate. (Oros (Scheck & Siress) Tr. 4862-63).

Response to Finding No. 470:

Complaint Counsel's proposed finding of fact is incomplete. This testimony relates to Oros's statement that MPKs have a "sweet spot" for a target patient, which is high K-2 to low K-3 ambulators. (Oros, Tr. 4862). Oros believes that a patient who has a moderately physically demanding occupation would be in that sweet spot. (Oros, Tr. 4862). Notably, at trial, Oros testified that he would not put the Plié 3 in the group of MPKs that would benefit patients in the "sweet spot" that he testified about in his deposition. (Oros, Tr. 4876). Oros testified that he would not put the Plié 3 in the same group as Rheo, C-Leg, Orion, and Allux. (Oros, Tr. 4876). [redacted]

[redacted]

Therefore, to the extent that Complaint Counsel attempts to use Oros's testimony regarding a "sweet spot" for MPKs to mean that a certain group of patients needs an MPK, the Court should find that the Plié 3 is also not a substitute for C-Leg, Rheo, Orion, or Allux.

471. A K3 amputee with insurance coverage who works in an office would also be a good MPK candidate. (Oros (Scheck & Siress) Tr. 4862).

Response to Finding No. 471:

Complaint Counsel's proposed finding of fact is incomplete. This testimony relates to Oros's statement that MPKs have a "sweet spot" for a target patient, which is high K-2 to low K-3 ambulators. (Oros, Tr. 4862). Oros believes that a K-3 who works in an office would also be in that sweet spot. (Oros, Tr. 4862). Notably, at trial, Oros testified that he would not put the Plié 3 in the group of MPKs that would benefit patients in the "sweet spot" that he testified about in his deposition. (Oros, Tr. 4876). Oros testified that he would not put the Plié 3 in the same group as Rheo, C-Leg, Orion, and Allux. (Oros, Tr. 4876). [redacted]

[redacted]

[redacted]

Therefore, to the extent that Complaint Counsel attempts to use Oros's testimony regarding a "sweet spot" for MPKs to mean that a certain group of patients needs an MPK, the court should find that the Plié 3 is also not a substitute for C-Leg, Rheo, Orion, or Allux.

472. MPKs are likely beneficial for the subset of K3 amputees that engage in the following activities, including, but not limited to, "going up the stairs, going down the stairs with variable speed. . . . [g]oing down a hill, walking down a hill with variable speed, climbing up sometimes, sometimes jogging. . . . [s]emi-jump from curb to the street, things of that nature." In addition to those activities, it also includes navigating environmental barriers, crowded areas, icy streets, going through shrubs and leaves, and having to regularly walk on mulch or uneven ground. (PX05117 (Choi (ST&G) Dep. at 192-93)).

Response to Finding No. 472:

Complaint Counsel's proposed finding of fact is misleading, because the full context of Choi's deposition testimony reveals that there is no particular subset of K-3 patients that he would consider to benefit from an MPK, but instead any K-3 who engages in K-3 activities would likely benefit from an MPK, and engaging in certain activities assists in proving that a patient is a K-3. Complaint Counsel's proposed finding omits the following, which immediately precedes the testimony cited in this proposed finding. "Q: In order to get reimbursement from a microprocessor knee, what activities do clinicians want to have evidence of that the amputee engages in those activities? A: K3, K4. Q: Well, that's the K level. I'm asking about the activities. A Walking variable speed, jogging, ability to jump, just being active and being on their feet many hours a day. These are all evidence that can prove that the amputees are in the K3 category." (PX05117 (Choi, Dep. at 191) (emphasis added)). This testimony does not at all support the idea that there is a particular group or "subset" of K-3 patients for whom an MPK is a necessity and a non-MPK is

not a substitute; indeed, the non-MPK distributed by ST&G, the VGK, was designed for K-3 patients, and was designed to compete with knees that could be fit on both K-2 and K-3 level patients. (PX05117 (Choi, Dep. at 113)).

473. Michael Fillauer of Fillauer testified that the segment of the population that would "greatly benefit" from MPKs includes individuals "walking at a variable cadence but who may occasionally stumble or who may have to change their gait due to various reasons. Maybe they have other injuries that slow them down or some kind of health condition that may cause them to occasionally have to change the way they walk, and the microprocessor system could adapt better to that person." (PX05105 (Fillauer (Fillauer) Dep. at 23-24)).

Response to Finding No. 473:

Complaint Counsel's proposed finding of fact is a gross misrepresentation of Fillauer's deposition testimony, omitting key testimony that contextualizes the cited testimony and undermines Complaint Counsel's claim that there is a particular group of patient for whom a non-MPK is not a good substitute. Fillauer testified that there is "some crossover" between types of patients fit with non-MPKs and MPKs. (PX05105 (Fillauer, Dep. at 21-22); *see also* CCFF ¶ 483). Fillauer testified that "you could cover all spectrums" of patients with non-MPKs. (PX05105 (Fillauer, Dep. at 22)). He further testified that K-3 and K-4 patients often prefer a non-MPK over an MPK for "durability" and "lower maintenance" of their prosthetic knee. (PX05105 (Fillauer, Dep. at 21-22)).

474. Keith Watson, the President of Fourroux Prosthetics, testified that "[a] discussion of clinical factors might include completing an evaluation with the patient to determine K level activities; discussing activities including obstacles, terrain, distance and slopes on a typical day, including functional K level activities prior to the amputation and those activities that the patient desires to get back to at home, work, therapy, exercise and leisure; evaluating and discussing possible K-3 activities, long distance ambulation, variable cadence walking speed. Does the patient experience falls, stumbles or inability to change gait speed? Describe any ambulatory problems that may impact the use of a prosthetic knee, for example, phantom limb pain, residual limb pain, conditions of the sound side limb. If problems are identified that might impact the end -- that impact the use of a prosthetic device, discuss a plan to mitigate that problem. Describe any ambulatory

assistance, cane, walker, wheelchair, currently used in addition to the prosthesis. If the patient is using a mobility aid, discuss a plan to ambulate without mobility aids in the near future using the prosthetic device. Discuss the complete history of the patient's prior prosthetic use or the problems with current prosthetic components." (PX05166 (Watson (Fourroux) Dep. at 36-37)).

Response to Finding No. 474:

Complaint Counsel's proposed finding of fact is misleading, because the cited deposition testimony of Keith Watson does not distinguish between assessing a patient's K-Level and determining whether to fit the patient with an MPK or non-MPK. This testimony does not at all support the idea that there is a particular group or "subset" of K-3 patients that for whom an MPK is a necessity and a mechanical knee is not a substitute. (PX05166 (Watson, Dep. at 41-42) ("K-3 and K-4 patients benefit from both microprocessor knees and hydraulic knees"), 148-149 (Fourroux does not divide the world into MPKs and non-MPKs)).

475. Patients benefiting from MPKs rather than mechanical knees include those who "are able to move at varying cadences," "go up stairs and go down ramps and step over curbs," "walk in the outside community," or like to hike or dance. (PX05141 (Bright (North Bay) Dep. at 149-50)).

Response to Finding No. 475:

Complaint Counsel's proposed finding of fact is misleading, because the cited deposition testimony of Michael Bright does not distinguish between assessing a patient's K-Level and determining whether to fit the patient with an MPK or non-MPK. This testimony does not at all support the idea that there is a particular group or "subset" of K-3 patients for whom an MPK is a necessity and a mechanical knee is not a substitute. (PX05141 (Bright, Dep. at 71-74)).

476. **Rob Yates of Jonesboro P&O Labs testified that prosthetists consider the patient's "desired activities of daily living" and their "ability to use a prosthesis to accomplish those tasks."** (PX05108 (Yates (Jonesboro) Dep. at 39-41)).

Response to Finding No. 476:

Complaint Counsel's proposed finding of fact is misleading, because the cited deposition testimony of Rob Yates does not distinguish between assessing a patient's K-Level and determining whether to fit the patient with an MPK or non-MPK. This testimony does not at all support the idea that there is a particular group or "subset" of K-3 patients for whom an MPK is a necessity and a mechanical knee is not a substitute. (PX05108 (Yates, Dep. at 106 (noting that all K-levels can use a non-MPK, with the exception of K-level 0 because those patients have no potential benefit from a prosthesis of any kind))).

477. Prosthetists ask questions about an amputee's daily activities in evaluating what type of knee to fit. These include questions related to "the daily function of the person," and typically include inquiries such as: whether the amputee needs to climb stairs on a regular basis; whether the amputee needs to traverse uneven ground regularly; and whether the patient needs to negotiate crowded environments regularly? (PX05160 (Kaufman (Mayo) Dep. at 39-41)).

Response to Finding No. 477:

Complaint Counsel's proposed finding of fact is misleading, because the cited deposition testimony of Dr. Kaufman does not distinguish between assessing a patient's K-Level and determining whether to fit the patient with an MPK or non-MPK. This testimony does not at all support the idea that there is a particular group or "subset" of K-3 patients for whom an MPK is a necessity and a mechanical knee is not a substitute. (PX05160 (Kaufman, Dep. at 128 (noting that he was aware clinicians do fit K-3s with non-MPKs)).

d) Importance of Stumbles, Falls, and Other Negative Consequences Experienced by the Patient on a Mechanical Knee

478. Prosthetists evaluate whether patients frequently stumble or fall using their current prosthetic knee or avoid activities due to safety concerns, lack of balance, or lack of confidence. For instance, Scott Sabolich testified that each patient attends an evaluation appointment where the prosthetist determines a patient's "fall risk, their speed of walking

. . . [as well as] how much they alter their patterns of gait when they sit, [and] stand. . .” (PX05132 (Sabolich (Scott Sabolich Prosthetics) Dep. at 27-28)).

Response to Finding No. 478:

Complaint Counsel’s proposed finding of fact is misleading, because the cited deposition testimony does not distinguish between assessing a patient’s K-Level and determining whether to fit the patient with an MPK or non-MPK. To the contrary, Sabolich discusses the functional level determination and the narrowing down of component possibilities together, in the same meeting and consideration. Sabolich does not say that he first decides whether a patient gets an MPK or a non-MPK. Instead, he talks about narrowing the universe of potential options that could meet a patient’s needs as follows:

> “So we have, let's say three to four socket types to choose from, let's call those suspension types. We have, if they're an above-the-knee amputee, let's say we have 20 temporary knees to choose from. If they're a definitive, we could have 200 knees to choose from -- well, maybe not, let's say a hundred knees to choose from. Feet, it could be 200 feet to choose from. So we try to narrow the field down of what would be best for them and most appropriate for them, based on all the criteria we just got in the evaluation: What's their functional level, what's their needs, what's their wants and then what's realistic.” (PX05132 (Sabolich, Dep. at 28)) (emphasis added))

479. Falling is more likely for an amputee with a mechanical knee than an MPK, all else being equal. Scott Schneider, Otto Bock’s Vice President of Government, Medical Affairs and Future Development, testified to this principle in his investigational hearing, stating that “[t]he more simpler the knee, the more likely they would fall.” (PX05010 (Schneider (Otto Bock) IHT at 68)).

Response to Finding No. 479:

Complaint Counsel’s proposed finding of fact is inaccurate, unsupported by the record, and should be disregarded. The cited testimony of Scott Schneider says *nothing* about the comparative safety of an MPK versus a non-MPK. Instead, all that Schneider’s testimony can support is the idea that a simpler device would be more likely to cause an amputee to fall. To make the logical

leap in this proposed finding, it would have to be the case that *all* non-MPKs are simpler than *all* MPKs. This is contrary to the evidence presented in this case, which establishes that there is a range of functionality of MPKs and a range of functionality of non-MPKs, and the presence of a microprocessor in a device is not the most important feature of a knee, usually. (*See, e.g.*, RFOF ¶¶ 392-468 (some MPKs are functionally and reasonably interchangeable with Non-MPKs, particularly Sophisticated Non-MPKs); Kannenberg, Tr. 1944 (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); Schneider, Tr. 4370 (there are close to 50 different types of sophisticated non-MPKs on the U.S. market for K-3 and K-4 patients); RFOF ¶¶ 923-926 (discussing the importance of four-bar linkage technology, like that available in the Allux, for some patients); Doug Smith, Tr. 6019 (the fact that a knee has four-bar linkage is a more important feature for knee disarticulation patients than the presence of a microprocessor)).

480. "When the patient has used the mechanical prosthesis for quite a while and, you know, experiences frequent stumbles and falls, and is not able to do activities that he needs to do or wants to do on a regular basis, that is where you would consider using a microprocessor knee, from the prosthetic or – or technological perspective." (PX05150 (Kannenberg (Otto Bock) Dep. at 78)).

Response to Finding No. 480:

Complaint Counsel's proposed finding of fact is misleading, because Dr. Kannenberg's testimony immediately preceding the cited testimony makes clear that he is referring to an initial prosthesis. (PX05150 (Kannenberg, Dep. at 78)) ("[F]or instance is the patient a new amputee? So then most insurances would require that the patient try some mechanical knee first before you can even consider a microprocessor knee")). The evidence in the record establishes that knees used in temporary prostheses are simple, K-1 or K-2 level knees and are not sophisticated non-MPKs. (Sabolich, Tr. 5841-5842; Doug Smith, Tr. 5999-6000; Carver, Tr. 2027).

481. Jack Sanders, the Senior Clinical Program Consultant at United Healthcare testified at trial: "Q. And if you're an amputee who is prone to, for example, stubbing your toe, having an MPK will [help] you recover could make a huge difference for that patient, correct? A. It certainly could make a difference." (Sanders (United) Tr. 5470).

Response to Finding No. 481:

Complaint Counsel's proposed finding of fact should be disregarded, because Sanders lacks the requisite foundation to discuss the benefits that an MPK can provide over a non-MPK. Sanders is not now, and has never been a prosthetist or certified prosthetist. (Sanders, Tr. 5377).

482. Patient preference for a microprocessor knee may be linked to performance outcomes; that is, for those patients, MPKs allow them to walk faster, have a more efficient gait, and stumble and fall less. (PX05164 (Highsmith (VA) Dep. at 39-40)).

Response to Finding No. 482:

Complaint Counsel's proposed finding of fact is misleading because it is incomplete. Dr. Highsmith testified that:

> Q. So have you studied why they prefer the microprocessor systems?
>
> A. Well, sometimes you have to look back at the performance outcomes; because when I say the majority, it's important to understand that not all do, the majority do. And so clinically speaking, we think that it's related to the outcomes -- you know, some of the things that are mentioned here. Like, for instance, in some cases patients walk faster; in some cases, they walk with a more energy efficient gait; in some cases, they stumble or fall less. And so these are believed to be the -- you know, among the reasons, but there is the case too that we've seen in a minority of cases that a person has those objective performance improvements and still, for one reason or another, chooses not to use a microprocessor system. (PX05164 (Highsmith, Dep. at 39))

Also important to note is that Dr. Highsmith has never studied the Plié 3, never done any academic research regarding the Plié 3, and has never fit a Plié 3 himself. (PX05164 (Highsmith, Dep. at 135-136)).

483. For some patients, "you could cover all spectrums with mechanical knees. But with microprocessor knees, you have features that would be advantageous to certain patients when it comes to things like stumble control and the regulation of the hydraulics as they go through gait cycle. So I'd say there's crossover, but I would also say that there is a certain segment of the patient population that's going to greatly benefit from microprocessor knees." (PX05105 (Fillauer (Fillauer) Dep. at 21-23).

Response to Finding No. 483:

Respondent has no specific response to Complaint Counsel's proposed finding of fact, other than that Respondent's response to CCFF ¶ 473 provides additional context for this testimony.

e) Importance of the Patient's Comfort with and Preference for a Microprocessor Knee

484. "[P]references of the patient" are a consideration in choosing between a mechanical knee and an MPK. (PX05150 (Kannenberg (Otto Bock) Dep. at 54)).

Response to Finding No. 484:

Respondent has no specific response, other than that this proposed finding of fact is consistent with the idea that when deciding on a prosthetic knee, the patient and the prosthetist weigh the pros and cons of the various differentiated products available for that patient.

485. Michael Bright, a prosthetist at North Bay, testified that he considers a patient's "comfort and preference" with a microprocessor knee when determining which is the best prosthetic for them. (PX05141 (Bright (North Bay) Dep. at 140-41)).

Response to Finding No. 485:

Respondent has no specific response, other than that this proposed finding of fact is consistent with the idea that when deciding on a prosthetic knee, the patient and the prosthetist weigh the pros and cons of the various differentiated products available for that patient.

486. Some patients prefer microprocessor knees over mechanical knees. (PX05107 (Carver (College Park) Dep. at 195-96).

Response to Finding No. 486:

Respondent has no specific response, other than that this proposed finding of fact is consistent with the idea that when deciding on a prosthetic knee, the patient and the prosthetist weigh the pros and cons of the various differentiated products available for that patient. Notably, some patients also prefer non-microprocessor knees over MPKs. (Doug Smith, Tr. 4006-4011).

487. Once a patient has been trained on a microprocessor knee, "patients significantly tend to prefer a microprocessor knee over a non-microprocessor [knee] alternative." (PX05164 (Highsmith (VA) Dep. at 37-38)).

Response to Finding No. 487:

Complaint Counsel's proposed finding of fact is incomplete, as it omits key deposition testimony from Dr. Highsmith. Dr. Highsmith testified that where he indicates that even when patients have good clinical outcomes from MPKs, some patients prefer the feel of non-MPKs and choose to return to the non-MPK. (PX05164 (Highsmith, Dep. at 39)).

C. AFTER HEALTHCARE PROFESSIONALS DETERMINE AN MPK IS APPROPRIATE AND SEEK INSURANCE COVERAGE, INSURERS DECIDE WHETHER TO REIMBURSE A CLINIC FOR AN MPK

488. [redacted] (Brandt (Ability) Tr. 3772-73 (*in camera*)).

Response to Finding No. 488:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

489. To receive reimbursement, payers often require clinics to provide prior authorization or pre-determination of coverage based on a medical provider's written clinical assessment of the patient. (PX05165 (Sanders (United) Dep. at43-46).

Response to Finding No. 489:

Complaint Counsel's proposed finding of fact is incomplete. The evidence presented at trial shows that Medicare operates differently than private payers. For example, Michael Oros, a certified prosthetist and operator of one of the largest clinic networks in the United States, testified that he does not typically submit paperwork affirmatively to Medicare. Instead, he keeps the documentation on file in the event that Medicare or an agent of Medicare later reviews the claim. (Oros, Tr. 4882-4883).

490. When reimbursing for an MPK, insurance policies—including Medicare and private insurance—are agnostic as to the MPK manufacturer. (Kannenberg (Otto Bock) Tr. 1872; [redacted]

Response to Finding No. 490:

Complaint Counsel's proposed finding of fact is incomplete. Payers reimburse according to L-Codes. [redacted] Therefore, to the extent that an MPK is billed at the same set of L-Codes as another MPK, payers are manufacturer agnostic. (*See also* Schneider, Tr. 4352; Kannenberg, Tr. 1934).

491. Insurance policies usually allow patients to receive a new MPK after four to seven years, approximately the lifecycle of the device. After that time, the insurance policy will provide reimbursement for a new MPK. (Solorio (Otto Bock) Tr. 1651; *see also* Senn (COPC) Tr. 181 (testifying that a patient can use an MPK for approximately three to five years)).

Response to Finding No. 491:

Respondent has no specific response.

492. In order for a patient to receive insurance reimbursement for an MPK, the prosthetist or clinic submits various categories of information on their behalf. (Kannenberg (Otto Bock) Tr. 1830). It is important that this submission include a demonstration that a patient is an unlimited community ambulatory, or K3, because private insurers and Medicare only cover MPKs for K3 and K4 patients. (Kannenberg (Otto Bock) Tr. 1830-31).

Response to Finding No. 492:

Respondent has no specific response, other than that this is consistent with the idea that eligibility documentation is focused on mobility level classification, and not anything beyond that.

493. To demonstrate that a patient is a K3-level amputee, many insurers require proof of certain capabilities, such as the ability to walk with different walking speeds or variable cadence; or certain patient needs, such as the need to walk a significant distance each day, or a need to negotiate uneven terrain, slopes and stairs on a regular basis. (Kannenberg (Otto Bock) Tr. 1831-32).

Response to Finding No. 493:

Respondent has no specific response, other than that this is consistent with the idea that eligibility documentation is focused on mobility level classification, and not anything beyond that.

494. When prosthetists submit claims for microprocessor knees, they need to "show that the microprocessor that they have selected is most appropriate for that patient, and that they need to fit the requirements of being in the appropriate K level, as one indication." (PX05139 (Schneider (Otto Bock) Dep. at 89)).

Response to Finding No. 494:

Respondent has no specific response.

495. [redacted] (Sanders (United) Tr. 5476-79 (*in camera*)).

Response to Finding No. 495:

Respondent has no specific response.

1. Overview of Insurers' "Medical Necessity" Requirements to Obtain Coverage for an MPK

496. If the prosthetist determines that a patient is a K3 or K4, and would benefit from an MPK, the prosthetist must also show that there is a medical necessity in order to receive reimbursement for the MPK. (Carkhuff (Freedom) Tr. 346; Ell (Mid-Missouri O&P) Tr. 1694; Kannenberg (Otto Bock) Tr. 1891; *see also* PX05165 (Sanders (United) Dep. at 43-46); [redacted].

Response to Finding No. 496:

Complaint Counsel's proposed finding of fact is misleading and should not be adopted by the Court. The term "medical necessity" as it is used in coverage criteria by certain insurers for prosthetic devices is not the same as the term is used in a medical setting. (Kannenberg, Tr. 1938-1939; Doug Smith, Tr. 6012-6013 (distinguishing between the emergent situation of an appendectomy and the additional marginal benefit of a microprocessor knee)).

The record shows that there is no consistent definition of "medical necessity" in coverage criteria. (Kannenberg, Tr. 1938-1939). Further, for most patients, a letter of medical necessity is not needed for reimbursement purposes. (Doug Smith, Tr. 6012-6015).

Importantly, if a letter of medical necessity is written, it always takes place after a patient, prosthetist, and physician have weighed the pros and cons of various prosthetic knees, and have decided to provide an MPK. (Doug Smith, Tr. 6015-6017). The locus of competition has already taken place. For K-3 patients, medical necessity can be established for either a non-MPK or an MPK. (Oros, Tr. 4801; Sabolich, Tr. 5956-5957).

497. [redacted]

[redacted] *see also* Kannenberg (Otto Bock) Tr. 1831-33; PX05150 (Kannenberg (Otto Bock) Dep. at 83-84)).

Response to Finding No. 497:

Complaint Counsel's proposed finding of fact is misleading and should not be adopted by the Court. The term "medical necessity" as it is used in coverage criteria for prosthetic devices is not the same as the term is used in a medical setting. (Kannenberg, Tr. 1938-1939; Doug Smith, Tr. 6012-6013 (distinguishing between the emergent situation of an appendectomy and the additional marginal benefit of a microprocessor knee)).

The record shows that there is no consistent definition of "medical necessity" in coverage criteria. (Kannenberg, Tr. 1938-1939). Further, for most patients, a letter of medical necessity is not needed for reimbursement purposes. (Doug Smith, Tr. 6012-6015).

Importantly, if a letter of medical necessity is written, it always takes place after a patient, prosthetist, and physician have weighed the pros and cons of various prosthetic knees, and have decided to provide an MPK. (Doug Smith, Tr. 6015-6017). The locus of competition has already taken place. For K-3 patients, medical necessity can be established for either a non-MPK or an MPK. (Oros, Tr. 4801; Sabolich, Tr. 5956-5957).

498. [redacted]

Response to Finding No. 498:

Complaint Counsel's proposed finding of fact is misleading for the reasons articulated in Respondent's response to CCFF ¶ 497.

499. Dr. Kannenberg 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. (Kannenberg (Otto Bock) Tr. 1834-35; PX05150 (Kannenberg (Otto Bock) Dep. at 100-101)). This is equally true under both Medicare and private insurance coverage requirements. (Kannenberg (Otto Bock) Tr. 1835).

Response to Finding No. 499:

Complaint Counsel's proposed finding of fact is misleading for the reasons articulated in Respondent's response to CCFF ¶ 497.

500. The most important unmet need highlighted in justifying the necessity of an MPK is a need for more safety. For example, if a patient with a mechanical knee experiences excessive falls that can be attributed to the mechanical knee, that fact could be documented to justify an MPK. (Kannenberg (Otto Bock) Tr. 1834-35).

Response to Finding No. 500:

Complaint Counsel's proposed finding of fact is misleading for the reasons articulated in Respondent's response to CCFF ¶ 497.

501. Otto Bock assists customers in demonstrating the medical necessity of an MPK to insurance providers in several ways. (Kannenberg (Otto Bock) Tr. 1849-50; [redacted] PX05148 (Swiggum (Otto Bock) Dep. at 34-36)).

Response to Finding No. 501:

Complaint Counsel's proposed finding of fact is misleading for the reasons articulated in Respondent's response to CCFF ¶ 497. In addition, Ottobock assisting customers to obtain reimbursement for MPKs is consistent with the idea that MPKs and non-MPKs compete. [redacted]

[redacted]

502. Dr. Kannenberg has prepared and delivered presentations to assist prosthetists with the process for establishing the medical necessity of an MPK to insurance providers. (Kannenberg (Otto Bock) Tr. 1833). [redacted]; *see also* PX05139 (Schneider (Otto Bock) Dep. at 96) (Otto Bock conducts presentations "on several reimbursement topics, including claim submittals, new coding, reimbursement systems.")).

Response to Finding No. 502:

Complaint Counsel's proposed finding of fact is misleading for the reasons articulated in Respondent's response to CCFF ¶ 497. In addition, Ottobock assisting customers to obtain reimbursement for MPKs is consistent with the idea that MPKs and non-MPKs compete [redacted].

503. [redacted] (Kannenberg (Otto Bock) Tr. 1890 (*in camera*) (discussing PX01543)).

Response to Finding No. 503:

Complaint Counsel's proposed finding of fact is misleading for the reasons articulated in Respondent's response to CCFF ¶ 497. In addition, Ottobock assisting customers to obtain

reimbursement for MPKs is consistent with the idea that MPKs and non-MPKs compete. [redacted]

504. [redacted] (Kannenberg (Otto Bock) Tr. 1887-88 (*in camera*) (discussing PX01543)).

Response to Finding No. 504:

Complaint Counsel's proposed finding of fact is misleading for the reasons articulated in Respondent's response to CCFF ¶ 497. In addition, Ottobock assisting customers to obtain reimbursement for MPKs is consistent with the idea that MPKs and non-MPKs compete. [redacted]

[redacted] To assist in the reimbursement process, Otto Bock's reimbursement group, led by Dr. Kannenberg, provides clinics and prosthetists with guidance to help demonstrate the medical necessity of an MPK for a patient. (*See, e.g.*, PX01489 (Otto Bock) at 034). Otto Bock identifies "[s]afety," "[s]lope negotiation," "[s]tair negotiation," and "[n]egotiation of uneven terrain" as factors that prosthetists must demonstrate to establish the medical necessity of an MPK for a patient when seeking reimbursement from insurance providers. (PX01489 (Otto Bock) at 033-34; [redacted] PX05150 (Kannenberg (Otto Bock) Dep. at 83-84)).

Response to Finding No. 505:

Complaint Counsel's proposed finding of fact is misleading for the reasons articulated in Respondent's response to CCFF ¶ 497. In addition, Ottobock assisting customers to obtain reimbursement for MPKs is consistent with the idea that MPKs and non-MPKs compete. [redacted]

What Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can provide to a patient. (RFOF ¶¶ 454, 456, 349). These additional functional benefits come with some drawbacks, which go into the prosthetist and patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs); RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)).

506. Dr. Kannenberg contributed to Otto Bock's Microprocessor Knees Physician's Documentation Guide for Medicare, dated May 2017. (PX01489 (Otto Bock) at 003; Kannenberg (Otto Bock) Tr. 1836-37). 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." (PX01489 (Otto Bock) at 003).

Response to Finding No. 506:

Complaint Counsel's proposed finding of fact is misleading for the reasons articulated in Respondent's response to CCFF ¶ 497. In addition, this finding of fact underscores the point that a determination of "medical necessity" frequently just means an assessment of K-Level or

"potential functional ability." What Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can provide to a patient. (RFOF ¶¶ 454, 456, 349). These additional functional benefits come with some drawbacks – which go into the prosthetist and patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs); RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)).

507. [redacted] (PX01619 (Otto Bock) at 009 (*in camera*) (emphasis in original)).

Response to Finding No. 507:

Complaint Counsel's proposed finding of fact is misleading for the reasons articulated in Respondent's response to CCFF ¶ 497. In addition, this finding of fact underscores the point that a determination of "medical necessity" frequently just means an assessment of K-Level or "potential functional ability." What Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can potentially provide to a patient. (RFOF ¶¶ 454, 456, 349). These additional functional benefits come with some drawbacks, which go into the prosthetist and patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs) RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)).

508. [redacted] (PX01543 (Otto Bock) at 065 (*in camera*)).

Response to Finding No. 508:

Complaint Counsel's proposed finding of fact is misleading for the reasons articulated in Respondent's response to CCFF ¶ 497. In addition, Ottobock assisting customers to obtain reimbursement for MPKs is consistent with the idea that MPKs and non-MPKs compete. [redacted]

Further, there is overwhelming evidence in the record that the studies demonstrating superior safety relate primarily to Ottobock MPKs, and there are no published studies that study the Plié 3. (*See* RFOF ¶¶ 612-614 (clinical studies reveal that some of Ottobock's MPKs are safer and require less energy than non-MPKs); [redacted]; RFOF ¶¶ 369 (RAND study does not study Plié or any studies that study Plié); [redacted] The only study that includes the Plié 3, the FASTK2 study, cannot establish that an MPK is superior to a Sophisticated non-MPK, and cannot establish that the Plié 3 disaggregated from other MPKs provides any benefits compared to even K-2 mechanical knees. (Kauffman, Tr. 889; [redacted]).

509. Otto Bock's reimbursement group provides customers with clinical research articles and other academic literature showing the benefits of MPKs. (Kannenberg (Otto Bock) Tr. 1850; *see also, e.g.*, [redacted]

[redacted]. Otto Bock provides this evidence in expectation that customers will rely on these materials in seeking insurance reimbursement for Otto Bock MPKs. (Kannenberg (Otto Bock) Tr. 1850; [redacted]. These articles are provided on Otto Bock's website and directly via email. (Kannenberg (Otto Bock) Tr. 1850; PX05150 (Kannenberg (Otto Bock) Dep. at 91-92)).

Response to Finding No. 509:

Complaint Counsel's proposed finding of fact is misleading for the reasons articulated in Respondent's response to CCFF ¶ 497. In addition, Ottobock assisting customers to obtain reimbursement for MPKs is consistent with the idea that MPKs and non-MPKs compete. [redacted]. What Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can provide to a patient, and that benefit must be demonstrated. (RFOF ¶¶ 454, 456, 349). These additional functional benefits come with some drawbacks as well, which go into the prosthetist and patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs); RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)).

510. Insurers are "pretty generous in accepting" evidence supporting the use of an MPK, even when the evidence was developed using a different MPK than will be fit to the patient. (PX05150 (Kannenberg (Otto Bock) Dep. at 85-86)).

Response to Finding No. 510:

Respondent has no specific response, other than that this is consistent with the idea that the entire prosthetics industry benefits from the presence of a market leader like Ottobock in the

market, because Ottobock is willing to invest the time and money into developing clinical evidence to support the use of higher technology products. (*See* [redacted]; RFOF ¶¶ 612-614 (Ottobock's MPKs have been subjected to over sixty clinical studies over the years, and the entire prosthetics industry benefits from the clinical studies that Ottobock does); RFOF ¶ 776 (all MPK manufacturers use clinical studies that study Ottobock knees to market their MPKs and encourage switching); [redacted]

511. Otto Bock also assists its clinic and prosthetist customers by offering to review their reimbursement claims prior to submission to insurers. (PX05150 (Kannenberg (Otto Bock) Dep. at 25)).

Response to Finding No. 511:

Respondent has no specific response, other than that this proposed finding of fact is consistent with Ottobock assisting customers to obtain reimbursement for MPKs, which is consistent with the idea that MPKs and non-MPKs compete. [redacted]

512. Otto Bock will "analyze the – the requirements of the insurance plan and coverage of the patient and help the prosthetist to produce the documentation that is needed to meet these

criteria that the insurance companies have defined." (PX05150 (Kannenberg (Otto Bock) Dep. at 89)).

Response to Finding No. 512:

Respondent has no specific response, other than that this proposed finding of fact is consistent with Ottobock assisting customers to obtain reimbursement for MPKs, which is consistent with the idea that MPKs and non-MPKs compete. [redacted] This is also consistent with the idea that "medical necessity" is really about meeting coverage criteria, and there is no particular group of people for whom a non-MPK is not a substitute.

513. Clinics have begun using internal procedures to ensure prosthetists comply with payer's documentation requirements for the reimbursement of MPKs and only fit the products on patients who meet eligibility criteria. (*See, e.g.*, PX05134 (Oros (Scheck and Siress) Dep. at 46-47; 228-29; Ford (POA) Tr. 972-75 (explaining POA's internal 27-step reimbursement process before releasing a claim to be billed to an insurer)).

Response to Finding No. 513:

Respondent has no specific response, other than that this proposed finding of fact supports the idea that clinics make fitting decisions in part based on finances. Ford in particular testified that the 27-step process is geared toward mitigating the effects of RAC audits. (Ford, Tr. 972-974). This shows that the determination of what knee to fit is not solely a clinical decision, it includes realities of business as well, such as a threat of a claw-back of funds.

514. Clinics often submit clinical research showing the benefits of MPKs to insurance providers when submitting paperwork to establish the medical necessity of an MPK. (*See, e.g.*,

PX05119 (Kahle (Prosthetic Design & Amputee Research) Dep. at 53-54) (highlighting that prosthetists include clinical studies in their clinical notes when denied reimbursement); Kannenberg (Otto Bock) Tr. 1850; PX05139 (Schneider (Otto Bock) Dep. at 89-90)).

Response to Finding No. 514:

Complaint Counsel's proposed finding of fact is misleading for the reasons articulated in Respondent's response to CCFF ¶ 497. In addition, this proposed finding of fact is misleading to the extent that there is overwhelming evidence in the record that the studies demonstrating superior safety relate primarily to Ottobock MPKs, and there are no published studies that study the Plié 3. (*See* RFOF ¶¶ 612-614 (clinical studies reveal that some of Ottobock's MPKs are safer and require less energy than non-MPKs); [redacted]; RFOF ¶¶ 369 (RAND study does not study Plié or any studies that study Plié); [redacted]). The only study that includes the Plié 3, the FASTK2 study, cannot establish that an MPK is superior to a Sophisticated non-MPK, and cannot establish that the Plié 3 disaggregated from other MPKs provides any benefits compared to even K-2 mechanical knees. (Kauffman, Tr. 889; [redacted] Furthermore, what Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can provide to a patient. (RFOF ¶¶ 454, 456, 349). These additional functional benefits come with some drawbacks, which go into the prosthetist's and patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs); RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)).

2. Information a Clinic Needs to Meet Insurers' "Medical Necessity" Requirements and Receive Reimbursement for Fitting an MPK

515. [redacted]

[redacted] (Kannenberg (Otto Bock) Tr. 1891 (*in camera*); *see also* Kannenberg (Otto Bock) Tr. 1831-33; PX05150 (Kannenberg (Otto Bock) Dep. at 83-84) (discussing PX01543) (*in camera*)).

Response to Finding No. 515:

Complaint Counsel's proposed finding of fact is duplicative of CCFF ¶ 497, so Respondent incorporates its Response to CCFF ¶ 497. Furthermore, what Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can provide to a patient. (RFOF ¶¶ 454, 456, 349). These additional functional benefits come with some drawbacks, which go into the prosthetist's and patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs); RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)).

516. [redacted] (PX01543 (Otto Bock) at 042) (*in camera*)).

Response to Finding No. 516:

Complaint Counsel's proposed finding of fact is misleading for the reasons laid out in the Response to CCFF ¶ 497. Furthermore, what Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can provide to a patient, that can be demonstrated and documented for reimbursement purposes. (RFOF ¶¶ 454, 456, 349). These additional functional benefits come with some drawbacks, which go into the prosthetist and

patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs); RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)).

517. [redacted] (PX01543 (Otto Bock) at 039 (*in camera*)).

Response to Finding No. 517:

Complaint Counsel's proposed finding of fact is misleading for the reasons laid out in the Response to CCFF ¶ 497. Furthermore, what Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can provide to a patient. (RFOF ¶¶ 454, 456, 349). These additional functional benefits come with some drawbacks, which go into the prosthetist and patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs); RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)).

518. At Hanger clinics, the PAVET form, which evaluates a patient's ability to partake in activities of daily living, their functionality, and strength, is submitted with a physician's notes regarding a patient. (Asar (Hanger) Tr. 1341-43). Because the form has been around for "a couple of decades," some payers use the form to determine if a patient has the appropriate device. (Asar (Hanger) Tr. 1341).

Response to Finding No. 518:

Respondent has no specific response, other than that the Hanger PAVET form supports the idea that the assessment of a patient's functional level (K-Level) and an assessment of medical appropriateness are done in tandem, and there is no separate determination of "medical necessity"

that creates an obligation on the part of the prosthetist to provide an MPK. Instead, the PAVET form allows the prosthetist to narrow the universe of prosthetic knees that are appropriate for a patient's functional level.

519. Otto Bock's Physician's Documentation Guide for Medicare, in a section titled "Evidence for the C-Leg," lists documentable patient needs to justify the medical necessity of the C-Leg and secure Medicare reimbursement. (PX01489 (Otto Bock) at 034). The patient needs that are enumerated include "Safety," "Slope negotiation," "Stair negotiation," and "Negotiation of uneven terrain." (PX01489 (Otto Bock) at 034).

Response to Finding No. 519:

Respondent has no specific response, other than that this proposed finding of fact is consistent with Ottobock assisting customers to obtain reimbursement for MPKs, which is consistent with the idea that MPKs and non-MPKs compete. [redacted]. This is also consistent with the idea that "medical necessity" is really about meeting coverage criteria, and there is no particular group of people for whom a non-MPK is not a substitute. Furthermore, what Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can provide to a patient. (RFOF ¶¶ 454, 456, 349). These additional functional benefits come with some drawbacks, which go into the prosthetist's and patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs); RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)).

3. Consequences of Not Meeting Insurers' "Medical Necessity" Requirements for MPK Coverage

520. [redacted]

Response to Finding No. 520:

[redacted] Just because a patient will receive a functional benefit from an MPK *does not* mean that the patient will choose an MPK for their prosthetic component. For example, Scott Sabolich testified that there are pros and cons to each type of device: "I can give you a C-Leg 4 and give you stability at heel 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." (Sabolich, Tr. 5848-5849); *see also* (RFOF ¶ 347 (advantages to non-MPKs); RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)).

521. "So if you're not – and usually you have to provide documentation for all of these criteria. So if the patient doesn't have to negotiate uneven terrain, slopes and stairs outside the home of the patient on a regular basis, then the insurance usually denies the claim for a microprocessor knee." (PX05150 (Kannenberg (Otto Bock) Dep. at 83-84).

Response to Finding No. 521:

Complaint Counsel's proposed finding of fact is misleading, because if a patient does not have to negotiate uneven terrain, slopes and stairs outside of his or her home on a regular basis, that patient is unlikely to be classified as a K-3 functional level. (PX03270 (Hanger PAVET Form

for Patient Assessment Validation Evaluation Test); Asar, Tr. 1340 (explaining PAVET form). Furthermore, what Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can provide to a patient. (RFOF ¶¶ 454, 456, 349). These additional functional benefits come with some drawbacks, which go into the prosthetist and patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs); RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)).

522. [redacted]; *see also* Ell (Mid-Missouri O&P) Tr. 1722-24 (explaining that patients designated by a physician as a K3 who do not meet medical necessity requirements for a microprocessor generally get a different non-microprocessor K3 knee, such as a mechanical knee)).

Response to Finding No. 522:

[redacted] Ell's testimony should not be credited, because his testimony regarding how the component selection process works in prosthetic clinics was so far afield of the consensus in the record. Contrary to most prosthetists and other industry participants who testified that the prosthetist drives the fitting process, Ell testified that 90% of the time in his clinics, the type of knee that he fits is already selected by the physician, and he does not have input into the process. (Ell, Tr. 1724).

523. Patients not receiving coverage for an MPK very rarely purchase one out of pocket. Otto Bock's Dr. Andreas Kannenberg testified that fewer than one percent of MPKs are paid for entirely out of pocket. (PX05150 (Kannenberg (Otto Bock) Dep. at 60).

Response to Finding No. 523:

Respondent has no specific response.

D. PATIENTS ARE NOT SWITCHED FROM MPKS TO MECHANICAL KNEES BASED ON PRICES PAID BY CLINICS FOR THOSE PRODUCTS

524. Prosthetists have an ethical and reputational obligation to fit a patient with a prosthetic knee that best meets his or her medical needs. (PX05129 (Ell (Mid-Missouri O&P) Dep. at 141, 154-155) ("Q. So your ethical duties with regard to maximizing patient outcomes really drives your decision of which knee to fit on a prosthetic patient, correct? A. Yes, sir."); PX05119 (Kahle (Prosthetic Design & Amputee Research) Dep. at 66-67); [redacted] PX05145 (Ford (POA) Dep. at 95-96 ("Q. Is maximizing patient outcomes the biggest factor in fitting an MPK at POA? A. Yes. Q. Do POA's clinicians have ethical guidelines that factor into their daily work? A. All of our clinicians are certified by ABC, and there are ethical guidelines that are part of that certification.").

Response to Finding No. 524:

Complaint Counsel's proposed finding of fact is misleading. Prosthetists have certain ethical obligations, but there is significant evidence in the record that finances play a significant role in the decision to fit particular components as part of a prosthetic device. (RFOF ¶¶ 407-419). Furthermore, what Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can provide to a patient. (RFOF ¶¶ 454, 456, 349). These additional functional benefits come with some drawbacks, which go into the prosthetist and patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs); RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)). In addition, "medical necessity" for an MPK can be established for most any K-3 patient. (RFOF ¶ 457 (citing Sabolich, Tr. 5855; Oros, Tr. 4801). There is frequently no clear choice between an MPK and non-MPK. (RFOF ¶ 449 (citing Oros, Tr. 4801; Schneider, Tr. 4405; [redacted])).

525. 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 the clinics pay for MPKs or mechanical knees. (Tr. 143-6895; JX002).

Response to Finding No. 525:

Complaint Counsel's proposed finding of fact is inaccurate. There is a significant amount of evidence in the record that prosthetists would move some patients from MPKs to non-MPKs in response to the prices paid for MPKs. (RFOF ¶¶ 408, 425, 428; PX05151 (Patton Dep. at 75-78, 93)); PX05108 (Yates, Dep. at 41-42; 56-57)); PX05168 (Sprinkle, Dep. at 29; 147-148); PX05135 (Weber, Dep. at 126-127)); PX05145 (Ford, Dep. at 160); PX05141 (Bright, Dep. 112-113, 162); *see also* RFOF ¶¶ 753-761 (prosthetics clinics are price sensitive and will switch between MPKs due to price)). There is also significant evidence in the record that other financial considerations that affect a clinics margin cause clinics to fit more patients with non-MPKs, such as fear of RAC audits, poor reimbursement contracts, and inability to collect copays from patients. (Ford, Tr. 1059-1060 (fits a lower percentage of patients with private insurance with MPKs than their overall population); [redacted]

526. None of the seven clinic customers that testified at trial said that their prosthetists had ever switched a patient from an MPK to a mechanical knee based solely on price. (Senn (COPC) Tr. 148-280; Ford (POA) Tr. 901-1067; Asar (Hanger) Tr. 1306-1571; Ell (Mid-Missouri O&P) Tr. 1658-1816; Brandt (Ability) Tr. 3741-3845; Oros (Scheck & Siress) Tr. 4770-4920; Sabolich (Scott Sabolich Prosthetics) Tr. 5787-5960).

Response to Finding No. 526:

Complaint Counsel's proposed finding of fact is misleading. There is a significant amount of evidence in the record that prosthetists would move some patients from MPKs to non-MPKs in response to the prices paid for MPKs. (RFOF ¶¶ 408, 425, 428; PX05151 (Patton, Dep. at 75-78; 93); PX05108 (Yates, Dep. at 41-42; 56-57); PX05168 (Sprinkle, Dep. at 29, 147-148); PX05135

(Weber, Dep. at 126-127); PX05145 (Ford, Dep. at 160); PX05141 (Bright, Dep. 112-113, 162); *see also* RFOF ¶¶ 753-761 (prosthetics clinics are price sensitive and will switch between MPKs due to price)). There is also significant evidence in the record that other financial considerations that affect a clinics margin cause clinics to fit more patient with non-MPKs, such as fear of RAC audits, poor reimbursement contracts, and inability to collect copays from patients. (Ford, Tr. 1059-1060 (fits a lower percentage of patients with private insurance with MPKs than their overall population); [redacted] In addition, it is irrelevant what a prosthetist has done in the past, because the antitrust laws are forward-looking. Furthermore, whether a switch was made *solely* on price as opposed to being made in part due to price, is irrelevant, particularly in markets with differentiated products where all products have features that are more or less attractive, and price is just one aspect.

527. None of the fifteen clinic customers that testified in a deposition or investigational hearing said that their prosthetists had ever switched a patient from an MPK to a mechanical knee based solely on price. (PX05002 (Asar (Hanger) IHT); PX05153A & PX05153B (Asar (Hanger) Dep.); PX05003 (Yates (Jonesboro) IHT; PX05108 (Yates (Jonesboro) Dep.); PX05004 (Senn (COPC) IHT); PX05128 (Senn (COPC) Dep.); PX05129 (Ell (Mid-Missouri O&P) Dep.); PX05132 (Sabolich (Scott Sabolich Prosthetics) Dep.); PX05134 (Oros (Scheck & Siress) Dep.); PX05135 (Weber (Prosthetic & Orthotic Care) Dep.); PX05140 (Weott (Orthotic Prosthetic Center Inc.) Dep.); PX05141 (Bright (North Bay) Dep.); PX05145 (Ford (POA) Dep.); PX05149 (Brandt (Ability) Dep.); PX05151 (Patton (Prosthetic Solutions) Dep.); PX05166 (Watson (Fourroux) Dep.); PX05167 (Filippis (Wright & Filippis) Dep.); PX05168 (Sprinkle (Sprinkle) Dep.)).

Response to Finding No. 527:

Complaint Counsel's proposed finding of fact is misleading. There is a significant amount of evidence in the record that prosthetists would move some patients from MPKs to non-MPKs in response to the prices paid for MPKs. (RFOF ¶¶ 408, 425, 428; PX05151 (Patton, Dep. at 75-78; 93); PX05108 (Yates, Dep. at 41-42; 56-57); PX05168 (Sprinkle, Dep. at 29, 147-148); PX05135

(Weber, Dep. at 126-127); PX05145 (Ford, Dep. at 160); PX05141 (Bright, Dep. 112-113, 162); *see also* RFOF ¶¶ 753-761 (prosthetics clinics are price sensitive and will switch between MPKs due to price)). There is also significant evidence in the record that other financial considerations that affect a clinics margin cause clinics to fit more patient with non-MPKs, such as fear of RAC audits, poor reimbursement contracts, and inability to collect copays from patients. (Ford, Tr. 1059-1060 (fits a lower percentage of patients with private insurance with MPKs than their overall population); [redacted] In addition, it is irrelevant what a prosthetist has done in the past, because the antitrust laws are forward-looking. Furthermore, whether a switch was made *solely* on price as opposed to being made in part due to price, is irrelevant, particularly in markets with differentiated products where all products have features that are more or less attractive, and price is just one aspect.

528. Respondent's own expert testified that he could not identify any testimony in the record of a customer who has switched from fitting MPKs to fitting mechanical knees on the basis of price where the patient was able to demonstrate medical necessity and insurance coverage for an MPK. (Argue, Tr. 6274; PX05173 (Argue (Respondent) Dep. at 232)).

Response to Finding No. 528:

Complaint Counsel's proposed finding of fact is misleading. Dr. Argue noted that he was not aware of any testimony "that refers to that type of decision-making, choosing a non-MPK, *outside of the context of a discussion of what would they do if prices of the MPKs increased.*" (Argue, Tr. 6274) (emphasis added). Thus, Dr. Argue was aware of the fact that prosthetists would move some patients from MPKs to non-MPKs in response to the prices paid for MPKs. Indeed, there is a significant amount of evidence in the record that prosthetists would move some patients from MPKs to non-MPKs in response to the prices paid for MPKs. (RFOF ¶¶ 408, 425, 428;

PX05151 (Patton, Dep. at 75-78; 93); PX05108 (Yates, Dep. at 41-42; 56-57); PX05168 (Sprinkle, Dep. at 29, 147-148); PX05135 (Weber, Dep. at 126-127); PX05145 (Ford, Dep. at 160); PX05141 (Bright, Dep. 112-113, 162); *see also* RFOF ¶¶ 753-761 (prosthetics clinics are price sensitive and will switch between MPKs due to price)). Additionally, 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).

529. 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. For instance, Michael Fillauer, who used to be a practicing prosthetist, testified as follows: "Q. When you were a clinician, did you decide whether to fit your patients in mechanical or microprocessor knees based on – was that a clinical decision, or a price decision? A. I would like to say that it was mostly a clinical decision. Obviously funding is a factor. If you can't get the device paid for, you can't fit it. But the goal was always for it to be a clinical decision." (PX05105 (Fillauer (Fillauer) Dep. at 24)). [redacted] (PX05166 (Watson (Fourroux) Dep. at 61 (*in camera*)).

Response to Finding No. 529:

Complaint Counsel's proposed finding of fact is misleading because it relies on cherry-picked evidence. The overwhelming evidence presented at trial establishes that prosthetic clinics are price sensitive and make decisions based on their margins. Price of acquisition, reimbursement levels, and risk of RAC audits all influence clinic margins, and they all influence the decisions that prosthetists make regarding prosthetic componentry. (RFOF ¶¶ 407-445; Ford, Tr. 1059-1060 (fits

a lower percentage of patients with private insurance with MPKs than their overall population);

[redacted] Indeed, there is a significant amount of evidence in the record that prosthetists would move some patients from MPKs to non-MPKs in response to the prices paid for MPKs. (RFOF ¶¶ 408, 425, 428; PX05151 (Patton, Dep. at 75-78; 93); PX05108 (Yates, Dep. at 41-42; 56-57); PX05168 (Sprinkle, Dep. at 29, 147-148); PX05135 (Weber, Dep. at 126-127); PX05145 (Ford, Dep. at 160); PX05141 (Bright, Dep. 112-113, 162); *see also* RFOF ¶¶ 753-761 (prosthetics clinics are price sensitive and will switch between MPKs due to price)). Additionally, 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).

E. THE U.S. HEALTHCARE SYSTEM RESULTS IN TWO TYPES OF K3/K4 PATIENTS: THOSE WITH ACCESS TO MPKS AND THOSE WITHOUT

530. Össur's Executive Vice President of Research and Development, Kim 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. (PX05124 (De Roy (Össur) Dep. at 184-85)).

Response to Finding No. 530:

Complaint Counsel's proposed finding of fact is misleading because it contradicts the weight of the evidence in this case, including testimony from *every clinic customer*. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a non-MPK. (RFOF ¶¶ 392-406). Dr. Doug Smith testified that 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 agreed with this statement. (Senn, Tr.

263). Ford testified that patients, physicians, and prosthetists frequently weigh the pros and cons of a MPK versus a non-MPK. (Ford, Tr. 992-995). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Sabolich testified that choosing between an MPK and non-MPK often has no clear choice. (Sabolich, Tr. 5849-5850). Oros testified that similarly situated K-3 patients come to different decisions on whether to get an MPK or a non-MPK. (Oros, Tr. 4793). Brandt testified that if he were choosing between a non-MPK and an MPK, for most of the day he would want a non-MPK, but for some of the day, he would want an MPK. [redacted]; PX05149 (Brandt Dep. 196-197)). Vinit Asar, the CEO of Hanger, Inc., who Complaint Counsel admits sparked the investigation that lead to this litigation, stated that [redacted] Schneider and Dr. Kannenberg characterized MPK eligibility as a "ceiling" which would not prevent someone from choosing a non-MPK instead. (RFOF ¶ 448 (citing Schneider, Tr. 4405; Kannenberg, Tr. 1939)).

1. Most K3/K4 Patients Approved for MPK Insurance Coverage Receive and Wear an MPK

531. Michael Bright, a certified prosthetist and owner of North Bay prosthetic clinic, testified as follows: "Q. Okay. If you determine as a prosthetist that a microprocessor knee would be best to serve a patient and the patient's insurance covered the cost of that MPK, would you fit the patient for a mechanical knee instead?" . . . "A. No, I would not. Q. Why not? A. Because they will fall and they will hurt themselves, and I don't like it when my patients fall and hurt themselves." (PX05141 (Bright (North Bay) Dep. at 160-61)).

Response to Finding No. 531:

Complaint Counsel's proposed finding of fact is misleading. The question included in this proposed finding assumes that the decision has already been made – meaning the pros and cons between the two knees (including price and margin) have already been weighed. For the people for whom the MPK was a better choice, after weighing all of those factors, it is not fair to ask

whether or not the prosthetist would then switch them to a non-MPK – the prosthetist has already made their decision at that point. This is akin to saying that the market for Buicks is different than the market for Cadillacs, because when people walk into a Buick dealership after having weighed all of the pros and cons, having test drove both Buicks and Cadillac, and decided to buy a Buick, they are no longer in the market for a Cadillac because they are standing in the Buick dealership. Further, this proposed finding of fact is misleading because not all MPKs are proven to reduce falls in patients. [redacted]; RFOF ¶ 369 (RAND study does not study Plié or any studies that study Plié); ***see*** **RFOF ¶ 359 (discussing Brian Kaluf of Ability P&O and Eric Ferris of Freedom's plans to create a literature review to aid Plié 3 sales; noting that there were no published clinical studies analyzing the benefits of the Plié 3 and no intention by Kaluf to conduct a study); (Ferris, Tr. 2373, 2448).}**

532. [redacted] (PX05107 (Carver (College Park) Dep. at 46 (*in camera*)).

Response to Finding No. 532:

Complaint Counsel's proposed finding of fact is misleading because it contradicts the weight of the evidence in this case, including testimony from *every clinic customer*. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a non-MPK. (RFOF ¶¶ 392-406). Dr. Doug Smith testified that 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 agreed with this statement. (Senn, Tr. 263). Ford testified that patients, physicians, and prosthetists frequently weigh the pros and cons

of a MPK versus a non-MPK. (Ford, Tr. 992-995). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Sabolich testified that choosing between an MPK and non-MPK often has no clear choice. (Sabolich, Tr. 5849-5850). Oros testified that similarly situated K-3 patients come to different decisions on whether to get an MPK or a non-MPK. (Oros, Tr. 4793). Brandt testified that if he were choosing between a non-MPK and an MPK, for most of the day he would want a non-MPK, but for some of the day, he would want an MPK. [redacted]; PX05149 (Brandt Dep. 196-197)). Vinit Asar, the CEO of Hanger, Inc., who Complaint Counsel admits sparked the investigation that lead to this litigation, stated that [redacted] Schneider and Dr. Kannenberg characterized MPK eligibility as a "ceiling" which would not prevent someone from choosing a non-MPK instead. (RFOF ¶ 448 (citing Schneider, Tr. 4405; Kannenberg, Tr. 1939)).

533. Vinit Asar, CEO of Hanger, the largest prosthetic clinic company in the country, testified as follows: "A patient that qualifies for a microprocessor knee based on, you know, the PAVET score and the K level, of course, would get a microprocessor knee. I wouldn't think that any clinician would say, you know, that a mechanical knee would benefit a patient more than a microprocessor knee. I think they would be shortchanged." (PX05153B (Asar (Hanger) Dep. at 54-55)).

Response to Finding No. 533:

Complaint Counsel's proposed finding of fact is misleading because it contradicts the weight of the evidence in this case, including Asar's testimony at trial, and testimony from *every clinic customer*. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a non-MPK. (RFOF ¶¶ 392-406). Dr. Doug Smith testified that 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 agreed with this

statement. (Senn, Tr. 263). Ford testified that patients, physicians, and prosthetists frequently weigh the pros and cons of a MPK versus a non-MPK. (Ford, Tr. 992-995). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Sabolich testified that choosing between an MPK and non-MPK often has no clear choice. (Sabolich, Tr. 5849-5850). Oros testified that similarly situated K-3 patients come to different decisions on whether to get an MPK or a non-MPK. (Oros, Tr. 4793). Brandt testified that if he were choosing between a non-MPK and an MPK, for most of the day he would want a non-MPK, but for some of the day, he would want an MPK. [redacted]; PX05149 (Brandt Dep. 196-197)). Vinit Asar, the CEO of Hanger, Inc., who is cited in support of this proposed finding, and who Complaint Counsel admits sparked the investigation that lead to this litigation, stated that [redacted] Schneider and Dr. Kannenberg characterized MPK eligibility as a "ceiling" which would not prevent someone from choosing a non-MPK instead. (RFOF ¶ 448 (citing Schneider, Tr. 4405; Kannenberg, Tr. 1939)).

534. K-3 and K-4 patients usually get an MPK because "they're going to be more efficient in their day-to-day activities when they're walking on a microprocessor knee. They're putting less effort into controlling the knee because the microprocessor is helping them do that. So it's a more efficient knee, and it may be a safer knee." (PX05105 (Fillauer (Fillauer) Dep. at 96-97)).

Response to Finding No. 534:

Complaint Counsel's proposed finding of fact is misleading because it contradicts the weight of the evidence in this case, including testimony from *every clinic customer*. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a non-MPK. (RFOF ¶¶ 392-406). Dr. Doug Smith testified that 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 agreed with this statement. (Senn, Tr. 263). Ford testified that patients, physicians, and prosthetists frequently weigh the pros and cons of a MPK versus a non-MPK. (Ford, Tr. 992-995). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Sabolich testified that choosing between an MPK and non-MPK often has no clear choice. (Sabolich, Tr. 5849-5850). Oros testified that similarly situated K-3 patients come to different decisions on whether to get an MPK or a non-MPK. (Oros, Tr. 4793). Brandt testified that if he were choosing between a non-MPK and an MPK, for most of the day he would want a non-MPK, but for some of the day, he would want an MPK. [redacted]; PX05149 (Brandt Dep. 196-197)). Vinit Asar, the CEO of Hanger, Inc., who Complaint Counsel admits sparked the investigation that lead to this litigation, stated that [redacted] Schneider and Dr. Kannenberg characterized MPK eligibility as a "ceiling" which would not prevent someone from choosing a non-MPK instead. (RFOF ¶ 448 (citing Schneider, Tr. 4405; Kannenberg, Tr. 1939)). [redacted]

535. Keith Senn, the President of COPC, testified at trial that MPKs are "a much better knee, and if a patient is [an] eligible candidate for one, that is the knee they would prefer and deserve." (Senn (COPC) Tr. 198).

Response to Finding No. 535:

Complaint Counsel's proposed finding of fact should be disregarded, because Keith Senn is not a prosthetist and lacks the requisite foundation to testify regarding whether an MPK is a "much better knee." The only foundation laid for Senn's knowledge of clinical issues was that he "used to have an office for about a decade within one of COPC's clinics" and the Court found that

inadequate, stating, "I am not talking about whether he sits and can look out a window. I want to know that that's part of his job if you're going to offer him for this fact. I mean, if you want his testimony to be 'Yeah, I see this from my window,' then we'll go with that." (Senn, Tr. 163). To compound this issue, Senn testified that he has *never observed* a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 173). This witness clearly lacks foundation to support a finding of fact on an issue relating to the clinical benefits of any particular prosthetic componentry.

It is also vague as to what Senn meant by "eligible candidate," as the evidence shows that COPC takes into account the reimbursement level that COPC receives from particular patients when deciding which knee to fit. (Senn, Tr. 246-247). Complaint Counsel's proposed finding of fact is misleading because it contradicts the weight of the evidence in this case, including testimony from *every clinic customer*. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a non-MPK. (RFOF ¶¶ 392-406). Dr. Doug Smith testified that 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 agreed with this statement. (Senn, Tr. 263). Ford testified that patients, physicians, and prosthetists frequently weigh the pros and cons of a MPK versus a non-MPK. (Ford, Tr. 992-995). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Sabolich testified that choosing between an MPK and non-MPK often has no clear choice. (Sabolich, Tr. 5849-5850). Oros testified that similarly situated K-3 patients come to different decisions on whether to get an MPK or a non-MPK. (Oros, Tr. 4793). Brandt testified that if he were choosing between a non-MPK and an MPK, for most of the day he would want a non-MPK, but for some of the day, he would want an MPK. [redacted]; PX05149 (Brandt Dep. 196-197)). Vinit Asar, the CEO of Hanger, Inc., who Complaint Counsel admits sparked the

investigation that lead to this litigation, stated that [redacted] Schneider and Dr. Kannenberg characterized MPK eligibility as a "ceiling" which would not prevent someone from choosing a non-MPK instead. (RFOF ¶ 448 (citing Schneider, Tr. 4405; Kannenberg, Tr. 1939)).

536. Asked if a mechanical knee would be suitable for a patient who qualified for an MPK, DAW's President testified that "[i]f a patient qualifies for microprocessor knee, a K3 patient qualify for microprocessor knee which is the best of the best of function, then why go for less?" (PX05147 (Belzidsky (DAW) Dep. at 82)).

Response to Finding No. 536:

Complaint Counsel's proposed finding of fact is misleading because it contradicts the weight of the evidence in this case, including testimony from *every clinic customer*. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a non-MPK. (RFOF ¶¶ 392-406). Dr. Doug Smith testified that 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 agreed with this statement. (Senn, Tr. 263). Ford testified that patients, physicians, and prosthetists frequently weigh the pros and cons of a MPK versus a non-MPK. (Ford, Tr. 992-995). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Sabolich testified that choosing between an MPK and non-MPK often has no clear choice. (Sabolich, Tr. 5849-5850). Oros testified that similarly situated K-3 patients come to different decisions on whether to get an MPK or a non-MPK. (Oros, Tr. 4793). Brandt testified that if he were choosing between a non-MPK and an MPK, for most of the day he would want a non-MPK, but for some of the day, he would want an MPK. [redacted]; PX05149 (Brandt, Dep. 196-197)). Vinit Asar, the CEO of Hanger, Inc., who Complaint Counsel admits sparked the investigation that lead to this

litigation, stated that [redacted] Schneider and Dr. Kannenberg characterized MPK eligibility as a "ceiling" which would not prevent someone from choosing a non-MPK instead. (RFOF ¶ 448 (citing Schneider, Tr. 4405; Kannenberg, Tr. 1939)).

537. Jeffrey Brandt of Ability Prosthetics & Orthotics testified that most patients would benefit from an MPK, and that at Ability, the practice is that "people need to be ruled out of microprocessor technology, not ruled in." (PX05149 (Brandt (Ability) Dep. at 42-43)).

Response to Finding No. 537:

Complaint Counsel's proposed finding of fact is misleading because it contradicts the weight of the evidence in this case, including testimony from *every clinic customer*, including Brandt himself. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a non-MPK. (RFOF ¶¶ 392-406). Dr. Doug Smith testified that 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 agreed with this statement. (Senn, Tr. 263). Ford testified that patients, physicians, and prosthetists frequently weigh the pros and cons of a MPK versus a non-MPK. (Ford, Tr. 992-995). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Sabolich testified that choosing between an MPK and non-MPK often has no clear choice. (Sabolich, Tr. 5849-5850). Oros testified that similarly situated K-3 patients come to different decisions on whether to get an MPK or a non-MPK. (Oros, Tr. 4793). Brandt testified that if he were choosing between a non-MPK and an MPK, for most of the day he would want a non-MPK, but for some of the day, he would want an MPK. [redacted]; PX05149 (Brandt, Dep. 196-197)). Vinit Asar, the CEO of Hanger, Inc., who Complaint Counsel admits sparked the investigation that lead to this litigation, stated that [redacted]

[redacted] Schneider and Dr. Kannenberg characterized MPK eligibility as a "ceiling" which would not prevent someone from choosing a non-MPK instead. (RFOF ¶ 448 (citing Schneider, Tr. 4405; Kannenberg, Tr. 1939)).

2. Reasons Some K3/K4 Patients Receive Mechanical Knees

a) Insurers Deny MPK Coverage for Some K3/K4 Patients

538. Insurance companies do not always reimburse for microprocessor knees; in those cases, a patient may get a mechanical knee given the high out-of-pocket cost of buying an MPK without insurance. [redacted]; PX05151 (Patton (Prosthetic Solutions) Dep. at 24-25); PX05134 (Oros (Scheck & Siress) Dep. at 91); [redacted]; PX05108 (Yates (Jonesboro) Dep. at 161)); PX05128 (Senn (COPC) Dep. at 93)).

Response to Finding No. 538:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that the only reason a person would chose not to have an MPK is if they could not be reimbursed. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a non-MPK. (RFOF ¶¶ 392-406). Dr. Doug Smith testified that 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 agreed with this statement. (Senn, Tr. 263). Ford testified that patients, physicians, and prosthetists frequently weigh the pros and cons of a MPK versus a non-MPK. (Ford, Tr. 992-995). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Sabolich testified that choosing between an MPK and non-MPK often has no clear choice. (Sabolich, Tr. 5849-5850). Oros testified that similarly situated K-3 patients come to different decisions on whether to get an MPK or a non-MPK. (Oros, Tr. 4793). Brandt testified that if he were choosing between a non-MPK and an MPK, for most of the day he would want a non-MPK, but for some of the day, he

would want an MPK. [redacted]; PX05149 (Brandt, Dep. 196-197)). Vinit Asar, the CEO of Hanger, Inc., who Complaint Counsel admits sparked the investigation that lead to this litigation, stated that [redacted] Schneider and Dr. Kannenberg characterized MPK eligibility as a "ceiling" which would not prevent someone from choosing a non-MPK instead. (RFOF ¶ 448 (citing Schneider, Tr. 4405; Kannenberg, Tr. 1939)).

539. "[P]rivate health insurance may consider a microprocessor knee medically necessary for certain patients in their policy, but they sell – they may sell plans that don't cover microprocessor prosthetic components. So although they consider these products medically necessary in their policy, if the patient has a plan that does not include microprocessor components, they will not pay for them." (PX05150 (Kannenberg (Otto Bock) Dep. at 78-79)).

Response to Finding No. 539:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that the only reason a person would chose not to have an MPK is if they could not be reimbursed. This proposed fining also undermines Complaint Counsel's position regarding a group of patients who clinically *need* MPKs. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a non-MPK. (RFOF ¶¶ 392-406). Dr. Doug Smith testified that 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 agreed with this statement. (Senn, Tr. 263). Ford testified that patients, physicians, and prosthetists frequently weigh the pros and cons of a MPK versus a non-MPK. (Ford, Tr. 992-995). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Sabolich testified that choosing between an MPK and non-MPK often has no clear choice. (Sabolich, Tr. 5849-5850). Oros testified that similarly situated K-3 patients come to different

decisions on whether to get an MPK or a non-MPK. (Oros, Tr. 4793). Brandt testified that if he were choosing between a non-MPK and an MPK, for most of the day he would want a non-MPK, but for some of the day, he would want an MPK. [redacted]; PX05149 (Brandt, Dep. 196-197)). Vinit Asar, the CEO of Hanger, Inc., who Complaint Counsel admits sparked the investigation that lead to this litigation, stated that [redacted] Schneider and Dr. Kannenberg characterized MPK eligibility as a "ceiling" which would not prevent someone from choosing a non-MPK instead. (RFOF ¶ 448 (citing Schneider, Tr. 4405; Kannenberg, Tr. 1939)).

540. Curt Patton of Prosthetic Solutions testified that if a patient came to his clinic with a prescription for an MPK and Medicaid did not cover it, while he would not prefer to fit a mechanical knee, he may have to. (PX05151 (Patton (Prosthetic Solutions) Dep. at 24-25)).

Response to Finding No. 540:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that the only reason a person would chose not to have an MPK is if they could not be reimbursed. This proposed fining also undermines Complaint Counsel's position regarding a group of patients who clinically *need* MPKs. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a non-MPK. (RFOF ¶¶ 392-406). Dr. Doug Smith testified that 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 agreed with this statement. (Senn, Tr. 263). Ford testified that patients, physicians, and prosthetists frequently weigh the pros and cons of a MPK versus a non-MPK. (Ford, Tr. 992-995). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Sabolich testified that choosing between an MPK and non-MPK often has no clear choice.

(Sabolich, Tr. 5849-5850). Oros testified that similarly situated K-3 patients come to different decisions on whether to get an MPK or a non-MPK. (Oros, Tr. 4793). Brandt testified that if he were choosing between a non-MPK and an MPK, for most of the day he would want a non-MPK, but for some of the day, he would want an MPK. [redacted]; PX05149 (Brandt, Dep. 196-197)). Vinit Asar, the CEO of Hanger, Inc., who Complaint Counsel admits sparked the investigation that lead to this litigation, stated that [redacted] Schneider and Dr. Kannenberg characterized MPK eligibility as a "ceiling" which would not prevent someone from choosing a non-MPK instead. (RFOF ¶ 448 (citing Schneider, Tr. 4405; Kannenberg, Tr. 1939)).

541. Customers with insurance plans that do not cover MPKs—including MediCal and Medicaid—are instead fit with mechanical knees. (PX05141 (Bright (North Bay) Dep. at 68)).

Response to Finding No. 541:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that the only reason a person would chose not to have an MPK is if they could not be reimbursed. This proposed fining also undermines Complaint Counsel's position regarding a group of patients who clinically *need* MPKs. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a non-MPK. (RFOF ¶¶ 392-406). Dr. Doug Smith testified that 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 agreed with this statement. (Senn, Tr. 263). Ford testified that patients, physicians, and prosthetists frequently weigh the pros and cons of a MPK versus a non-MPK. (Ford, Tr. 992-995). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Sabolich testified that choosing between an MPK and non-MPK often has no clear choice.

(Sabolich, Tr. 5849-5850). Oros testified that similarly situated K-3 patients come to different decisions on whether to get an MPK or a non-MPK. (Oros, Tr. 4793). Brandt testified that if he were choosing between a non-MPK and an MPK, for most of the day he would want a non-MPK, but for some of the day, he would want an MPK. [redacted]; PX05149 (Brandt, Dep. 196-197)). Vinit Asar, the CEO of Hanger, Inc., who Complaint Counsel admits sparked the investigation that lead to this litigation, stated that [redacted] Schneider and Dr. Kannenberg characterized MPK eligibility as a "ceiling" which would not prevent someone from choosing a non-MPK instead. (RFOF ¶ 448 (citing Schneider, Tr. 4405; Kannenberg, Tr. 1939)).

542. [redacted] (PX03025 (College Park) at 002 (*in camera*) (College Park Report: New Product Proposal – Capital Hydraulic Knee)).

Response to Finding No. 542:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that the only reason a person would chose not to have an MPK is if they could not be reimbursed. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a non-MPK. (RFOF ¶¶ 392-406). Dr. Doug Smith testified that 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 agreed with this statement. (Senn, Tr. 263). Ford testified that patients, physicians, and prosthetists frequently weigh the pros and cons of a MPK versus a non-MPK. (Ford, Tr. 992-995). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Sabolich testified that choosing between an MPK and non-MPK often has no clear choice. (Sabolich, Tr. 5849-5850).

Oros testified that similarly situated K-3 patients come to different decisions on whether to get an MPK or a non-MPK. (Oros, Tr. 4793). Brandt testified that if he were choosing between a non-MPK and an MPK, for most of the day he would want a non-MPK, but for some of the day, he would want an MPK. [redacted]; PX05149 (Brandt, Dep. 196-197)). Vinit Asar, the CEO of Hanger, Inc., who Complaint Counsel admits sparked the investigation that lead to this litigation, stated that [redacted] Schneider and Dr. Kannenberg characterized MPK eligibility as a "ceiling" which would not prevent someone from choosing a non-MPK instead. (RFOF ¶ 448 (citing Schneider, Tr. 4405; Kannenberg, Tr. 1939)).

b) Medical Professional Do Not Recommend an MPK for Some K3/K4 Patients Due to Health, Work, or Lifestyle Issues

543. Several witnesses testified that if a patient's lifestyle involves being in water on a regular basis, the patient is better served with a mechanical knee than the microprocessor they could otherwise qualify for. (Smith (Retired) Tr. 6008; Ell (Mid-Missouri O&P) Tr. 1722-24; PX05134 (Oros (Scheck & Siress) Dep. at 91-95)). For instance, Dr. Smith testified that he would tell his rural patients who enjoy fly fishing using waders that a "microprocessor knee probably wouldn't fit that lifestyle." (Smith (Retired) Tr. 6008). Fishermen almost always get mechanical knees because they do not want their microprocessor knees to short out on the water. (Smith (Retired) Tr. 6008; Ford (Prosthetic & Orthotic Assocs.) Tr. 994-98).

Response to Finding No. 543:

Respondent has no specific response other than that these are not clinical reasons but are descriptions of patient preferences, and describe a scenario where a patient is weighing the pros and cons of MPK functionality and the more practical benefits of non-MPKs.

544. Some mechanical knees are waterproof, or even salt-waterproof, making them preferable for fishermen, or others who enjoy water activities. (Kannenberg (Otto Bock) Tr. 1985; PX05150 (Kannenberg (Otto Bock) Dep. at 54-55)).

Response to Finding No. 544:

Respondent has no specific response other than these are not clinical reasons but are descriptions of patient preferences, and describes a scenario where a patient is weighing the pros and cons of MPK functionality and the more practical benefits of non-MPKs.

545. Some K3 or K4 amputees with young children prefer mechanical knees to MPKs because mechanical knees better enable kneeling, and entering water to teach a child to swim or to rescue them. (Sanders (United) Tr. 5396).

Response to Finding No. 545:

Respondent has no specific response other than that these are not clinical reasons but are descriptions of patient preferences, and describes a scenario where a patient is weighing the pros and cons of MPK functionality and the more practical benefits of non-MPKs.

546. Mechanical knees may provide greater knee flexion angle, which may make them preferable for parents with small kids who want the ability to kneel on the ground. (Kannenberg (Otto Bock) Tr. 1985. See also Sanders (United) Tr. 5389).

Response to Finding No. 546:

This is duplicative of CCFF ¶ 545. Respondent has no specific response other than that these are not clinical reasons but are descriptions of patient preferences, and describes a scenario where a patient is weighing the pros and cons of MPK functionality and the more practical benefits of non-MPKs.

547. Some patients may do better with a mechanical knee because it is simpler to operate than an MPK. (PX05121 (Potter (Walter Reed) Dep. at 77)).

Response to Finding No. 547:

Respondent has no specific response other than that these are not clinical reasons but are descriptions of patient preferences, and describes a scenario where a patient is weighing the pros and cons of MPK functionality and the more practical benefits of non-MPKs.

548. Patients who do not have access to chargers for their knees may be better suited to mechanical knees because they do not need to be charged. (Smith (Retired) Tr. 6012; Ell (Mid-Missouri O&P) Tr. 1722-24).

Response to Finding No. 548:

Respondent has no specific response other than that these are not clinical reasons but are descriptions of patient preferences, and describes a scenario where a patient is weighing the pros and cons of MPK functionality and the more practical benefits of non-MPKs.

549. [redacted] (Asar (Hanger) Tr. 1482 (*in camera*)).

Response to Finding No. 549:

Respondent has no specific response other than that these are not clinical reasons but are descriptions of patient preferences, and describes a scenario where a patient is weighing the pros and cons of MPK functionality and the more practical benefits of non-MPKs.

550. Since MPKs need to be charged, patients with mental deficits who would otherwise qualify for an MPK are often fitted with a mechanical knee. (PX05134 (Oros (Scheck & Siress) Dep. at 91-95); PX05168 (Sprinkle (Sprinkle Prosthetics) Dep. at 37-38); PX05145 (Ford (Prosthetic & Orthotic Assocs.) Dep. at 93-95); *see also* PX05173 (Argue (Respondent) Dep. at 135-36) (agreeing that a patient's cognitive abilities are evaluated in order to determine whether an MPK or mechanical knee is more suitable to a particular patient))).

Response to Finding No. 550:

Respondent has no specific response other than that these are not clinical reasons but are descriptions of patient preferences, and describes a scenario where a patient is weighing the pros and cons of MPK functionality and the more practical benefits of non-MPKs.

551. Mechanical knees have been developed for specific types of sports; these knees may be preferable to MPKs for patients engaging in those sports. (PX05150 (Kannenberg (Otto Bock) Dep. at 51-52)).

Response to Finding No. 551:

Respondent has no specific response other than that these are not clinical reasons but are descriptions of patient preferences, and describes a scenario where a patient is weighing the pros and cons of MPK functionality and the more practical benefits of non-MPKs.

552. Patients who would otherwise wear an MPK might feel more comfortable using mechanical knees for specific activities include cycling, weightlifting and Crossfit. (Potter (Walter Reed) Tr. 783-84). Mechanical knees are more appropriate than MPKs for these activities because they are cheaper, more durable, and easier to replace if they break. (Potter (Walter Reed) Tr. 784).

Response to Finding No. 552:

Respondent has no specific response other than that these are not clinical reasons but are descriptions of patient preferences, and describes a scenario where a patient is weighing the pros and cons of MPK functionality and the more practical benefits of non-MPKs.

553. Some very high end users prefer mechanical knees as well, because they are more durable. (Smith (Retired) Tr. 6008). A K-3 patient who runs often, for instance, may be better served by a mechanical knee even though they could be fitted with an MPK. (PX05151 (Patton (Prosthetic Solutions) Dep. at 24-25); PX05134 (Oros (Scheck & Siress) Dep. at 91-95); PX05105 (Fillauer (Fillauer) Dep. at 21-23); PX05150 (Kannenberg (Otto Bock) Dep. at 51-52); PX05141 (Bright (North Bay) Dep. at 156-57)). The user would have to have enough hip extension strength to stabilize the lock of the knee. (Ell (Mid-Missouri O&P) Tr. 1773-77).

Response to Finding No. 553:

Respondent has no specific response other than that these are not clinical reasons but are descriptions of patient preferences, and describes a scenario where a patient is weighing the pros and cons of MPK functionality and the more practical benefits of non-MPKs.

554. [redacted] (Asar (Hanger) Tr. 1480 (*in camera*)).

Response to Finding No. 554:

Respondent has no specific response other than that these are not clinical reasons but are descriptions of patient preferences, and describes a scenario where a patient is weighing the pros and cons of MPK functionality and the more practical benefits of non-MPKs.

555. Jack Sanders of United Health testified that some K3 or K4 members prefer mechanical knees to MPKs where they work in "environmental conditions that are not suitable" for MPKs, or where they are "highly active people that are involved with working with large weight." (Sanders (United) Tr. 5390-91). Additionally, hunters may prefer non-MPKs to avoid the need to recharge the knee, and for mechanical knees' ability to handle wet or cold environments. (Sanders (United) Tr. 5391).

Response to Finding No. 555:

Respondent has no specific response other than that these are not clinical reasons but are descriptions of patient preferences, and describes a scenario where a patient is weighing the pros and cons of MPK functionality and the more practical benefits of non-MPKs.

c) Mechanical Knees are Typically Used for Initial or Temporary Prosthesis

556. When a transfemoral amputee gets his or her first, provisional prosthesis, it is usually made of "simpler components" than an MPK because the patient is learning to walk on their amputated stump, a part of the body that was never designed for bearing so much weight. (Smith (Retired) Tr. 5999-6000).

Response to Finding No. 556:

Complaint Counsel's proposed finding of fact is misleading to the extent that it suggests that patients are fit with Sophisticated non-MPKs as their initial prostheses. This is not true. The record establishes that the type of knee appropriate for an initial prosthesis is a lower-level K-1 or K-2 knee. (Sabolich, Tr. 5841-5842; Doug Smith, Tr. 5999-6000). Dr. Smith's testimony about "simpler components" cited above is in reality comparing a knee used on an initial prosthesis with a Sophisticated Non-MPK, not an MPK.

557. During this time period, "goals can be set, habits can be formed, [and] the patient can work with a therapist" while wearing a mechanical knee, with the goal that the patient is "going to progress into an MPK." (PX05149 (Brandt (Ability) Dep. at 41-42)). [redacted] (PX05107 (Carver (College Park) Dep. at 44) (*in camera*)).

Response to Finding No. 557:

Complaint Counsel's proposed finding of fact is misleading to the extent that it suggests that patients are fit with Sophisticated non-MPKs as their initial prostheses. This is not true. The record establishes that the type of knee appropriate for an initial prosthesis is a lower-level K-1 or K-2 knee. (Sabolich, Tr. 5841-5842; Doug Smith, Tr. 5999-6000).

558. "Usually patients have mechanical knees first before you think about providing them with a microprocessor knee. It's pretty tough to convince an insurance company to pay for a microprocessor knee as the first knee after an amputation . . . . [I]nsurance companies usually say the patient has to try a mechanical knee first, and only if that is functionally and safety-wise insufficient, then we may discuss if a microprocessor knee is medically necessary." (PX05150 Kannenberg (Otto Bock) Dep. at 54-55; see also PX05150 Kannenberg (Otto Bock) Dep. at 79)).

Response to Finding No. 558:

Complaint Counsel's proposed finding of fact is misleading to the extent that it suggests that patients are fit with Sophisticated non-MPKs as their initial prostheses. This is not true. The record establishes that the type of knee appropriate for an initial prosthesis is a lower-level K-1 or K-2 knee. (Sabolich, Tr. 5841-5842; Doug Smith, Tr. 5999-6000).

d) Some K3/K4 Patients Prefer to Use a Mechanical Knee

559. Michael Bright, owner of North Bay Prosthetics, a prosthetic clinic company, testified as follows: "Q. Are there some K3 level ambulators that you fit with a mechanical knee because of patient preference, even though they might be eligible for a microprocessor knee through insurance or Medicare? A. Yes. Q. Why is that? A. You just said it, patient preference. We have patients that are amputees from World War II that are still using metal and leather joints on their prosthesis. It's just – it's antiquated technology, but they just –

it's what's always worked for them, and it's what they always want. In that case that's typically it, they don't want to change." (PX05141 (Bright (North Bay) Dep. at 68-69); *see also* PX05164 (Highsmith (Veteran's Affairs) Dep. at 148-50) (describing study showing that 26% of mechanical knee wearers who were trained on a C-Leg returned to a mechanical knee, mostly because they were "long time users" who had been in a mechanical knee "for at least ten years")).

Response to Finding No. 559:

Complaint Counsel's proposed finding of fact is inaccurate and incomplete. It is inaccurate that non-MPKs are "antiquated technology." (RFOF ¶¶ 336, 340, 347 349). In addition, there is significant evidence in the record that some K-3 patients prefer non-MPKs over MPKs for different reasons. (*See* RFOF ¶¶ 392-406 (discussing reasons such as lower co-pay, preference for durability, preference not to have charge their knee, desire for more voluntary control)). The evidence shows that for K-3 patients who could qualify either for an MPK or a Sophisticated non-MPK, they weigh the pros and cons of each product because they each have positive and negative attributes. (*See* RFOF ¶ 398 (citing Sabolich, Tr. 5849-5850; Oros, Tr. 4793)).

560. Mr. Belzidsky, President of DAW, testified as follows: "Q. Do you know if any K3 level patients have a preference for using a mechanical knee rather than the microprocessor knee even if they might qualify for a microprocessor knee? A. I can't think of any logical reason except that the only reason I can think of because I've been a long time in this business is patients sometimes are used to something that's before they were amputees, before microprocessor knees and therefore wants to stick to what they've been used to." (PX05147 (Belzidsky (DAW) Dep. at 82-83)).

Response to Finding No. 560:

Complaint Counsel's proposed finding of fact should not be credited by the Court because this deposition testimony is contrary to the overwhelming weight of the evidence in the record. There is significant evidence in the record that some K-3 patients prefer non-MPKs over MPKs for different reasons. (RFOF ¶¶ 392-406 (discussing reasons such as lower co-pay, preference for durability, preference not to have charge their knee, desire for more voluntary control). The

evidence shows that for K-3 patients who could qualify either for an MPK or a Sophisticated non-MPK, they weigh the pros and cons of each product because they each have positive and negative attributes. (RFOF ¶ 398 (citing Sabolich, Tr. 5849-5850; Oros, Tr. 4793).

561. [redacted] (PX05140 (Weott (Orthotic Prosthetic Center Inc.) Dep. at 68-69) (*in camera*)).

Response to Finding No. 561:

Respondent has no specific response.

V. FUNDAMENTALS OF COMPETITION AMONG MPK SUPPLIERS FOR SALES OF MPKS TO U.S. PROSTHETIC CLINICS

A. U.S. Prosthetic Clinics Purchase MPKs from Manufacturers to Meet the Needs of K3/K4 Patients Treated at Their Facilities Who Benefit Significantly from Using an MPK

562. [redacted] (Solorio (Otto Bock) Tr. 1625-26 (*in camera*); Kannenberg (Otto Bock) Tr. 1825; Blatchford (Endolite) Tr. 2101)).

Response to Finding No. 562:

Respondent has no specific response.

563. Prosthetic clinic customers typically purchase MPKs directly from prosthetic manufacturers. (Ell (Mid-Missouri O&P) Tr. 1688; PX05128 (Senn (COPC) Dep. at 21, 196-97)).

Response to Finding No. 563:

Complaint Counsel's proposed finding of fact is misleading. The evidence shows that several MPK manufacturers sell their MPKs through distributors, such as SPS. (PX05140 (Weott, Dep. at 80) (testifying that his clinic orders Rheo, Orion, and Plié from SPS's distribution arm). Clinicians sometimes prefer to purchase through distributors because it is easier. (PX05140 (Weott, Dep. at 80)).

564. [redacted] (PX05007 (Carkhuff (Freedom) IHT at 120-121 (*in camera*)).

Response to Finding No. 564:

Respondent has no specific response.

565. [redacted] (PX05153B (Asar (Hanger) Dep. at 55 (*in camera*)).

Response to Finding No. 565:

Complaint Counsel's proposed finding of fact is incomplete and misleading. The record is clear that prosthetic knee selection process is dynamic and many factors play a role in determining the knee a patient is fit with. Mr. Asar's testimony regarding the prosthetic knee selection process is unreliable and lacks foundation. Mr. Asar is not a prosthetist and does not fit patients with prosthetic devices. He is not a doctor and is not involved in the patient evaluation and component selection process. Dr. Douglas Smith, a renowned surgeon with significant experience related to prosthetic knees, testified at trial that clinics purchase Sophisticated Non-MPKs even in instances where the patient qualifies for an MPK and has a prescription for an MPK. (Doug Smith, Tr. 6011; RFOF ¶¶ 392-406).

566. Mr. Senn of COPC testified that it is "rare" for any of COPC's K3 or K4 patients to be fit with a mechanical knee instead of a microprocessor knee because the "MPK is the best available knee that's available to those patients, so we want to provide, you know, what those patients deserve and what works best." (Senn (COPC) Tr. at 180-81). Mr. Senn explained that it "would be a disservice to the patients and poor patient care" to threaten to shift COPC's MPK volume to mechanical knees because MPKs are "a much better knee, and if a patient is [sic] eligible candidate for one, that is the knee they would prefer and deserve." (Senn (COPC) Tr. at 198).

Response to Finding No. 566:

Complaint Counsel's proposed finding is misleading because Senn lacks the requisite knowledge and experience for his testimony to support this proposed finding, so his testimony

should be disregarded here. At trial, the only foundation laid for Senn's knowledge of clinical issues was that he "used to have an office for about a decade within one of COPC's clinics" and the Court found that inadequate, stating, "I am not talking about whether he sits and can look out a window. I want to know that that's part of his job if you're going to offer him for this fact. I mean, if you want his testimony to be 'Yeah, I see this from my window,' then we'll go with that." (Senn, Tr. 163). To compound this issue, Senn testified that he is not familiar with non-MPKs, does not know the difference between a fluid-controlled and a constant friction non-MPK, and has never observed a patient wearing an MPK navigate terrain such as hills or stairs. he has *never observed* a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 173, 253-254). This witness clearly lacks foundation to support a finding of fact on an issue relating to the clinical benefits of any particular prosthetic componentry.

Complaint Counsel's proposed finding of fact is also contradicted by the record and belied by COPC's own documents. [redacted] Indeed, Mr. Senn specifically testified that Sophisticated Non-MPKs are appropriate for K-3 and K-4 patients at COPC. (Senn, Tr. 254). Complaint Counsel's proposed finding is also contrary to the record, which demonstrates that both Sophisticated Non-MPKs and MPKs are medically appropriate for K-3 and K-4 patients. (RFOF ¶¶ 392-406).

567. Clinics purchase microprocessor knees based on prosthetist feedback about which products are "working the best and which ones we would prefer to use the most." (Senn (COPC) Tr. at 168-69). Clinics procure the MPK that their clinicians prefer. (Ford (POA) Tr. at 904-05, 940-42) (testifying that the clinicians "make the final decision about the products" but that he is involved at a "high level" in negotiating the with manufacturers).

Response to Finding No. 567:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted] Clinic owners also incentivize prosthetists financially with inducements to choose certain prosthetics products that provide greater margin to the clinics. (Ford, Tr. 928-929). [redacted]

B. U.S. Prosthetic Clinics Engage in One-on-One Negotiations with MPK Suppliers to Determine the Price and Terms of the MPKs Fit on Patients

568. Customers negotiate pricing for MPKs with the MPK suppliers. (PX05116 (Endrikat (Empire Medical) Dep. at48-49).

Response to Finding No. 568:

Complaint Counsel's proposed finding of fact is incomplete. Customers negotiate pricing for prosthetics products with prosthetics suppliers and prices depend, in part, on the total volume of prosthetics purchases. (RFOF ¶¶ 762-772).

569. [redacted] (Carkhuff (Freedom) Tr. 381-82 (*in camera*); Ford (POA) Tr. 940-41); PX05116 (Endrikat (Empire Medical) Dep. at 51)).

Response to Finding No. 569:

Respondent has no specific response.

570. [redacted]

Response to Finding No. 570:

Respondent has no specific response.

571. [redacted] (Carkhuff (Freedom) Tr. 382-83 (*in camera*); (Senn (COPC) Tr. at 195; PX05116 (Endrikat (Empire Medical) Dep. at 53)).

Response to Finding No. 571:

Respondent has no specific response.

572. [redacted]

Response to Finding No. 572:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that [redacted]

573. [redacted] (Carkhuff (Freedom) Tr. 383 (*in camera*)). [redacted] (Carkhuff (Freedom) Tr. 382-383 (*in camera*)).

Response to Finding No. 573:

Respondent has no specific response.

574. [redacted] (PX05128 (Senn (COPC) Dep. at 24); PX05108 (Yates (Jonesboro) Dep. at 59-62 (*in camera*)). For example, Keith Senn of COPC testified that his clinic increased its purchases of Freedom's Plié due to "[t]he competitive pricing that we received from them." (Senn (COPC) Tr. 191). [redacted] (Asar (Hanger) Tr. 1402-1403 (*in camera*)).

Response to Finding No. 574:

Complaint Counsel's proposed finding of fact is incomplete, misleading, and vague. The first sentence is vague because the term "high-quality MPKs" is not defined. [redacted]

The first sentence is also misleading because prosthetic clinics purchase prosthetic knees on a case-by-case basis depending on the prospective users K-level and ability to pay, among other factors. (Doug Smith, Tr. 6007; Ford, Tr. 1055). Prosthetic clinics do, however, shift volume between the multiple MPK suppliers in the United States depending on the features and benefits of different knees, trial fittings performed by MPK suppliers, as well as on negotiated prices, among other factors. (RFOF ¶¶ 753-761).

The second sentence is incomplete. [redacted]

The third sentence is misleading because Hanger, through its subsidiary, SPS, can adjust prices of prosthetic component that SPS sells to Hanger clinics. (RFOF ¶ 856). SPS can mark prosthetic knees up or down to shift volume between different products, including between

Sophisticated Non-MPKs and MPKs. (RFOF ¶ 1165). In 2017 and 2018, SPS has artificially raised the price of the C-Leg 4 to Hanger clinics while lowering the price of the Orion 3 and Plié 3 to attempt to shift volume. (RFOF ¶ 1165).

575. [redacted] (Asar (Hanger) Tr. 1484 (*in camera*); PX05108 (Yates (Jonesboro) Dep. at 75 (*in camera*); PX05168 (Sprinkle (Sprinkle Prosthetics) Dep. at 164-65) (testifying that Sprinkle Prosthetics expects to receive a higher margin for the Plié 3 purchase, as opposed to a C-leg 4 purchase); PX05128 (Senn (COPC) Dep. at 24)).

Response to Finding No. 575:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Clinics' margins depend on price, reimbursement, and other costs associated with providing services. (RFOF ¶¶ 407-409). Depending on reimbursement and other costs, lower prices can lead to higher margins. (RFOF ¶ 409).

576. [redacted] (PX01023 (Freedom) at 003 (*in camera*)).

[redacted] (PX01023 (Freedom) at 003 (*in camera*)).

[redacted] (PX01023 (Freedom) at 003 (*in camera*)); (Carkhuff (Freedom) Tr. at 393-396 (*in camera*); PX05007 (Carkhuff (Freedom) IHT at 107-116)).

Response to Finding No. 576:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

577. [redacted] (Ford (POA) Tr. 1027-1028 (*in camera*); Asar (Hanger) Tr. 1411-12 (*in camera*); PX05108 (Yates (Jonesboro) Dep. at 76-77 (*in camera*)); PX05128 (Senn (COPC) Dep. at 24)).

Response to Finding No. 577:

Respondent has no specific response.

578. [redacted] (Ford (POA) Tr. 1028-28 (*in camera*)).

Response to Finding No. 578:

Respondent has no specific response.

579. Mr. Senn of COPC testified that his clinic uses cost savings to "hiring residents with facilities, with programs that we put in support of the patient care, such as compliance." (PX05128 (Senn (COPC) Dep. at 34; *see also* Senn (COPC) Tr. at 227 (*in camera*) [redacted]).

Response to Finding No. 579:

Respondent has no specific response.

580. [redacted] (PX07008 at 005 (Respondent's Responses to Complaint Counsel's First Set of Requests for Admissions); *see also* PX05108 (Yates (Jonesboro) Dep. at 73-74) (*in camera*)).

Response to Finding No. 580:

Complaint Counsel's proposed finding of fact is vague as to which Ottobock "prosthetic knees" competed with Freedom's Plié 3 for sale to prosthetic clinics.

C. The Bargaining Leverage of U.S. Clinics in Negotiations with MPK Suppliers

581. A clinic's bargaining leverage in negotiations with an MPK supplier turns on the clinic's ability to credibly threaten to switch some portion of its purchases to another MPK. (PX05007 (Carkhuff (Freedom) IHT at 121-22) (testifying that if the threat is credible, the clinic may use that to negotiate lower prices from Freedom for the Plié 3).

Response to Finding No. 581:

Complaint Counsel's proposed finding of fact is misleading to the extent it states that bargaining leverage "turns on" switching purchases. There are a number of factors that impact leverage.

582. Mr. Endrikat of Empire Medical testified that during pricing negotiations, he has two things to leverage: "our volume purchases and the price of other manufacturers." (PX05116 (Endrikat (Empire Medical) Dep. at 33-34)).

Response to Finding No. 582:

Respondent has no specific response.

583. [redacted] (Blatchford (Endolite) Tr. 2163 (*in camera*); Ford (POA) Tr. 1004-05; PX05108 (Yates (Jonesboro) Dep. at 115 (*in camera*)); PX05116 (Endrikat (Empire Medical) Dep. at 58)).

Response to Finding No. 583:

Respondent has no specific response.

584. [redacted] (Carkhuff (Freedom) Tr. 383 (*in camera*)). [redacted] (Carkhuff (Freedom) Tr. 404 (*in camera*)).

Response to Finding No. 584:

Respondent has no specific response.

585. [redacted] (Carkhuff (Freedom)

Tr. at 402 (*in camera*); PX05007 (Carkhuff (Freedom), IHT at 122; Testerman (Freedom) Tr. at 1280-81 (*in camera*); PX01023 (Freedom) at 004 (*in camera*)).

Response to Finding No. 585:

Complaint Counsel's proposed finding of fact is incomplete. The record is clear that all clinic customers have bargaining leverage in negotiations with MPK suppliers, with different clinics having different abilities to negotiate lower prices. (Responses to CCFF ¶¶ 568-574.).

586. Mr. Ell of Mid-Missouri testified that Otto Bock has matched Freedom prices for microprocessor knees. (Ell (Mid-Missouri) Tr. at 1751). 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.'" (Ell (Mid-Missouri) Tr. at 1751).

Response to Finding No. 586:

Complaint Counsel's proposed finding is incomplete, vague, and not supported by the record. Ell testified that "over the years" there have been several iterations of the C-Leg, from C-Leg 1 to C-Leg 4, and the Plié, from Plié 1 to Plié 3, and that over those years "Ottobock has matched Freedom's prices for microprocessor knees." (Ell, Tr. 1750-1751). The first C-Leg launched in 1999, and the Plié launched in 2007. (RFOF ¶ 1099; Carkhuff, Tr. 294). When asked for specifics about the purported price match, Ell could provide no specifics. (Ell, Tr. 1751). Ell did not testify as to when over the last many years such a price match occurred, and did not state which Ottobock product (or version of Ottobock product) purportedly matched the price of some iteration of the Freedom Plié. (Ell, Tr. 1751).

1. Clinics Use the Availability of Close Substitute MPKs to Negotiate the Most Favorable MPK Prices and Terms Possible from a Manufacturer

587. Customers use pricing from other MPK firms in order to get Freedom to decrease its pricing on the Plié. (PX05137 (Mathews (Freedom) Dep. at 158).

Response to Finding No. 587:

Respondent has no specific response.

588. [redacted] (Carkhuff (Freedom) Tr. 404 (*in camera*)).

Response to Finding No. 588:

Respondent has no specific response.

589. [redacted] (Carkhuff (Freedom) Tr. 382 (*in camera*)).

Response to Finding No. 589:

Respondent has no specific response, other than that the phrase "other microprocessor knee manufacturers" is vague as to whether it includes any specific microprocessor knee manufacturer.

590. [redacted] (Carkhuff (Freedom) Tr. 383 (*in camera*)).

Response to Finding No. 590:

Respondent has no specific response.

591. Mr. Ford testified that he has used the presence of the Freedom Plié 3 in negotiations with Otto Bock to get better pricing for the C-Leg 4. (Ford (POA) Tr. 1004-05).

Response to Finding No. 591:

Complaint Counsel's proposed finding of fact is misleading, incomplete and not supported by the record evidence. After Ford testified that he has used the presence of the Plié 3 to get better pricing for the C-Leg 4, Complaint Counsel asked "Can you describe the circumstance where you've done that?" (Ford, Tr. 1005). Here is Ford's complete answer to that question:

> A. We talk -- I mean, when we do our annual reviews, we talk about these are the options, this is our total number of MPKs we fit for the year, so that both companies understand our total volume. Then they also obviously understand what their volume is, so they can determine that we're buying a certain number of products from

> other manufacturers. In addition, occasionally we will have patients -- we had one this spring -- where the patients doesn't have health insurance and they need an MPK and they're going to pay out of pocket. In that case, what we did was we took that patient's specific information and we went to Össur, Freedom and Otto Bock and said this is the situation, full transparency, the patient doesn't have insurance, here's what we're looking at, what can you put together that's going to be the best option, set of options for this patient.

(Ford, Tr. 1005). Ford testified that the patient described above is the only POA patient to receive a Plié 3 during his time at POA and that this was the only "circumstance" where he used the presence of the Plié 3 in negotiations with Ottobock to get better pricing for the C-Leg 4. (Ford, Tr. 1005). It is unclear from the record whether Ottobock offered better pricing for the C-Leg 4 in this special circumstance for a patient with no insurance. (Ford, Tr. 1005).

592. [redacted] (Senn (COPC) Tr. 227 (*in camera*); (PX05116 (Endrikat (Empire Medical) Dep. at 35-36) (testifying that "[i]t has happened" that his Otto Bock sales representative will cut him a deal on the C-Leg if he says that he will buy Pliés instead)).

Response to Finding No. 592:

Complaint Counsel's proposed finding of fact is vague and misleading. The phrases "MPK manufacturers" and "presence of Freedom" are vague. Senn provided no testimony regarding COPC using the price of Freedom's Plié 3 to get better pricing on Ottobock's C-Leg 4. (Senn, Tr. 226-227, 264-265). Senn testified that the Acquisition has not negatively impacted COPC as follows:

> Q. The Freedom acquisition by Otto Bock hasn't impacted your business at all, has it?
> A. It has not.
> Q. You're still getting the exact same pricing that you were receiving before the acquisition; is that right?
> A. Correct.
> Q. You haven't lost any sales?

A. No.
Q. It hasn't impacted your patients, has it?
A. No.
Q. You're still able to buy Freedom's knees at discounted prices?
A. Yes.

(Senn, Tr. 264-265). Complaint Counsel's second citation does not support Complaint Counsel's proposed finding of fact. (PX05116 (Endrikat, Dep. at 35-36) (no testimony regarding negotiations with sales representatives). At the IHT, Endrikat testified:

> Q. Mr. Endrikat, let's focus on your pricing negotiations for the three clinics that own Empire. In your experience if you call an Ottobock sales representative, will they cut you a deal on the C-Leg microprocessor knees if you say you are going to buy a Plié microprocessor knee instead?
>
> A. It has happened. It can happen, yes. It doesn't always happen, but it has.

(PX05116 (Endrikat Dep. at 35)). This is vague as to when and which version of the C-Leg and Plié, respectively.

593. Mr. Ford of POA 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." (Ford (POA) Tr. at 1004-05)).

Response to Finding No. 593:

Complaint Counsel's proposed finding of fact is incomplete and misleading. POA has only purchased 1 Freedom Plié 3 during Ford's time at POA (since 2016). At trial, Complaint Counsel asked Ford to "describe the circumstance" where POA has used both Freedom and Ottobock against each other in negotiations, and he could only provide one instance involving a patient that had no insurance. (Ford, Tr. 1004-1006). Ford testified that it is "not very common" for POA to have an MPK patient that has no insurance. (Ford, Tr. 1006). Given the unique, single instance of Plié 3 versus C-Leg competition offered by Ford at trial, it would be inaccurate to claim that

Ottobock and Freedom engage in vigorous head-to-head competition for POA's MPK business. (Ford, Tr. 1004-1006).

594. [redacted] (Blatchford (Endolite) Tr. 2165-66 (*in camera*)).

Response to Finding No. 594:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

595. Mr. Senn of COPC testified that after COPC started using more Pliés in 2015, 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" (PX05128 (Senn (COPC) Dep. at 24-25). Mr. Senn elaborated that by "increasingly more aggressive, he meant that the "discounts were greater." (PX05128 (Senn (COPC) Dep. at 24-25)).

Response to Finding No. 595:

Complaint Counsel's proposed finding of fact is vague and misleading. At his deposition, Senn stated that in 2015 Ottobock was "increasingly more aggressive [with] pricing on their MPKs, on their C-leg 3 and C-Leg 4" and that Ottobock was trying to increase its overall volume of business with COPC on all product offerings, including more than just knees. (PX05128 (Senn, Dep. at 24-25)). Senn did not provide any specific examples of Ottobock lowering the price of the C-Leg 4 or any examples of continued "aggressive pricing" from Ottobock since 2015. (PX05128 (Senn, Dep. at 24-26)). To the contrary, when asked if any of COPC's clinics had switched from fitting Freedom's Plié to Ottobock's C-Leg, Senn testified that no, none had. (PX05128 (Senn, Dep. at 26)).

[redacted]

596. Mr. Endrikat of Empire Medical testified that he uses "ballpark" pricing to play the microprocessor knee manufacturers off of each other during price negotiations. (PX05116 (Endrikat (Empire Medical) Dep. at 58). He testified further that he only uses MPK

competitor pricing to negotiate extra discounts for MPKs. (PX05116 (Endrikat (Empire Medical) Dep. at 59)).

Response to Finding No. 596:

Respondent has no specific response.

2. Mechanical Knees Do Not Play a Significant Role in Negotiations

597. Microprocessor knees prices do not respond to price changes of non-microprocessor knees. (PX05004 (Senn (Center for O&P) Dep. at 151);

Response to Finding No. 597:

Complaint Counsel's proposed finding of fact is vague and misleading. [redacted] The Selection Guide for K-3 and K-4 patients appears as follows:

(PX03114 at 005).

598. 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." He further elaborated that MPKs are a "much better knee" and the clinic will continue to fit "eligible candidates" because eligible patients "would prefer and deserve" an MPK. (Senn (COPC) Tr. 198).

Response to Finding No. 598:

Complaint Counsel's proposed finding of fact is not supported by the record evidence.

[redacted] (Senn, Tr. 239-249). Senn also testified at trial that some patients might be eligible for an MPK, but they decide that they do not want one. (Senn, Tr. 263).

599. According to Mr. Senn of COPC, non-microprocessor mechanical knee prices do not respond to price changes of MPKs. (PX05004 (Senn (Center for O&P) Dep. at 150)).

Response to Finding No. 599:

Complaint Counsel's proposed finding of fact is incomplete. [redacted] Senn also testified that COPC needs to make a margin of around $10,000 on the acquisition cost of the knee in order to be profitable after all of the other service costs are accounted for with providing a prosthetic knee to a COPC patient. (Senn, Tr. 257-263).

600. Össur does not set the price of its microprocessor knees against the price of mechanical knees because "they don't really compete for the same population" of people with access to certain funds since "[i]f they have access to a microprocessor knee, they'll buy a microprocessor knee." PX05124 (De Roy (Össur) Dep. at 184-185)).

Response to Finding No. 600:

Complaint Counsel's proposed finding of fact is incomplete and vague. Össur sells "the Total Knee, the Mauch Knee, the Rheo Knee, the Rheo Knee XC, and the Power Knee" for K-3 amputees in the United States, (PX05124 (DeRoy, Dep. at 24-25)). Kim DeRoy, Össur's Executive Vice-President of R&D and former Vice President of Sales of Prosthetics from 2013 to 2017, testified that not all of Össur's MPKs compete with one another. (DeRoy, Tr. 3584-3585).

DeRoy testified that the Rheo XC is approximately $9,000 to $10,000 more expensive than the Rheo Knee and competes with the Ottobock Genium and Ottobock X3. (DeRoy, Tr. 3584-3585). DeRoy also testified that the Power Knee "is about twice as expensive as a Rheo" and that "[t]here's no real comparable technology on the market today." (DeRoy, Tr. 3586).

601. Prices of mechanical knees do not respond to charges in the prices charged for MPKs. (PX05116 (Endrikat (Empire Medical) Dep. at 68).

Response to Finding No. 601:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Despite price and reimbursement differences between Sophisticated Non-MPKs, and MPKs, the profit margins on Sophisticated Non-MPKs is quite similar to MPKs. (PX05116 (Endrikat, Dep. at 158-160))

[redacted]

602. Endolite's Executive Chairman, Stephen Blatchford, testified that Endolite "only look[s] at other MPKs" and not mechanical knees when analyzing competition for the Orion 3 because "the price point is completely different" and "customers don't tend to think of [the two types of knees] in the same way." (Blatchford (Endolite) Tr. 2143-44).

Response to Finding No. 602:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Endolite's Executive Chairman, Stephen Blatchford, testified that Endolite markets both Sophisticated Non-MPKs and MPKs for K-3 and K-4 patients in the United States. (RX-0814 at 2). Endolite's marketing materials show as follows:

(RX-0814 at 02; *see also* Blatchford, Tr. 2237-2243). Endolite sets its prices for Sophisticated Non-MPKs and MPKs based on three factors: (i) whether Endolite can earn a margin; (ii) reimbursement rates, or L-codes, that are recommended for the component; and (iii) competitors' price and positioning. (Blatchford, Tr. 2122-2124; PX05144 (Blatchford, Dep. at 47-48)).

603. [redacted] (Blatchford (Endolite) Tr. 2154-55 (*in camera*)).

Response to Finding No. 603:

Respondent has no specific response, other than the fact that Endolite considers reimbursement rates that are available for the Orion 3 in addition to other factors when setting the price of the Orion 3. (Blatchford, Tr. 2122-2124).

604. [redacted] (De Roy (Ossur) Tr. 3603 (*in camera*); see also (PX05124 (De Roy (Ossur) Dep. at 184-85).

Response to Finding No. 604:

Respondent has no specific response.

3. Role of Clinic Purchase Volumes in Negotiations

605. The overall volume of MPKs a clinic customer purchases also affects the discounts they receive from MPK suppliers. (Senn (COPC) Tr. at 196-97); (PX05004 (Senn (COPC), IHT at 38) (testifying that "we could obtain a higher discount from Freedom, if we're able to drive more of the MPK volume to Freedom" and that "Otto Bock has offered the same thing"); (PX05132 (Sabolich (Sabolich Research) Dep. at 91-92).

Response to Finding No. 605:

Complaint Counsel's proposed finding of fact is incomplete. The overall volume of all products a clinic customer purchases, including MPKs, affects the discounts they receive from suppliers. [redacted]

606. Mr. Endrikat, CEO of Empire Medical, testified that he negotiates the lowest price possible for microprocessor knees through volume by saying "we did X amount of business, and therefore we warrant this amount of discount." (PX05116 (Endrikat (Empire Medical) Dep. at 58).

Response to Finding No. 606:

Complaint Counsel has no specific response.

VI. THE SALE OF MPKS TO PROSTHETIC CLINICS IS A RELEVANT PRODUCT MARKET

A. MPKs Possess Distinct Characteristics

1. Physical Attributes of MPKs Differ from Mechanical Knees

607. As of January 18, 2018, Otto Bock's publicly available website stated that "Generally, there are two kinds of prosthetic knees: non-microprocessor (or "mechanical") and microprocessor" knees. Otto Bock distinguishes microprocessor knees as providing a "more sophisticated method of control to a prosthetic knee." (PX08013 (Otto Bock) at 001).

Response to Finding No. 607:

Complaint Counsel's proposed finding of fact is misleading to the extent that it attempts to take one quote from one manufacturer's website and apply it to all MPKs. At a minimum, this finding of fact should be limited to only Ottobock MPKs and MPKs that have similar functionality. There was significant evidence presented at trial regarding the range in functionality of various MPKs sold in the United States, and in particular the disparity between Freedom's Plié and MPKs from other manufacturers, including Ottobock's C-Leg, Endolite's Orion, and Össur's Rheo. Therefore the finding proposed here, which cites only to Ottobock's website, should not be extended broader than the source document allows. There is no evidence that this proposed finding of fact should apply to the Plié 3. (*See* RFOF ¶¶ 164-239 (MPKs range in functionality based on level of microprocessor control and other features); RFOF ¶¶ 577-606 (Plié is functionally dissimilar from other MPKs)).

608. Freedom's CEO at the time of the Merger, David Smith, testified that Freedom's MPK and mechanical knees are "completely different products [at] completely different price points." (PX05122 (Smith (HEP) Dep. at 106-07). To distinguish a mechanical knee from an MPK, David Smith explained: "[o]ne is rudimentary and one is sophisticated. One

> doesn't allow mobility and ambulation and one does. One restricts activity or limits your activity, or you want it limited for safety reasons because the patient is incapable. The other one allows it and facilitates it." The differences, he highlighted, are because "one of them has different componentry and different functionality than the other one." (PX05122 (Smith (HEP) Dep. at 202-03).

Response to Finding No. 608:

This proposed finding of fact should not be adopted by the Court, because it relies on a witness not competent to testify on this subject. At trial and at his deposition, and in his investigational hearing, David Smith testified repeatedly regarding his lack of familiarity with the functionality of particular prosthetic components. [redacted] Further, at trial, David Smith clarified that the testimony cited in this proposed finding related to K-1 or K-2 non-MPKs, of the type that Freedom was looking to license and distribute. Furthermore, there is significant evidence in the record that indicates that many non-microprocessor knees are sophisticated, enable ambulation, and facilitate activity – particularly for active amputees. (*See* RFOF ¶¶ 140-163, 335 – 349; *see also* Schneider, Tr. 4335 (Ottobock's Scott Schneider described the 3R60, introduced at trial as RDX-009, as a "super cool knee" with "lots of sophistication."); Solorio, Tr. 1640-1644 ("the charging or the robustness that a mechanical knee really can offer if you have a high-impact lifestyle or a job that's going to put you in situations where it's going to get banged around a lot or you're lifting really, really heavy things" are all reasons why individuals may prefer non-MPKs to MPKs; for example, Marine veteran Kristie Ennis transitioned from wearing Ottobock's X3 microprocessor knee to its 3R80 non-microprocessor knee because her "lifestyle is very active, she's a mountaineer, she's constantly rock climbing and she's made the decision that the mechanical knee was a better option for her everyday life, so that's what she chooses to wear now."); Kannenberg, Tr. 1958-1959 (if Dr. Kannenberg needed a prosthetic knee device, he would choose the X3 and would also use a 3R80 because he would need a non-MPK as

a backup for certain activities); Doug Smith, Tr. 5991-5992, 5994 ("hydraulics and pneumatics are great. They actually really work. The microprocessor just adds one more little level of control to make it work a little better")).

609. The microprocessor in an MPK reads sensors located throughout the device to help position the knee during a user's gait cycle. These adjustments can predict a user's activities and the walking terrain with each step. (Kannenberg (Otto Bock) Tr. 1946-47).

Response to Finding No. 609:

Complaint Counsel's proposed finding of fact is misleading, because Dr. Kannenberg testified repeatedly that his knowledge and testimony related to Ottobock MPKs, and did not extend to other non-clinically proven MPKs like the Plié 3. (PX05150 (Kannenberg Dep. at 44)); Kannenberg, Tr. 1843-1844). There is no evidence that the Plié 3 can "position the knee during a user's gait cycle." There is also no evidence that the Plié 3 can "predict a user's activities and the walking terrain with each step." Indeed, there is significant evidence in the record that all the microprocessor in the Plié 3 can do is switch the knee between set levels of resistance in the swing phase and the stance phase. (Carkhuff, Tr. 335; Schneider, Tr. 4310-4314, 4320; Kannenberg, Tr. 1953; [redacted]).

610. [redacted] (PX04001 at 001 (Blatchford (Endolite), Decl.) (*in camera*); *see also* PX05144 (Blatchford (Endolite) Dep. at 168-69) (discussing PX04001)).

Response to Finding No. 610:

This finding of fact is misleading, to the extent that Complaint Counsel is suggesting that this statement by the executive Chairman of one MPK manufacturer should be applied equally to all knees that contain a microprocessor. The clear record evidence shows that Freedom's Plié 3

cannot "operate control valves to adjust in real time to how a patient walks." Further, the Court should discount the "testimony" that Blatchford provided via his declaration on December 7, 2017. The evidence at trial demonstrates that Complaint Counsel drafted this declaration and Blatchford agreed to sign in lieu of traveling from England to appear in person for an Investigational Hearing. (Blatchford, Tr. 2230-2235).

611. Mr. Blatchford further testified that an MPK 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 (Endolite) Tr. 2104).

Response to Finding No. 611:

This finding of fact is misleading, to the extent that Complaint Counsel is suggesting that this statement by the executive Chairman of one MPK manufacturer should be applied equally to all knees that contain a microprocessor. The clear evidence in the record that Freedom's Plié 3 cannot "operate control valves to adjust in real time to how a patient walks," but instead can only switch between two set levels of resistance in the swing and stance phase. (Carkhuff, Tr. 335; Schneider, Tr. 4310-4314, 4320; Kannenberg, Tr. 1953; [redacted]**).**

612. The use of a microprocessor allows an MPK to function differently than a mechanical knee. (Potter (Walter Reed) Tr. 775-76; Ford (POA) Tr. 916; PX05119 (Kahle (Prosthetic Design and Research) Dep. at 33-34); PX05144 (Blatchford (Endolite) Dep. at 166-67)).

Response to Finding No. 612:

Complaint Counsel's proposed finding of fact is misleading. The evidence demonstrates that there is a lot of overlap in technology between MPKs and non-MPKs. (Oros, Tr. 4791-4793). Indeed, Dr. Douglas Smith indicated that fluid-control that is present in many Sophisticated Non-MPKs is the technological innovation that improved functionality in prosthetic knees, and the microprocessor just adds "one more little level of control." (Doug Smith, Tr. 5994). Also, this proposed finding of fact is misleading because it treats MPKs and non-MPKs as two monolithic

groups, but the clear evidence at trial indicated that there is a range of MPKs with a range of microprocessor control, that there is a range of non-MPKs at various levels of functionality, and that the industry does not divide those knees up into two distinct groups. (RFOF ¶¶ 135-249, 337). Plié 3 functions more like a non-MPK than an MPK, even though it has a microprocessor in it. Industry participants characterize the Plié 3 as a hybrid knee, which is in between an MPK and a non-MPK. [redacted]; Schneider, Tr. 4324, 4351, Kannenberg, Tr. 1880-1881). In addition, Complaint Counsel's proposed finding should not be credited because the witnesses cited for this proposition are not prosthetists or purchasers of prosthetic knees. (*See* RFOF ¶¶ 68-69 (Dr. Potter), RFOF ¶ 60 (Ford); ¶ 40 (Blatchford)).

613. William Carver, President and COO of College Park, which manufactures mechanical knees, testified that the microprocessor in an MPK acts as the "brain" of the knee that "can unleash the potential of that technology" by adjusting the knee to match a user's motions. In contrast, he testified, mechanical knee users instead must rely on a prosthetist to "set th[e] knee to a setting" and cannot adjust this setting without a prosthetist. (Carver (College Park) Tr. 2023-24)). [redacted] (Carver (College Park) Tr. 2054 (*in camera*)).

Response to Finding No. 613:

This proposed finding of fact is misleading because it treats MPKs and non-MPKs as two monolithic groups, but the clear evidence at trial indicated that there is a range of MPKs with a range of microprocessor control, that there is a range of non-MPKs at various levels of functionality, and that the industry does not divide those knees up into two distinct groups. (RFOF ¶¶ 135-249, 337). Plié 3 functions more like a non-MPK than an MPK, even though it has a microprocessor in it. Industry participants characterize the Plié 3 as a hybrid knee, which is in between an MPK and a non-MPK. [redacted]; Schneider, Tr. 4324, 4351, Kannenberg, Tr. 1880-1881). The evidence shows that Plié 3 lacks the attributes that Carver

ascribes to MPKs in this proposed finding of fact, and in fact is more similar to Carver's description of a non-MPK. The Plié 3 cannot continuously adjust to a user's gait or environment, but instead uses a microprocessor only to switch between two pre-set levels of resistance. (Carkhuff, Tr. 335; [redacted]). Similar to Carver's description of a non-MPK, Plié 3 users must rely on a manual, pre-set level of resistance and must visit a prosthetist office if they would like to have this setting changed. [redacted]; Schneider, Tr. 4311; Kannenberg, Tr. 1953).

614. Jason Kahle, a certified prosthetist who performs research on prosthetic knees, testified that the "benefit of a microprocessor is it thinks instantaneously" which is attributed to the microprocessor itself. ." (PX05119 (Kahle (Prosthetic Design and Research) Dep. at 33-35)). The ability to think "instantaneously" allows an MPK to respond to a patient's movements. (Kahle (Prosthetic Design and Research) Dep. at 35-36)). Alternatively, a mechanical knee "has to go through a cycle for the knee to figure out what to do" and cannot respond "until it goes through that cycle." (PX05119 (Kahle (Prosthetic Design and Research) Dep. at 33-34)).

Response to Finding No. 614:

Complaint Counsel's proposed finding of fact is misleading because it treats MPKs and non-MPKs as two monolithic groups, but the clear evidence at trial indicated that there is a range of MPKs with a range of microprocessor control, that there is a range of non-MPKs at various levels of functionality, and that the industry does not divide those knees up into two distinct groups. (RFOF ¶¶ 135-249, 337). Plié 3 functions more like a non-MPK than an MPK, even though it has a microprocessor in it. Industry participants characterize the Plié 3 as a hybrid knee, which is in between an MPK and a non-MPK. [redacted]; Schneider, Tr. 4324, 4351, Kannenberg, Tr. 1880-1881). Notably, Kahle has not studied the benefits of Plié 3, and because Kahle's foundation for his statements is the research he has performed, his statements regarding MPKs cannot be attributed to the Plié 3. (PX05119 (Kahle, Dep. at 23)).

615. Ryan Arbogast, CEO of Ohio Willow Wood testified that "[m]icroprocessor knees provide additional features and benefits and function that mechanical knees could not." Mr. Arbogast elaborated that "[m]icroprocessor knees, in general, use sensors to assess what's happening with the knee and make changes in the function of the knee as a result." (PX05106 (Arbogast (Willow Wood) Dep. at 19-20)).

Response to Finding No. 615:

Complaint Counsel's proposed finding of fact is incomplete, because Arbogast later explains the above-quoted section by stating that non-MPKs have design characteristics that prevent amputees from falling, and that MPKs "aim" to improve on those characteristics through the addition of the microprocessor. (PX05106 (Arbogast, Dep. at 20)). Further, here Complaint Counsel relies on Arbogast for a description of how MPKs function, but in subsequent proposed findings of fact asks the Court [redacted] Complaint Counsel cannot have it both ways.

616. [redacted] 109-13) (discussing PX01164)). Maynard Carkhuff, the Chairman of Freedom, agreed that MPKs "involve higher technology" than mechanical knees. (PX05109 (Carkhuff (Freedom) Dep. at 112 (discussing PX01164)). [redacted] (PX01164 (Freedom) at 024 (*in camera*)).

Response to Finding No. 616:

Complaint Counsel's proposed finding of fact is misleading and inaccurately describes PX01164. [redacted] Further, PX01164 has limited probative value, because it is unclear when

the documents were created. (PX01164).

2. MPKs Provide Significant Safety and Performance Benefits Not Provided by Mechanical Knees

a) Clinical Research Establishes that MPKs Provide Safety, Performance, and other Benefits over Mechanical Knees

(1) Published Studies Showing the Benefits of MPKs

617. Peer-reviewed research articles have found increased safety and performance of MPKs over mechanical knees. (*See, e.g.*, Kaufman (Mayo) Tr. 820-21, 826; Blatchford (Endolite) Tr. 2119-20). 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." (Kaufman (Mayo) Tr. 826).

Response to Finding No. 617:

Complaint Counsel's proposed finding of fact is misleading. The evidence demonstrates that there is a lot of overlap in technology between MPKs and non-MPKs. (Oros, Tr. 4791-4793). This proposed finding of fact incorrectly treats MPKs and non-MPKs as two monolithic groups, but the clear evidence at trial indicated that there is a range of MPKs with a range of microprocessor control, and a range of non-MPKs at various levels of functionality, and the industry does not divide those knees up into two distinct groups. (RFOF ¶¶ 135-249, 337). Plié 3 functions more like a non-MPK than an MPK, even though it has a microprocessor in it. Industry participants characterize the Plié 3 as a hybrid knee, which is in between an MPK and a non-MPK.

; Schneider, Tr. 4324, 4351, Kannenberg, Tr. 1880-1881).

618. Authors of clinical research frequently present their findings to prosthetists and clinic owners. (*See, e.g.*, PX05119 (Kahle (Prosthetics Design and Research) Dep. at 54-55) (discussing PX08018); Kaufman (Mayo) Tr. 828).

Response to Finding No. 618:

Respondent has no specific response, other than that this is consistent with the idea that manufacturers of MPKs believe that their MPKs are competing for fittings with non-MPKs.

619. To determine what knees to fit on patients, some prosthetists and clinic owners consider clinical research studies related to MPKs. (Asar (Hanger) Tr. 1339; PX05108 (Yates (Jonesboro) Dep. at 49-50)).

Response to Finding No. 619:

Respondent has no specific response, other than that this is consistent with the idea that MPKs are competing for fittings with non-MPKs.

620. Prosthetic clinics testified that the benefits ascribed to MPKs in these studies are also evident in their own practices. (**PX05108 (Yates (Jonesboro) Dep. at 26-27 ("Q. What are the clinical benefits of a microprocessor knee? A. There is research that has supported that patients have a decreased incidence of falls, a decreased incidence of complications from the use of their prosthesis, an increased level of satisfaction with their device, an increased confidence in their device. That is the primary benefit that's supported by the literature. Q. Have you seen those benefits in the patients that you see at Jonesboro? A. Absolutely.")**; *see also* PX05129 (Ell (Mid-Missouri) Dep. at 44-48)).

Response to Finding No. 620:

Complaint Counsel's proposed finding of fact is misleading because it treats MPKs and non-MPKs as two monolithic groups, but the clear evidence at trial indicated that there is a range of MPKs with a range of microprocessor control, that there is a range of non-MPKs at various levels of functionality, and that the industry does not divide those knees up into two distinct groups. (RFOF ¶¶ 135-249; RFOF ¶ 337). Plié 3 functions more like a non-MPK than an MPK, even though it has a microprocessor in it. Industry participants characterize the Plié 3 as a hybrid knee, which is in between an MPK and a non-MPK. [redacted]**;** Schneider, Tr. 4324,

4351, Kannenberg, Tr. 1880-1881). Further, Complaint Counsel asks this Court to adopt this proposed finding on the testimony of one witness who did not testify at trial. No clinic representatives that testified at trial indicated that they had personally seen the benefits that MPKs provide to patients. For example, Asar of Hanger testified that the basis for his knowledge of the benefits of MPKs came from the results of the RAND study. (Asar, Tr. 1339; *see also* RFOF ¶ 371). He did not mention observing improved functionality. By way of additional example, Senn (Complaint Counsel's first witness at trial) testified that he had *never observed* a patient wearing an MPK navigate slopes or uneven terrain. (Senn, Tr. 173).

(a) Dr. Kaufman's Fast K2 Study

621. [redacted]

Response to Finding No. 621:

Complaint Counsel's proposed finding of fact is misleading. The FASTK2 study compared the Compact, Plié 3, Orion 2, and Rheo 3 to users' experience using mechanical knees that are appropriate for K-2 patients. (Kaufman, Tr. 888). The FASTK2 study aggregates all MPKs together. (Kauffman, Tr. 888-889; Kannenberg, 1905-1906; [redacted]). The FASTK2 study does not compare sophisticated non-MPKs to MPKs. (Kaufman, Tr. 888-889). Therefore, the FASTK2 study does not examine, and cannot support any conclusion regarding, the benefits of MPKs compared to Sophisticated non-MPKs that are appropriate for K-

3 patients. (Kaufman, Tr. 888-889). It also cannot support any conclusion regarding the benefits of any individual MPK compared to *any* other knee. As a result, the FASTK2 study has zero probative value in this case, because it makes no distinctions between the knees in Complaint Counsel's proposed market, and the knees Respondent argues should also be included in Complaint Counsel's too-narrow market.

622. Freedom's former Chairman and CEO, Maynard Carkhuff, testified that Dr. Kaufman is "[v]ery highly respected." (Carkhuff (Freedom) Tr. 369).

Response to Finding No. 622:

Respondent has no specific response.

623. [redacted]

Response to Finding No. 623:

Respondent has no specific response.

624. [redacted] (Kaufman (Mayo) Tr. 829-30; Kaufman (Mayo) Tr. 841 (*in camera*)).

Response to Finding No. 624:

Respondent has no specific response.

625. [redacted]

[redacted]

Response to Finding No. 625:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Respondent's response to CCFF ¶ 621.

626. [redacted]

Response to Finding No. 626:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Respondent's response to CCFF ¶ 621.

627. [redacted] (PX03219 (Mayo) at 002 (*in camera*)).

Response to Finding No. 627:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Respondent's response to CCFF ¶ 621.

628. [redacted]

[redacted]

Response to Finding No. 628:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Respondent's response to CCFF ¶ 621.

629. [redacted] (Kaufman (Mayo) Tr. 848-49 (*in camera*)).

Response to Finding No. 629:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Respondent's response to CCFF ¶ 621.

630. [redacted] (PX03219 (Mayo) at 013 (*in camera*)).

Response to Finding No. 630:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Respondent's response to CCFF ¶ 621.

631. [redacted] (Kaufman (Mayo) Tr. 850-51 (*in camera*)).

Response to Finding No. 631:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Respondent's response to CCFF ¶ 621.

(b) RAND Study

632. A 2017 study by the RAND Corporation entitled "Economic Value of Advanced Transfemoral Prosthetics" reviewed existing literature and utilized a simulation model "to assess the differential clinical outcomes and costs of microprocessor-controlled knees compared with non-microprocessor controlled knees." (PX08004 (Liu et al., Economic Value of Advanced Transfemoral Prosthetics, RAND Corporation (2017) ("RAND Report") at 003).

Response to Finding No. 632:

Complaint Counsel's proposed finding of fact is misleading. The RAND Report is not a clinical study; rather the RAND Report reviews existing literature and creates a simulation model on which it bases its conclusions. Importantly, none of the clinical studies underpinning the simulation model in the RAND report study the Plié 3 or any version of the Plié. (Kaufman, Tr. 878; Kannenberg, Tr. 1937; [redacted] Complaint Counsel's reliance on the RAND report is another example of Complaint Counsel's misplaced use of overgeneralizations to support its too-narrow and unsupported market.

633. The RAND study was initiated and funded by AOPA. (Kannenberg (Otto Bock) Tr. 1861).

Response to Finding No. 633:

Respondent has no specific response.

634. Among those acknowledged for contributing to the report were Andreas Kannenberg, Executive Medical Director of Otto Bock, Dr. Kenton Kaufman of the Mayo Clinic, Stephen Blatchford of Chas A. Blatchford and Sons, Ltd./Endolite, Kim De Roy of Össur, and Maynard Carkhuff, Chairman of Freedom. (PX08004 (RAND Report) at 008). Mr.

Carkhuff testified that the contributors were some of the best and brightest clinical researchers in the MPK space. (Carkhuff (Freedom) Tr. 369).

Response to Finding No. 634:

Complaint Counsel's proposed finding of fact is misleading. Although it is accurate that these individuals were recognized by the RAND Report authors as having contributed, it is not clear to what degree each contributed. Complaint Counsel's proposed finding of fact is also incomplete, because Complaint Counsel omits the fact that [redacted] is also included among the list of those acknowledged for contributing to the report, and who Carkhuff characterized as one among the best and brightest in the MPK space, despite the fact that Complaint Counsel repeatedly asks this Court to find that [redacted] (PX08004 at 008). In addition, Oros, who testified in Respondent's case-in-chief, and testified [redacted], is also among those acknowledged. (PX08004 at 008).

635. The RAND study concluded that "[o]verall, we found that compared with NMPKs, MPKs are associated with meaningful improvement in physical function and reductions in incidences of falls and osteoarthritis." (PX08004 (RAND Report) at 020). Asked to explain this conclusion, Dr. Kaufman testified that, "This is the projection based on the simulation that over time you'll have improved safety by reduction in falls, and because of the improvement of gait, you'll have less arthritis, when using a microprocessor knee compared to a non-microprocessor knee." (Kaufman (Mayo) Tr. 867 (discussing PX08004 at 020)).

Response to Finding No. 635:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Respondent's response to CCFF ¶ 632.

636. In a section titled "Clinical Benefits: Physical Function" the RAND study states that "[o]verall, there is strong evidence suggesting that compared with NMPKs, MPKs are associated with improvements in walking speed, gait symmetry, and the ability to negotiate obstacles in the environment . . . ." (PX08004 (Rand Report) at 020). Dr. Kaufman explained, regarding this conclusion, that "these are some of the biomechanical factors that

show improvement when using a microprocessor knee compared to a non-microprocessor knee." (Kaufman (Mayo) Tr. 867 (discussing PX08004 at 020)).

Response to Finding No. 636:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Respondent's response to CCFF ¶ 632.

637. Elsewhere in the RAND study, the authors conclude that, "In summary, the existing published literature shows that among transfemoral amputees, MPKs are superior to NMPKs in improving parameters of physical function, such as walking speed, gait symmetry, and obstacle assessments. Those improvements lead to fewer falls and lower incidences of osteoarthritis in the intact limb." (PX08004 (RAND Report) at 033). Asked about this conclusion, Dr. Kaufman testified that "[t]hese are some of the short-term and long-term benefits of using a microprocessor knee compared to a non-microprocessor knee." (Kaufman (Mayo) Tr. 868 (discussing PX08004 at 033)).

Response to Finding No. 637:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Respondent's response to CCFF ¶ 632.

638. Maynard Carkhuff, Freedom's Chairman, testified that the study showed that MPKs reduce stumbles and falls, relative to other technologies, and provide a good value to the healthcare system. (Carkhuff (Freedom) Tr. 364). Mr. Carkhuff agreed that the importance of the RAND Report includes establishing that MPKs are safer than mechanical knees and provide greater stability for patients, both of which will help lower healthcare costs associated with falls for MPK users. (Carkhuff (Freedom) Tr. 364).

Response to Finding No. 638:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Respondent's response to CCFF ¶ 632.

639. Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs, and Future Development, testified that he presented the results of the RAND study to multiple members of Congress or their staff in November 2017. (Schneider (Otto Bock) Tr. 4739-40, 4742-44). Mr. Schneider provided a "leave behind" regarding the RAND study's conclusions with the legislators in order to highlight that the funds provided by Congress for prosthetics are helping beneficiaries, cost efficient, and effective. (Schneider (Otto

Bock) Tr. 4739-40, 4742-44 (discussing PX01380); PX01380 (Otto Bock) at 004; PX05139 (Schneider (Otto Bock) Dep. at 61-65)).

Response to Finding No. 639:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Respondent's response to CCFF ¶ 632.

640. Otto Bock's "leave behind" noted, in its discussion of the RAND study, that "82% of patients receiving non-MPK limbs will fall compared to only 26% of MPK users." (PX01380 (Otto Bock) at 004)).

Response to Finding No. 640:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Respondent's response to CCFF ¶ 632.

(c) Other MPK Studies

641. Clinical research has found that microprocessor knee users improve their gait mechanics and stability as compared to mechanical knee users. (PX08010 at 001 (Kaufman et al., *Gait and Balance of Transfemoral Amputees Using Passive Mechanical and Microprocessor-Controlled Prosthetic Knees*, 26 Gait & Posture 489 (2007)) ("Gait and Balance of Transfemoral Amputees")) ("Transfemoral amputees using a microprocessor-controlled knee have significant improvements in gait and balance.")). Dr. Kaufman testified that it is important for an amputee to have improved gait and balance "[s]o they would have less falls." (Kaufman (Mayo) Tr. 856-57). When testifying about PX08010, Dr. Kaufman noted that "[t]he overall findings are that [amputees] have improved function, both their gait and their balance, when using a microprocessor knee" rather than a mechanical knee. (Kaufman (Mayo) Tr. 858 (discussing PX08010)). PX08010 is a document that Dr. Kaufman has presented at prosthetics industry conferences. (Kaufman (Mayo Clinic) Tr. 858-59).

Response to Finding No. 641:

Complaint Counsel's proposed finding of fact is misleading. PX08010 does not study the Plié 3 or any version of the Plié. (Kaufman, Tr. 879-885). As a result, PX08010 cannot support the conclusion that "clinical research has found that MPK users improve their gait mechanics" to the extent that Complaint Counsel attempts to include Plié 3 in their definition of MPK. Complaint

Counsel continually seeks to have it both ways. They attempt to use clinical research to support the conclusion that MPKs are a separate market from non-MPKs, but ignore the fact that there is no clinical research that would establish that the Plié 3 performs better than a Sophisticated Non-MPK. Furthermore, it is notable that the study at PX08010 studies the same group of 15 patients that are studied in PX08011 and PX08029. (Kaufman, Tr. 879-885).

642. Clinical research has found that microprocessor knee users have increased ability to walk on difficult terrain as compared with mechanical knee users. (PX08059 at 001 (Hafner and Smith, *Differences in Function and Safety Between Medicare Functional Classification Level-2 and -3 Transfemoral Amputees and Influence of Prosthetic Knee Joint Control*, 46 J. of Rehab. R&D 417) (2009) ("Hafner and Smith")) ("Active knee control [i.e., MPK] was associated with significant improvements ($p < 0.05$) in hill and stair gait, speed (hills, obstacle course, and attentional demand task), and ability to multitask while walking for both cohorts.")).

Response to Finding No. 642:

Complaint Counsel's proposed finding of fact is misleading. One of the authors of this study, Dr. Douglas Smith, testified at trial. Dr. Smith testified that his study aggregated both K-2 patients and K-3 patients. (Doug Smith, Tr. 6026-6032). Dr. Smith testified that this is a drawback, because K-3 non-MPKs are more advanced than K-2 non-MPKs, and the results in his study may not apply to the same degree if the baseline knees were all K-3 non-MPKs. (PX08059 at 017; Doug Smith, Tr. 6031 (discussing exhibit)). Dr. Smith also testified that there are inherent drawbacks to prosthetics studies that undermine their utility, including small sample size and inability to randomize or blind the study. (Doug Smith, Tr. 6028-6030). Dr. Smith testified that his study that included data from just 17 patients, was actually a large study by industry standards. (Doug Smith, Tr. 6030). Dr. Smith compared that sample size to drug studies that have 1,000 to 10,000 patients in them, and explained that such a large study is just not possible in prosthetics. (Doug Smith, Tr. 6030). Further, Dr. Smith testified unequivocally that the study cited by

Complaint Counsel in this proposed finding of fact can "absolutely not" 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).

643. Clinical research has found that microprocessor knee users experience fewer falls as compared with mechanical knee users. (PX08059 (Hafner and Smith) at 001 ("Results suggest that active knee control [i.e. MPKs] improves function and reduces the frequency of adverse events in a population that is at risk for falls. Use of active knee control may allow persons with amputation to expand their functional domain, transition to a higher MFCL, and access additional prosthetic options.")). Medicare Functional Classification Levels (MFCLs) are effectively equivalent to K-Levels. (PX05150 (Kannenberg (Otto Bock) Dep. at 36-37).

Response to Finding No. 643:

Complaint Counsel's proposed finding of fact is misleading. One of the authors of this study, Dr. Douglas Smith, testified at trial. Dr. Smith testified that his study aggregated both K-2 patients and K-3 patients. (Doug Smith, Tr. 6026-6032). Dr. Smith testified that this is a drawback, because K-3 non-MPKs are more advanced than K-2 non-MPKs, and the results in his study may not apply to the same degree if the baseline knees were all K-3 non-MPKs. (PX08059 at 017; Doug Smith, Tr. 6031 (discussing exhibit)). Dr. Smith also testified that there are inherent drawbacks to prosthetics studies that undermine their utility, including small sample size and inability to randomize or blind the study. (Doug Smith, Tr. 6028-6030). Dr. Smith testified that his study that included data from just 17 patients, was actually a large study by industry standards. (Doug Smith, Tr. 6030). Dr. Smith compared that sample size to drug studies that have 1,000 to 10,000 patients in them, and explained that such a large study is just not possible in prosthetics. (Doug Smith, Tr. 6030). Further, Dr. Smith testified unequivocally that the study cited by Complaint Counsel in this proposed finding of fact can "absolutely not" 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).

644. Clinical research has found that microprocessor knee users engage in more physical activity than mechanical knee users and experience overall improvement in quality of life. (PX08011 at 001 (Kaufman et al., *Energy Expenditure and Activity of Transfemoral Amputees Using Mechanical and Microprocessor-Controlled Prosthetic Knees*, 89 Arch Phys Med Rehab. 1380 (July 2008)) ("People ambulating with a microprocessor-controlled knee significantly increased their physical activity during daily life, outside the laboratory setting, and expressed an increased quality of life.")). Dr. Kaufman, the principal investigator for the study, testified that, "[w]hat we showed is that people spontaneously became more active, that is, they burned more energy, when using a microprocessor knee versus the mechanical knee." He noted that MPK users "burn more energy, which means that they're more active in their free living environment." (Kaufman (Mayo) Tr. 860-61 (discussing PX08011)).

Response to Finding No. 644:

Complaint Counsel's proposed finding of fact is misleading. PX08011 does not study the Plié 3, or any version of the Plié. (Kaufman, Tr. 879-885). As a result, PX08011 cannot support the conclusion that "clinical research has found that MPK users improve their gait mechanics" to the extent that Complaint Counsel attempts to include Plié 3 in their definition of MPK. Complaint Counsel continually seeks to have it both ways. They attempt to use clinical research to support the conclusion that MPKs are a separate market from non-MPKs, but ignore the fact that there is no clinical research that would establish that the Plié 3 performs better than a Sophisticated Non-MPK. Furthermore, it is notable that the study at PX08011 studies the same group of 15 patients that are studied in PX08010 and PX08029. (Kaufman, Tr. 879-885).

645. Other clinical research has further established the benefits of MPKs relative to mechanical knees. (*See, e.g.,* PX08002 at 001 (Sawyers and Hafner, *Evidence Note: Outcomes Associated with the Use of Microprocessor- and Non-Microprocessor-Controlled Prosthetic Knees after Unilateral Transfemoral Limb Loss*, American Academy of Orthotists and Prosthetists (2011)) ("At this time, there is evidence to suggest that microprocessor-controlled prosthetic knees (MPKs) provide greater ambulatory safety and improve environmental obstacle negotiation when compared to non-microprocessor-

controlled prosthetic knees (NMPKs) among individuals with unilateral transfemoral limb loss."); PX08003 at 001 (Kannenberg et al., *Benefits of Microprocessor-Controlled Prosthetic Knees to Limited Community Ambulators: Systemic Review*, 51 J. of Rehab. R&D 1469 (2014)) ("MPK use may significantly reduce uncontrolled falls by up to 80% as well as significantly improve indicators of fall risk. Performance-based outcome measures suggest that persons with MFCL-2 mobility grade may be able to walk about 14% to 25% faster on level ground, be around 20% quicker on uneven surfaces, and descend a slope almost 30% faster when using an MPK.")); PX08032 at 001 (Highsmith et al, *Ramp Descent Performance With the C-Leg and Interrater Reliability of the Hill Assessment Index*, 37 Prosthetics and Orthotics Int'l 362 (2013)) ("This study confirms that the C-Leg improves ramp descent performance and the Hill Assessment Index's interrater reliability.")).

Response to Finding No. 645:

Complaint Counsel's proposed finding of fact is misleading. None of the studies cited in this proposed finding of fact study the Plié 3 or any version of the Plié. (PX08002, PX08003, PX08032). Further, none of these documents were discussed at trial. (Tr. 143-6894).

PX08002 is a short "evidence note" and does not conduct its own clinical trial. (PX08002 at 001). Further, the conclusions that it reaches regarding benefits of MPKs are not particularly strong, using words like "moderate evidence," "preliminary, but not yet substantiated evidence" and "low evidence" to describe purported benefits of MPKs. (PX08002 at 003). The evidence note indicated that there were a "number of methodological issues" in the studies that were included in the note, which according to the authors "limited the overall strength of evidence reported in this note." (PX08002 at 003).

PX08003 is also a literature review of a total of six studies and does not conduct its own clinical trial. (PX08003 at 001, 006). Further, the conclusions that it reaches relate to K-2 patients only, which as described in Response to CCFF ¶ 621, is of zero probative value in this case. The only knees included in any of the six studies that form the basis of PX08003 are Ottobock's C-Leg and Ottobock's Compact.

PX08032 is a clinical study using only the C-Leg as the intervention, and its conclusions can only apply only to the C-Leg. The sample size of this study was 21 patients, and the patients were wearing various types of non-MPKs, including both Sophisticated non-MPKs and more basic knees. (PX08032 at 003). The authors of the study recognize limitations to the study, in that it was not blinded or randomized. (PX08032 at 006).

(2) Testimony from Clinical Researchers

646. Dr. Kaufman of the Mayo Clinic 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." (Kaufman (Mayo) Tr. 820). Dr. Kaufman's research has "demonstrated that people using microprocessor knees have less falls than when using non-microproccesor knees" because "the microprocessor knee is able to adapt to the environment more rapidly than a mechanical knee and allows a patient to prevent stumbles and falls." (Kaufman (Mayo) Tr. 820-22). MPKs also offer "health benefits" which "relate to the increased activity" an MPK user experiences compared to a mechanical knee user. (Kaufman (Mayo) Tr. 836-37). Dr. Kaufman testified that relative to MPKs, mechanical knees is "outdated" and based on "World War II technology." (PX05160 (Kaufman (Mayo) Dep. at 17-18)).

Response to Finding No. 646:

Complaint Counsel's proposed finding of fact is misleading. Dr. Kaufman admitted at trial that several of his clinical studies were performed on the *same patient group*. To say that there is a "recurring theme" in his work of patients with more safety is therefore completely disingenuous. (Kaufman, Tr. 882, 884). Further, Dr. Kaufman testified clearly that the only time he has worked on a study for publication that involved the Plié 3 or any version of the Plié is the FASTK2 study, discussed above. (Kaufman, Tr. 887; *see also* Response to CCFF ¶ 621). It is not appropriate to extend the clinical benefits that Dr. Kaufman discusses to Plié 3, because those clinical benefits have not been observed in the Plié 3. (Kaufman, Tr. 887). Further, Dr. Kaufman is incorrect in classifying non-MPKs as being based on "World War II technology" as several witnesses testified that non-MPKs can be quite sophisticated and that the real innovation in prosthetic knees has been

the inclusion of fluid-control, to allow for variable cadence. (Sabolich, Tr. 5956; Doug Smith, Tr. 5992).

647. Dr. Kaufman testified that prosthetists use his published clinical studies in their practice. Dr. Kaufman described these research studies as "objective evidence for evidence-based practice." (Kaufman (Mayo Clinic) Tr. 836-37).

Response to Finding No. 647:

Complaint Counsel's proposed finding of fact is misleading. Dr. Kaufman testified that the only time he has worked on a study for publication that involved the Plié 3 or any version of the Plié is the FASTK2 study, discussed above, and that has not yet been published. (Kaufman, Tr. 887; *see also* Response to CCFF ¶ 621). As a result, none of the "published studies" discussed in this proposed finding involve the Plié 3 or any version of the Plié. (Kaufman, Tr. 887). It is not appropriate to extend the clinical benefits that Dr. Kaufman discusses to Plié 3, because those clinical benefits have not been observed in the Plié 3. (Kaufman, Tr. 887).

648. Mr. Kahle of Prosthetics Design and Research testified that, based on his research of MPKs, the reduction in stumbles and falls is "the biggest benefit of a microprocessor knee." (PX05119 (Kahle (Prosthetic Design and Research) Dep. at 33)). He further explained, "[i]t's the reason why microprocessor knees are paid for by both CMS and most insurance companies, in my opinion." (PX05119 (Kahle (Prosthetic Design and Research) Dep. at 36)). The microprocessor in an MPK "can adjust the speed levels in both swing and stance. And then, primarily, it can reduce stumbles and falls by sensing where the knee is in space." (PX05119 (Kahle (Prosthetic Design and Research) Dep. at 35)). Mr. Kahle further testified that microprocessor users experience an improved quality of life thanks to the reduction in stumbles and falls. (PX05119 (Kahle (Prosthetic Design & Research) Dep. at 37-38)).

Response to Finding No. 648:

Complaint Counsel's proposed finding of fact is misleading, because it incorrectly treats MPKs and non-MPKs as two monolithic groups, but the clear evidence at trial indicated that there is a range of MPKs with a range of microprocessor control, that there is a range of non-MPKs at various levels of functionality, and that the industry does not divide those knees up into two distinct

groups. (RFOF ¶¶ 135-249, 337). Plié 3 functions more like a non-MPK than an MPK, even though it has a microprocessor in it. Industry participants characterize the Plié 3 as a hybrid knee, which is in between an MPK and a non-MPK. [redacted]; Schneider, Tr. 4324, 4351, Kannenberg, Tr. 1880-1881). Notably, Kahle has not studied the benefits of Plié 3, and because Kahle's foundation for his statements is the research he has performed, his statements regarding MPKs cannot be attributed to the Plié 3. (PX05119 (Kahle, Dep. at 23)).

b) Surgeons, Prosthetists, and Prosthetics Clinics Recognize that MPKs Provide Benefits Compared to Mechanical Knees

649. Dr. Benjamin Potter, a surgeon at Walter Reed National Military Medical Center testified that it is usually in a patient's best interest to receive a microprocessor knee. Dr. Potter testified at the trial that "I would say at this point it's medical fact that they can provide improved function." (Potter (Walter Reed) Tr. 775). Dr. Potter elaborated that "a well-functioning, well-aligned microprocessor knee attached to a well-designed comfortable socket can provide function that's superior to a mechanical knee or certainly no knee in a peg leg in terms of the patient's ability to walk symmetrically, their balance, their risk for falls, their energy expenditure when walking – you name it – better – better function in activities of daily living like walking, standing and sitting." (Potter (Walter Reed) Tr. 775-76). A more symmetrical gait can, in turn, lead to faster walking as well as a lower "risk for things like low back pain and osteoarthritis in joints above or on the other side of their amputation and for years in the future." (Potter (Walter Reed) Tr. 777). Dr. Potter further testified that MPKs provide greater balance than mechanical knees because they are "designed ideally not to buckle or give out on you when they're not supposed to be bending." (Potter (Walter Reed) Tr. 778-79).

Response to Finding No. 649:

Complaint Counsel's proposed finding of fact is misleading for two reasons. First, Dr. Potter is not well-versed in particular prosthetic componentry and is not aware of the specific benefits of any prosthetic components. (Potter, Tr. 785-786). Second, Dr. Potter testified that the MPKs he is most familiar with are knees from Ottobock and Össur: Genium, X3, C-Leg, and Rheo. (Potter, Tr. 787-788, 791-792).

650. The Department of Defense and the Department of Veteran's Affairs collaborated on a set of Clinical Practice Guidelines for Rehabilitation of Individuals with Lower Limb Amputation. (PX08005 (Dep't of Veteran's Affairs) at 001). These guidelines "suggest offering microprocessor knee units over non-microprocessor knee units for ambulation to reduce risk of falls and maximize patient satisfaction. There is insufficient evidence to recommend for or against any particular socket design, prosthetic foot categories, and suspensions and interfaces." (PX08005 (Dep't of Veteran's Affairs) at 007). Dr. Michael Highsmith, a contributor to the Clinical Practice Guidelines explained that this is the current recommendation from the VA and DoD and was based on the best available evidence at the time it was drafted and the consensus of the people that contributed to the recommendation. (PX05164 (Highsmith (Dep't of Veteran's Affairs) Dep. at 28-29) (discussing PX08005)). These Guidelines are not limited by K-level and do not force a clinician to use one specific make and model of prosthetic. (PX05164 (Highsmith (Dep't of Veteran's Affairs) Dep. at 35, 40)).

Response to Finding No. 650:

Complaint Counsel's proposed finding of fact is misleading, [redacted]

651. Dr. Robert Gailey, the Director of the Functional Outcomes and Research Evaluation Center at the University of Miami, testified that MPKs "across the board are smoother, they are more responsive to various terrains, going up and down ramps, being able to use stairs and that type of thing." (PX05142 (Gailey (University of Miami) Dep. at 35-36)). Dr. Gailey testified that "with prosthetists at both Walter Reed and Center for the Intrepid, [it's] pretty much a standard that a microprocessor knee is given to most veterans coming back and then they will also, if they choose, to have a mechanical knee in case there is failure with the microprocessor knee." (PX05142 (Gailey (University of Miami) Dep. at 86-87)). Based on his experience with veterans, Dr. Gailey "absolutely" thinks that U.S. veterans have benefited from MPKs. He testified, "Microprocessors have allowed folks to be able to use a prostheses with greater ease. They have been able to adapt to using a prostheses with less effort" and MPK technology "has enabled [a] far greater population of people to use prosthetic devices than we have ever seen before." (PX05142 (Gailey (University of Miami) Dep. at 88-89)).

Response to Finding No. 651:

Complaint Counsel's proposed finding of fact is misleading. The vast majority of service members have access to the highest technology products (including high-end MPKs like Genium, X3, Rheo XC, and the Össur Power Knee), and pay zero dollars out of pocket. (Potter, Tr. 594-596). Also, as recognized in this proposed finding, service members are not forced to choose between an MPK and a non-MPK – they can have both for different circumstances. (PX05142 (Gailey, Dep. at 86-87)). As a result, service members and the clinics serving them are able to operate outside of the normal process in the market for prosthetic knees. (Potter, Tr. 774-775).

652. Clinic customers (including prosthetists and clinic owners) testified that MPKs provide benefits over mechanical knees. Keith Senn, President of the Center for Orthotic and Prosthetic Care, testified that K3 amputees at COPC are typically fit with MPKs because "[w]e feel, and so does the industry, that the MPK is a better knee for the patient, and K3 is the first level that Medicare has said is eligible to receive the MPK knee." (Senn (COPC) Tr. 179). Michael Oros, President and CEO of Scheck & Siress Prosthetics, stated in a press release relating to the release of the RAND study regarding the benefits of MPKs, that "[t]his is not a case of amputees wanting to have access to new technology just because it is new. To the contrary, new tech versus old tech can be a life-and-death issue for an amputee." (PX05134 (Oros (Scheck & Siress) Dep. at 79-82); *see also* Oros (Scheck & Siress) Tr. 4901).

Response to Finding No. 652:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Senn lacks the requisite knowledge and experience for his testimony to support this proposed finding, so his testimony should be disregarded here. Further, the only foundation laid for Senn's knowledge of clinical issues was that he "used to have an office for about a decade within one of COPC's clinics." (Senn, Tr. 163). The Court found that inadequate, stating, "I am not talking about whether he sits and can look out a window. I want to know that that's part of his job if you're going to offer him for this fact. I mean, if you want his testimony to be 'Yeah, I see this from my window,' then we'll go with that." (Senn, Tr. 163). To compound this issue, Senn testified that

he has *never observed* a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 173). This witness clearly lacks foundation to support a finding of fact on an issue relating to the clinical benefits of any particular prosthetic componentry.

Complaint Counsel's proposed finding of fact is also misleading because Oros testified at trial that there are many patients who can benefit from both non-MPKs and MPKs, and sometimes there is no clear choice between the two. (Oros, Tr. 4787). Further, Dr. Doug Smith testified that whether or not a patient gets an MPK or not is not a matter of life and death. (Doug Smith, Tr. 6012-6015).

653. Clinic customers testified that MPKs provide more safety and stability than mechanical knees, leading to fewer stumbles and falls. For example, Tracy Ell, owner and Chief Prosthetist of Mid-Missouri Orthotics and Prosthetics testified that the "[i]nherent stability of the microprocessor knees are far superior than mechanical knees," and that the benefits of MPKs include reducing falls, allowing more variation in walking speed, improving gait patterns and efficiency, and decreasing the wear and tear on a patient's body. (Ell (Mid-Missouri O&P) Tr. 1698-703)). Keith Senn, President of the Center for Orthotic and Prosthetic Care testified that a "big benefit" of MPKs is "stumble recovery, so there's less falls. They feel more stable." (Senn (COPC) Tr. 174-75). Michael Oros, President and CEO of Scheck & Siress Prosthetics, testified that MPKs provide greater safety to amputees because they are more responsive to sudden movements than mechanical knees because of the microprocessor in the knee. (Oros (Scheck & Siress) Tr. 4860-61; *see also* PX05134 (Oros (Scheck & Siress) Dep. at 72, 76-77) ("So the microprocessor knee is going to provide the highest level stability of any prosthetic knee."); *see also* Ford (POA) Tr. 996-1000 ("There's no question that [MPKs] reduce the amount of falls that amputees can experience. Their ability to recover from stumbles, toes, hitting your toes, those kind of things, are all benefits that prevent the patient from falling."); **PX05108 (Yates (Jonesboro) Dep. at 26-27, 47-48, 168-69) (safety is the primary benefit to a patient of an MPK over a mechanical knee, including a decreased incidence of falls; complaints about falls are "significantly less common" with MPKs)**; PX05132 (Sabolich (Scott Sabolich Prosthetics) Dep. at 41-42) (explaining why MPKs are typically a safer choice than a mechanical knee)).

Response to Finding No. 653:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Senn lacks the requisite knowledge and experience for his testimony to support this proposed finding, so his

testimony should be disregarded here. Further, the only foundation laid for Senn's knowledge of clinical issues was that he "used to have an office for about a decade within one of COPC's clinics." The Court found that inadequate, stating, "I am not talking about whether he sits and can look out a window. I want to know that that's part of his job if you're going to offer him for this fact. I mean, if you want his testimony to be 'Yeah, I see this from my window,' then we'll go with that." (Senn, Tr. 163). To compound this issue, Senn testified that he has *never observed* a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 173). This witness clearly lacks foundation to support a finding of fact on an issue relating to the clinical benefits of any particular prosthetic componentry.

The Court should similarly disregard the testimony by Mark Ford of POA on this issue because Ford also lacks foundation to testify regarding the benefits of particular components, as he has never been a prosthetist, and does not even work in the same state as the clinics he oversees. (Ford, Tr. 902-907).

Complaint Counsel's proposed finding of fact is also misleading because Oros testified at trial that there are many patients who can also benefit from both non-MPKs and MPKs, and sometimes there is no clear choice between the two. (Oros, Tr. 4787). [redacted] Sabolich also testified that there are benefits and drawbacks to MPKs. (Sabolich, Tr. 5849-5852, 5855). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Finally, the basis for Yates' testimony cited by Complaint Counsel was not his personal observations, but rather, he was describing "the primary benefit that's supported by the literature." (PX05108 (Yates, Dep. at 26)). As previously noted, there are no published studies using the Plié 3 or any version of the Plié

[redacted]; Kaufman, Tr. 889; [redacted]; Oros, Tr. 4916-4917; Doug Smith, Tr. 6032; *see also* Response to CCFF ¶ 508). Further, as documented above, there are several inherent flaws to clinical research in the prosthetics industry. (*See, e.g.*, Response to CCFF ¶¶ 643).

654. Clinic customers testified that MPKs allow patients to more easily traverse everyday environmental barriers, such as curbs, steps, and slopes, as well as walk in crowded areas. Mark Ford, President and Managing Partner of Prosthetic and Orthotic Associates, testified that an MPK "can accommodate variable cadence, it can accommodate different types of terrain, it can accommodate ramps, steps, much more fast and more responsively than a mechanical knee." (Ford (POA) Tr. 1002). Michael Bright, owner of North Bay Prosthetics and Orthotics testified that patients who want to maneuver in crowds are "definitely" more likely to benefit from MPKs relative to mechanical knees. (PX05141 (Bright (North Bay) Dep. at 149-50); *see also* PX05134 (Oros (Scheck & Siress) Dep. at 75-76) ("Q. Are there benefits to amputees using microprocessor knees on kind of a sloped terrain? A. Absolutely.")).

Response to Finding No. 654:

Complaint Counsel's proposed finding of fact is misleading. The Court should not credit Ford's testimony on this point. Ford lacks foundation to competently testify regarding the benefits of particular components, as he has never been a prosthetist and does not even work in the same state as the clinics he oversees. (Ford, Tr. 902-907). Complaint Counsel's proposed finding of fact is also misleading because Oros testified at trial that there are many patients who can also benefit from both non-MPKs and MPKs, and sometimes there is no clear choice between the two. (Oros, Tr. 4787). [redacted] In addition, Bright testified that despite any benefits that MPKs may provide to certain patients, if the price of all MPKs were to increase such that it would not be profitable to fit MPKs, Bright would stop fitting MPKs and start fitting non-MPKs instead. (Bright, Tr. 162).

655. According to clinic customers, MPK-users demonstrate a much better gait, and are better able to walk with variable cadence, compared with users of mechanical knees. Mr. Senn of COPC testified that "[y]ou know, from my observation, they're able to have a much better gait, which means to walk better, as well as amputees go, to be able to improve their gait." (Senn (COPC) Tr. 174-75). Mr. Oros of Scheck & Siress Prosthetics, testified that MPKs respond to variable cadence much faster than mechanical knees, make adjustments more rapidly than mechanical knees, provide a higher level of stability than mechanical knees, and provide benefits walking down slopes relative to mechanical knees. (Oros (Scheck & Siress) Tr. 4858-59); *see also* (Ford (POA) Tr. 1002; PX05108 (Yates (Jonesboro) Dep. at 50-51)).

Response to Finding No. 655:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Senn lacks the requisite knowledge and experience for his testimony to support this proposed finding, so his testimony should be disregarded here. Further, the only foundation laid for Senn's knowledge of clinical issues was that he "used to have an office for about a decade within one of COPC's clinics." (Senn, Tr. 163). The Court found that inadequate, stating, "I am not talking about whether he sits and can look out a window. I want to know that that's part of his job if you're going to offer him for this fact. I mean, if you want his testimony to be 'Yeah, I see this from my window,' then we'll go with that." (Senn, Tr. 163). To compound this issue, Senn testified that he has *never observed* a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 173). This witness clearly lacks foundation to support a finding of fact on an issue relating to the clinical benefits of any particular prosthetic componentry.

Ford's testimony should also be disregarded on this point. Ford also lacks foundation to testify regarding the benefits of particular components, as he has never been a prosthetist, and does not even work in the same state as the clinics he oversees. (Ford, Tr. 902-907).

Complaint Counsel's proposed finding of fact is also misleading because Oros testified at trial that there are many patients who can also benefit from non-MPKs and MPKs, and sometimes there is no clear choice between the two. (Oros, Tr. 4787). [redacted]

[redacted]

656. Clinic customers testified that MPKs are associated with fewer health risks, such as back pain and osteoarthritis, compared to mechanical knees. **Rob Yates, President and CEO of Jonesboro Prosthetic & Orthotic Laboratory, testified that the documented benefits of MPKs include "a lower incidence of complications from, you know, compensatory gait deviations, such as low back pain, sound side complications from arthritis, and other involvement that could present on the sound side." (PX05108 (Yates (Jonesboro) Dep. at 47));** *see also* Ell (Mid-Missouri) Tr. 1699 (recent literature on MPKs shows that they lead to decreased instances of osteoarthritis and decreased "wear and tear on a patient's body, even subsequently extending their life span")).

Response to Finding No. 656:

Complaint Counsel's proposed finding of fact is misleading, because it is a too-general synopsis of clinical literature that must be examined individually. Further, this proposed finding should be rejected because it incorrectly treats MPKs and non-MPKs as two monolithic groups, but the clear evidence at trial indicated that there is a range of MPKs with a range of microprocessor control, that there is a range of non-MPKs at various levels of functionality, and that the industry does not divide those knees up into two distinct groups. (RFOF ¶¶ 135-249, 337). At a minimum, the descriptions provided in this proposed finding cannot apply to Plié 3 because that has not been subject to any published clinical trials. [redacted]; Oros, Tr. 4916-4917; Doug Smith, Tr. 6032; *see also* Response to CCFF ¶ 508).

c) Respondent Recognizes the Benefits of MPKs over Mechanical Knees

657. Testimony of Freedom executives demonstrates the perceived benefits of MPKs relative to mechanical knees. For example, Freedom Chairman Maynard Carkhuff testified that Freedom markets its Plié MPK as improving the stability of stance for amputees while ascending or descending stairs, relative to mechanical knees. (PX05109 (Carkhuff (Freedom) Dep. at 98)). Mr. Carkhuff further agreed that mechanical knee users generally

must "give more thought to controlling the knee in both the stance and swing phases of walking" as compared to microprocessor knees. (PX05109 (Carkhuff (Freedom) Dep. at 97-98) (discussing PX01164)).

Response to Finding No. 657:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because the cited testimony does not support the proposed finding, and in fact, it contradicts it. Below is the testimony cited by Complaint Counsel, as well as the surrounding testimony:

> "Q. And the next line says, 'Walking is less natural and requires both more attention and energy.' Do you see that?
> A. I do.
> Q. The next bullet says, 'A mechanical knee shows less stability in the stance phase of gait on stairs.' Do you see that?
> A. I do.
> Q. As a general matter is that true?
> A. I don't know because I think mechanical knees are very, very safe and stable on stairs
> Q. Does Freedom market its Plié as improving the stability of stance while ascending or descending stairs for amputees?
> A. We do.
> Q. So do you believe that that's one of the benefits that Plié provides?
> A. I believe it does. I'm just trying to make the point that there are lots of other knees in the spectrum of knee choices that also provide very safe stability. And that's easily observed worldwide or lots of patients worldwide do really well on mechanical knees, and they could do really well on microprocessor knees.
> Q. But Freedom markets its Plié as being superior to mechanical knees in providing more stability for amputees ascending and descending stairs; right?
> A. I don't know that we -- that we specifically market it that way. We might. I don't know what our literature actually says.
> Q. Do you think it's true?
> A. I know that they use in many cases similar cylinders and that the microprocessor is able to react quicker, act very, very quickly. So the mechanical -- hydraulics, though, on the other hand, actually react virtually instantly as well. So while we market it one way as -- that it has advanced stumble control, et cetera, I'm not sure it's because of the hydraulics. I think the real benefit is --
> Q. I don't think anybody asked about hydraulics just to get us back to the original question. I'm just asking whether you

> marketed the Plié, your microprocessor knee, as being superior to mechanical knees in terms of allowing amputees to ascend or descend stairs?
>
> A. I don't know that we do because it's very difficult actually to ascend stairs on -- in any knee, and I'm not sure that we say that for the Plié.

(PX05109 (Carkhuff, Dep. at 98-100)) (emphasis added)).

658. [redacted]

Response to Finding No. 658:

Complaint Counsel's proposed finding of fact is misleading, because it ignores Ferris's testimony at trial regarding [redacted] First, when asked if the goal of [redacted]

[redacted]

[redacted]

659. [redacted]

Response to Finding No. 659:

Complaint Counsel's proposed finding of fact is misleading because it ignores Ferris's testimony at trial regarding [redacted] First, when asked if the goal of [redacted]

[redacted]

[redacted]

660. [redacted]

Response to Finding No. 660:

Complaint Counsel's proposed finding of fact is misleading, because it ignores Ferris's testimony at trial regarding [redacted] First, when asked if the goal of [redacted]

[redacted]

[redacted]

661. [redacted]

[redacted]

Response to Finding No. 661:

Complaint Counsel's proposed finding of fact is misleading for the reasons laid out in the Response to CCFF ¶ 660.

662. [redacted]

Response to Finding No. 662:

Complaint Counsel's proposed finding of fact is misleading for the reasons laid out in the Response to CCFF ¶ 660.

663. [redacted] (Ferris (Freedom) Tr. 2382 (*in camera*)).

Response to Finding No. 663:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because Ferris testified that he is unfamiliar with the precise functionality of prosthetic components. (Ferris, Tr. 2335, 2459-2460).

664. [redacted]

[redacted]

Response to Finding No. 664:

Complaint Counsel's proposed finding of fact is misleading for the reasons laid out in the Response to CCFF ¶ 660. Complaint Counsel's proposed finding of fact should not be adopted by the Court because Ferris testified that he is unfamiliar with the precise functionality of prosthetic components. (Ferris, Tr. 2335, 2459-2460).

665. [redacted] (Ferris (Freedom) Tr. 2384-85 (*in camera*)).

Response to Finding No. 665:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because Ferris testified that he is unfamiliar with the precise functionality of prosthetic components. (Ferris, Tr. 2335, 2459-2460).

666. [redacted]

Response to Finding No. 666:

Complaint Counsel's proposed finding of fact is misleading for the reasons laid out in the Response to CCFF ¶ 660. Complaint Counsel's proposed finding of fact should not be adopted by

the Court because Ferris testified that he is unfamiliar with the precise functionality of prosthetic components. (Ferris, Tr. 2335, 2459-2460).

667. [redacted]

Response to Finding No. 667:

Complaint Counsel's proposed finding of fact is misleading for the reasons laid out in the Response to CCFF ¶ 660. Complaint Counsel's proposed finding of fact should not be adopted by the Court because Ferris testified that he is unfamiliar with the precise functionality of prosthetic components. (Ferris, Tr. 2335, 2459-2560).

668. [redacted] (Ferris (Freedom) Tr. 2375-76 (*in camera*)).

Response to Finding No. 668:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because Ferris testified that he is unfamiliar with the precise functionality of prosthetic components. (Ferris, Tr. 2335, 2459-2560).

669. Jeremy Matthews, Freedom's Vice President of Domestic Sales, testified that MPKs provide advantages over mechanical knees "for mobility, patient satisfaction and ease of use and safety[.]" Additionally, a MPK user would experience fewer falls than a mechanical knee user. (PX05137 (Matthews (Freedom) Dep. at 144-45); *see also* PX05137 (Matthews (Freedom) Dep. at 146-47); PX05118 (Testerman (Freedom) Dep. at 94-95); PX05138 (Reissfelder (Freedom) Dep. at 70-74)).

Response to Finding No. 669:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because Jeremy Matthews did not testify at trial, and as a V.P. of Sales with limited prosthetics industry

experience, Matthews lacks the foundation to competently testify about the clinical advantages of MPKs. (PX05137 (Matthews, Dep. at 5)).

670. [redacted] (PX01164 (Freedom) at 024) (*in camera*); *see also, e.g.,* PX01453 (Freedom) at 001 (circulating conclusions from the RAND study included in a draft of the study regarding the benefits of MPKs over mechanical knees)).

Response to Finding No. 670:

Respondent incorporates its Responses to CCFF ¶¶ 632-640 regarding the RAND Study. Further, this proposed finding is consistent with the idea that MPK manufacturers compete against non-MPKs for fittings on patients.

671. A 2015 Freedom presentation titled "Microprocessor Controlled Knees" includes slides titled "What makes MPC Knees different?" (PX00814 (Freedom) at 007-08). The listed benefits of MPKs are "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." (PX00814 (Freedom) at 007-08).

Response to Finding No. 671:

Complaint Counsel's proposed finding of fact is misleading, because there are no published studies that analyze the benefits, or establish any clinical benefits of, the Plié 3 or any version of the Plié. [redacted]; RFOF ¶¶ 369 (RAND study does not study Plié or any studies that study Plié); [redacted]; Oros, Tr. 4916-4917 (Oros is not aware of a single

clinical outcome study in the world that has been published that has used subjects fit with a Plié 3); Doug Smith, Tr. 6032). The vast majority of studies relate to the C-Leg, and the evidence shows that the Plié 3 does not have the same functional benefits as C-Leg. (Schneider, Tr. 4361-4362, 4373-4375; Kannenberg, Tr. 1843-1844; *see also* Oros, Tr. 4821 (Oros does not believe the Plié provides the same amount of recovery or stumble benefits as the C-Leg 4 and the Rheo)).

672. Freedom's website includes Plié 3 materials for use by Freedom customers seeking reimbursement that claim benefits of MPKs over mechanical knees. (PX08009 (Freedom)). The materials include a "Microprocessor Knee Literature Review" collected and summarizing clinical research articles "in an effort to understand where the research in Microprocessor Knees (MPK) has been focused and to determine where significant outcomes exist. These articles can be utilized within your initial Letter of Medical Necessity or could be used in refuting an appeal." (PX08009 (Freedom) at 017). The Freedom materials state 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." (PX08009 (Freedom) at 017). Moreover, according to these Freedom materials, "the user experiences less stumbles and falls while expressing a higher level of satisfaction and stability with MPKs." (PX08009 (Freedom) at 017).

Response to Finding No. 672:

Complaint Counsel's proposed finding of fact is misleading, because there are no published studies that analyze the benefits, or establish any clinical benefits of, the Plié 3 or any version of the Plié. [redacted]**;** RFOF ¶¶ 369 (RAND study does not study Plié or any studies that study Plié); [redacted]; Oros, Tr. 4916-4917 (Oros is not aware of a single clinical outcome study in the world that has been published that has used subjects fit with a Plié 3); Doug Smith, Tr. 6032). The vast majority of studies relate to the C-Leg, and the evidence shows that the Plié 3 does not have the same functional benefits as C-Leg. (Schneider, Tr. 4361-4362, 4373-4375; Kannenberg, Tr. 1843-1844; *see also* [redacted]

[redacted] Freedom's chairman, Maynard Carkhuff, also testified that non-MPKs also provide for great stability when navigating stairs, and that there are patients who would do quite well on both a non-MPK or a Plié 3. (PX05109 (Carkhuff, Dep. at 98-100)).

673. Freedom's internal training materials, part of its "Freedom Institute of Technology" list the "Benefits of MPK's[.]" (PX00805 (Freedom) at 370-71). The listed benefits include "MPC stumble recovery," "Customizable swing initiation," "Yielding for ramps, slopes, stairs and sitting," "Programming for different walking speeds," "Different modes," "Better outcomes long-term," and "Documenting variable cadence[.]" (PX00805 (Freedom) at 371).

Response to Finding No. 673:

Complaint Counsel's proposed finding of fact is misleading, because there are no published studies that analyze the benefits, or establish any clinical benefits of, the Plié 3 or any version of the Plié. [redacted]; RFOF ¶¶ 369 (RAND study does not study Plié or any studies that study Plié); [redacted]; Oros, Tr. 4916-4917 (Oros is not aware of a single clinical outcome study in the world that has been published that has used subjects fit with a Plié 3); Doug Smith, Tr. 6032). Further, this finding of fact is misleading because there is no evidence in the record that the Plié 3 provides "customizable swing initiation, yielding for ramps, slopes, stairs and sitting, better outcomes long-term, or documenting variable cadence." [redacted]

674. Otto Bock executives also testified about the benefits of MPKs. For example, Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs, and Future Development, testified that, "Microprocessors are proven to have stumble recovery, making them very, very safe. They also make – microprocessors allow for more cadence variance, so walking fast or slow, so the computer can adjust to those speed differences. Microprocessors can enable people to have more comfort because it gives them additional features and benefits that they do not have to overcompensate with their muscular structure.

So there's many, many ways in which an end user transfemoral amputee can benefit from a microprocessor knee." (PX05010 (Schneider (Otto Bock) IHT at 73-74)).

Response to Finding No. 674:

Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel contends that the Plié 3 is an MPK and that this finding of fact should apply to the Plié 3. This testimony cannot support the idea that the Plié 3 provides any particular benefits to patients. Scott Schneider testified at trial that Plié 3 lacks the functionality of other knees that contain microprocessor, and has not been clinically proven to benefit patients. (Schneider, Tr. 4361-4362, 4373-4375).

675. Andreas Eichler, Otto Bock's Head of Business Unit, Prosthetics, Lower Limb Mechatronic Systems, testified that the primary benefits of MPKs are "safety and comfort." He elaborated that safety meant "[t]hat patients can rely on their knee joints that it will be stiff when it's supposed to be stiff and it will be pliable when it's supposed to be pliable," and comfort meant "Less pain. So less pain and subsequent damages as a result of everyday use and walking on the prosthetic." (PX05133 (Eichler (Otto Bock) Dep. at43-44)). Mr. Eichler also agreed that microprocessor knees are more responsive than mechanical knees, and he testified mechanical knees "are not responsive at all." (PX05133 (Eichler (Otto Bock) Dep. at 51-52)

Response to Finding No. 675:

Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel contends that the Plié 3 is an MPK and this finding of fact should apply to the Plié 3. This testimony cannot support the idea that the Plié 3 provides any particular benefits to patients.

676. Otto Bock's Executive Medical Director, Dr. Andreas Kannenberg, testified in his deposition that K2 patients would benefit from MPKs over mechanical knees. He explained, "First and foremost, in terms of improved safety. So they would stumble less and fall less, which is the foundation for developing more trust and better trust in the prosthesis, and becoming more mobile and active, doing more activities than they could do on a mechanical prosthesis." (PX05150 (Kannenberg (Otto Bock) Dep. at 39-40)).

Response to Finding No. 676:

Complaint Counsel's proposed finding of fact is irrelevant, because the comparison between knees that are appropriate for K2 patients and MPKs has no relevance or probative value in this case.

677. Dr. Kannenberg further testified that for unlimited community ambulators, MPKs also provide a benefit in terms of a reduction in stumbles and falls. For this group, the benefit is also "about increasing their mobility and being able to do activities that they couldn't do or wouldn't dare to do on a mechanical knee." (PX05150 (Kannenberg (Otto Bock) Dep. at 42-43)).

Response to Finding No. 677:

Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel contends that the Plié 3 is an MPK and that this finding of fact should apply to the Plié 3. This testimony cannot support the idea that the Plié 3 provides any particular benefits to patients. Dr. Kannenberg testified at his deposition, and at trial that his testimony relating to the benefits of MPKs applies only to Ottobock MPKs, which have been clinically proven to benefit patients. (PX05150 (Kannenberg, Dep. at 44)); (Kannenberg, Tr. 1843-1844).

678. Dr. Kannenberg testified the C-Leg, due to its microprocessor, provides greater mobility than a mechanical knee because "the microprocessor control allows a knee to do more activities without the threat of collapsing and causing a fall." Additionally, "the resistances that are produced in the knee [are] much more flexible and adaptable to many more activities that you encounter in your daily life than a mechanical control. So when you – when you adjust the mechanical and – mechanical knee, it is usually quite nice for level walking, but as soon as you have to negotiate uneven terrain, slopes and stairs, you're in trouble." (PX05150 (Kannenberg (Otto Bock) Dep. at 44-45)).

Response to Finding No. 678:

Respondent has no specific response, provided that this fact is limited in its applicability to just the C-Leg, as is stated in the proposed finding.

679. Dr. Kannenberg agreed that for a given safety level, an MPK provides greater functionality than a mechanical knee, and that, for a given functionality level, an MPK would tend to provide greater safety than a mechanical knee. (PX05150 (Kannenberg (Otto Bock) Dep. at 83)).

Response to Finding No. 679:

Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel contends that the Plié 3 is an MPK and this finding of fact should apply to the Plié 3. This testimony cannot support the idea that the Plié 3 provides any particular benefits to patients. Dr. Kannenberg testified at his deposition, and at trial that his testimony relating to the benefits of MPKs applies only to Ottobock MPKs, which have been clinically proven to benefit patients. (PX05150 (Kannenberg, Dep. at 44); Kannenberg, Tr. 1843-1844).

680. Brad Ruhl, currently Otto Bock's Managing Director for North America, testified that "[t]he benefits of microprocessor control, specifically in C-Leg, is that it has features that will help patients avoid stumbles and falls. Again, as I mentioned earlier this is – as a lower-limb amputee, especially transfemoral amputee, the thing you're most concerned about when you walk is falling, tripping and – and falling." (PX05162 (Ruhl (Otto Bock) Dep. at 35)).

Response to Finding No. 680:

Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel contends that the Plié 3 is an MPK and this finding of fact should apply to the Plié 3. This testimony cannot support the idea that the Plié 3 provides any particular benefits to patients, as Ruhl specifically referenced the benefits of C-Leg in the cited testimony.

681. Otto Bock's internal documents and marketing materials espouse the benefits of MPKs over mechanical knees. For example, Otto Bock posted to its website a summary of a publication by Dr. Highsmith, Mr. Kahle, and Dr. Kaufman entitled "Safety, Energy Efficiency, and Cost Efficacy of the C-Leg for Transfemoral Amputees." (PX08007 (Otto Bock)). The Oto Bock summary quoted the conclusion of the study that "'Though methodological quality varied across the selected topic areas, there was sufficient evidence to suggest that the C-Leg provided increased efficacy in safety, energy efficiency, and cost effectiveness when compared with other [non-microprocessor controlled] prosthetic knees for transfemoral amputees.'" (PX08007 (Otto Bock) at 001) (alteration in the original)).

Response to Finding No. 681:

Complaint Counsel's proposed finding of fact is misleading, because there are no published studies that analyze the benefits, or establish any clinical benefits of, the Plié 3 or any version of the Plié. [redacted]; RFOF ¶ 369 (RAND study does not study Plié or any studies that study Plié); **Ferris, Tr. 2773, 2448 (no published studies which study the Plié 3.}**; Oros, Tr. 4916-4917 (Oros is not aware of a single clinical outcome study in the world that has been published that has used subjects fit with a Plié 3); Doug Smith, Tr. 6032). Further, this proposed finding is consistent with the idea that MPK manufacturers compete against non-MPKs for fittings on patients, as they attempt to convince clinics to purchase more MPKs.

682. [redacted]

Response to Finding No. 682:

Respondent has no specific response, provided that this fact is limited in its applicability to just the C-Leg and Compact, as is stated in the proposed finding.

683. [redacted]

[redacted] (PX01878 (Otto Bock) at 002 (*in camera*)).

Response to Finding No. 683:

Complaint Counsel's proposed finding of fact is misleading and based upon the statement of an individual who did not testify and whom Respondent had no opportunity to cross-examine, and should not be credited. Further, this proposed finding of fact relies solely upon a document that was never presented at trial and thus was not subject to cross-examination before the Court.

684. In a letter advocating for Medicare coverage of MPKs for K2s, Otto Bock stressed the benefits of MPKs over mechanical knees. (PX01480 (Otto Bock) at 004-07). The authors (Kim Hanson and Andreas Kannenberg of Otto Bock) wrote that "While there is no doubt that the unlimited community ambulatory receives tremendous benefit from fluid and microprocessor knee control, it is clear that this same technology may equally provide tremendous benefits to patients with MFCL-2 mobility grade. In these beneficiaries, stumble recovery and improved stability while ambulating on all terrains create a solid foundation for improvement of overall function and mobility." (PX01480 (Otto Bock) at 007)).

Response to Finding No. 684:

Complaint Counsel's proposed finding of fact is irrelevant, because the comparison between knees that are appropriate for K-2 patients and MPKs has zero probative value in this case.

685. Otto Bock has regularly provided customers with clinical research and other documentation discussing the benefits of MPKs relative to mechanical knees. Over the last several years, Otto Bock employees have sent clinical research studies to its customers in order to market its MPK products. (*See, e.g.*, PX05150 (Kannenberg (Otto Bock) Dep. at 193-194); PX05148 (Swiggum (Otto Bock) Dep. at 36-38)).

Response to Finding No. 685:

Respondent has no specific response, other than that this is consistent with the idea that manufacturers of MPKs feel as though their MPK sales are competing for fittings with non-MPKs.

686. [redacted] (Kannenberg (Otto Bock) Tr. 1893 (*in camera*)). For example, On May 6, 2015, Dr. Kannenberg sent to Sam Liang, then and currently the President of Hanger, an article entitled "Benefits of microprocessor-controlled prosthetic knees to limited community ambulators: Systemic review," by Andreas Kannenberg, MD, PhD; Britta Zacharias, Dipl-Ing (FH), CPO; and Eva Pröbsting, Dipl-Ing (FH), CPO (an article in evidence as PX08003). (PX01494 (Otto Bock at 001; *see also* PX00848 (Otto Bock) at 001, 040, (Aug. 18, 2015 email from Otto Bock on behalf of Dr. Kannenberg sending several research articles highlighting the benefits of MPKs to insurer Select Health, including "Safety, energy efficiency, and cost efficacy of the C-Leg for transfemoral amputees: A review of the literature," by M. Jason Highsmith; Jason T. Kahle; Dennis R. Bongiorni; Bryce S. Sutton; Shirley Groer; and Kenton R. Kaufman (article in evidence as PX08001)); PX00849 (Otto Bock) at 001, 022 (Sept. 23, 2015 email from Dr. Kannenberg to Phil Stevens, prosthetist and orthotist at Hanger, attaching several articles highlighting the benefits of MPKs including "Gait and balance of transfemoral amputees using passive mechanical and microprocessor-controlled prosthetic knees," by Kenton R. Kaufman; J.A. Levine; R.H. Brey (article in evidence as PX08010)); PX01497 (Otto Bock) at 002, 004 (Nov. 3, 2015 email from Dr. Kannenberg attaching several articles highlighting the benefits of MPKs for transmittal to Deanna Hines of Russell Prosthetics including "Safety, energy efficiency, and cost efficacy of the C-Leg for transfemoral amputees: A review of the literature," by M. Jason Highsmith; Jason T. Kahle; Dennis R. Bongiorni; Bryce S. Sutton; Shirley Groer; and Kenton R. Kaufman (article in evidence as PX08016); PX01620 (Otto Bock) at 001 (March 25, 2016 email from Dr. Kannenberg sending several articles highlighting the benefits of MPKs to Lee Childers PhD, MSPO, CP of Alabama State University Prosthetics and Orthotics); PX01480 (Otto Bock) at 002, 017 (April 25, 2016 email from Otto Bock's Kimberly Hanson, Director of Reimbursement for North America, attaching several articles highlighting the benefits of MPKs to Stacey Brennan of Anthem, including "Comparison of nonmicroprocessor knee mechanism versus C-Leg on Prosthesis Evaluation Questionnaire, stumbles, falls, walking tests, stair descent, and knee preference," by Jason T. Kahle, CPO, LPO; M. Jason Highsmith, DPT, CP; and Sandra L. Hubbard, PhD, OTR/L, ATP (article in evidence as PX08018)); PX00852 (Otto Bock) at 001 (Nov. 17, 2016 email from Dr. Kannenberg sending several articles highlighting the benefits of MPKs to Courtney Boniello of A Step Ahead Prosthetics)).

Response to Finding No. 686:

Respondent has no specific response, other than that this is consistent with the idea that manufacturers of MPKs feel as though their MPK sales are competing for fittings with non-MPKs. In addition, Respondent incorporates its response to CCFF ¶¶ 617-645 regarding the inherent limitations in prosthetics studies.

687. Otto Bock employees have directed customers to the RAND website, and specifically to the article "Economic Value of Advanced Transfemoral Prosthetics," by Hangsheng Liu et al. (article in evidence as PX08004). (PX05150 (Kannenberg (Otto Bock) Dep. at 193)).

Response to Finding No. 687:

Respondent has no specific response, other than that this is consistent with the idea that manufacturers of MPKs feel as though their MPK sales are competing for fittings with non-MPKs. In addition, Respondent incorporates its responses to CCFF ¶¶ 632-640 regarding the limitations of the RAND study.

d) Other Prosthetic Manufacturers Tout the Benefits of MPKs over Mechanical Knees

688. Other MPK manufacturers testified about advantages of MPKs over mechanical knees. For example, Kim De Roy, Executive Vice President for R&D at Össur, testified that "microprocessor-controlled knees were originally designed to overcome shortfalls related to the safety and stability of the amputee, so if you don't have a knee that thinks and that senses for the patient, the patient is 100 percent relying on his own ability to utilize that knee to make sure that he's – he or she is stable when standing. The microprocessor knee, because of the interpretation of the data, will help them prevent a stumble, will help them prevent a fall, by constantly monitoring what the position of the patient is and making sure that the knee is in fact locked or provides the necessary type of resistance when that's required. So the sensation of the patient will be one of additional safety, additional stability. And the research that has been done over the last decade relating to microprocessor knees shows that there is actually a reduction in the amount of falls with those patients and an increased feeling of proprioception or control over the prosthesis by the users." (De Roy (Össur) Tr. 3543-44).

Response to Finding No. 688:

Complaint Counsel's finding of fact is misleading to the extent that Complaint Counsel attempts to argue that DeRoy's testimony should be applied to all knees that contain a microprocessor. MPKs function differently from each other, and not all have been clinically tested. It is not appropriate to extend the results of a clinical study regarding one knee to include all other knees that happen to contain microprocessors. For example, no published studies analyze the benefits of Plié, so no published studies can support the idea that Plié benefits patients. (*See*

Response to CCFF ¶¶ 508, 671). Respondent incorporates its responses to CCFF ¶¶ 617-645, above, which detail the inherent limitations of prosthetics studies.

689. Mr. De Roy further testified that research on MPKs "shows that people that transfer from a mechanical knee over to the microprocessor knee experience more safety, experience reduced falls. And in some cases it's even shown that they have reduced comorbidities, such as back pain, because their gait normalizes. They walk better. They don't use their muscles in straining matters; therefore, the risk for developing those types of issues is lower. There's also a benefit to the sound side leg, because typically people are amputated on one side, and the advantages that these types of knees reduce the impact on the sound side, which has proven to be related to or have a positive impact on reducing the chances of developing knee OA on the sound side, osteoarthritis." (De Roy (Össur) Tr. 3546-47).

Response to Finding No. 689:

Complaint Counsel's finding of fact is misleading to the extent that Complaint Counsel attempts to argue that DeRoy's testimony should be applied to all knees that contain a microprocessor. MPKs function differently from each other, and not all have been clinically tested. It is not appropriate to extend the results of a clinical study regarding one knee to include all other knees that happen to contain microprocessors. For example, no published studies analyze the benefits of Plié, so no published studies can support the idea that Plié benefits patients. (*See* Response to CCFF ¶¶ 508, 671). Respondent incorporates its responses to CCFF ¶¶ 617-645, above, which detail the inherent limitations of prosthetics studies.

690. Össur highlights the benefits of microprocessor knees compared to mechanical knees to market its MPKs. (*See, e.g.*, PX03097 (Össur) at 011; *see also* De Roy (Össur) Tr. 3549). The benefits listed include "associated with increased quality of life and improved mobility in transfemoral amputees, as measured by transitioning from nonmicroprocessor, mechanical knees." (PX03097 (Össur) at 006 ("Health Economic Analysis, The case for Rheo Knee 3 | Rheo Knee XC")).

Response to Finding No. 690:

Respondent has no specific response, other than that this is consistent with the idea that manufacturers of MPKs believe that their MPK sales are competing for fittings with non-MPKs.

691. Össur also uses research studies showing the benefits of MPKs to market its products because the studies prove the benefits of MPKs to insurance companies and other payers. (De Roy (Össur) Tr. 3552).

Response to Finding No. 691:

Respondent has no specific response, other than that this is consistent with the idea that manufacturers of MPKs believe that their MPK sales are competing for fittings with non-MPKs.

692. For example, Össur has used the article, "Economic Value of Advanced Transfemoral Prosthetics," by Hangsheng Liu et al. to market its MPKs (article in evidence as PX08004). (De Roy (Össur) Tr. 3552-53). Mr. De Roy described this study as a "health economic study" that "relate[s] the functional/clinical benefits of a device to the economic factors" in order to highlight the "overall cost of care" for the patient. (De Roy (Össur) Tr. 3552-53).

Response to Finding No. 692:

Complaint Counsel's proposed finding of fact is misleading for the reasons stated in Responses to CCFF ¶¶ 632-640 regarding the RAND Study, which this proposed finding references. Also, this proposed finding is consistent with the idea that manufacturers of MPKs believe that their MPK sales are competing for fittings with non-MPKs.

693. Stephen Blatchford, Executive Chairman of Endolite, testified that the main clinical benefits the company highlights for its Orion 3 MPK "are the fact that the user will need less energy to walk with the knee because on average they will walk more quickly, so their self-selected speed, to use a horrible phrase, is higher than it would be without a microprocessor knee" and also that "[t]he knees reduce the instance of falling very considerably." (Blatchford (Endolite) Tr. 2119-20).

Response to Finding No. 693:

Complaint Counsel's proposed finding of fact is misleading because it is not clear whether Blatchford is comparing Endolite MPKs to sophisticated non-MPKs or more basic level non-MPKs.

694. According to Mr. Blatchford, Endolite's MPKs provide "several advantages" over its non-MPKs: "If you look at it from the amputee's perspective, the consequence of the fact that

the knee reacts to – more exactly to what the user is doing means that the user on average will walk faster – there's clinical studies which will support that – that the user uses less energy, further clinical studies that will support that, that there is less distortion in the gait of the amputee so that when you compare the gait on the sound side with the gait on the amputated side, there's more symmetry, which means – a consequence of more symmetry is that there's less bad force – I couldn't think of the right phrase – because it's more symmetrical, it applies less adverse force on the patient's skeletal system, and therefore, you can get less things like back pain, and so on." (Blatchford (Endolite) Tr. 2114-15).

Response to Finding No. 694:

Complaint Counsel's proposed finding of fact is misleading because it is not clear whether Blatchford is comparing Endolite MPKs to sophisticated non-MPKs or more basic level non-MPKs.

695. Endolite's marketing materials list clinical benefits of its Orion 3 MPK, including "greater stability," "less effort," "improved gait," "reduced compensation," and "greater patient satisfaction." (PX03176 (Endolite) at 031-36).

Response to Finding No. 695:

Respondent has no specific response, other than that this is consistent with the idea that manufacturers of MPKs believe that their MPK sales are competing for fittings with non-MPKs.

696. Endolite encourages its sales representatives to highlight the clinical benefits of the Orion 3 MPK during sales calls with prosthetists. (PX05144 (Blatchford (Endolite) Dep. at175-80).

Response to Finding No. 696:

Respondent has no specific response, other than that this is consistent with the idea that manufacturers of MPKs believe that their MPK sales are competing for fittings with non-MPKs.

697. [redacted] (Carver (College Park) Tr. 2059-60 (*in camera*); *see also* PX03025 (College Park) at 002 (*in camera*) (describing a new mechanical knee in development as a good option for amputees

whose insurance will not reimburse for an MPKs, which are described as the "first choice"); PX05107 (Carver (College Park) Dep. at 19-20)).

Response to Finding No. 697:

This proposed finding of fact is misleading because it treats MPKs and non-MPKs as two monolithic groups, but the clear evidence at trial indicated that there is a range of MPKs with a range of microprocessor control, that there is a range of non-MPKs at various levels of functionality, and that the industry does not divide those knees up into two distinct groups. (RFOF ¶¶ 135-249, 337). Plié 3 functions more like a non-MPK than an MPK, even though it has a microprocessor in it. Industry participants characterize the Plié 3 as a hybrid knee, which is in between an MPK and a non-MPK. [redacted]; Schneider, Tr. 4324, 4351; Kannenberg, Tr. 1880-1881). The evidence shows that Plié 3 lacks the attributes that Carver ascribes to MPKs in this proposed finding of fact, and in fact is more similar to Carver's description of a non-MPK. The Plié 3 cannot continuously adjust to a user's gait or environment, but instead uses a microprocessor only to switch between two pre-set levels of resistance. (Carkhuff, Tr. 335; [redacted]). Similar to Carver's description of a non-MPK, Plié 3 users must rely on a manual, pre-set level of resistance and must visit a prosthetist office if they would like to have this setting changed. [redacted]; Schneider, Tr. 4311; Kannenberg, Tr. 1953).

698. Ryan Arbogast, CEO of Ohio Willow Wood, testified that "[m]icroprocessor knees provide additional features and benefits and function that mechanical knees could not." (PX05106 (Arbogast (Willow Wood) Dep. at 19)). He elaborated that, "[m]icroprocessor knees, in general, use sensors to assess what's happening with the knee and make changes in the function of the knee as a result." Further, he testified "[t]hat could be a benefit when an amputee is changing their mode of activity or has a potential for instability or for a fall." With respect to instability and falling, he testified that "[m]echanical knees have certain design characteristics to prevent amputees from falling. Those are called lock or stance phases. Microprocessor knees improve upon that or aim to improve upon that function by using sensors to better understand what's happening with the knee." (PX05106 (Arbogast (Willow Wood) Dep. at 19-20)).

Response to Finding No. 698:

Complaint Counsel's proposed finding of fact is incomplete, because Arbogast later explains the above-quoted section by stating that non-MPKs have design characteristics that prevent amputees from falling, and that MPKs "aim" to improve on those characteristics through the addition of the microprocessor. (PX05106 (Arbogast Dep. at 20)). Further, here Complaint Counsel relies on Arbogast for a description of how MPKs function, but in subsequent proposed findings of fact asks the Court to find that his company, Willow Wood, lacks the requisite knowledge and ability to sell an MPK. (CCFF ¶¶ 2243-2286, 6875-6885). Complaint Counsel cannot have it both ways.

699. Mr. Arbogast testified that he expected insurance coverage of MPKs to expand in the future to encompass individuals at lower K levels "because we're starting to see studies showing long-term healthcare costs and the related benefits to a microprocessor knee or a microprocessor prosthetic, preventing healthcare cost occurrences such as stumbling, falling, lack of mobility, lack of activity." (PX05106 (Arbogast (Willow Wood) Dep. at 195-96)).

Response to Finding No. 699:

Complaint Counsel's proposed finding of fact is irrelevant. Further, here Complaint Counsel relies on Arbogast for a description of how MPKs function and benefit amputees, but in subsequent proposed findings of fact asks the Court [redacted] Complaint Counsel cannot have it both ways.

700. 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." (PX05117 (Choi (ST&G) Dep. at 43)). 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." (PX05117 (Choi (ST&G) Dep. at 43-44)). He also

testified that, unlike a pneumatic or hydraulic mechanical knee, an MPK is constantly adjusting the resistance provided during the swing phase. The benefit to the amputee is that "[a]s the patient's activity changes or movement changes within the gait cycle, the input of the load forces being applied is not always the same, nor is it predictable, so the microprocessor compensates for the unpredictability in the load that's being applied to the knee in both stance and swing phase" which creates greater safety and stability. (PX05117 (Choi (ST&G) Dep. at 44-45)).

Response to Finding No. 700:

Complaint Counsel's proposed finding of fact is irrelevant to the extent that Choi is testifying at a deposition about the advantages that MPKs may or may not provide over constant friction knees, because those differences have no probative value in this case. The advantages that Choi testifies about that relate to MPKs as compared to fluid-controlled non-MPKs have not been shown to be present in the Plié 3 or any version of the Plié. For example, there is no evidence that the Plié 3 adjusts within a gait cycle to provide greater stability. All that the microprocessor in the Plié 3 can do is switch between two pre-set levels of resistance. (Carkhuff, Tr. 335; Schneider, Tr. 4310; [redacted]

B. MPK PRICES AND REIMBURSEMENT AMOUNTS DIFFER SIGNIFICANTLY FROM THOSE OF MECHANICAL KNEES

1. Clinics Pay Significantly Higher Prices for MPKs than for Mechanical Knees

701. [redacted]
(Blatchford (Endolite) Tr. 2123-24; De Roy (Ossur) Tr. 3554-56; PX05109 (Carkhuff) Dep. at 112; Schneider (Otto Bock) Tr. 4355-56; Senn (COPC) Tr. 197-98); PX05141 (Bright (North Bay) Dep. at 74); PX05168 (Sprinkle (Sprinkle Prosthetics) Dep. at 57-58); PX05108 (Yates (Jonesboro) Dep. at 55, 119-20) (*in camera*)); Ford (POA) Tr. 945); Asar (Hanger) Tr. 1374 (*in camera*); PX05001 (Endrikat (Empire Medical) Dep. at 17-18)).

Response to Finding No. 701:

Complaint Counsel's proposed finding of fact is irrelevant, because the reimbursement rate is also greater for MPKs than non-MPKs, which makes the margins that the clinics receive much closer together.

702. [redacted] (Blatchford (Endolite) Tr. 2123-24; De Roy (Ossur) Tr. 3554-56; PX05168 (Sprinkle (Sprinkle Prosthetics) Dep. at 57-58 ("the average [price] for a microprocessor is 17,000, and the average [price] for a mechanical knee is 1,500.")); Ford (POA) Tr. 945 (manufacturers charge "five to eight times" more for MPKs than mechanical knees)); Senn (COPC) Tr. 197-98 (COPC pays between $10,000 and $15,000 for an MPK and between $3,000 and $5,000 for a mechanical knee); PX05141 (Bright (North Bay) Dep. at 74 (average price for an MPK is around $16,000 while mechanical knees range from $400 to $3000)); [redacted]; PX05001 (Endrikat (Empire Medical) Dep. at 17-18 (Empire pays $16,000 on average for MPKs and between $250 and $3,000 for mechanical knees))).

Response to Finding No. 702:

Complaint Counsel's proposed finding of fact is irrelevant, because the reimbursement rate is also greater for MPKs than non-MPKs, which makes the margins that the clinics receive much closer together.

703. [redacted] (Collins (Cascade) Tr. 3290 (*in camera*)).

Response to Finding No. 703:

Complaint Counsel's proposed finding of fact is irrelevant, because the reimbursement rate is also greater for MPKs than non-MPKs, which makes the margins that the clinics receive much closer together.

704. According to Michael Fillauer of Fillauer, "a mechanical knee could be anywhere under a thousand dollars to a couple of thousand dollars . . . whereas, a microprocessor knee might be close to 20,000 or more. So it's a pretty significant price difference." (PX05105 (Fillauer (Fillauer) Dep. at 97-98)).

Response to Finding No. 704:

Complaint Counsel's proposed finding of fact is irrelevant, because the reimbursement rate is also greater for MPKs than non-MPKs, which makes the margins that the clinics receive much closer together.

705. [redacted] (PX06001 (Scott Morton Report) at ¶¶ 50, Table 3 (*in camera*))). [redacted] (PX06001 (Scott Morton Report) at ¶¶ 51, Table 4 (*in camera*))).

Response to Finding No. 705:

Complaint Counsel's proposed finding of fact is irrelevant, because the reimbursement rate is also greater for MPKs than non-MPKs, which makes the margins that the clinics receive much closer together.

706. Respondent's expert witness, Dr. David Argue, testified that the manufacturers charge higher prices for MPKs than non-MPKs. (PX05173 (Argue) Dep. at 134).

Response to Finding No. 706:

Complaint Counsel's proposed finding of fact is irrelevant, because the reimbursement rate is also greater for MPKs than non-MPKs, which makes the margins that the clinics receive much closer together.

2. Clinics Receive Substantially More Reimbursement from Insurers for MPKs than Mechanical Knees

707. [redacted] PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 37-40).

Response to Finding No. 707:

Complaint Counsel's proposed finding of fact is duplicative of CCFF ¶ 377 and incomplete. Respondent incorporates its response to CCFF ¶ 377.

708. [redacted] (PX05109 (Carkhuff (Freedom) Dep. at 112); Kaufman (Mayo) Tr. 834; Senn (COPC) Tr. 250; Ford (POA) Tr. 980 (POA is reimbursed "[f]our to five times" higher for fitting an MPK over a mechanical knee)); Asar (Hanger) Tr. 1360 (*in camera*) [redacted]

Response to Finding No. 708:

Complaint Counsel's proposed finding of fact is misleading, because it implies that the reason MPKs are reimbursed at a higher rate is an attempt to assign a value to the additional benefit they provide to patients, for which there is no support in the record. Further, Asar testified at trial that the basis for his knowledge that MPKs provide more benefit to patients is the RAND Study, so he lacks the personal foundation in order to be credited on this finding of fact. (Asar, Tr. 1339; *see also* RFOF ¶ 371). In addition, the higher acquisition cost and higher reimbursement rate on MPKs causes clinics' margins on MPKs and non-MPKs to be very similar.

709. [redacted] (Sanders (United) Tr. 5492-93 (*in camera*)).

Response to Finding No. 709:

Complaint Counsel's proposed finding of fact is misleading because it implies that United Healthcare's reimbursement rate takes into account the additional programming required to fit an MPK instead of a non-MPK, for which there is no support in the record. The evidence shows that clinic margins in fitting MPKs on United Healthcare members in particular are extremely tight.

(Sabolich, Tr. 5827-5828). In addition, the higher acquisition cost combined with the higher reimbursement rate on MPKs causes clinics' margins on MPKs and non-MPKs to be very similar.

710. Prosthetic manufacturers agree that the reimbursement by both private payers and Medicare is substantially greater for MPKs than it is for mechanical knees. (PX05117 (Choi (ST&G) Dep. at 51-52(regarding Medicare and private payers)); Blatchford (Endolite) Tr. 2127 ("reimbursement rates for just the MPK part of it are several times higher than the reimbursement rates for the non-MPK part of a prosthesis which didn't have a microprocessor knee")).

Response to Finding No. 710:

Respondent has no specific response, other than that this is consistent with the idea that the higher acquisition cost combined with the higher reimbursement rate on MPKs causes the clinics' margins on MPKs and non-MPKs to be very similar.

711. Dr. Argue, Respondent's economic expert, testified that he concluded in his expert report that prosthetic clinics receive larger reimbursement amounts for MPKs than non-MPKs. (Argue, Tr. 6270; PX05173 (Argue Dep. at 134); *see also* (RX-1049 at 013 (¶¶ 18-19) (Argue Expert Report) (estimating that the Medicare reimbursement rate for MPKs ranged from approximately $26,000 to $35,000, while the Medicare reimbursement amount for non-MPKs of $5,000 to $8,000).

Response to Finding No. 711:

Respondent has no specific response, other than that this is consistent with the idea that the higher acquisition cost combined with the higher reimbursement rate on MPKs causes the clinics margins on MPKs and non-MPKs to be very similar.

C. MPK PRICES ARE NOT SENSITIVE TO MECHANICAL KNEE PRICES

712. According to Keith Senn, President and COO for Kentucky of the Center for Orthotic & Prosthetic Care, MPK prices do not respond to price changes of non-microprocessor knees. (PX05128 (Senn (Center for O&P) Dep. at 152). According to Mr. Senn, prices of mechanical knees do not respond to price changes of microprocessor knees. (PX05004 (Senn (COPC) IHT at 20; PX05128 (Senn (Center for O&P) Dep. at 151). Mr. Senn testified at trial 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." (Senn (COPC) Tr. 198).

Response to Finding No. 712:

Complaint Counsel's proposed finding of fact is misleading. The last sentence of this proposed finding of fact, at a minimum, should not be credited by the Court because Senn lacks the foundation to determine if a particular course of action "would be a disservice to patients and poor patient care." The only foundation laid for Senn's knowledge of clinical issues was that he "used to have an office for about a decade within one of COPC's clinics." The Court found that inadequate, stating, "I am not talking about whether he sits and can look out a window. I want to know that that's part of his job if you're going to offer him for this fact. I mean, if you want his testimony to be 'Yeah, I see this from my window,' then we'll go with that." (Senn, Tr. 163). To compound this issue, Senn testified that he has *never observed* a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 173). This witness clearly lacks foundation to support a finding of fact on an issue relating to the clinical benefits or drawbacks of any particular prosthetic componentry. In fact, Senn's testimony is inadequate to support this proposed finding of fact altogether, because Senn testified that he is "not very" familiar with non-MPKs generally (Senn, Tr. 251) and is not familiar with fluid-controlled non-MPKs in particular, and does not know the difference between a fluid-controlled knee and a constant friction knee. (Senn, Tr. 254). A witness that self-describes himself as "not very" familiar with non-MPKs cannot competently testify about the pricing of those knees or other knees in relation to them.

713. Mr. Endrikat of Empire Medical testified that prices of mechanical knees do not respond to changes in the prices charged for microprocessor knees. (PX05001 (Endrikat (Empire Medical) IHT at 18) ("Q: In your experience do non-microprocessor mechanical knee prices respond to price changes of microprocessor knees? A: They do not.")). Mr. Endrikat of Empire Medical testified that he uses "ballpark" pricing to play the microprocessor knee manufacturers off of each other during price negotiations. (PX05116 (Endrikat (Empire) Dep. at 58)). He testified further that he only uses MPK competitor pricing to negotiate extra discounts for MPKs. (PX05116 (Endrikat (Empire Medical) Dep. at 59). Mr. Endrikat explained that he is unable to use pricing of mechanical knees when negotiating

with manufacturers for the price of MPKs because "[i]t's a different product category." (PX05116 (Endrikat (Empire) Dep. at 58-59)).

Response to Finding No. 713:

Complaint Counsel's proposed finding of fact is misleading and should not be credited. Complaint Counsel's proposed finding of fact relies on the testimony of a single individual who didn't testify at trial to support their proposition that MPKs do not compete with MPKs, while ignoring the testimony of the many individuals who did testify at trial that competition is defined by K-Level classification, rather than by whether a product is an MPK or a non-MPK. For example, [redacted] 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). Further, 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). Further, clinics describe pricing negotiations as being based on volume. [redacted] Ford, Tr. 904, 935-937; [redacted].

714. [redacted] (Blatchford (Endolite) Tr. 2155 (*in camera*)). [redacted] (Blatchford (Endolite) Tr. 2155 (*in camera*)).

Response to Finding No. 714:

Complaint Counsel's proposed finding of fact is misleading because it attempts to suggest that because Endolite does not consider the prices of non-MPKs in setting the prices of its MPKs, they do not compete in the same category. However, Blatchford noted that his definition of an MPK applies only to Endolite's MPKs. (Blatchford, Tr. 2109). Further, the evidence illustrates that Endolite groups its non-MPKs and MPKs together in the overall knee category for purposes of marketing and tracking sales. (*See* RFOF ¶ ¶ 483-489).

715. Dr. Argue, Respondent's economic expert, could not identify any clinic customers that have switched from fitting MPKs to mechanical knees in the past. (PX05173 (Argue Dep. at 232)).

Response to Finding No. 715:

Complaint Counsel's proposed finding of fact is duplicative of CCFF ¶ 528. Respondent incorporates its Response to CCFF ¶ 528.

716. [redacted] (Senn (COPC) Tr. 148-280 (*partial in camera*); Ford (Prosthetic & Orthotic Assocs.) Tr. 901-1067 (*partial in camera*); Asar (Hanger) Tr. 1306-1571 (*partial in camera*); Ell (Mid-Missouri) Tr. 1658-1816 (*partial in camera*); Brandt (Ability) Tr. 3741-3845 (*partial in camera*); Oros (Scheck & Siress) Tr. 4770-4920 (*partial in camera*); Sabolich (Scott Sabolich Prosthetics) Tr. 5787-5960 (*partial in camera*)). [redacted] (PX05002 (Asar (Hanger) IHT (*partial in camera*)); PX05153A & PX05153B (Asar (Hanger) Dep. at (*partial in camera*)); PX05003 (Yates (Jonesboro P&O) IHT (*in camera*)); PX05108 (Yates (Jonesboro P&O) Dep. at (*in camera*)); PX05004 (Senn (COPC) IHT; PX05128 (Senn (COPC) Dep.); PX05129 (Ell (Mid-Missouri) Dep.); PX05132 (Sabolich (Scott Sabolich Prosthetics) Dep.); PX05134 (Oros (Scheck & Siress) Dep. at (*partial in camera*)); PX05135 (Webster (Prosthetic & Orthotic Care) Dep.); PX05140 (Weott (Orthotic Prosthetic Center Inc.) Dep. at (*in camera*)); PX05141 (Bright (North Bay) Dep.); PX05145 (Ford (Prosthetic & Orthotic Assocs.) Dep.); PX05149 (Brandt (Ability) Dep. at

(*partial in camera*)); PX05151 (Patton (Prosthetic Solutions) Dep.); PX05166 (Watson (Fourroux) Dep. at(*partial in camera*)); PX05167 (Filippis (Wright & Filippis) Dep. at(*partial in camera*)); PX05168 (Sprinkle (Sprinkle) Dep.)).

Response to Finding No. 716:

Complaint Counsel's proposed finding of fact is duplicative of CCFF ¶¶ 524-527. Respondent incorporates its Responses to CCFF ¶¶ 524-527.

D. RESPONDENT'S ACTIONS AND ANALYSES IN THE ORDINARY COURSE OF BUSINESS DEMONSTRATE MPKS ARE A RELEVANT MARKET

1. Respondent Analyzes MPKs as a Distinct Market from Mechanical Knees in the Ordinary Course of Business

717. Otto Bock has consistently characterized the market that its microprocessor knee, the C-Leg, competes in, as a microprocessor knee market. 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. microprocessor knee market on a regular basis. (PX05148 Swiggum (Otto Bock) Dep. at 40-44).

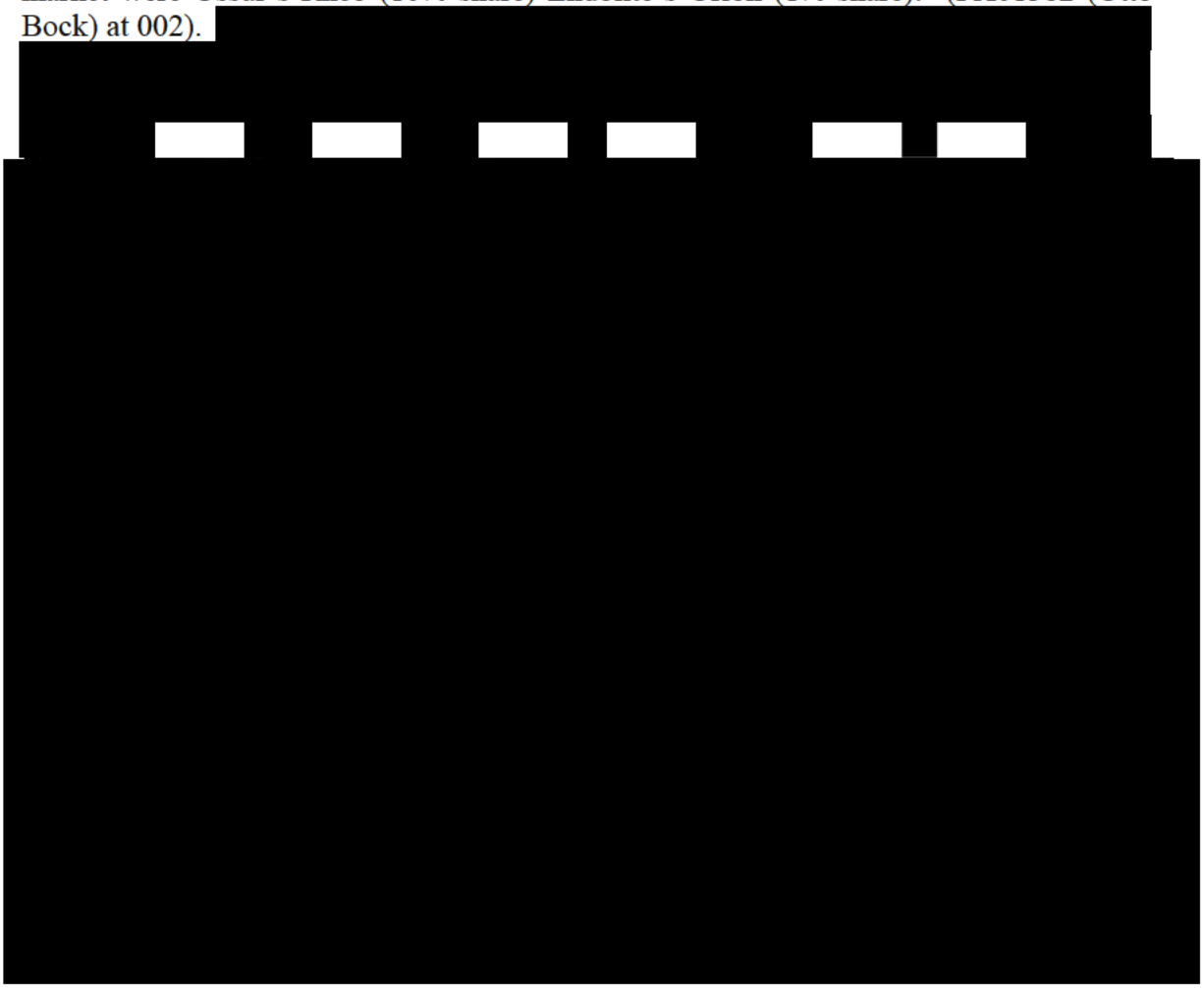
Response to Finding No. 717:

Complaint Counsel's proposed finding of fact is misleading and is not supported by the evidence. Complaint Counsel asks this Court to adopt this proposed finding solely on the deposition testimony of an unreliable witness – a disgruntled former executive, Swiggum. In addition, Brad Ruhl, the current managing director of Ottobock, testified to quite the opposite:

> Q. So in -- in estimating the potential for the C-Leg 4 in the market, it's most relevant to look at microprocessor knee sales?
>
> A. No. No. I think it's critically important to look at the entire market. Microprocessor knees, fully controlled microprocessor knees, swing and stance. I mentioned we launched the first product in the U.S. market in 1999.
>
> Prior to that time, there was a few years that Endolite had introduced a swing-only microprocessor knee. Prior to that, the market was dominated by mechanical knees, and even wooden knees. So as the market has developed, there's a certain umbrella over those products that are microprocessor-controlled, but mechanical knees continue to outsell microprocessor knees probably four or five to one.

> So when we launched C-Leg in the market, it -- it had to compete with mechanical knees . . . So to just, with a razor, slice out the existing MPK market, and only try to say that that's the whole market is completely dismissing the fact that the majority of the market today is still mechanical knees. So every microprocessor knee is competing against mechanical knees in -- in the total market to provide knees to amputees. (PX05162 (Ruhl, Dep. at 70-71)).

718. For example, on January 30, 2015, Otto Bock estimated its own share (78%) and Freedom's Plié's share (11%) in the U.S. MPK market. (PX01382 (Otto Bock) at 002). The only other products included in Otto Bock's "Estimated market size and share" in the MPK market were Össur's Rheo (10% share) Endolite's Orion (1% share). (PX01382 (Otto Bock) at 002).



(PX01382 (Otto Bock) at 002).

Response to Finding No. 718:

Complaint Counsel's proposed finding of fact is misleading. Although this slide discusses an "Estimated Market Size and Share" it is really not clear what the contours of this market are and which knees are included. Notably, Schneider testified [redacted] Further, this "market" does not match the market advanced by Professor Scott Morton (the Government's expert economist). Her market contains every knee that happens to contain a microprocessor that is sold in the United States, and it does not appear that this chart also includes every knee that contains a microprocessor. It is unclear if Genium, X3, Compact, IP Knee, Rheo XC, the Power Knee, or Kenevo are included in this market.

719. When preparing for the launch of the C-Leg 4, Mr. Schneider sent Otto Bock estimates of shares and positioning in an "MPK market" on February 20, 2015 to his "cross-functional" launch team; the analysis did not mention any mechanical knees. (PX01518 (Otto Bock) at 001-002; 009).

(PX01518 (Otto Bock) at 001-002; 009).

Response to Finding No. 719:

Complaint Counsel's proposed finding of fact is misleading. Although this slide discusses an "Estimated Market Size and Share," it is unclear what the contours of this market are and which knees are included. Further *the same slide* describes the landscape as a "segment" when it says "new segment entry." This disparity in terminology underscores the difficulty with using a layperson's use of the word "market" as evidence of a relevant antitrust market.

Notably, Schneider testified regarding the difficulty in estimating any type of market size or share for particular products, given the lack of available data, so these share estimates are not accurate. (Schneider, Tr. 4565-4566). Further, this "market" does not match the market advanced by Professor Scott Morton (the Government's expert economist). Her market contains every knee

that happens to contain a microprocessor that is sold in the United States, and it does not appear that this chart also includes every knee that contains a microprocessor. It is unclear if Genium, X3, Compact, IP Knee, Rheo XC, the Power Knee, or Kenevo are included in this market. Further, this document is from 2015, and describes a constantly-changing industry with numerous product launches since that year, which renders the probative value of this document negligible.

720. Cali Solorio, Otto Bock's Senior Prosthetics Marketing Manager, estimated market size and shares of an MPK market that did not include mechanical knees in a November 18, 2015 presentation. (PX01002 (Otto Bock) at 006 (MPK Portfolio Alignment)). In the presentation, Ms. Solorio estimated Otto Bock had a 81% share of the MPK market, Freedom's Plié had an 10% share, Össur's Rheo had an 8% share, and Endolite's Orion had a 1% share. (PX01002 (Otto Bock) at 005). At trial, Ms. Solorio testified that she presented this entire presentation to her regional management team. (Solorio (Otto Bock) Tr. 1593-94). [redacted] (Solorio (Otto Bock) Tr. 1601 (*in camera*)).

Response to Finding No. 720:

Complaint Counsel's proposed finding of fact is misleading. Although this slide discusses an "Estimated Market Size and Share," it is unclear what the contours of this market are and which knees are included. Further, this "market" does not match the market advanced by Professor Fiona Scott Morton (the Government's expert economist). Professor Scott Morton's market contains every knee that happens to contain a microprocessor that is sold in the United States, and it does not appear that this chart also includes every knee that contains a microprocessor. It is unclear if Genium, X3, Compact, IP Knee, Rheo XC, the Power Knee, or Kenevo are included in this market. Complaint Counsel omits the fact that Nabtesco is included on this chart, in addition to Endolite, Össur, and Freedom. Further, this document is from 2015, and describes a constantly-changing industry with numerous product launches since that year, which renders the probative value of this document negligible. This changing nature is reflected in the document itself, which states "new

low-cost, high performance, niche Asian products (Allux) will challenge share status in 2016." (PX01002).

Further, to the extent the sales presented on these slides are to be believed, it is notable that the C-Leg 4 launch appears to have had *almost no* effect on Plié sales, as Freedom's estimated share has stayed largely the same from February to November. This suggests that Plié and C-Leg 4 are not particularly close competitors.

721. [redacted] (PX01623 (Otto Bock) at 010 (*in camera*); [redacted]

Response to Finding No. 721:

Complaint Counsel's proposed finding of fact is irrelevant and misleading. [redacted] Cali Solorio testified that Ottobock's market share estimates are rough and inaccurate. (PX05123 (Solorio, Dep. at 77)). Several other witnesses testified similarly to Ms. Solorio. (*See, e.g.*, Schneider, Tr. 4565 ("it's also very important to note that these are absolute estimates at this time, and we had no idea of really what was in the market").

Moreover, neither document cited by Complaint Counsel for this proposed fact was presented at trial and thus there was no opportunity for cross-examination before this Court.

722. [redacted] (PX1473 (Otto Bock) at 010 (Roosevelt Due Diligence Summary, Integration, Business Plan and Valuation) (*in camera*)). [redacted] (PX1473 (Otto Bock) at 010 (Roosevelt Due Diligence Summary, Integration, Business Plan and Valuation) (*in camera*)). [redacted] (PX1473 (Otto Bock) at 010 (Roosevelt Due Diligence Summary, Integration, Business Plan and Valuation) (*in camera*)). [redacted] (PX 05148 (Swiggum (Otto Bock) Dep. at 110, 120-123 (*in camera*)).

Response to Finding No. 722:

Complaint Counsel's proposed finding of fact is misleading, because it relies entirely on a document marked clearly as a "DRAFT." (PX01473 at 002). Alex Gück, the author of this document, was asked about a version of this document at his deposition, and testified that: "[t]his document is a draft which summarizes the results of the due diligence. It also contains preliminary considerations as to integration, and considerations made back then as to the evaluation of Freedom Innovations." (PX05131 (Gück, Dep. at 104)).

723. [redacted] (PX01302 (Otto Bock) at 074, 076 (*in camera*)). [redacted] (PX01302 (Otto Bock) at 074 (*in camera*)). [redacted] (PX01302 (Otto Bock) at 076 (*in camera*)).

Response to Finding No. 723:

Complaint Counsel's proposed finding of fact is misleading. [redacted] To the extent that Complaint Counsel attempts to now zero-in on the MPK-Swing-and-Stance segment as their relevant market, Respondent notes that this market is not what was alleged in the Complaint, and is not what is advanced by Dr. Scott Morton. Clearly, this document shows that there are a range of types of prosthetic knees, and a range of microprocessor control. This document supports the idea that just because a knee contains a microprocessor, does not mean that it functions the same as other knees that contain microprocessors. [redacted]

724. [redacted] (PX00867 (Otto Bock) at 021 (*in camera*)). [redacted] (Solorio (Otto Bock) Tr. 1602-06 (*in camera*)). [redacted] (PX00867 (Otto Bock) at 021 (*in camera*)).

Response to Finding No. 724:

Complaint Counsel's proposed finding of fact is misleading. It is misleading to take a laypersons use of the word "market" (especially a marketing employee's use of the word) and equate it to a relevant antitrust market. Further, this "market" does not fit the contours of any market advanced by Dr. Scott Morton, so it does support Complaint Counsel's alleged relevant market.

725. [redacted]

Response to Finding No. 725:

Respondent has no specific response other than to state that not a single document cited by Complaint Counsel in this proposed fact was presented at trial and thus there was no opportunity for cross-examination before this Court.

726. [redacted] (PX01164 (Freedom) at 016, 024-028 (Mechanical Knee Market Data) (*in camera*)). [redacted] (PX01164 (Freedom) at 005 (Mechanical Knee Market Data) (*in camera*)).

Response to Finding No. 726:

Complaint Counsel's proposed finding of fact should not be credited because it relies on an outdated document that was not presented at trial. PX01164 has limited probative value, because it is unclear when the documents were created. (PX01164). [redacted]

[redacted]

727. [redacted] (PX01024 (Freedom) at 006 (*in camera*)). [redacted] (PX01024 (Freedom) at 006 (*in camera*)).

[redacted]

(PX01024 (Freedom) at 006) (*in camera*)).

Response to Finding No. 727:

Complaint Counsel's proposed finding of fact is misleading. It is misleading to take a laypersons use of the word "market" and equate it to a relevant antitrust market. Further, this "market" does not fit the contours of any market advanced by Dr. Scott Morton, and it does not support Complaint Counsel's alleged relevant market.

728. [redacted] (PX01155 (Freedom) at 091 (*in camera*)). [redacted] (PX05109 (Carkhuff (Freedom) Dep. at 194-96 (*in camera*)); Carkhuff (Freedom) Tr. 438-39 (*in camera*)). [redacted] (PX01155 (Freedom) at 091 (*in camera*)).

Response to Finding No. 728:

Complaint Counsel's proposed finding of fact is misleading. It is misleading to take a laypersons use of the word "market" and equate it to a relevant antitrust market. Further, this "market" does not fit the contours of any market advanced by Dr. Scott Morton, and it does not support Complaint Counsel's alleged relevant market.

2. Respondent Views Only Other MPKs as Competitors to Its MPKs in the Ordinary Course of Business

729. [redacted] (PX01057 (Otto Bock) at 001 (Email forwarding C-Leg 4 Global Launch Plan) (*in camera*)). [redacted] (PX01057 (Otto Bock) at 057 (Email forwarding C-Leg 4 Global Launch Plan) (*in camera*)). [redacted] (PX01057 (Otto Bock) at 054 (Email forwarding C-Leg 4 Global Launch Plan) (*in camera*)). [redacted] (PX01057 (Otto Bock) at 074 (Email forwarding C-Leg 4 Global Launch Plan) (*in camera*)).

Response to Finding No. 729:

Respondent has no specific response, other than that this "market" does not fit the contours of any market advanced by Dr. Scott Morton, and it is not supportive of Complaint Counsel's alleged relevant market.

730. [redacted] (PX01518 (Otto Bock) at 003 (CLeg 4 Core Launch Team invitation) (*in camera*)). [redacted] (PX01518 (Otto Bock) at 003 (CLeg 4 Core Launch Team invitation) (*in camera*)). [redacted] (Schneider (Otto Bock) Tr. 4432-33 (*in camera*)). [redacted] (PX01526 (Otto Bock) at 002 (Updated C-Leg 4 Battle Card)).

Response to Finding No. 730:

Respondent has no specific response, other than to note that it is unreasonable to expect a manufacturer to list every single competitor knee on a single battle card. Further, this "market" does not fit the contours of any market advanced by Dr. Scott Morton.

731. [redacted] (PX01524 (Otto Bock) at 004, 007 (*in camera*)). Brad Ruhl, Otto Bock Managing Director for North America, confirmed that this is what C-Leg 4 pricing was based on. (PX05162 (Ruhl (Otto Bock) Dep. at 102-103)).

Response to Finding No. 731:

Complaint Counsel's proposed finding of fact is misleading, because [redacted] Further, it is clear from the record that Ottobock does not compete on price very much with any other knees. (*See* RFOF ¶¶ 184, 226-227, 506-507, 683-685).

732. [redacted] (PX01383 (Otto Bock) at 001 (Perception and reality email);

Schneider (Otto Bock) Tr. 4561-63 (*in camera*)). [redacted] (Schneider (Otto Bock) Tr. 4561-63 (*in camera*)).

Response to Finding No. 732:

Complaint Counsel's proposed finding of fact is misleading. It is misleading to take a laypersons use of the word "market" and equate it to a relevant antitrust market. Further, this "market" does not fit the contours of any market advanced by Dr. Scott Morton. For example, Genium and X3 are not included in this document.

733. [redacted] (PX00867 (Otto Bock) at 022 (*in camera*)). [redacted] (Solorio (Otto Bock) Tr. 1603 (*in camera*)).

Response to Finding No. 733:

Complaint Counsel's proposed finding of fact is misleading. It is misleading to take a laypersons use of the word "market" and equate it to a relevant antitrust market. Further, this "market" does not fit the contours of any market advanced by Dr. Scott Morton. Also notable is that in this cited document, [redacted]

734. [redacted]

[redacted]

Response to Finding No. 734:

Complaint Counsel's proposed finding of fact is misleading. It is misleading to take a laypersons use of the word "market" and equate it to a relevant antitrust market. Further, this "market" does not fit the contours of any market advanced by Dr. Scott Morton.

735. Freedom only identified other MPKs as competitors to its Plié. Mark Testerman, Vice President of National and Key Accounts, 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." (Testerman (Freedom) Tr. 1144). He agreed that he does not look to pricing of mechanical knees. (Testerman (Freedom) Tr. 1144).

Response to Finding No. 735:

Respondent has no specific response.

736. [redacted] (PX05112 (Ammouri (Freedom) Dep. at 54 (*in camera*)); *see also* PX05137 (Matthews (Freedom) Dep. at 219-221) [redacted] (*in camera*); PX01024 (Freedom) at 006 (Freedom Innovations Presentation: Quattro) (*in camera*); *see also* PX01024 (Freedom) at 004 (Freedom Innovations Presentation: Quattro) (*in camera*) [redacted].

Response to Finding No. 736:

Complaint Counsel's proposed finding of fact is misleading because Quattro is too speculative at this point. [redacted]

[redacted] Therefore, these documents and the cited testimony are unreliable on this topic.

737. [redacted] (PX05109 (Carkhuff (Freedom) Dep. at 225) (*in camera*)).

Response to Finding No. 737:

Complaint Counsel's proposed finding of fact is misleading, [redacted]

738. Freedom created a Battle Card for the Plié 3, comparing the features of the Plié 3 to the C-Leg 4. (PX01214 (Freedom) at 030 (Plié 3 Fact Sheet)). Manar Ammouri, Senior Product Manager for the Plié, confirmed that she had not created a battle card comparing the Plié to any mechanical knees. (PX05112 (Ammouri (Freedom) Dep. at 103)).

Response to Finding No. 738:

Respondent has no specific response, other than that the cited document is just one example of comparison documents with other knees, and that exercise was not just limited to a C-Leg 4 comparison.

739. When positioning the Plié against its competition, Ms. Ammouri testified that, "I'm primarily targeting the segment for the Plié's competition, which is other microprocessors." (PX05112 (Ammouri (Freedom) Dep. at 118; *see also* PX01172 (Freedom) at 003-04 (Plié versus Competitors Positioning)).

Response to Finding No. 739:

Respondent has no specific response, other than that Ammouri clearly classifies MPK sales as an "MPK Segment," which implies it is part of a larger market.

740. As part of the Plié 3 Selling Guide, Freedom created a Benefits Matrix, which compares functionality, adaptability, safety, versatility, and other factors between the Plié and its competitors. (PX05112 (Ammouri (Freedom) Dep. at 147-48; PX01182 (Freedom) at 026 ("Benefits Matrix")). The benefits matrix only lists microprocessor knees. (PX05112 (Ammouri (Freedom) Dep. at 149)).

Response to Finding No. 740:

Complaint Counsel's proposed finding of fact is misleading because Freedom did not sell a non-MPK.

741. [redacted]

Response to Finding No. 741:

Complaint Counsel's proposed finding of fact is misleading because Freedom did not sell a non-MPK.

E. THE INDUSTRY VIEWS MPKS AS DISTINCT FROM MECHANICAL KNEES

1. MPKs and Mechanical Knees Have Distinct L-Codes

742. Medicare and other payers use the Healthcare Common Procedure Coding System ("HCPCS") Level II codes, commonly referred to as "L-Codes," to assign reimbursement amounts to prosthetic devices. (PX05165 (Sanders (United) Dep. at 22-23)).

Response to Finding No. 742:

Complaint Counsel's proposed finding of fact is slightly different from, but similar to, CCFF ¶ 381. Respondent incorporates its Response to CCFF ¶ 381.

743. [redacted] (Sanders (United) Tr. 5489-90 (*in camera*); PX05141 (Bright (North Bay) Dep. at 62-63)).

Response to Finding No. 743:

Complaint Counsel's proposed finding of fact is slightly different from, but similar to, CCFF ¶ 381. Respondent incorporates its Response to CCFF ¶ 381.

744. L-Codes describe the function of specific prosthetic device components. (PX05133 (Eichler (Otto Bock) Dep. at 54-56); PX05165 (Sanders (United) at 26-28)).

Response to Finding No. 744:

Complaint Counsel's proposed finding of fact is slightly different from, but similar to, CCFF ¶ 378. Respondent incorporates its Response to CCFF ¶ 378.

745. [redacted] (Kannenberg (Otto Bock) Tr. 1872; Sanders (United) Tr. 5434 (*in camera*); PX05129 (Ell (Mid-Missouri O&P) Dep. at 65); Asar (Hanger) Tr. 1382 (*in camera*)).

Response to Finding No. 745:

Complaint Counsel's proposed finding of fact is slightly different from, but similar to, CCFF ¶ 383. Respondent incorporates its Response to CCFF ¶ 383.

746. [redacted] (PX05150 (Kannenberg (Otto Bock) Dep. at 77); PX05105 (Fillauer (Fillauer) Dep. at 24); PX05129

(Ell (Mid-Missouri Orthotics & Prosthetics) Dep. at 64-65); PX05151 (Patton (Prosthetic Solutions) Dep. at 70-73); Senn (COPC) Tr. 250; De Roy (Össur) Tr. 3557-60; Sanders (United) Tr. 5491-93 (*in camera*); PX05173 (Argue (Respondent) Dep. at 134)).

Response to Finding No. 746:

Complaint Counsel's proposed finding of fact is slightly different from, but similar to, CCFF ¶ 383. Respondent incorporates its Response to CCFF ¶ 383.

747. The L-Codes commonly used for an MPK are L5856, L5828, L5845, and L5848. (*See, e.g.*, Ell (Mid-Missouri O&P) Tr. 1802-03; PX01062 (Otto Bock) at 004). All MPKs, regardless of manufacturer, qualify for reimbursement under these codes. (PX05149 (Brandt (Ability) Dep. at 54-55); PX05141 (Bright (North Bay) Dep. at 86-87); PX05134 (Oros (Scheck & Siress) Dep. at 65-66)). A clinic's acquisition cost does not impact the reimbursement that an insurer will provide for a particular MPK. (Sanders (United) Tr. 5490-92 (*in camera*)).

Response to Finding No. 747:

Complaint Counsel's proposed finding of fact is inaccurate and should be disregarded. First, of the four L-Codes listed, only L5856 applies only to MPKs. The other L-Codes listed can apply to other types of knees (such as many Sophisticated Non-MPKs), because the function described does not include a microprocessor. (*See* *https://www.dmepdac.com/resources/articles/2012/01_03_12.html*). It is also untrue that "all MPKs, regardless of manufacturer, qualify for reimbursement under these codes." Microprocessor swing-only knees and Microprocessor stance-only knees, as well as powered prosthetics, would not qualify for reimbursement under L5856. (Kannenberg, Tr. 1976, 1998-1999; s*ee also* Schneider, Tr. 4350 (discussing stance-only knees reimbursed under the base L-Code L5858 for stance-only microprocessor control, not L5856 for swing and stance microprocessor control); Mattear, Tr. 5595 (discussing a swing-only knee billed with L-Code L5857, not L5856)).

748. The base L-code designating an MPK is L5856. (Schneider (Otto Bock) Tr. 4293-94; PX05129 (Ell (Mid-Missouri O&P) Dep. at 61-62); PX05141 (Bright (North Bay) Dep. at 62-63); PX05134 (Oros (Scheck & Siress) Dep. at 102-103); Sabolich (Scott Sabolich

Prosthetics & Research) Tr. 5923). L-Code 5856 covers "Addition to lower extremity prosthesis, endoskeletal knee-shin system, microprocessor control feature, [and] swing and stance phase." (Carkhuff (Freedom) Tr. 714-15).

Response to Finding No. 748:

Complaint Counsel's proposed finding of fact is misleading. L5856 is the base code for swing-and stance microprocessor knees, and does not apply to swing-only or stance-only MPKs or to powered prosthetic devices. (Kannenberg, Tr. 1976, 1998-1999; DeRoy, Tr. 3646-3648; s*ee also* Schneider, Tr. 4350 (discussing stance-only knees reimbursed under the base L-Code L5858 for stance-only microprocessor control, not L5856 for swing and stance microprocessor control); Mattear, Tr. 5595 (discussing a swing-only knee billed with L-Code L5857, not L5856)). Further, although Genium and X3 qualify for "coverage" under L-5856, there is no additional reimbursement for these high-end knees, so essentially CMS or commercial payers do not cover them. (Kannenberg, Tr. 1959). Dr. Scott Morton's proposed market is not limited to knees reimbursable under L-5856, so this proposed finding of fact is of limited probative value.

749. L-5856 applies to the Plié 3, C-Leg 4, Rheo 3 and Orion. (PX05007 (Carkhuff (Freedom) IHT at 139-40)). In order to apply the L-5856 code, a knee "requires a microprocessor that controls both the swing and the stance." (PX05010 (Schneider (Otto Bock) IHT at 91-92)).

Response to Finding No. 749:

Complaint Counsel's proposed finding of fact is misleading. Although the evidence shows that clinics submit the Plié 3 for reimbursement under L-5856, [redacted]

[redacted]

750. Mechanical knees do not qualify for reimbursement under L5856. (PX05129 (Ell (Mid-Missouri O&P) Dep. at 64-65); PX05150 (Kannenberg (Otto Bock) Dep. at 76-77); PX05149 (Brandt (Ability) Dep. at 54-55); PX05141 (Bright (North Bay) Dep. at 168-69); PX05116 (Endrikat (Empire) Dep. at 40); PX05117 (Choi (ST&G) Dep. at 47-48)).

Response to Finding No. 750:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

751. A clinic would not be able to use an L-code for a mechanical knee with an MPK candidate because "it's against Medicare supplier standards because it doesn't adequately describe what was actually provided, so [the clinic would] be in trouble with CMS." (Ford (POA) Tr. 979-80). Mr. Ell of Mid-Missouri O&P testified that fitting a patient with a mechanical knee and claiming L code 5856 for reimbursement "would be illegal." (Ell (Mid-Missouri O&P) Tr. 1730; *see also* PX05130 (Governor (Otto Bock) Dep. at 93-94)(agreeing that

apart from committing a crime, mechanical knees cannot be reimbursed under L-Code 5856)).

Response to Finding No. 751:

Respondent incorporates its Responses to CCFF ¶¶ 748-749.

2. Other MPK Manufacturers Do Not View Mechanical Knees as Competitors

752. [redacted] (De Roy (Ossur) Tr. 3613-14 (*in camera*)).

Response to Finding No. 752:

Complaint Counsel's proposed finding of fact is misleading because it misstates the history of Össur's business. Össur was primarily a liner company before it acquired Flex Foot and Mauch. [redacted]

753. 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. (PX05124 (De Roy (Össur) Dep. at 184-85)).

Response to Finding No. 753:

Complaint Counsel's proposed finding of fact is duplicative of CCFF ¶ 530. Respondent incorporates its Response to CCFF ¶ 530.

754. [redacted]

[redacted]
(PX03245 (Ossur) at 023 (Gate 2 – Business Case Review) (*in camera*)).

Response to Finding No. 754:

Complaint Counsel's proposed finding of fact is misleading because the cited document [redacted]

755. Össur does not look at the price of mechanical knees when setting the price of its MPKs. (PX05124 (De Roy (Össur) Dep. at 184-185)).

Response to Finding No. 755:

Complaint Counsel's proposed finding of fact is misleading, because the citation is to the section of DeRoy's testimony where he indicates that MPKs are for people with access to certain funds. For the reasons stated in the Response to CCFF ¶ 530, that testimony is contrary to the record in this case.

756. Endolite's Executive Chairman, Stephen Blatchford, testified that Endolite "only look[s] at other MPKs" and not mechanical knees when analyzing competition for the Orion 3 because "the price point is completely different" and "customers don't tend to think of [the two types of knees] in the same way." (Blatchford (Endolite) Tr. 2143-44).

Response to Finding No. 756:

Complaint Counsel's proposed finding of fact is misleading, because it omits Blatchford's testimony that "customers will make a decision between whether to use a microprocessor knee or

a non-microprocessor knee," which indicates that Blatchford knows that the types of knees compete for fittings on patients (Blatchford, Tr. 2144).

757. Endolite's sales and marketing materials for the Orion 3 differentiate its MPK from its mechanical knees by highlighting the clinical benefits of MPKs and the "technical features of the knee in terms of how it works, why it works, why it's safe." (Blatchford (Endolite) Tr. 2118).

Response to Finding No. 757:

Respondent has no specific response other than that including alleged benefits of Orion 3 over non-MPKs in marketing material demonstrates that Endolite is aware that the Orion 3 competes against non-MPKs for fittings on patients.

758. [redacted] (Blatchford (Endolite) Tr. 2154-55 (*in camera*)).

Response to Finding No. 758:

Respondent has no specific response, other than that Blatchford also did not mention the Kenevo, Compact, Rheo XC, Genium, X3, or Power Knee, but Dr. Scott Morton includes those knees in her proposed relevant market.

3. Mechanical Knee Suppliers Do Not View MPKs as Competitors

759. [redacted] (De Roy (Ossur) Tr. 3603 (*in camera*)).

Response to Finding No. 759:

Respondent has no specific response, other than that DeRoy also did not mention taking into account Kenevo, Compact, Genium, or X3 in pricing decisions, but Dr. Scott Morton includes those knees in her proposed relevant product market.

760. [redacted] (Carver (College Park) Tr. 2058 (*in camera*)).

Response to Finding No. 760:

Complaint Counsel's proposed finding of fact is misleading to the extent that it suggests that the only reason a person would chose not to have an MPK is if they could not be reimbursed. Witnesses consistently testified that patients with access to MPKs from a coverage standpoint are nevertheless frequently fit with a non-MPK. (RFOF ¶¶ 392-406). Dr. Doug Smith testified that 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 agreed with this statement. (Senn, Tr. 263). Ford testified that patients, physicians, and prosthetists frequently weigh the pros and cons of a MPK versus a non-MPK. (Ford, Tr. 992-995). Ell testified that prosthetists allow patients to trial various knees, including both MPKs and non-MPKs. (Ell, Tr. 1690). Sabolich testified that choosing between an MPK and non-MPK often has no clear choice. (Sabolich, Tr. 5849-5850). Oros testified that similarly situated K-3 patients come to different decisions on whether to get an MPK or a non-MPK. (Oros, Tr. 4793). Brandt testified that if he were choosing between a non-MPK and an MPK, for most of the day he would want a non-MPK, but for some of the day, he would want an MPK. [redacted]; PX05149 (Brandt Dep. 196-197)). Vinit Asar, the CEO of Hanger, Inc., who Complaint Counsel admits sparked the investigation that lead to this litigation, stated that [redacted] Schneider and Dr. Kannenberg characterized MPK eligibility as a "ceiling" that would not prevent someone from choosing a non-MPK instead. (RFOF ¶ 448 (citing Schneider, Tr. 4405; Kannenberg, Tr. 1939)).

761. [redacted] (PX05107 (Carver (College Park) Dep. at 42-43) (*in camera*). [redacted] (PX05107 (Carver (College Park) Dep. at 74) (*in camera*). [redacted] (PX05107 (Carver (College Park) Dep. at 71) (*in camera*). [redacted] (PX05107 (Carver (College Park) Dep. at 71) (*in camera*).

Response to Finding No. 761:

Complaint Counsel's proposed finding of fact is misleading and irrelevant. The Guardian Knee is College Park's constant friction knee designed for K-1 and K-2 patients, and its comparison to MPKs is of no probative value in this case.

762. [redacted] (PX05107 (Carver (College Park) Dep. at 87) (*in camera*). [redacted] (PX05107 (Carver (College Park) Dep. at 81-82) (*in camera*). [redacted] (PX05107 (Carver (College Park) Dep. at 87) (*in camera*).

Response to Finding No. 762:

This proposed finding of fact is misleading because it treats MPKs and non-MPKs as two monolithic groups, but the clear evidence at trial indicated that there is a range of MPKs with a range of microprocessor control, that there is a range of non-MPKs at various levels of functionality, and that the industry does not divide those knees up into two distinct groups. (RFOF ¶¶ 135-249, 337). Plié 3 functions more like a non-MPK than an MPK, even though it has a microprocessor in it. Industry participants characterize the Plié 3 as a hybrid knee, which is in between an MPK and a non-MPK. [redacted]; Schneider, Tr. 4324, 4351;

Kannenberg, Tr. 1880-1881). The evidence shows that Plié 3 lacks the attributes that Carver ascribes to MPKs in this proposed finding of fact, and in fact is more similar to Carver's description of a non-MPK. The Plié 3 also requires manual adjustments and can only rely on the microprocessor to switch between two pre-set levels of resistance. (Carkhuff, Tr. 335; [redacted]). Similar to Carver's description of a non-MPK, Plié 3 users must rely on a manual, pre-set level of resistance and must visit a prosthetist office if they would like to have this setting changed. [redacted]; Schneider, Tr. 4311; Kannenberg, Tr. 1953).

763. [redacted] (PX03025 (College Park) at 002 (*in camera*); PX05107 (Carver (College Park) Dep. at 96-97) [redacted] (*in camera*).

Response to Finding No. 763:

Respondent incorporates its response to CCFF ¶ 762.

764. [redacted] (PX03030 (College Park) at 003 (*in camera*); *see also* PX05107 (Carver (College Park) Dep. at 87) (*in camera*)). [redacted] (PX05107 (Carver (College Park) Dep. at 105-106) (*in camera*). [redacted] (PX05107 (Carver (College Park) Dep. at 105-106) (*in camera*)).

Response to Finding No. 764:

Respondent incorporates its response to CCFF ¶ 762.

765. [redacted] (PX05105 (Fillauer (Fillauer) Dep. at 24-25)). [redacted]

[redacted]
(PX05105 (Fillauer (Fillauer) Dep. at 24-25)).

Response to Finding No. 765:

Respondent has no specific response.

766. Cascade, a distributor of mechanical knees, also testified that the microprocessor knee category is distinct from the mechanical knee category. (PX05120 (Collins (Cascade) Dep. at 50).

Response to Finding No. 766:

Respondent has no specific response, other than to note that Collins uses language like "category" repeatedly throughout his deposition testimony. It is clear that he does not believe that MPKs comprise a wholly different market than non-MPKs.

F. THE HYPOTHETICAL MONOPOLIST TEST SHOWS THAT THE SALE OF MPKS TO PROSTHETIC CLINICS IS A RELEVANT MARKET

767. Complaint Counsel's economic expert, Dr. Scott Morton, concluded that the appropriate relevant market in which to analyze the likely competitive effects of the acquisition is the manufacture and sale of microprocessor prosthetic knees to prosthetic clinics in the United States. (PX06001A at 6, 45-46, 58 (¶¶ 12, 52, 77) (Scott Morton Report)).

Response to Finding No. 767:

Complaint Counsel's proposed finding of fact is misleading, because Dr. Scott Morton fails to define any market at all. She cannot explain the contours of her market given that she has no definition of a microprocessor knee, other than all knees that contain a microprocessor. (Morton, Tr. 3983-3984). Dr. Scott Morton primarily points to performance differences as a reason to exclude knees that do not contain microprocessors, but Dr. Scott Morton was unable to describe those differences at trial. (Morton, Tr. 3999). In addition, Dr. Scott Morton admits that there are performance differences among MPKs, but she nevertheless included all knees that contain microprocessors in her market. (Morton, Tr. 3992). Further, Dr. Scott Morton was unable to

explain why integrated leg systems, which *do* contain microprocessor knees, were *not* in her market. (Morton, Tr. 3995). This market has no basis in reality, has no grounding in economics, and is legally insufficient, given that it is at once too broad and too narrow. (*See* Responses to CCFF ¶¶ 767-794).

768. Dr. Scott Morton's analysis of the industry led her to conclude that microprocessor knees are distinguished from mechanical knees by many features, including price, safety, performance, and functionality. (PX06001A at 14-19, 42-46 (¶¶ 21-25, 50-52) (Scott Morton Report)).

Response to Finding No. 768:

Complaint Counsel's proposed finding of fact is misleading. Dr. Scott Morton may have stated that in her report, but when on the witness stand, she was unable to provide any information regarding the differences in safety, performance, and functionality between MPKs and non-MPKs. (Morton, Tr. 3998).

769. [redacted] (PX06001A at 45-46, 54, 58 (¶¶ 52, 68, 77) (Scott Morton Report); Scott Morton Tr. 3862, 3905-06 (*in camera*)).

Response to Finding No. 769:

Complaint Counsel's proposed finding of fact is misleading, because Dr. Scott Morton fails to define any market at all. She cannot explain the contours of her market given that she has no definition of a microprocessor knee, other than all knees that contain a microprocessor. (Morton, Tr. 3983-3984). Dr. Scott Morton primarily points to performance differences as a reason to exclude knees that do not contain microprocessors, but Dr. Scott Morton was unable to describe those differences at trial. (Morton, Tr. 3999). In addition, Dr. Scott Morton admits that there are performance differences among MPKs, but she nevertheless included all knees that contain microprocessors in her market. (Morton, Tr. 3992). Further, Dr. Scott Morton was unable to

explain why integrated leg systems, which *do* contain microprocessor knees, were *not* in her market. (Morton, Tr. 3995). This market has no basis in reality, has no grounding in economics, and is legally insufficient, given that it is at once too broad and too narrow. (*See* Responses to CCFF ¶¶ 767-794).

770. Dr. Scott Morton based her product market findings on the analytical framework in the U.S. Department of Justice & Federal Trade Commission Horizontal Merger Guidelines (2010) ("Merger Guidelines") and she conducted a Hypothetical Monopolist Test. (PX06001A at 54-58 (¶¶ 69-77) (Scott Morton Report)).

Response to Finding No. 770:

Respondent admits that Dr. Scott Morton cited the guidelines, but denies that she applied them properly. *See* Responses to CCFF ¶¶ 774-792.

771. The Merger Guidelines provide that "[t]he hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ('hypothetical monopolist') 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." (PX08040 at 012 (§ 4.1.1) (Merger Guidelines)).

Response to Finding No. 771:

Respondent has no specific response.

772. The Merger Guidelines provide that "[w]hen the necessary data are available, the Agencies also may consider a 'critical loss analysis.'" The Merger Guidelines describe this analysis as "ask[ing] whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits." Further, the Merger Guidelines explain, "A price increase raises profits on sales made at the higher price, but this will be offset to the extent customers substitute away from products in the candidate market." (PX08040 at 015 (§ 4.1.3) (Merger Guidelines)).

Response to Finding No. 772:

Respondent has no specific response.

773. In the "critical loss analysis," the Merger Guidelines define a "critical loss" as "the number of lost unit sales that would leave profits unchanged." A "predicted loss" is defined as "the number of unit sales that the hypothetical monopolist is predicted to lose due to the price increase." Using these calculations, "[t]he price increase raises the hypothetical monopolist's profits if the predicted loss is less than the critical loss." (PX08040 at 015 (§ 4.1.3) (Merger Guidelines)).

Response to Finding No. 773:

Respondent has no specific response.

1. Dr. Scott Morton's Critical Loss Analysis Demonstrates MPKs Constitute a Relevant Market

774. Dr. Scott Morton uses the critical loss analysis as described in the Merger Guidelines to "test if it would be profitable for a hypothetical monopolist to impose a SSNIP on a candidate market limited to the microprocessor knees sold in the United States by Freedom and Otto Bock." (PX06001A at 74-75(¶ 93) (Scott Morton Report)). If it is profitable for the two firms to raise prices, then that candidate market is a relevant antitrust market. (PX06001A at 74-75 (¶ 93) (Scott Morton Report)).

Response to Finding No. 774:

Complaint Counsel's proposed finding of fact is misleading and is the product of flawed expert analysis. Dr. Scott Morton uses a flawed economic approach to conclude that Ottobock and Freedom MPKs constitute their own relevant product market. [redacted] The Lerner Condition has been thoroughly criticized in the economic literature, including in articles by FTC chairman Mr. Joseph Simons, as "resulting in extremely narrow markets" consisting of "only the two merging firms" (RFOF ¶ 541). Indeed, Mr. Simons has criticized that "virtually all unilateral effects models utilizing the Lerner Condition produce price increases for any horizontal merger." Because every merger is predicted to raise prices under this analysis, Simons has stated that the method that Dr. Scott Morton has used "has no empirical support and would face serious *Daubert* issues if used in court." (RFOF ¶ 542).

775. Dr. Scott Morton performs two separate critical loss tests, a symmetric critical loss test and an asymmetric critical loss test. (PX06001A at 75-79 (¶¶ 96-105) (Scott Morton Report)).

Response to Finding No. 775:

Respondent has no specific response.

776. Dr. Scott Morton performs an asymmetric critical loss test, which "assumes that each firm in the market sells a single product, but allows the prices and margins of those products to differ" and "evaluates the profitability of increasing the price of only one product in the candidate market, rather than all products." (PX06001A at 75 (¶ 96) (Scott Morton Report)).

Response to Finding No. 776:

Respondent has no specific response.

777. To perform the asymmetric critical loss test, Dr. Scott Morton uses Respondent's own margin data and diversion analysis. (PX06001A at 75-77 (¶¶ 96-100) (Scott Morton Report)).

Response to Finding No. 777:

Complaint Counsel's proposed finding of fact is misleading and largely duplicative of CCFF ¶¶ 778-779. Respondent incorporates its responses to CCFF ¶¶ 778-779.

778. [redacted] (PX06001A at 77-78 (¶100 n.193) (Morton Expert Report) (*in camera*)).

Response to Finding No. 778:

Respondent has no specific response.

779. Dr. Scott Morton uses a diversion rate of [redacted] in her asymmetric critical loss analysis, calculated using Respondent's own diversion analysis. (PX06001A at 77-78 (¶100 n.195) (Morton Expert Report) (*in camera*)).

Response to Finding No. 779:

Complaint Counsel's proposed finding of fact should be rejected because it is entirely inaccurate. Ottobock and Freedom did not perform a "diversion analysis." Respondent incorporates its Response to CCFF ¶ 783, below.

780. Respondent's expert witness, Dr. David Argue, testified that he and Dr. Scott Morton used "very similar margins" in their critical loss analyses. (Argue, Tr. 6171).

Response to Finding No. 780:

Respondent has no specific response.

781. [redacted] (RX-1049 at 21-23 (¶¶ 37-39) (Argue Expert Report); *see also* Argue, Tr. 6284-85, 6292 (*in camera*)).

Response to Finding No. 781:

Respondent has no specific response.

782. Dr. Argue uses a diversion rate of [redacted] in his symmetric critical loss analysis. (RX-1049 at 096 (¶214) (Argue Expert Report) (*in camera*)).

Response to Finding No. 782:

Complaint Counsel's proposed finding of fact is false and must be rejected by the Court. The cited section of Dr. Ague's report is a section in which Dr. Argue uses Dr. Scott Morton's numbers and formulae to make a point regarding Hanger's presence as a powerful influence in the prosthetics market. Using this citation to claim that Dr. Argue uses a [redacted] diversion rate in "his" analysis is a gross mischaracterization, and is irresponsible behavior by Complaint Counsel, given that it is clearly contradicted by Dr. Argue's report and trial testimony (RX-1049 at 96, ¶ 214; [redacted]).

783. [redacted]

Response to Finding No. 783:

Complaint Counsel's proposed finding of fact is extraordinarily misleading, as in reality, Dr. Scott Morton used just *one* document to conduct her diversion analysis. This document, PX01003, was in *draft* form, and is not sufficiently reliable to form the basis of the key portion of Dr. Scott Morton's expert analysis. Contrary to Complaint Counsel's framing in their Opening Statement to this Trial, Dr. Scott Morton applied no "economic rigor" to the numbers that she hand-picked from one piece of a draft document. (Complaint Counsel Opening Statement, Tr. 43). Compounding this issue, and highlighting Complaint Counsel's repeated reliance on cherry-picked evidence is that to "verify" the contents of PX01003, Complaint Counsel chooses to rely on the testimony of a disgruntled former executive, Matthew Swiggum, who was not particularly engaged in the Acquisition (Schneider, Tr. 4408), rather than the testimony of the author of this document, Alex Gück. [redacted] Gück testified that "[t]his document is a draft which summarizes the results of the due diligence. It also contains preliminary considerations as to integration, and considerations made back then as to the evaluation of Freedom Innovations." (PX05131 (Gück, Dep. at 104)).

784. [redacted] (Scott Morton Tr. 3882 (*in camera*)).

Response to Finding No. 784:

Respondent has no specific response.

785. [redacted] (Scott Morton Tr. 3882 (*in camera*)).

Response to Finding No. 785:

Complaint Counsel's proposed finding of fact is extraordinarily misleading, as in reality, Dr. Scott Morton used just *one* document to conduct her diversion analysis. This document, PX01003, was in *draft* form, and is not sufficiently reliable to form the basis of the key portion of Dr. Scott Morton's expert analysis. Contrary to Complaint Counsel's framing in their Opening Statement to this Trial, Dr. Scott Morton applied no "economic rigor" to the numbers that she hand-picked from one piece of a draft document. (Complaint Counsel Opening Statement, Tr. 43). Compounding this issue, and highlighting Complaint Counsel's repeated reliance on cherry-picked evidence is that to "verify" the contents of PX01003, Complaint Counsel chooses to rely on the testimony of a disgruntled former executive, Matthew Swiggum, who was not particularly engaged in the Acquisition (Schneider, Tr. 4408), rather than the testimony of the author of this document, Alex Gück. [redacted] Gück testified that "[t]his document is a draft which summarizes the results of the due diligence. It also contains preliminary considerations as to integration, and considerations made back then as to the evaluation of Freedom Innovations." (PX05131 (Gück, Dep. at 104)).

786. [redacted] (Scott Morton Tr. 3883-84 (*in camera*)).

Response to Finding No. 786:

Complaint Counsel's proposed finding of fact is extraordinarily misleading, for the reasons described in the Response to CCFF ¶ 783. The document that Complaint Counsel cites in this Proposed finding of fact, PX01473 is really just another version of PX01003, discussed at length in the Response to CCFF ¶ 783.

787. Dr. Scott Morton performs a symmetric critical loss test, which assumes "that each firm in the candidate market has a single product with the same price and marginal cost" and "that the hypothetical monopolist imposes a [small but significant price increase] on all products in the candidate market." (PX06001A at 79 (¶ 101) (Scott Morton Report)).

Response to Finding No. 787:

Respondent has no specific response.

788. Dr. Scott Morton uses an aggregate diversion rate of [redacted] in her symmetric critical loss analysis. (PX06001A at 80 (¶ 104) (Morton Expert Report) (*in camera*)).

Response to Finding No. 788:

Respondent has no specific response to the fact that Dr. Scott Morton uses that diversion rate, but incorporates its Responses to CCFF ¶¶ 783, 785 as to why that diversion rate is wrong and lacks support in the record.

789. Dr. Scott Morton uses a percentage margin of [redacted] in her symmetric critical loss analysis, calculated using data produced by Respondent. (PX06001A at 80 (¶ 104) (Morton Expert Report) (*in camera*)).

Response to Finding No. 789:

Respondent has no specific response.

790. [redacted] (PX06001A at 76-77(¶ 100) (Scott Morton Report)); Scott Morton Tr. 3892-96 (*in camera*)).

Response to Finding No. 790:

Respondent incorporates its response to CCFF ¶ 767. Further, this proposed finding is inaccurate as stated, because in reality [redacted]

791. [redacted] (PX06001A at 80 (¶ 104) (Scott Morton Report); Scott Morton Tr. 3897-98 (*in camera*)).

Response to Finding No. 791:

Respondent incorporates its response to CCFF ¶ 767. Further, this proposed finding is inaccurate as stated, because in reality [redacted]

792. Dr. Scott Morton confirms that if the narrow candidate market of Otto Bock's C-Leg 4 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 antitrust market." (PX06001A at 74-75, 82 (¶¶ 93, 109) (Scott Morton Report)) (concluding that "if it is profitable for a hypothetical monopolist to impose a SSNIP in the narrow market, then it is profitable for a hypothetical monopolist to impose a SNIP in the wider market as well.")).

Response to Finding No. 792:

Complaint Counsel's proposed finding of fact is misleading because Dr. Scott Morton's conclusion is unsupported by economic analysis and is unsupported by the record. Once she uses a flawed economic approach to arrive at the conclusion that [redacted]

793. Even though Dr. Scott Morton performs both the symmetric and asymmetric critical loss tests to evaluate the product market in this case, Dr. Scott Morton confirms that the most appropriate critical loss test to apply in this matter is the asymmetrical critical loss test because it assumes "that each firm in the market sells a single product, but allows the prices and margins of those products to differ." (PX06001A at 75 (¶ 96) (Scott Morton Report); PX06003 at 8-9 (¶ 12) (Scott Morton Rebuttal Report)).

Response to Finding No. 793:

Respondent has no specific response.

794. [redacted] (Argue, Tr. 6293 (*in camera*)).

Response to Finding No. 794:

Respondent has no specific response, other than to note that Dr. Scott Morton's errors are much more serious than arithmetic errors.

2. Qualitative Evidence Confirms that Customers Would Not Switch to Mechanical Knees if Faced with a 5-10% Increase in the Price of MPKs

a) Clinic Customers Testified They Would Not Switch to Mechanical Knees in Response to an MPK SSNIP

795. [redacted] (*See* PX05149 (Brandt (Ability Prosthetics & Orthotics) Dep. at 68) (*in camera*); PX05168 (Sprinkle (Sprinkle Prosthetics) Dep. at 49); PX05004 (Senn (Center for O&P) IHT at 21); PX05108 (Yates (Jonesboro) Dep. at 56-57) (*in camera*)).

Response to Finding No. 795:

Complaint Counsel's proposed finding of fact is misleading. Brandt was asked only if he would switch patients from MPKs to non-MPKs given a 5% increase. (PX05149 (Brandt, Dep. at 68). Sprinkle testified that he only fits a knee if he is making money on it. (PX05168 (Sprinkle, Dep. at 127). Senn is incompetent to testify about knee selection, as described in Response to CCFF ¶ 652. Yates testified, as recognized by Complaint Counsel in CCFF ¶ 796, that [redacted] Given that the critical loss applicable here is only 6%, and the clinics cited here only fit a handful of MPKs per year, it is not necessary for a large volume of patients to be switched from an MPK to non-MPK in order to defeat a price increase on MPKs. (RFOF ¶ 436). Several clinics indicated that they would look to non-MPKs in the face of a price increase. (RFOF ¶ 425).

796. [redacted] (PX05108 (Yates (Jonesboro) Dep. at 54-55) (*in camera*)). [redacted] (PX05108 (Yates (Jonesboro) Dep. at 56) (*in camera*)).

Response to Finding No. 796:

Respondent has no specific response, other than given that the critical loss applicable here is only 6%, and Jonesboro fits only a handful of MPKs per year, it is not necessary for a large

volume of patients to be switched from an MPK to non-MPK in order to defeat a price increase on MPKs. (RFOF ¶ 436).

797. [redacted] (PX05149 (Brandt (Ability Prosthetics and Orthotics) Dep. at 68) (*in camera*)).

Response to Finding No. 797:

Respondent has no specific response.

798. [redacted] (PX05149 (Brandt (Ability Prosthetics and Orthotics) Dep. at 206) (*in camera*)). [redacted] (PX05149 (Brandt (Ability Prosthetics and Orthotics) Dep. at 47) (*in camera*)).

Response to Finding No. 798:

Respondent has no specific response.

799. According to Keith Senn, the President of Kentucky/Indiana Operations at the Center for Orthotic and Prosthetic Care, his clinics would not begin recommending more non-microprocessor mechanical knees if the priced charged by manufacturers for MPKs increased by 5 to 10 percent. (PX05004 (Senn (COPC) IHT at 21)).

Response to Finding No. 799:

Complaint Counsel's proposed finding of fact should be rejected because Keith Senn is not competent to testify on prosthetic component selection for the reasons described in Response to CCFF ¶ 652.

800. Jeff Sprinkle, the co-owner of Sprinkle Prosthetics, testified in April 2018 that he would typically not switch a patient who would otherwise medically benefit from an MPK and whose insurance provided coverage for an MPK to a mechanical knee if the cost that Sprinkle Prosthetics pays for an MPK were to rise by 5 to 10 percent. (PX05168 (Sprinkle (Sprinkle Prosthetics) Dep. at 48-49)). He testified that at the time of his deposition, in

April 2018, Sprinkle Prosthetics paid $18,159 for the C-Leg and $16,447 for the Plié. (PX05168 (Sprinkle (Sprinkle Prosthetics) Dep. at 56-57)).

Response to Finding No. 800:

Complaint Counsel's proposed finding of fact is incomplete, because later in his deposition Sprinkle testified that he only fits a knee if he is making money on it. (PX05168 (Sprinkle Dep. at 127)).

801. **Paul Weott, the owner of Orthotic and Prosthetic Centers, testified that he does not believe he would start looking for other alternatives to a Plié if the price for the MPK were to rise by $1,000.** (PX05140 (Weott (Orthotic and Prosthetic Centers) Dep. at 117-18)).

Response to Finding No. 801:

Complaint Counsel's proposed finding of fact is incomplete, because Weott also testified at his deposition that he believes that the Plié is appropriate for a distinct patient population, which is a different patient population than the C-Leg's target group. (PX05140 (Weott, Dep. at 116-117)).

b) Respondent's Ordinary Course Analyses Are Consistent with the Conclusions of Dr. Scott Morton's Hypothetical Monopolist Test

802. The Merger Guidelines provide that "[t]he hypothetical monopolist's incentive to raise prices depends both on the extent to which customers would likely substitute away from the products in the candidate market in response to such a price increase and on the profit margins earned on those products." (PX08040 at 014 (§ 4.1.3) (Merger Guidelines)).

Response to Finding No. 802:

Respondent has no specific response.

803. [redacted] (PX01091 (Otto Bock) at 004 (*in camera*)).

[redacted] (Schneider (Otto Bock) Tr. 4453, 4583-84 (*in camera*)).

Response to Finding No. 803:

Complaint Counsel's proposed finding is misleading. The characterization of the statement is misleading to the extent it is claiming that the quoted language in the first sentence relates to the Plié 3. [redacted]

804. [redacted] (Swiggum (Otto Bock) Tr. 3421-23 (*in camera*); PX01302 (Otto Bock) at 081 (*in camera*); PX01462 (Otto Bock) at 002 (*in camera*); PX05148 (Swiggum (Otto Bock) Dep. at 193-95) (*in camera*)). [redacted] (PX01302 (Otto Bock) at 081 (*in camera*); PX05148 (Swiggum (Otto Bock) Dep. at 175-176) (*in camera*)). [redacted] (PX01302 (Otto Bock) at 081 (*in camera*)).

Response to Finding No. 804:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

[redacted], 1065-1066 (testifying that neither POA nor any other clinic that Ford is aware of has been impacted by the Acquisition); Sabolich, Tr. 5866-5867; [redacted]). [redacted]

805. A SSNIP on a Plié being profitable for a hypothetical monopolist of all MPKs is consistent with the trial testimony of Matthew Swiggum, Otto Bock's CEO at the time of the Merger. [redacted] (Swiggum (Otto Bock) Tr. 3421-3423 (*in camera*)); (PX05148 (Swiggum (Otto Bock) Dep. at194-95) (*in camera*)). [redacted] (Swiggum (Otto Bock) Tr. 3356 (*in camera*)).

Response to Finding No. 805:

Complaint Counsel's proposed finding is misleading and inaccurate. [redacted]

806. [redacted]

[redacted] (PX01473 (Otto Bock) at 010 (*in camera*); (Swiggum (Otto Bock) Tr. 3376-380 (*in camera*)). [redacted] (PX01473 (Otto Bock) at 023 (*in camera*)). [redacted] (PX01473 (Otto Bock) at 023 (*in camera*)). [redacted] PX01473 (Otto Bock) at 023 (*in* camera)). [redacted] (PX05148 (Swiggum (Otto Bock) Dep. at 113-14) (*in camera*)). [redacted] (PX05148 (Swiggum (Otto Bock) Dep. at 113-14)).

Response to Finding No. 806:

Complaint Counsel's proposed finding is inaccurate and unreliable. [redacted]

3. A SSNIP by a Hypothetical Monopolist of MPKs Would Not Cause Clinics to Lose Money Fitting Lower-Limb Prostheses with MPKs on Patients

a) Clinics Fit MPKs on Patients When it is Medically Appropriate and the Clinic Can Earn a Profit on the Lower-Limb Prosthesis

807. [redacted] (PX05153B (Asar (Hanger) Dep. at 33, 57-58 (*in camera*)); PX05124 (De Roy (Ossur) Dep. at 133) (*in camera*)); PX05138 (Reissfelder (Freedom) Dep. at 69-70); PX05105 (Fillauer (Fillauer) Dep. at 24) (*in camera*)).

Response to Finding No. 807:

Complaint Counsel's proposed finding of fact is misleading, because only one of these cited witnesses (Fillauer) is a certified prosthetist, and Fillauer does not work for a clinic. Further, this cited testimony is comprised entirely of deposition testimony and ignores the testimony from 12 weeks of trial. The evidence clearly shows that there are several factors that go into selecting a non-MPK or an MPK for each patient, which includes clinical information, patient preference, and finances. (*See* RFOF ¶¶ 129, 392-495).

808. Clinics often must demonstrate the "medical necessity" of an MPK to insurance providers in order to receive reimbursement for the provision of an MPK. (See CCFF ¶¶ 496-498, above).

Response to Finding No. 808:

Complaint Counsel's proposed finding of fact is misleading for the reasons detailed in Responses to CCFF ¶¶ 496-498.

809. **Prosthetists and clinic executives testified that safety is the primary concern when deciding which prosthetic knee to fit on a patient.** (*See, e.g.,* PX05168 (Sprinkle (Sprinkle Prosthetics) Dep. at 26-27); PX05108 (Yates (Jonesboro) Dep. at 46); PX05138 (Reissfelder (Freedom) Dep. at 69-70)).

Response to Finding No. 809:

Complaint Counsel's proposed finding of fact is misleading because the evidence shows that clinics make decisions weighing several different inputs, as described in RFOF ¶¶ 129, 392-495.

810. Jeff Sprinkle, the co-owner of Sprinkle Prosthetics, testified that his clinic's primarily goal for each patient is patient safety and the enabling of patients to perform certain activities. He elaborated that, so long as the clinic is making money, his clinic will fit what is best for the patient. (PX05168 (Sprinkle (Sprinkle Prosthetics) Dep. at 162-63)).

Response to Finding No. 810:

Respondent has no specific response, except to note that this testimony from Sprinkle is consistent with Dr. Argue's model of clinic profitability. Sprinkle also testified that non-MPK fluid-controlled knee is an "excellent alternative" and "good substitute" for an MPK. (PX05168 (Sprinkle, Dep. at 39)).

811. [redacted] (Brandt (Ability Prosthetics and Orthotics) Tr. 3786 (*in camera*)).

Response to Finding No. 811:

Complaint Counsel's proposed finding of fact should not be adopted by the court, because this cited testimony from Brandt is not credible. [redacted]

Further Brandt's demeanor on the stand also made him less credible, as he was extremely "forgetful" and had to be shown his *own deposition* several times to "refresh his recollection." (Brandt, Tr. 3759-3760, 3765, 3773-3774).

812. Mark Ford, President and Managing Partner of Prosthetic and Orthotic Associates, testified that a prosthetist "is a medical professional who has been trained in providing prosthetic devices and prosthetic patient care services to patients living with limb loss." He further elaborated that a prosthetist's job "is to determine the needs of the patient and then to help design and create a prosthetic device that will be suitable for the patient, comfortable for the patient and allow the patient to get back to their activities of daily living." (PX05145 (Ford (POA) Dep. at 23-24)).

Response to Finding No. 812:

Respondent has no specific response.

813. Mr. Ford also testified that, "[d]ifferent patients need different function out of their devices." He explained further that prosthetists at POA are "looking at what the patient's past history is, what their medical history is, and all of that - - all of those different variables go into the decision-making process that the clinician goes through, so there's a lot of discussion back and forth about what those are." Ultimately, with respect to MPKs, POA is "[t]rying to find the right product to match up with the right patient." (Ford (POA) Tr. 925).

Response to Finding No. 813:

Complaint Counsel's proposed finding of fact should not be adopted, because Ford is not competent to testify regarding prosthetic component selection for the reasons stated in Response to CCFF ¶ 654.

b) Clinics Have an Ethical Obligation to Fit Patients with Only Medically Appropriate Prostheses

814. [redacted] (PX05149 (Brandt (Ability Prosthetics and Orthotics) Dep. at 213-15 (*in camera*)); PX05129 (Ell (Mid-Missouri Orthotics & Prosthetics) Dep. at 141, 154-55); PX05119 (Kahle (Prosthetic Design & Research) Dep. at 66-67)).

Response to Finding No. 814:

Complaint Counsel's proposed finding of fact is misleading. Prosthetists have certain ethical obligations, but there is significant evidence in the record that finances play a significant role in the decision to fit particular components as part of a prosthetic device. (RFOF ¶¶ 407-419). Furthermore, what Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can provide to a patient. (RFOF ¶ 454, 456, 349). These additional functional benefits come with some drawbacks – which go into the prosthetist and patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs) RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)). In addition, "medical necessity" for an MPK can be established for most any K-3 patient. (RFOF ¶ 457 (citing Sabolich, Tr. 5855;

Oros, Tr. 4801). There is frequently no clear choice between an MPK and non-MPK. (RFOF ¶ 449 (citing [redacted]; Schneider, Tr. 4405; [redacted]))

815. Jim Weber, the President and CEO of Prosthetic & Orthotic Care, testified that ethics is "a fundamental requirement of [his] business." (PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 137-38). He further elaborated, "it's kind of the nature of what we do, we provide the best outcome and so I expect full, you know, quality of ethics from our practitioner's standpoint." (PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 137-38)). When asked whether a prosthetist would have an ethical duty to provide an MPK to a patient who the prosthetist had determined qualified for an MPK and the MPK was medically best, Mr. Weber explained, "I guess if there was an ethical reason for them not to provide it, I would be really curious to know what that would be." (PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 137-38)).

Response to Finding No. 815:

Complaint Counsel's proposed finding of fact is misleading. Prosthetists have certain ethical obligations, but there is significant evidence in the record that finances play a significant role in the decision to fit particular components as part of a prosthetic device. (RFOF ¶¶ 407-419). Furthermore, what Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can provide to a patient. (RFOF ¶ 454, 456, 349). These additional functional benefits come with some drawbacks – which go into the prosthetist and patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs) RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)). In addition, "medical necessity" for an MPK can be established for most any K-3 patient. (RFOF ¶ 457 (citing Sabolich, Tr. 5855; Oros, Tr. 4801). There is frequently no clear choice between an MPK and non-MPK. (RFOF ¶ 449 (citing [redacted]; Schneider, Tr. 4405; [redacted])).

816. **Robert Yates, the President and CEO of Jonesboro Prosthetic & Orthotic Laboratory, described the ethical requirements pertaining to the prosthetists' duties to patients as "[i]n general, our obligation to the patient is to treat them in the most appropriate manner, to maintain their best interests at the forefront of our activities, to not partake in practices that would be a breach of our trust with them and, in the event that we're not qualified to provide the care that they need, to direct them to**

other providers who are." (PX05108 (Yates (Jonesboro) Dept. at 85)). With respect to fitting prosthetic knees, Mr. Yates agreed that these ethical obligations cover recommending prosthetic devices for patients that he believes are suitable for a patient's medical needs. (PX05108 (Yates (Jonesboro) Dep. at 86))).

Response to Finding No. 816:

Complaint Counsel's proposed finding of fact is misleading. Prosthetists have certain ethical obligations, but there is significant evidence in the record that finances play a significant role in the decision to fit particular components as part of a prosthetic device. (RFOF ¶¶ 407-419). Furthermore, what Complaint Counsel attempts to frame as a "necessity" really is just an additional functional benefit that an MPK can provide to a patient. (RFOF ¶ 454, 456, 349). These additional functional benefits come with some drawbacks – which go into the prosthetist and patient's calculus as to which knee to choose. (RFOF ¶ 347 (advantages to non-MPKs) RFOF ¶ 349 (prosthetists explain features and drawbacks of each knee)). In addition, "medical necessity" for an MPK can be established for most any K-3 patient. (RFOF ¶ 457 (citing Sabolich, Tr. 5855; Oros, Tr. 4801). There is frequently no clear choice between an MPK and non-MPK. (RFOF ¶ 449 (citing [redacted]; Schneider, Tr. 4405; [redacted])).

c) Clinics Currently Fit Lower-Limb Prostheses with MPKs Profitably

817. [redacted] (Senn (COPC) Tr. 277 (*in camera*)). [redacted] (Senn (COPC) Tr. 222-23 (*in camera*)).

Response to Finding No. 817:

Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel states that [redacted] Clinics' margin between reimbursement and

component cost is not "profit" but rather reflects payments intended to cover all non-billable costs, inclusive of overhead. (PX05141 (Bright, Dep. at 182); PX05129 (Ell, Dep. at 125); PX05129 (Sprinkle, Dep. 56); PX05135 (Weber, Dep. 44); PX05108 (Yates, Dep. 75-77)) Moreover, Senn makes no distinction between margin on commercially insured patients and margin on Medicare patients which are typically very different.

818. **Robert Yates, the President and CEO of Jonesboro Prosthetic & Orthotic Laboratory, testified that his clinic profits off the fitting of an MPK. When asked, he responded "Yes. I think so. I hope so."** (PX05108 (Yates (Jonesboro) Dep. at 54-55)). [redacted] (PX05108 (Yates (Jonesboro) Dep. at 52-55) (*in camera*)).

Response to Finding No. 818:

Complaint Counsel's proposed finding of fact should not be credited, because Yates did not testify about this with confidence. Yates stated that he "hopes" he profits off of fitting MPKs, but did not have specific data to back this up. (PX05108 (Yates, Dep. at 54-55)). Further, it was clear from Yates' testimony that for some insurers, he receives very unfavorable reimbursement. Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel states that [redacted] Clinics' margin between reimbursement and component cost is not "profit" but rather reflects payments intended to cover all non-billable costs, inclusive of overhead. (PX05141 (Bright, Dep. at 182); PX05129 (Ell, Dep. at 125); PX05129 (Sprinkle, Dep. 56); PX05135 (Weber, Dep. 44); PX05108 (Yates, Dep. 75-77)) Moreover, Yates makes no distinction between margin on commercially insured patients and margin on Medicare patients which are typically very different.

819. [redacted] (Brandt (Ability Prosthetics and Orthotics) Tr. 3779 (*in camera*)). [redacted] (Brandt (Ability Prosthetic and Orthotics) Tr. 3770-71 (*in camera*)). [redacted]

Response to Finding No. 819:

Complaint Counsel's proposed finding of fact is misleading. Jeff Brandt was not a credible witness at trial, and as a result, this proposed finding of fact should not be adopted by the Court. In addition, the evidence showed that at times, [redacted] Clinics' margin between reimbursement and component cost is not "profit" but rather reflects payments intended to cover all non-billable costs, inclusive of overhead. (PX05141 (Bright, Dep. at 182); PX05129 (Ell, Dep. at 125); PX05129 (Sprinkle, Dep. 56); PX05135 (Weber, Dep. 44); PX05108 (Yates, Dep. 75-77)) Moreover, Brandt makes no distinction between margin on commercially insured patients and margin on Medicare patients which are typically very different.

820. [redacted] (Asar (Hanger) Tr. 1382 (*in camera*)). [redacted] (Asar (Hanger) Tr. 1383 (*in camera*)). [redacted] (Asar (Hanger) Tr. 1382-83 (*in camera*)).

Response to Finding No. 820:

Complaint Counsel's proposed finding of fact is misleading. Clinics' margin between reimbursement and component cost is not "profit" but rather reflects payments intended to cover all non-billable costs, inclusive of overhead. (PX05141 (Bright, Dep. at 182); PX05129 (Ell, Dep. at 125); PX05129 (Sprinkle, Dep. 56); PX05135 (Weber, Dep. 44); PX05108 (Yates, Dep. 75-77)) Moreover, Asar makes no distinction between margin on commercially insured patients and margin on Medicare patients which are typically very different.

821. [redacted] (Ell (Mid-Missouri O&P) Tr. 1744 (*in camera*)). [redacted] (Ell (Mid-Missouri O&P) Tr. 1746 (*in camera*)). [redacted] (PX05129 (Ell (Mid-Missouri O&P) Dep. at 69-70) (*in camera*)). [redacted]

Response to Finding No. 821:

Complaint Counsel's proposed finding of fact is misleading. Clinics' margin between reimbursement and component cost is not "profit" but rather reflects payments intended to cover all non-billable costs, inclusive of overhead. (PX05141 (Bright, Dep. at 182); PX05129 (Ell, Dep. at 125); PX05129 (Sprinkle, Dep. 56); PX05135 (Weber, Dep. 44); PX05108 (Yates, Dep. 75-77)) Moreover, Ell makes no distinction between margin on commercially insured patients and margin on Medicare patients which are typically very different.

d) In the Past, when MPK Prices Were Higher for Certain Clinics, They Fit Lower-Limb Prostheses with MPKs Profitably

822. [redacted]

[redacted] (Brandt (Ability Prosthetics and Orthotics) Tr. 3785 (*in camera*)). Mr. Brandt testified that the price Ability Prosthetics and Orthotics currently pays for the C-Leg is $15,799. (Brandt (Ability Prosthetics and Orthotics) Tr. 3770-71 (*in camera*)).

Response to Finding No. 822:

Complaint Counsel's proposed finding of fact should not be adopted, because it is based on faulty assumptions about costs that have changed. For example, in order for this to be probative, Ability's costs must have stayed constant and not risen since it first began fitting C-Legs. In addition, Brandt was not a credible witness at trial, particularly regarding the prices that he has paid for various prosthetic components.

823. [redacted] (Sabolich (Scott Sabolich Prosthetics and Research) Tr. 5879-80 (*in camera*)).

Response to Finding No. 823:

Complaint Counsel's proposed finding of fact is misleading because it is based on supported assumptions about costs. For example, Sabolich's costs must have stayed constant and not decreased between the C-Leg 3 and C-Leg 4. For example, if the C-Leg 4 is easier or faster to fit, or breaks less often, then it presents a higher value proposition and may compensate for its additional cost.

e) MPK Purchasing Data Shows Clinics Would Still Earn a Profit Fitting Lower-Limb Prostheses with MPKs Post-SSNIP

824. [redacted] (PX05108 (Yates (Jonesboro) Dep. at 29) (*in camera*)). [redacted] (PX05108 (Yates (Jonesboro) Dep. at 29) (*in camera*)). [redacted]

Response to Finding No. 824:

Complaint Counsel's proposed finding of fact is misleading, because it assumes that fitting the Plié 3 does not impose additional costs on clinics. The Plié 3, for example,

825. (Asar (Hanger) Tr. 1381-82 (*in camera*)). (Asar (Hanger) Tr. 1382 (*in camera*)).

Response to Finding No. 825:

Complaint Counsel's proposed finding of fact is misleading, because it assumes that fitting the Plié 3 does not impose additional costs on Hanger clinics and that reimbursement does not differ between insurers. The Plié 3,

826. (Brandt (Ability Prosthetics and Orthotics) Tr. 3770-71 (*in camera*)).

Response to Finding No. 826:

Complaint Counsel's proposed finding of fact should not be adopted by the Court. Jeff Brandt was not a credible witness at trial, particularly regarding the prices that he has paid for various prosthetic components. In addition, the evidence showed that at times, [redacted]

827. [redacted] (PX05166 (Watson (Fourroux Prosthetics) Dep. at 48) (*in camera*)). [redacted]

Response to Finding No. 827:

Complaint Counsel's proposed finding of fact is misleading, because it assumes that fitting the Plié 3 does not impose additional costs on clinics and that reimbursement does not differ between insurers. The Plié 3, for example, [redacted]

828. [redacted] (Argue,

Tr. 6295 (*in camera*)). [redacted]

Response to Finding No. 828:

Complaint Counsel's proposed finding is misleading because Dr. Argue testified that the cost and reimbursement structure of the average clinic would make a 5-10% price increase unprofitable for a sufficient number of clinics to defeat such a price increase. (Argue, Tr. 6174).

VII. THE UNITED STATES IS THE RELEVANT GEOGRAPHIC MARKET

A. RESPONDENT STIPULATED THAT THE UNITED STATES IS THE RELEVANT GEOGRAPHIC MARKET

829. Respondent has admitted the United States constitutes the Relevant Geographic Market for the purposes of analyzing the effects of the Acquisition. When asked by the Court during Opening Statements, Counsel for Respondent agreed that there is no dispute on the Relevant Geographic Market is the United States. (Resp't Opening Statements Tr. 91).

Response to Finding No. 829:

Respondent has no specific response.

830. Respondent's economic expert, Dr. David A. Argue, agrees that the United States is the relevant geographic market. At the trial, Dr. Argue testified that in his analysis of the prosthetic knee and feet markets, he used the United States as the geographic market. (Argue, Tr. 6267 (agreeing that he "used the U.S. geographic market for [his] knee and foot markets because clinic customers are not going to go to suppliers outside of the U.S. to purchase knees or feet"); *see also* (PX05173 (Argue (Respondent) Dep. at 69) (testifying that he used a U.S. geographic market in his analysis because "based on the information I've gathered over the time that I've been evaluating this, it seems that both the feet and the knees have a U.S. geographic market. Customers are not going to be going to suppliers outside of the area to purchase knees and feet."); (RX1049 at 21 (¶ 36) (Argue Expert Report) (stating that "[f]or purposes of this report, I do not dispute that the United States is a properly defined geographic market.")).

Response to Finding No. 830:

This finding is irrelevant because there is no dispute about the relevant geographic market.

831. Dr. Argue defines the relevant geographic market in his report as the United States. (RX1049 at 020-21 (¶¶ 34, 36) (Argue Expert Report)). Dr. Argue explained in his deposition that "[t]here's no evidence to indicate that the market, geographic market, was broader than the United States." (PX05173 (Argue (Respondent) Dep. at 91)).

Response to Finding No. 831:

This finding is irrelevant because there is no dispute about the relevant geographic market.

B. QUALITATIVE EVIDENCE DEMONSTRATES THAT THE UNITED STATES IS THE RELEVANT GEOGRAPHIC MARKET

1. Unique Regulatory and Reimbursement Features in the United States

832. In the United States, Medicare and private payer reimbursement rules play a key role in how competition works in the MPK market. (Carkhuff (Freedom) Tr. 378 (testifying that the two largest sources of reimbursement in the MPK market in the United States are Medicare and private insurance, comprising roughly 80% of all MPKs that are fit and reimbursed); Senn (COPC) Tr. 200-02 (testifying that Medicare defines the L-Codes that determine the reimbursement amounts for MPKs regardless of the manufacturer, which are also used by private insurers); Sanders (United) Tr. 5438-39 (*in camera*) (indicating that [redacted] *see also* (PX05150 (Kannenberg (Otto Bock) Dep at 38-39, 103)) (testifying that "most insurance companies, including Medicare, reserve [MPKs] for patients with higher mobility" and that, for Medicare and private payers, a key aspect of medical justification is documenting the functionality provided by a microprocessor knee that the patient is not receiving from a mechanical knee); Carkhuff (Freedom) Tr. 377 (indicating that private insurers generally follow Medicare's fee-for-service schedule when reimbursing for prosthetic knees)).

Response to Finding No. 832:

This finding is irrelevant because there is no dispute about the relevant geographic market.

833. For example, third-party payers often must determine which patients have a medical necessity for an MPK, rather than a mechanical knee. (Sanders (United) Tr. 5481, 5484-85 (*in camera*) (testifying that [redacted]; Carkhuff (Freedom) Tr. 534 (*in camera*) (testifying that [redacted]; PX03151 (United) at 003-05 (a United HealthCare "Coverage Determination Guideline" listing "Functional level is 3 or above" as the description for L5856, the L-code associated with MPKs)).

Response to Finding No. 833:

This finding is irrelevant because there is no dispute about the relevant geographic market.

834. The U.S. market has characteristics that are "very unique and different from other places in the world." (PX05123 (Solorio (Otto Bock) Dep. at 94-95)).

Response to Finding No. 834:

This finding is irrelevant because there is no dispute about the relevant geographic market.

835. [redacted] (Carkhuff (Freedom) Tr. 529-30 (*in camera*)).

Response to Finding No. 835:

This finding is irrelevant because there is no dispute about the relevant geographic market.

[redacted]

836. Within the United States, reimbursement for microprocessor and non-microprocessor knees are based on L-Codes set by CMS. (Senn (COPC) Tr. 200-02 (testifying that Medicare defines the L-Codes, which are also used by private insurers, that determine the reimbursement amounts for MPKs regardless of the manufacturer); PX05141 (Bright (North Bay) Dep. at62-63)).

Response to Finding No. 836:

This finding is irrelevant because there is no dispute about the relevant geographic market.

837. In the United States, reimbursement rules created by Medicare and U.S. private insurers impact how MPKs are purchased and sold: in particular, only K3 and K4 patients are eligible to be considered for a microprocessor knee under Medicare and most private insurance plans. (*See* CCFF ¶¶ 440-441, 445, above).

Response to Finding No. 837:

This finding is irrelevant because there is no dispute about the relevant geographic market.

Further, Respondent incorporates its Responses to CCFF ¶¶ 440-441 and 445, above.

838. Dr. Kannenberg testified that "in other countries, to take my home country Germany as an example, we don't have that tie of K levels to coverage of certain prosthetic technologies, so a K2 patient who is physically capable enough to control a microprocessor knee or a mechanical knee can receive that." (Kannenberg (Otto Bock) Tr. 1942).

Response to Finding No. 838:

This finding is irrelevant because there is no dispute about the relevant geographic market.

839. The President of Wright & Filippis, Anthony Filippis, testified that he considered setting up a location in Canada, but it "is very, very difficult" to get approval due, in part, to the differences in the reimbursement system. (PX05167 (Filippis (Wright & Filippis) Dep. at 91)).

Response to Finding No. 839:

This finding is irrelevant because there is no dispute about the relevant geographic market.

2. Importance of Prosthetic Manufacturers' U.S. Business Presence

840. U.S. prosthetic clinics testified that they rely on MPK manufacturers' sales and clinical employees to fit, program, and maintain their patients' MPKs at their facilities. (Ford (POA) Tr. 964-67 (testifying that MPK manufacturers' sales and clinical employees are "very important" and demonstrate products to clinicians to ensure the MPKs are optimized for each patient); PX05145 (Ford (POA) Dep. at 34-36) (describing the importance of clinical and technical staff from MPK suppliers); **PX05108 (Yates (Jonesboro) Dep. at30-31 (describing the support provided to clinic by MPK sales representatives)**; PX05141 (Bright (North Bay) Dep. at 223); *see also* PX05118 (Testerman (Otto Bock) Dep. at 51-53) (discussing the interaction between Freedom sales reps and prosthetic clinic customers)).

Response to Finding No. 840:

This finding is irrelevant because there is no dispute about the relevant geographic market.

841. Many clinic customers have testified that United States sales representatives from prosthetic manufacturers play an important role in the clinic's purchasing decisions. (Ford

(POA) Tr. 962; PX05141 (Bright (North Bay) Dep. at 223); PX05151 (Patton (Prosthetic Solutions) Dep. at 109-10, 115)).

Response to Finding No. 841:

This finding is incomplete because it omits Patton's additional testimony that even though Ottobock representatives were also present at his clinic, that did not influence him to sell more Ottobock products because of price. (PX05151 (Patton, Dep. at 110)). In any event, this finding is irrelevant because there is no dispute about the relevant geographic market.

842. [redacted] (PX05153B (Asar (Hanger) Dep. at 65) (*in camera*)).

Response to Finding No. 842:

This finding is irrelevant because there is no dispute about the relevant geographic market.

843. [redacted]

Response to Finding No. 843:

Complaint Counsel's proposed finding of fact is incomplete to the extent that it omits testimony from [redacted] When asked whether a U.S. presence was important,

Sprinkle testified that "[a]s long as there is local technical support for the knee, then that's what I'm worried about." (PX05168 (Sprinkle, Dep. at 71)). In any event, this finding is irrelevant because there is no dispute about the relevant geographic market.

844. The Chairman of Freedom, Maynard Carkhuff, 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." (PX05109 (Carkhuff (Freedom) Dep. at 130)).

Response to Finding No. 844:

This finding is irrelevant because there is no dispute about the relevant geographic market.

845. Mark Ford from POA testified that, when something goes wrong with an MPK, he relies first on "input from the local salesperson" to resolve the issue. (Ford (POA) Tr. 968).

Response to Finding No. 845:

This finding is irrelevant because there is no dispute about the relevant geographic market.

846. Jeffrey Sprinkle of Sprinkle Prosthetics testified that "I'm not going to order a knee from, you know, Argentina that doesn't have any representatives here." (PX05168 (Sprinkle (Sprinkle) Dep. at 71)).

Response to Finding No. 846:

This finding omits additional relevant testimony from Sprinkle, in which he made clear that what is important is technical support: Sprinkle testified that "[a]s long as there is local technical support for the knee, then that's what I'm worried about." (PX05168 (Sprinkle, Dep. at 71)). In any event, this finding is irrelevant because there is no dispute about the relevant geographic market.

847. Clinics have further testified that non-sales presence is also important. (Ford (POA) Tr. 964, 968; PX05168 (Sprinkle (Sprinkle) Dep. at 71); PX05132 (Sabolich (Scott Sabolich Prosthetics) Dep. at 70-71) (testifying that loaner knees are important)).

Response to Finding No. 847:

Sabolich's cited testimony offers only limited support for this point because it was focused on the importance of having loaner knees, not in person contact with sales or clinical staff. (PX05132 (Sabolich, Dep. at 70-71)). In any event, this finding is irrelevant because there is no dispute about the relevant geographic market.

848. For example, Mr. Sprinkle testified that it is important that an MPK manufacturer provide "local technical support for that knee." (PX05168 (Sprinkle (Sprinkle) Dep. at 71)).

Response to Finding No. 848:

This finding is irrelevant because there is no dispute about the relevant geographic market.

849. Freedom's Vice President of National and Key Accounts, Mark Testerman, testified that Freedom's continuing education programs offered to clinicians at their offices give Freedom "a good, solid, aggressive strategy to try to differentiate ourselves from the competition" by "sav[ing] the account time, energy and funds to send their practitioners somewhere else." (Testerman (Freedom) Tr. 1107-08).

Response to Finding No. 849:

As Vice President of National and Key Accounts, Testerman's characterization of Freedom's sales strategies is self-serving and of limited probative value.

In any event, this finding is irrelevant because there is no dispute about the relevant geographic market.

850. At trial, no clinic customer testified that they would switch MPK purchases to an MPK not currently sold in the U.S. through a U.S. sales force. (Senn (COPC) Tr. 148-280; Ford (POA) Tr. 901-1067; Asar (Hanger) Tr. 1306-1571; Ell (Mid-Missouri) Tr. 1658-1816); Brandt (Ability Prosthetics and Orthotics) Tr. 3741-3846; Oros (Scheck & Siress) Tr. 4769-4920; Sabolich (Sabolich Prosthetics and Research) Tr. 5787-5960).

Response to Finding No. 850:

This finding is of limited probative value because Complaint Counsel does not cite any instance in which a clinic customer was asked whether they would make such a switch.

In any event, this finding is irrelevant because there is no dispute about the relevant geographic market.

3. Respondent Conducts Business Reflecting Recognition of a U.S. Market

851. Internal Respondent documents distinguish the "U.S." MPK market from the rest of the world. (*See, e.g.*, PX01022 (Freedom) at 007-30 (analyzing the "United State Market" separately from the "European Market"); [redacted]

Response to Finding No. 851:

This finding is irrelevant because there is no dispute about the relevant geographic market.

852. Matt Swiggum testified that Otto Bock "regularly produced" documents that analyzed the U.S. MPK business. (PX05148 (Swiggum (Otto Bock) Dep. at 24-25)).

Response to Finding No. 852:

This finding is irrelevant because there is no dispute about the relevant geographic market.

853. Freedom's 2014 marketing plan identified three separate markets: the United States, the European Union, and the rest of the world. (PX01022 (Freedom) at 031).

Response to Finding No. 853:

While it identified the United States as a market, the cited plan was careful to note that "Europe is not a homogenized market, but rather a collection of individual markets each with its own characteristics in terms of price, product usage and reimbursement." (PX01022 at 16). In any event, this finding is irrelevant because there is no dispute about the relevant geographic market.

854. For a given customer with multiple clinic locations in the U.S., Freedom's MPK prices are consistent throughout the United States. (PX05007 (Carkhuff (Freedom) IHT at 106)).

Response to Finding No. 854:

This finding is irrelevant because there is no dispute about the relevant geographic market.

855. [redacted] (PX05144 (Blatchford (Endolite) Dep. at 204) (*in camera*)). (Blatchford (Endolite) Tr. 2158-59 (*in camera*)).

Response to Finding No. 855:

Complaint Counsel's proposed finding of fact is misleading because Blatchford's testimony is of limited probative value. He was not asked whether he considers prices outside the United States.

C. THE HYPOTHETICAL MONOPOLIST TEST CONFIRMS THE UNITED STATES IS THE RELEVANT GEOGRAPHIC MARKET

856. Dr. Scott Morton performed a Hypothetical Monopolist Test to confirm that the relevant geographic market is the United States. (PX06001A (Scott Morton Report) at 066-76 (¶¶ 85-90) (Scott Morton Expert Report)).

Response to Finding No. 856:

This finding is irrelevant because there is no dispute about the relevant geographic market.

857. Dr. Scott Morton finds that "patients in the United States are not likely to seek treatment" outside the United States "following a SSNIP" for numerous reasons, including patient visit requirements, follow-up care, and unwillingness of third-party payers to reimburse for the cost of knees fitted outside the United States. (PX06001A (Scott Morton Report) at 067-69 (¶ 87) (Scott Morton Expert Report)).

Response to Finding No. 857:

This finding is irrelevant because there is no dispute about the relevant geographic market.

858. Further, Dr. Scott Morton concludes that clinics in the United States could not turn to suppliers or products sold outside the United States to overcome a SSNIP on microprocessor knees. (PX06001A at 069-70 (¶ 88) (Scott Morton Expert Report)). Dr. Scott Morton finds that there are no other significant manufacturers of MPKs sold outside the United States. (PX06001A at 069-70 (¶ 88) (Scott Morton Expert Report)).

Response to Finding No. 858:

This finding is irrelevant because there is no dispute about the relevant geographic market.

859. Professor Scott Morton concludes, "the options of clinics in the United States are limited to the microprocessor knee manufacturers that currently have a presence in the United States." (PX06001A at 073-74 (¶ 90) (Scott Morton Expert Report)).

Response to Finding No. 859:

This finding is irrelevant because there is no dispute about the relevant geographic market.

860. Dr. Argue, agrees, having testified that "[c]ustomers are not going to be going to suppliers outside of the [United States] to purchase knees or feet." (PX05173 (Argue (Respondent) Dep. at 069)).

Response to Finding No. 860:

This finding is irrelevant because there is no dispute about the relevant geographic market.

861. Dr. Argue agrees with Dr. Scott Morton that the relevant geographic market is the United States. (RX1049 at 020, 021 (¶¶ 34, 36) (Argue Expert Report); PX05173 (Argue (Respondent) Dep. at 91)).

Response to Finding No. 861:

This finding is irrelevant because there is no dispute about the relevant geographic market.

862. Several clinics in the United States indicated that they could not easily turn to firms without a substantial U.S. presence for MPKs. (PX05168 (Sprinkle (Sprinkle Prosthetics) Dep. at 71) ("I'm not going to order a knee from, you know, Argentina that doesn't have any representatives here"); PX05141 (Bright (North Bay) Dep. at 190) (explaining that an MPK manufacturer's lack of a U.S. local distribution and sales force would create problems for his clinic); [redacted]

Response to Finding No. 862:

This finding is irrelevant because there is no dispute about the relevant geographic market.

VIII. HIGH MARKET SHARES AND CONCENTRATION LEVELS ESTABLISH A STRONG PRESUMPTION OF HARM TO COMPETITION

A. MARKET STRUCTURE

1. Otto Bock

863. Otto Bock currently manufactures and sells five lines of MPKs – the Kenovo, Compact, C-Leg, Genium, and X3. (PX05133 (Eichler (Otto Bock) Dep. at 57).

Response to Finding No. 863:

Complaint Counsel's proposed finding of fact is vague as to the term "MPK." Ottobock currently manufactures and sells two stance-only microprocessor controlled knees, the Kenevo and the Compact, and three swing-and-stance microprocessor controlled knees, the X3, Genium, and C-Leg 4. (Schneider, Tr. at 4324-4325).

a) Otto Bock's Top-Selling C-Leg 4

864. Otto Bock designed the C-Leg MPK for K3 level ambulators. (Solorio (Otto Bock) Tr. 1634-1635). After launching the first version of the C-Leg in 1999, Otto Bock launched the C-Leg 4 in 2015. The C-Leg 4 is still the current model sold by Otto Bock in the United States. (PX05010 (Schneider (Otto Bock) IHT at 99-100)).

Response to Finding No. 864:

Respondent has no specific response.

865. The C-Leg supports a maximum patient weight of 300 lbs/136 kg. (PX01599 (Otto Bock) at 012). [redacted] The battery life is approximately 2 days. (PX01599 (Otto Bock) at 012). The C-Leg is weatherproof with a IP67 rating. (PX01599 (Otto Bock) at 012). The maximum possible knee flexion angle without flexion stop is 130 degrees. (PX01599 (Otto Bock) at 012).

Response to Finding No. 865:

Complaint Counsel's proposed finding of fact is vague. The term "C-Leg" is overly broad as it could apply to any of the four versions that have been commercialized in the United States or to the three versions currently in development at Ottobock. PX01599 refers to features of the Ottobock C-Leg 4. (PX01599 at 012).

866. [redacted]

Response to Finding No. 866:

Respondent has no specific response.

867. [redacted]

Response to Finding No. 867:

Respondent has no specific response.

868. [redacted]

Response to Finding No. 868:

Respondent has no specific response.

869. Otto Bock employs 28 sales representatives divided into separate regions located across the United States. Each of Otto Bock's sales representatives sells the full suite of prosthetic components. (Schneider (Otto Bock) Tr. 4285-86; Solorio (Otto Bock) Tr. 1638-1639). Matthew Swiggum, Otto Bock's CEO at the time of the Merger, estimated that Otto Bock sales representatives visited U.S. clinics owned by its largest customer more than 2,000 times each year. (PX05148 (Swiggum (Otto Bock) Dep. at 58-59)).

Response to Finding No. 869:

Complaint Counsel's proposed finding of fact is misleading. Respondent has no specific response to the first two sentences. The final sentence mischaracterizes Mr. Swiggum's testimony. Mr. Swiggum testified that each of Ottobock's sales representatives try to visit each Hanger facility at least four times per year and that the total number of Hanger site visits by the entire Ottobock sales force would depend upon the number of Hanger clinics. (PX05148 (Swiggum, Dep. at 58-59).

870. [redacted]

Response to Finding No. 870:

Respondent has no specific response.

b) Otto Bock's Kenevo and Compact MPKs

871. The microprocessor in Otto Bock's Kenovo knee controls only the stance phase of a user's gait. (Kannenberg (Otto Bock) Tr. 1956-57). The Kenovo does not qualify for L5856 – the base L-code that accounts for the greatest share of reimbursement a clinic receives for an MPK. (Kannenberg (Otto Bock) Tr. 1999; PX05111 (Prince (Freedom) Dep. at 95-96); *see also* PX05133 (Eichler (Otto Bock) Dep. at 57 (explaining that only microprocessor knees that have swing and stance phase controls can be reimbursed under L-Code 5856)).

Response to Finding No. 871:

Respondent has no specific response.

872. Otto Bock's Senior Prosthetics Marketing Manager, Cali Solorio, testified that Otto Bock targets different patient populations for sales of the Kenovo and the C-Leg 4. (Solorio (Otto Bock) Tr. 1639). Specifically, Otto Bock markets the Kenovo to K2 level ambulators because of its design. (Solorio (Otto Bock) Tr. 1633-34; PX08097 (Otto Bock) at 001 (Otto Bock)).

Response to Finding No. 872:

Complaint Counsel's proposed finding of fact is misleading. Ottobock targets different patient populations for sales of the Kenevo and the C-Leg 4, (Solorio, Tr. 1639; RFOF ¶¶ 181-188) because Ottobock recommends that the Kenevo receive reimbursement for L5858 and not L5856 because the Kenevo's microprocessor controls only the stance phase of a user's gait and not the swing phase. (Solorio, Tr. 1633-1634, 1639; Schneider, Tr. 4350). Medicare and virtually all private insurers do not provide reimbursement for the Kenevo for K-2 level ambulators, despite Ottobock's marketing. (Dr. Kannenberg, Tr. 1944-1948)

873. Similarly, the microprocessor in Otto Bock's Compact knee controls the stance phase of a user's gait only. (Kannenberg (Otto Bock) Tr. 1955-56; Solorio (Otto Bock) Tr. 1634). Otto Bock focuses on high K2 and low K3 level ambulators for sales of the Compact. (Solorio (Otto Bock) Tr. 1634). Similar to the Kenovo, the Compact does not qualify for L5856. (Kannenberg (Otto Bock) Tr. 1999; PX05007 (Carkhuff (Freedom) IHT 139-40)).

Response to Finding No. 873:

Complaint Counsel's proposed finding of fact is incomplete. The Kenevo and Compact use a microprocessor that controls the stance phase of the user's gait cycle only and are recommended for reimbursement with code L5858, not L5856 which is recommended for knees that contain a microprocessor that controls both the swing and stance phases of the gait cycle. (RFOF ¶¶ 181-188).

874. Otto Bock plans to discontinue the Compact in 2018. (PX05133 (Eichler (Otto Bock) Dep. at 64-65)).

Response to Finding No. 874:

Respondent has no specific response, [redacted]

875. [redacted]

Response to Finding No. 875:

Respondent has no specific response.

c) Otto Bock's Higher-End MPKs: Genium and X3

876. Otto Bock designed the Genium for "higher activity K3 patient[s] into the K4 level." (Solorio (Otto Bock) Tr. 1635-1636).

Response to Finding No. 876:

Complaint Counsel's proposed finding of fact is incomplete. The Genium is a "high-end" microprocessor-controlled swing and stance knee. (Solorio, Tr. 1635-1636; Schneider, Tr. 4325). Ottobock launched the Genium in the United States in 2012, and received a facelift within the last two years. (Schneider, Tr. 4339-4340). The Genium has a different rule set than the C-Leg that offers five different modes and 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; Schneider, Tr. 4340-4341). The Genium has a walk-to-run feature. (Solorio, Tr. 1635-36). The Genium does not compete with Freedom's Plié 3 on the bases of functionality or price. (Schneider, Tr. 4341-4342).

877. Because of reimbursement limitations set by most private insurers, 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. (Solorio (Otto Bock) Tr. 1636-1637).

Response to Finding No. 877:

Respondent has no specific response.

878. [redacted]

Response to Finding No. 878:

Respondent has no specific response.

879. Otto Bock initially developed the X3 MPK for active duty military users. Higher activity users are still the primary users of this MPK. (Kannenberg (Otto Bock) Tr. 1959-60).

Response to Finding No. 879:

Complaint Counsel's proposed finding of fact is incomplete. Ottobock developed the X3 with the U.S. Department of Defense. (Schneider, Tr. 4390-4391). "It has the highest water rating, which is waterproof. It has the most resilience. It has a higher weight load. It has the capability to create walk to a run. " (Schneider, Tr. 4390-4391). The X3 has a 5-day battery life. (Schneider, Tr. 4391). The X3 does not compete with any other prosthetic knees because "it's in a league of its own." (RFOF ¶¶ 226-227).

880. [redacted]

Response to Finding No. 880:

Respondent has no specific response.

881. Because of reimbursement limitations set by most private insurers, 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 X3. (Solorio (Otto Bock) Tr. 1636-1637).

Response to Finding No. 881:

Respondent has no specific response.

2. Freedom

a) Freedom's Plié 3

882. Today, Freedom sells the Plié 3 MPK, which was launched in 2014. (Carkhuff (Freedom) Tr. 294; PX1071 (Freedom) at 023). The original Plié was released in 2007, followed by the Plié 2 in 2010. (Carkhuff (Freedom) Tr. 293-94; PX1071 (Freedom) at 023).

Response to Finding No. 882:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

883. [redacted]

Response to Finding No. 883:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

884. 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. (*See* CCFF ¶¶ 3065-3070, 3072, below.) Market participants consider the Plié to be an MPK. (*See* CCFF ¶¶ 3073-3074, below.)

Response to Finding No. 884:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

885. As of March 2018, Freedom employed a team of approximately 19 employees responsible for sales. 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. (PX05137 at 007-08 (Matthews (Freedom) Dep. at 25-26)). Freedom also offers reimbursement support to assist clinics in the process of filing for reimbursement. (Ferris (Freedom) Tr. 2355).

Response to Finding No. 885:

Complaint Counsel's proposed finding of fact is misleading. Between 2014 and 2018, Freedom employed between 12 and 14 sales representatives and three clinical sales representatives. (Testerman, Tr. 1077-1078).

886. [redacted]

Response to Finding No. 886:

Respondent has no specific response, other than that there is ample evidence in the record of [redacted]

887. [redacted]

Response to Finding No. 887:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted] 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 at 011 ¶ 22). Those margins indicate that [redacted] (RX-1048 at 012 ¶ 24). Given the observed below-market margins, Freedom would likely need to raise its prices in order to achieve industry level margins. (RX-1048 at 013 ¶ 24.b). "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]

b) Freedom's Quattro

888. At the time of the Merger, Freedom was in the process of developing a new MPK called the Quattro. (Carkhuff (Freedom) Tr. 422 (*in camera*); PX05111 (Prince (Freedom) Dep. at 58); PX07049 at 022 (¶¶ 49-50) (Otto Bock Amended Answer) (*in camera*)).

Response to Finding No. 888:

Respondent has no specific response, other than that [redacted]

889. Prior to the Merger with Otto Bock, Freedom internally listed the launch date for the Quattro as mid-2018. (*See* CCFF ¶¶ 1207-1209, below).

Response to Finding No. 889:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

890. Prior to the Merger with Otto Bock, Freedom's internally projected Quattro to generate sales greater than $51 million in revenue over three years. *See* CCFF ¶¶ 1273-1274, below.

Response to Finding No. 890:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

891. Otto Bock, proposed Freedom divestiture buyers, and third-parties who tested the Quattro all indicated that the Quattro offered functional improvements over Otto Bock's C-Leg 4. *See* CCFF ¶¶ 1295-1309, 1311-1312, below.

Response to Finding No. 891:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

c) Freedom's Plié 4/Plié 3 Fast Fit

892. [redacted] *See* CCFF ¶¶ 1456-1460, 1466, below (*in camera*).

Response to Finding No. 892:

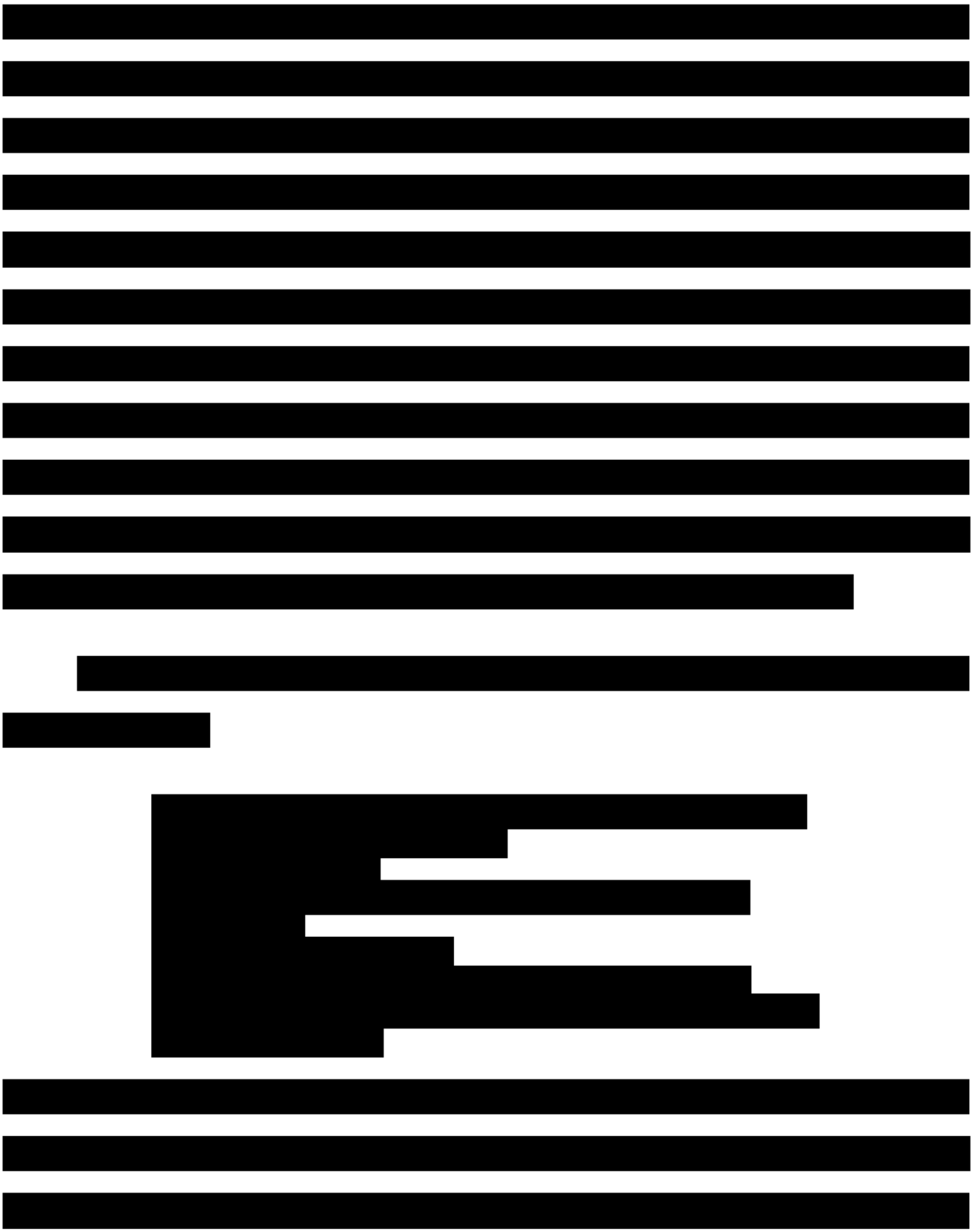
Complaint Counsel's proposed finding of fact is vague and misleading. [redacted]

[redacted]

893. [redacted] *See* CCFF ¶¶ 1457-1458, below (*in camera*).

Response to Finding No. 893:

Complaint Counsel's proposed finding of fact is vague and misleading. [redacted]



[redacted]

894. [redacted] *See* CCFF ¶¶ 1461, 1464, below (*in camera*).

Response to Finding No. 894:

Complaint Counsel's proposed finding of fact is vague and misleading. [redacted]

[redacted]

3. Össur

895. In the United States, Össur currently sells the Rheo MPK, Rheo XC MPK, and the Power Knee. (De Roy (Össur) Tr. 3576). Össur also sells the Symbionic Leg, a combination of the Rheo MPK and Propio ankle. (De Roy (Össur) Tr. 3576).

Response to Finding No. 895:

Complaint Counsel's proposed finding of fact is incomplete. For K-3 and K-4 patients in the United States, Össur sells the Rheo, Rheo XC, and Power Knee, which are all controlled with a microprocessor, and the Mauch Knee, Mauch Knee Plus, Total Knee 1900, Total Knee 2000, and Total Knee 2100, among other Sophisticated Non-MPKs. (RX-0906 at 001; DeRoy, Tr. 3541-3542, 3634-3638 (testifying that Össur uses RX-0906 to educate its customers on the full range of prosthetic knees offered by Össur for K-3 and K-4 patients in the United States)).

(RX-0906 at 001).

896. Össur has its headquarters in Reykjavik, Iceland. (De Roy (Össur) Tr. 3537) .

Response to Finding No. 896:

Complaint Counsel's proposed finding of fact is incomplete. Össur's global headquarters is located in Reykjavik, Iceland, and its U.S. headquarters is located in Foothill Ranch, California. (DeRoy, Tr. 3537).

897. The current version of the Rheo MPK—the Rheo 3—was launched in September 2017. (De Roy (Össur) Tr. 3576).

Response to Finding No. 897:

Complaint Counsel's proposed finding of fact is inaccurate. Össur launched the Rheo 3 in the United States in 2014. (DeRoy, Tr. 3640, 3678; PX03245 at 005). Össur launched a weatherproof version of the Rheo 3 in 2016. (DeRoy, Tr. 3650-2641; PX03245). The current, fourth generation version of the Rheo that was launched by Össur in the United States in September 2017 is marketed only as the "Rheo." (DeRoy, Tr. 3545, 3640).

898. [redacted]

Response to Finding No. 898:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

899. Össur targets moderate to high-level K3 and some K4 users for sales of the Rheo XC. (De Roy (Össur) Tr. 3583). Össur's Executive VP of R&D testified that Otto Bock's high-end Genium and X3 MPKs are the primary competitors for the Rheo XC. (De Roy (Össur) Tr. 3584).

Response to Finding No. 899:

Complaint Counsel's proposed finding of fact is incomplete. Össur's Executive VP of R&D and former VP of Sales of Prosthetics, testified at trial that "with the Rheo XC we actually

target a group of patients that potentially start using a microprocessor knee as their first device, because we allow the patient to do rehabilitation-related exercises, such as biking, such as potentially running as well, from the get-go and cater that through to -- through their -- throughout their rehabilitation and then back into their active daily life, so moderate to active amputees K3 and potentially some K4s." (DeRoy, Tr. at 3583).

900. [redacted] Only the Department of Veterans Affairs, some private payers, and worker's compensation plans reimburse clinics for the fitting of a Rheo XC. Medicare does not reimburse clinics for the fitting of a Rheo XC. (De Roy (Össur) Tr. 3583-84).

Response to Finding No. 900:

Respondent has no specific response.

901. 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. Thus, RHEO KNEE 3 is capable of shifting almost instantaneously from the high resistance required for stability in stance phase to the low resistance needed for a dynamic, free swing phase." (PX03099 (Össur) at 02). Össur's Executive VP of R&D testified that this technology uses "magnetical particles that are contained in an oil which is kept in a cylinder between blades." (De Roy (Össur) Tr. 3576-77). To regulate the magnetic fluid, the MPK uses magnets that "control the input and the outtake of the fluid." (Ford (POA) Tr. 950)).

Response to Finding No. 901:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Össur's Rheo and Rheo XC utilize magnetorheological technology, as opposed to hydraulic and/or pneumatic technology, to provide resistance to the prosthetic knee during the swing and stance phases of the user's gait cycle. (PX03099 at 02; DeRoy, Tr. 3576-3577, 3638). From a functionality perspective, Össur's Rheo and Rheo XC utilize a microprocessor and sensors to provide variable resistance control in both the swing and stance phases of the user's gait cycle, (DeRoy, Tr. 3638-3639) similar to the Ottobock C-Leg 4, Endolite Orion 3, and Nabtesco Allux, (DeRoy, Tr. 3646-

3648; Blatchford, Tr. 2213-2216; Sanders, Tr. 5426; RX-0894 at 004, 016; RX-0345 at 002; Schneider, Tr. 4322). The swing phase of the Össur Rheo is not set with an air pump like it is with the Freedom Plié 3. (DeRoy, Tr. 3649-3650; Schneider, Tr. 4322-4323). The Össur Rheo and Ottobock C-Leg 4 are also PDAC verified for L5856, the L-code associated with microprocessor swing and stance control, but the Freedom Plié 3 is not PDAC verified for L5856. (DeRoy, Tr. 3646-3648; Sanders, Tr. 5426). Health economic studies support the benefits of the Össur Rheo and Ottobock C-Leg relative to Sophisticated Non-MPKs, but Össur's Executive VP of R&D is not familiar with any studies showing any benefits of the Freedom Plié 3 relative to Sophisticated Non-MPKs. (DeRoy, Tr. 3645).

902. The magnetorheological technology is unique to Össur's 6 and Rheo XC and not used by other MPK manufacturers. (De Roy (Össur) Tr. 3578).

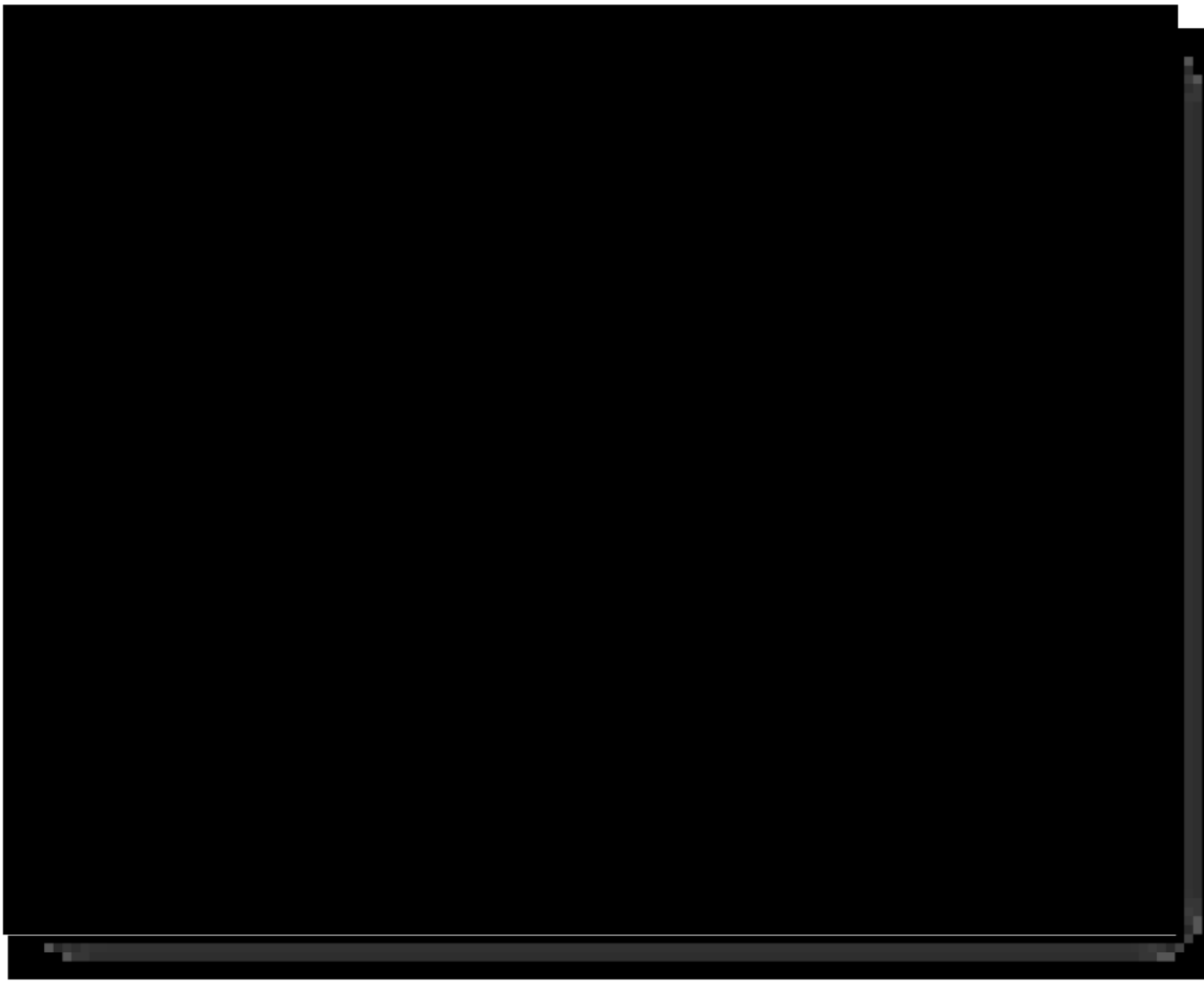
Response to Finding No. 902:

Complaint Counsel's proposed finding of fact is incomplete and misleading. The magnetorheological technology is unique to Össur's Rheo and Rheo XC and not used by other Sophisticated Non-MPKs and MPKs that use hydraulic and/or pneumatic technology. (DeRoy, Tr. 33541-3542, 3578). Nonetheless, the Össur's Rheo and Rheo XC function more similarly to other microprocessor-controlled swing and stance knees than they do to the Freedom Plié 3, which functions more similarly to Össur's Mauch Knee, a Sophisticated Non-MPK. (DeRoy, Tr. 3649-3652; Schneider, Tr. 4322-4323; *see also* Response to CCFF ¶ 901).

903. Kim De Roy, Vice President of Össur, testified that the Rheo's magnetorheological technology is different from the hydraulic technology that is used in the C-Leg 4 and Plié 3. Whereas hydraulic knees are stance default knees, the Rheo 3 is a swing default knee, "which means that it's always free swinging unless you put it on the floor and trigger the electric field to be created". (PX05124 De Roy (Össur) Dep. at 149-153). Mr. De Roy further testified that a Rheo 3 user "needs to have better control, voluntary control over the leg in case the leg runs out of battery." (PX05124 (Össur) Dep. at 149-153).

Response to Finding No. 903:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. The first sentence of Complaint Counsel's proposed finding of fact is not supported by any citation to record evidence. There is substantial evidence in the record that the first sentence is inaccurate because Plié 3's technology is more similar to a Sophisticated Non-MPK than it is to the Ottobock C-Leg 4, the Össur's Rheo, the Endolite Orion 3, or the Nabtesco Allux. (DeRoy, Tr. 3649-3650 (referring to PXD0001 and testifying that the swing phase of the Plié 3, unlike the Rheo and C-Leg 4, is set with an air pump); Schneider, Tr. 4322-4323). The second and third sentences are misleading to the extent that Complaint Counsel is attempting to create an inference that the Rheo is functionally inferior to the Freedom Plié 3. The record evidence establishes that, from a functionality perspective, the Rheo and C-Leg 4 compete most closely. (PX03245 at 011; DeRoy, Tr. 3671 (testifying that the Plié 3's closest competitors are the Orion 3 and Nabtesco Allux); DeRoy, Tr. 3677-3683 (testifying that Össur and Ottobock's MPKs compete most closely on functionality and quality and that Endolite's Orion 3 and Nabtesco's Allux would be appear closer to the Plié 3 at PX03245 at 011 (depicted below))).



904. Össur's Rheo transitions to "free swing" mode when the battery in the MPK dies because of the magnetorheological technology used in the knee. A user wearing the Rheo can either continue walking in "free swing" mode, without variable cadence, or engage a mechanical lock that allows the MPK to function like a "peg leg." (De Roy (Össur) Tr. 3580-81).

Response to Finding No. 904:

Respondent has no specific response.

905. A clinic executive described the differences between Össur's Rheo and MPKs that use a hydraulic fluid system as "chang[ing] the way that the knee operates" and agreed that there is a "fundamental difference in design and operation" between the Rheo and C-Leg, in particular. (Ford (POA) Tr. 950-51).

Response to Finding No. 905:

Complaint Counsel's proposed finding of fact is misleading and unreliable. It relies exclusively on the testimony of Mark Ford, who testified that he is not and never has been a prosthetist. (Ford, Tr. 918). Complaint Counsel's proposed finding of fact is misleading because Ford also testified that the prosthetists that work at POA for Ford all believe that "the C-Leg is a better product than the Plie." (Ford, Tr. 1044). Ford also testified that, despite the fact that POA clinics fit Ottobock C-Legs "almost exclusively," that POA's prosthetists consider Össur's Rheo and Endolite's Orion 3 to be in the same category as the C-Leg as a microprocessor knee. (Ford, Tr. 1050). Certified prosthetists that testified at trial consider the Össur Rheo to be the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; Oros, Tr. 4816-4817).

906. 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." (De Roy (Össur) Tr. 3584-85). Össur's Executive VP of R&D testified that, "there's no real comparable technology [to the Power Knee] on the market today." (De Roy (Össur) Tr. 3585-86).

Response to Finding No. 906:

Respondent has no specific response.

907. The Power Knee costs approximately twice as much as the Rheo, and other MPKs on the market, and is only reimbursed by payers on a "case-by-case" basis. (De Roy (Össur) Tr. 3585-86). [redacted]

Response to Finding No. 907:

Respondent has no specific response.

908. Össur employs a team of approximately 50 sales representatives and clinicians responsible for technical support located across the United States. (De Roy (Össur) Tr. 3568).

Response to Finding No. 908:

Respondent has no specific response.

909. [redacted]

Response to Finding No. 909:

Complaint Counsel's proposed finding of fact is misleading. The data reflected in Table 6 and Table 7 of PX05001A (Scott Morton Report) are annualized. (PX06001A at 084 (noting that Össur data is through an end date of November 2, 2017)).

4. Endolite

910. Chas. A Blatchford & Sons Ltd., d/b/a Endolite, sells prosthetic components, including MPKs, in the United States. (JX001 at ¶ 39).

Response to Finding No. 910:

Respondent has no specific response.

911. Chas. A Blatchford & Sons Ltd. was founded in 1890 as a family-owned business. (Blatchford (Endolite) Tr. 2090). Chas. A. Blatchford & Sons Ltd. is currently headquartered in Basingstoke, England. (Blatchford (Endolite) Tr. 2093). Endolite is the trade name for Blatchford's prosthetic business. (Blatchford (Endolite) Tr. 2099-3000).

Response to Finding No. 911:

Complaint Counsel's proposed finding of fact is incomplete. Endolite's U.S. headquarters is located in Miamisburg, Ohio. (Blatchford, Tr. 2101).

912. [redacted]

Response to Finding No. 912:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

913. Endolite has 80 employees in the United States, including 15 sales representatives and 5 clinical support specialists located across the country. The majority of the remaining employees in the United States work at Endolite's manufacturing facility in Miamisburg, Ohio. (Blatchford (Endolite) Tr. 2100-01).

Response to Finding No. 913:

Complaint Counsel's proposed finding of fact is incomplete. Endolite employs 900 people throughout the world, including approximately 80 people in the United States. (Blatchford, Tr. 2208, 2212-2213). Endolite's U.S. sales force consists of two regional sales managers, fifteen sales representatives and five clinical support specialists located across the country. (2212-2213, 2100-2101). Endolite's U.S. sales force is larger than Freedom Innovations' sales force prior to

the Acquisition. (Testerman, Tr. 1077, 1114 (noting that Freedom had just 14 sales representatives at the time of Acquisition)).

914. Endolite has been selling MPKs for more than 20 years. (PX04001 at 002 (Blatchford (Endolite) Decl.) Endolite currently sells three MPK products—the Orion 3, the Linx Limb System ("Linx"), and the Smart IP. (PX04001 at 001-02 (Blatchford (Endolite) Decl.); Blatchford (Endolite) Tr. 2133).

Response to Finding No. 914:

Respondent has no specific response.

915. The Orion is Endolite's only microprocessor-controlled swing and stance knee without a prosthetic foot attached. (Blatchford (Endolite) Tr. 2133-34). Endolite began selling the Orion in 2010, which was later upgraded with the release of the Orion 2 in 2014. Endolite launched the Orion 3 in September 2016. (Blatchford (Endolite) Tr. 2109-10).

Response to Finding No. 915:

Respondent has no specific response.

916. [redacted]

Response to Finding No. 916:

Complaint Counsel's proposed finding of fact is misleading and incomplete. The Orion 3 offers several improvements over the Orion 2, including better sensors, stance support mode, an improved hybrid cylinder, weatherproofing, intuitive software, and significantly increased battery life. (Blatchford, Tr. 2219-2226; *see also* RFOF ¶¶ 622-628). Ottobock's head of mechatronic marketing in the United States testified at trial that "Endolite has improved a lot on their Orion product with that latest iteration of it, the Orion 3." (Solorio, Tr. 1647). Quality improvements to the Orion 3 and Endolite's increased trials of the Orion 3 have allowed Endolite to grow its market

share and become a stronger competitor according to Ottobock's head of U.S. MPK marketing. (Solorio, Tr. 1647).

917. [redacted]

Response to Finding No. 917:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Starting in 2016, Endolite began pricing the Orion 3 much more competitively to the Freedom Innovations Plié 3. (Testerman, Tr. 1298 (testifying that "Endolite was taking a very aggressive approaching in the pricing of the [Orion 3]"); Ferris, Tr. 2467-2468; RX-0277; DeRoy, Tr. 3596, 3603). [redacted]

918. The Linx Limb System is an "integrated limb system" with a microprocessor-controlled knee connected to a microprocessor-controlled foot. (Blatchford (Endolite) Tr. 2110). [redacted]

Response to Finding No. 918:

Respondent has no specific response.

919. The SmartIP is a microprocessor-controlled swing knee that does not offer microprocessor-control for stance phase, which Endolite's Executive Chairman described as an "older-technology product." (Blatchford (Endolite) Tr. 2133-34).

Response to Finding No. 919:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Blatchford developed the IP knee, which later became the SmartIP, by licensing microprocessor-controlled

swing technology from Nabtesco Corporation. (Blatchford, Tr. 2141-2142). The microprocessor technology in the SmartIP controls the swing phase of the knee "very nicely" but the stance phase is not microprocessor-controlled so it does not offer the benefit of improved stumble control and reduced falls offered by knees that utilize microprocessor-control in both the swing and stance phases of the gait cycle. (Blatchford, Tr. 2142-2143). The SmartIP offers users greater technology and functionality than Freedom's Plié 3. (Schneider, Tr. 4363-4370).

920. [redacted] (PX06001A (Scott Morton Report) Table A1 and Table A2 (*in camera*)).

Response to Finding No. 920:

Complaint Counsel's proposed finding of fact is incomplete and misleading. According to [redacted]

921. [redacted] (Blatchford (Endolite) Tr. 2176-77 (*in camera*)).

Response to Finding No. 921:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

[redacted]

922. [redacted] (Blatchford (Endolite) Tr. 2178 (*in camera*)).

Response to Finding No. 922:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

923. [redacted] (Asar (Hanger) Tr. 1390-91 (*in camera*)).

Response to Finding No. 923:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

5. Fringe MPK Manufacturers

a) Nabtesco

924. Nabtesco Corp. ("Nabtesco") manufactures prosthetic devices including microprocessor knees, non-microprocessor knees, microprocessor feet, and non-microprocessor feet. (PX03004 (Nabtesco) at 001).

Response to Finding No. 924:

Respondent has no specific response.

925. Nabtesco is headquartered in Kobe, Japan, where the company manufacturers all of its products. Nabtesco does not manufacture any products in the United States. (PX03004 (Nabtesco) at 001; PX05161 (Mattear (Proteor Inc.) Dep. at 26:02-06)).

Response to Finding No. 925:

Respondent has no specific response.

926. In the past, all of Nabtesco's sales in the United States were made through four distributors—Cascade Orthopedic Supply, Inc., Southern Prosthetic Supply, Inc. ("SPS"), PEL LLC, and Proteor Inc. Nabtesco does not make any sales directly to prosthetic clinics in the United States. (PX03004 (Nabtesco) at 001).

Response to Finding No. 926:

Complaint Counsel's proposed finding of fact is misleading. Before September 2018, Nabtesco's sales in the United States were made through four distributors, but those four distributors sold Nabtesco products directly to prosthetic clinics in the United States. (PX03004 at 001). In September 2018, Proteor, Inc., based in Arizona, entered into an exclusive distribution agreement with Nabtesco. (Mattear, Tr. 5510, 5521-5522, 5525-5526, 5546-5547). Pursuant to the new arrangement with Nabtesco, Proteor, Inc. exclusively sells Nabtesco's products, including the Allux MPK, directly to prosthetic clinics in the United States. (Mattear, Tr. 5521-5522, 5525-5526; RX-0896 at 002). Proteor, Inc. also acquired Ability Dynamics in June 2018, and through that acquisition, Proteor, Inc. now utilizes a sales force of eight people to sell Nabtesco products, including the Allux, directly to prosthetic clinics in the United States. (Mattear, Tr. 5527-5528). On September 20, 2018, Brad Mattear, Managing Director of Proteor, Inc., testified that in the

days since entering into the exclusivity agreement with Nabtesco on September 1, 2018, Proteor, Inc. had already sold 8 Allux MPKs. (Mattear, Tr. 5518-5519, 5689).

927. 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. . (Mattear (Proteor Inc.) Tr. 5521-22). Proteor Inc. was based out of Muskego, Wisconsin until June 2018 when it relocated to Tempe, Arizona. (Mattear (Proteor Inc.) Tr. 5510).

Response to Finding No. 927:

Complaint Counsel's proposed finding of fact is incomplete. In 2018, Proteor, Inc. acquired Ability Dynamics, including its RUSH foot line of prosthetic products and its experienced sales force and clinical team, and as a result of the acquisition, moved its headquarters from Muskego, Wisconsin to Tempe, Arizona. (Mattear, Tr. 5519, 5527-5528, 5554-5555, 5562-5563).

928. Nabtesco currently manufactures and sells three microprocessor knee products—the Intelligent Knee, the Hybrid Knee, and the Allux. (PX05161 (Mattear (Proteor Inc.) Dep. at 35)).

Response to Finding No. 928:

Complaint Counsel's proposed finding of fact is misleading. Nabtesco currently manufactures three microprocessor knee products—the Intelligent Knee, the Hybrid Knee, and the Allux—and Proteor, Inc. exclusively sells those products directly to prosthetics clinics in the United States. (PX05161 (Mattear, Dep. at 35)); Mattear, Tr. 5521-5522, 5525-5526; RX-0896 at 002).

929. U.S. sales for both designs of Nabtesco's Intelligent knee—the single-axis and 4-bar designs—include 2 knees in 2014, 1 knee in 2015, 3 knees in 2016, and 2 knees between January 1 and October 31, 2017. (PX03004 (Nabtesco) at 005).

Response to Finding No. 929:

Respondent has no specific response other than that those sales were made prior to Proteor, Inc.'s acquisition of Ability Dynamics and its experienced sales force and prior to Proteor, Inc.

entering into an exclusivity agreement to sell Nabtesco products, including the Intelligent knee, in the United States. (Responses to CCFF ¶¶ 926-928).

930. U.S. sales for Nabtesco's Hybrid knee include 9 knees in 2014, 4 in 2015, 0 in 2016, and 1 between January 1 and October 31, 2017. (PX03004 (Nabtesco) at 005).

Response to Finding No. 930:

Respondent has no specific response other than that those sales of Nabtesco's Hybrid knee were made prior to Proteor, Inc.'s acquisition of Ability Dynamics and its experienced sales force and prior to Proteor, Inc. entering into an exclusivity agreement to sell Nabtesco products, including the Intelligent knee, in the United States. (Responses to CCFF ¶¶ 926-928).

931. Nabtesco has been selling the Allux MPK in the United States since 2015. (PX03004 (Nabtesco) at 005; Mattear (Proteor Inc.) Tr. 5718). In total (through all U.S. sales channels), Nabtesco sold 13 Allux knees in 2015, 12 knees for 2016, and 29 knees between January 1 and October 31, 2017. (PX03004 (Nabtesco) at 005).

Response to Finding No. 931:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Between 2015 and June 2017, Nabtesco sold a beta version of the Allux in the United States via four different distributor partners. (Response to CCFF ¶ 926; RFOF ¶¶ 209, 871). In June 2017, Nabtesco released a full-launch model of the Allux in the United States, and in September 2018, Nabtesco and Proteor, Inc. entered into an exclusivity arrangement wherein Proteor, Inc. only sells Nabtesco products, including the Allux, directly to prosthetic clinics in the United States. (RFOF ¶¶ 209, 871; Response to CCFF ¶ 926). [redacted] (RFOF ¶ 895).

932. Several clinic customers testified that they are not familiar with MPKs manufactured by Nabtesco. (*See* CCFF ¶¶ 1593-1598, below). 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 ¶¶ 1599-1602, below).

Response to Finding No. 932:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the record evidence. The testimony cited by Complaint Counsel referred to the beta version of the Allux, not the full-launch model released in 2017. (Responses to CCFF ¶¶ 1593-1598). The testimony relied upon by Complaint Counsel regarding difficulties with customer service was also elicited before Nabtesco entered into an exclusive agreement with Proteor, Inc. and before Proteor, Inc. acquired Ability Dynamics and it well-established sales force and clinicians. (Responses to CCFF ¶¶ 1599-1602). Several clinic customers testified at trial that they are more familiar with the Allux in 2018 than they had been previously. (Oros, Tr. 4811, 4813 (testifying that Scheck & Siress has recently fit 1 or 2 Allux knees), 4815-4816; Sabolich, Tr. 5889 (testifying that his clinic has been introduced to the Allux), 5890-5891; PX03287 at 01). The President and CEO of Scheck & Siress, a prosthetic clinic with 15 locations in the Midwest, testified at trial that he was not familiar with the Allux at his deposition on March 29, 2018, (PX05134 (Oros, Dep. at 158)) but that Scheck & Siress has fit 1 or 2 patients with the Allux since that time. (Oros, Tr. 4813, 4866-4867). Vinit Asar, the CEO of Hanger, the largest prosthetics clinic in the United States, testified at trial that Hanger invited Proteor, Inc. to do a presentation on the Nabtesco Allux at the Hanger Education Fair in 2018. (Asar, Tr. 1491-1492; RX-0894).

b) DAW Industries

933. DAW Industries ("DAW") sells prosthetic components, including MPKs, in the United States. (JX001 at ¶ 40).

Response to Finding No. 933:

Respondent has no specific response.

934. DAW does not manufacture its own MPKs. Instead, DAW serves as a distributor of MPKs manufactured by a company named Teh Lin, located in Taipei, Taiwan. (PX05146 (Marquette (DAW) Dep. at 15-17)).

Response to Finding No. 934:

Respondent has no specific response.

935. [redacted]

Response to Finding No. 935:

Respondent has no specific response.

936. [redacted] DAW does not have an R&D department for MPKs. (PX05146 (Marquette (DAW) Dep. at 27)).

Response to Finding No. 936:

Respondent has no specific response.

937. [redacted]

Response to Finding No. 937:

Respondent has no specific response.

938. [redacted] (PX04002 at 001-02 (Marquette (DAW) Decl.) (*in camera*)).

Response to Finding No. 938:

Respondent has no specific response.

B. MARKET SIZE

1. Size of the U.S. MPK Market

939. [redacted]

Response to Finding No. 939:

Complaint Counsel's proposed finding is inaccurate and misleading. The first sentence reflects the estimation performed by Dr. Scott Morton in her expert report. (PX06001A (Scott Morton Report) at Table 7 (*in camera*)). It is unclear from Dr. Scott Morton's report which products are considered MPKs and which products are not considered MPKs for purposes of her estimation. Dr. Scott Morton appears to have simply multiplied year-to-date 2017 sales to arrive at an annual estimation of sales. (PX06001A (Scott Morton Report) at Table 7 (*in camera*)). [redacted]

940. [redacted]

Response to Finding No. 940:

Complaint Counsel's proposed finding is inaccurate and misleading. For example, Dr. Morton appears to include Ottobock high-end prosthetic knees, such as the Genium and X3, in her definition of "all Ottobock MPKs." (PX06001A at 084). Prosthetists testified at trial that the Genium and X3 are higher-end prosthetic knees, and are only reimbursed by the "VA, DoD, and some Workers' Comp." (Oros, Tr. 4812-4813). Dr. Morton including "all Ottobock MPKs" in Table 6 is inaccurate because the Genium and the X3 cost significantly more than other MPKs. (Brandt, Tr. 3794). Additionally, the Genium and X3 are not billed as microprocessor swing and stance knees. (Kannenberg, Tr. 1961). Accordingly, by including the Genium and X3 into Table 6, Dr. Morton incorrectly skews the revenues to make it appear as though Ottobock has more market share. [redacted]

941. [redacted]

Response to Finding No. 941:

Respondent has no specific response.

942. [redacted]

Response to Finding No. 942:

Complaint Counsel's proposed finding is inaccurate and misleading because Dr. Morton's calculations were inaccurate. [redacted] Moreover, Dr. Morton's calculation of C-Leg sales is based only upon assumptions. [redacted] However, not only does Mr. Ruhl state that he would need to look the numbers and provided a mere guess, but Mr. Ruhl's testimony is not specific to 2017. (PX05162 (Ruhl, Dep. at 37)). Additionally, Dr. Morton's calculations assume that PX01302 represents "worldwide" sales with

no facts to support such an assumption. Accordingly, Dr. Morton's Table A2 is not based upon any facts in record and should be dismissed.

943. [redacted]

Response to Finding No. 943:

Complaint Counsel's proposed finding is inaccurate and misleading because Dr. Morton's calculations were inaccurate. [redacted] Moreover, Dr. Morton's calculation of C-Leg sales is based only upon assumptions. [redacted] However, not only does Mr. Ruhl state that he would need to look the numbers and provided a mere guess, but Mr. Ruhl's testimony is not specific to 2017. (PX05162 (Ruhl, Dep. at 37)).

Additionally, Dr. Morton's calculations assume that PX01302 represents "worldwide" sales with no facts to support such an assumption. Accordingly, Dr. Morton's Table A1 is not based upon any facts in record and should be dismissed.

944. [redacted]

Response to Finding No. 944:

Respondent has no specific response.

945. [redacted]

Response to Finding No. 945:

Complaint Counsel's proposed finding is inaccurate and misleading. The proposed finding states that PX01704, at page 150, shows the market share for Ottobock MPKs. [redacted] Further, there is no evidence in the record to show which Ottobock MPKs are included in this chart. Additionally, the proposed finding cites PX01623, which, again, only includes an "estimate" of market share. (PX01623 at

010). Ottobock has no access to the sales numbers of private manufacturers like Nabtesco and Endolite. Ottobock's internal estimates of market share cannot be used to support Dr. Morton's calculations.

2. U.S. MPK Market Is Poised to Grow

946. Maynard Carkhuff, Freedom's Chairman, testified at trial that Freedom expected growth in the global MPK market in the next three to five years. (Carkhuff (Freedom) Tr. 465 (*in camera*)).

Response to Finding No. 946:

Complaint Counsel's proposed fact is inaccurate, incomplete and misleading. Scott Schneider of Ottobock has testified that United States MPK market "is contracting," not expanding. (Schneider, Tr. 4434). Additionally, Jack Sanders of United HealthCare also testified that the MPK market in the United States has been contracting. (Sanders (United), Tr. 5453-5458).

947. Currently, if a patient is categorized as a K0, K1 or K2, CMS will not reimburse them for an MPK. Some commercial payers or workers' compensation payers might reimburse for an MPK at those levels, but most insurers follow Medicare's guidelines. *See* CCFF ¶¶ 440, 445, above).

Response to Finding No. 947:

Respondent has no specific response.

948. [redacted]

Response to Finding No. 948:

Complaint Counsel's proposed finding is misleading because the testimony at trial was consistent that CMS is unlikely to change its MPK coverage determinations to include K-0, K-1,

or K-2 patients within the next five to ten years, at the earliest. (Schneider, Tr. 4532; Kannenberg, Tr. 1996).

949. [redacted]

Response to Finding No. 949:

Complaint Counsel's proposed finding is inaccurate and misleading. [redacted]

950. Dr. Kannenberg believes CMS may begin reimbursing clinics for the provision of MPKs on K2 patients covered by Medicare within the next five to ten years. (Kannenberg (Otto Bock) Tr. 1996-97).

Response to Finding No. 950:

Complaint Counsel's proposed finding is misleading and incomplete because it incorrectly summarizes Dr. Kannenberg's testimony and ignores testimony from Scott Schneider. Dr. Kannenberg testified that "Medicare coverage for K2 patients *could* be achieved within the next five to ten years." (Kannenberg, Tr. 1996 (emphasis added)). [redacted]

951. Freedom's Chairman, Mr. Carkhuff, testified that K2 patients can benefit medically from MPKs. (Carkhuff (Freedom) Tr. 615; *see also* PX05150 (Kannenberg (Otto Bock) Dep. at

39 (MPKs have attributes making them superior to mechanical knees for "the majority of [K2] patients."))

Response to Finding No. 951:

Complaint Counsel's proposed finding is irrelevant and misleading. The fact that some K2 patients can benefit medically from MPKs, even if true, is immaterial to this case because of the reimbursement system in the United States today and for the foreseeable future. [redacted]

952. [redacted] (Blatchford (Endolite) Tr. 2179 (*in camera*)).

Response to Finding No. 952:

Complaint Counsel's proposed finding is misleading. Blatchford is an international company that sells prosthetic products, including MPKs throughout the world. It is developing a new platform MPK technology to use in knees it plans to recommend for K-2, K-3, and K-4 patients. Blatchford's internal sales and marketing analysis documents estimate zero U.S. sales for the new MPK targeting K-2 users because of the current reimbursement system in the United States. (RX-0814 at 002) [redacted]

C. THE MARKET FOR MPKS SOLD TO U.S. PROSTHETIC CLINICS IS HIGHLY CONCENTRATED

1. Dr. Scott Morton's Share and Concentration Estimates

953. Complaint Counsel's industry 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. (PX06001A at 82-84 (¶¶ 111-14) (Scott Morton Report); *see also* [redacted]

Response to Finding No. 953:

Complaint Counsel's proposed finding of fact is misleading and vague. Dr. Scott Morton is not an industry expert. Dr. Morton testified that she has zero experience in the orthotics and prosthetics industry. (Morton, Tr. 3967). She testified extensively that she is unfamiliar with the factual record. (*E.g.*, Morton, Tr. 4031, 4057, 4076,). Complaint Counsel's proposed finding of fact is also vague regarding the definition of the term "industry."

954. According to the Merger Guidelines, markets with an HHI above 2500 are classified as "Highly Concentrated Markets." (PX08040 at 018-19 (§ 5.3) (Merger Guidelines)). In "Highly Concentrated Markets," "Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." (PX08040 at 018-19 (§ 5.3) (Merger Guidelines)).

Response to Finding No. 954:

Complaint Counsel's proposed finding is an improper and inaccurate summary of the Merger Guidelines, and is an improper legal conclusion. Further, it is incomplete and ignores the subsequent language that the "presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power." (PX08040 at 018-19 (§ 5.3) (Merger Guidelines)).

a) Dr. Scott Morton's Methodology

(1) Data Used for Dr. Scott Morton's Estimates

955. [redacted]

[redacted]

Response to Finding No. 955:

Complaint Counsel's proposed finding is misleading because Dr. Morton did not use actual sales data for the year 2017. Instead, Dr. Morton estimated 2017 sales based upon sales data for each company up to a certain date in 2017 (i.e., Ottobock – October 26, 2017; Freedom – September 30, 2017). [redacted]

956. [redacted]

Response to Finding No. 956:

Complaint Counsel's proposed finding is misleading because Dr. Scot Morton's report estimates 2017 sales based on past performance [redacted]

[redacted]

(2) Knees Included and Excluded in Dr. Scott Morton's Estimates

957. [redacted] (PX06001A at 84, Tables 6 & 7; 179-80, Tables A1 & A2 (Scott Morton Report) (*in camera*)).

Response to Finding No. 957:

Complaint Counsel's proposed finding of fact is incomplete. It is unclear how Dr. Scott Morton determined which products to include in which markets.

958. [redacted] (PX06001A at 083, Table 7 (Scott Morton Report) (*in camera*)).

Response to Finding No. 958:

Complaint Counsel's proposed finding is misleading. Dr. Morton, who testified at trial that she has no experience in the prosthetics industry, included Ottobock's Genium and the X3 in her calculations of market share because they are "microprocessor knees," despite evidence at trial that the Genium and X3 cost significantly more than other MPKs and are not billed as microprocessor swing and stance knees. (Morton, Tr. 3967, 3925; Brandt, Tr. 3794; Kannenberg, Tr. 1961).

959. [redacted] (PX06001A at 082, n.205 (Scott Morton Report) (*in camera*)).

Response to Finding No. 959:

Complaint Counsel's proposed finding is misleading. Dr. Scott Morton's narrowest market is the Plié and Ottobock MPKs market. Dr. Scott Morton also purports to define a market that includes the Ottobock C-Leg 4, Freedom Plié 3, Össur's Rheo, Endolite's Orion 3, Nabtesco's Allux, and DAW's MPKs. Dr. Scott Morton's various "markets" are inconsistent with trial testimony and exhibits showing that the Plié is not a microprocessor swing and stance knee; and, unlike the C-Leg 4, Rheo and other MPKs, requires the use of an Allen wrench and an air pump to manually adjust resistances for the swing phase (Kannenberg, Tr. 1953; DeRoy, Tr. 3639-3640).

(3) Appropriateness of Revenue-based versus Unit-based Share Estimates

960. Dr. Scott Morton concluded that it is more appropriate to calculate market shares by revenue because the products in the market are not homogenous—they have different features and price points. (PX06003 at 19-20 (¶ 38) (Scott Morton Rebuttal Report)).

Response to Finding No. 960:

Complaint Counsel's proposed finding is misleading. The Merger Guidelines provide that "[i]n cases where one unit of a low-priced product can substitute for one unit of a higher-priced product, unit sales may measure competitive significance better than revenues." (PX08040 at 020). Dr. Scott Morton reached her conclusion that way based on an article that does not support her conclusion. (PX06003 at 020 n.54 (citing Gregory J. Werden, "Assigning Market Shares," 70 Antitrust Law Journal 1 (2002)). Respondent Counsel's expert, Dr. Argue, calculated market share based on units sold and not revenues, based upon the Merger Guidelines. (Argue, Tr. 6194-6195).

961. [redacted]

[redacted] (Scott Morton, Tr. 4061-62 (*in camera*)).

Response to Finding No. 961:

Complaint Counsel's proposed finding is misleading. Although Dr. Scott Morton did offer that testimony, that testimony is contrary to economic principles and the Merger Guidelines, which both provide that units sold is more appropriate than revenue in calculating market share for differentiated products that may not be perfect substitutes but there is a one-for-one substitution, as is the case here. (PX08040 at 020; Argue, Tr. 6194-6195).

962. [redacted] (Scott Morton, Tr. 4061-62 (*in camera*)).

Response to Finding No. 962:

Complaint Counsel's proposed finding is misleading. Although Dr. Scott Morton did offer that testimony, that testimony is contrary to economic principles and the Merger Guidelines, which both provide that units sold is more appropriate than revenue in calculating market share for differentiated products that may not be perfect substitutes but there is a one-for-one substitution, as is the case here. (PX08040 at 020; Argue, Tr. 6194-6195).

963. 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. (PX06001A at 84 (¶ 114) (Scott Morton Report)).

Response to Finding No. 963:

Complaint Counsel's proposed finding is incomplete and misleading. Although Dr. Scott Morton did reach this conclusion, the proposed finding ignores the fact that Dr. Scott Morton's conclusion is based upon a multitude of faulty assumptions and inaccurate facts. For example, Dr. Scott Morton calculated market shares based upon revenues; however, economic principles and the Merger Guidelines both provide that units sold is more appropriate than revenue in calculating market share for differentiated products that may not be perfect substitutes but there is a one-for-one substitution, as is the case here. (PX08040 at 020; Argue, Tr. 6194-6195). Further, Dr. Scott Morton's calculations of revenue is based upon annualized 2017 sales data, [redacted] Additionally, Dr. Scott Morton relies upon the Lerner condition despite economic articles published by professors, including the Chairman of the FTC (Joseph Simons), stating that there is no empirical evidence that the Lerner condition can "reliably predict price effects for mergers." (Morton, Tr. 4098-4100).

b) Dr. Scott Morton's Market Share and HHI Calculations for the Broader All MPK Market

964. 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. (PX06001A at 84 (¶ 113) (Scott Morton Report)). The tables containing these market shares are reproduced below.

Table 6: Market Shares and HHIs Based on Revenues in the U.S. MPK Market

Table 7: Market Shares and HHIs Based on Units Sold in the U.S. MPK Market

(PX06001A at 83, Tables 6 & 7 (Scott Morton Report) *(in camera*)).

Response to Finding No. 964:

Respondent has no specific response

c) Dr. Scott Morton's Alternative Market Share and HHI Calculations for the Narrower MPK Market

965. Dr. Scott Morton also calculates market shares excluding both high-end and low-end microprocessor knees, 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. (PX06001A at 82, n.205; 179-180, Tables A1 & A2 (Scott Morton Report) (*in camera*)).

Response to Finding No. 965:

Respondent has no specific response.

966. Dr. Scott Morton's concludes that the pre-Merger HHIs confirm that the narrower MPK market in the United States is also highly concentrated and that the change in HHIs post-Merger establish a strong presumption that the Merger will likely enhance market power in the merged firm. (PX06001A at 179-180, Tables A1 & A2 (Scott Morton Report) (*in camera*)). The tables containing these market shares are reproduced below.

Table A1: Narrow Revenue Shares of Microprocessor Knees and HHIs

Table A2: Narrow Unit Shares of Microprocessor Knees and HHIs

(PX06001A at 179-180, Tables A1 & A2 (Scott Morton Report) (*in camera*)).

Response to Finding No. 966:

Complaint Counsel's proposed finding is misleading. Dr. Scott Morton concludes that the market was concentrated, but she looks at past performance rather than future performance. Economic principles provide that the competitive impact of a merger should, instead, be measured upon the future actions and response of the market. (Argue, Tr. 6213-6214). Moreover, Dr. Scott Morton's 2017 calculations are based upon "annualized" sales,

[redacted]

2. Respondent's Ordinary Course Market Share Estimates

a) Respondent's Ordinary Course Market Share Estimates are Consistent Across Time

967. Matthew Swiggum, the CEO of Otto Bock at the time of the Merger, testified that Otto Bock internally generates market share estimates of the U.S. microprocessor knee market. (PX05148 Swiggum (Otto Bock) Dep. at 40-41). Cali Solorio, Otto Bock's Senior Prosthetics Marketing Manager, is responsible for generating internal market share estimates at Otto Bock. (PX05148 Swiggum (Otto Bock) Dep. at 40-41).

Response to Finding No. 967:

Complaint Counsel's proposed finding is irrelevant and misleading. Ottobock's internal attempts to generate market share estimates are more art than science and are predicated mostly on out-of-date data provided by CMS. (Schneider, Tr. 4564). Cali Solorio testified that Ottobock's market share estimates are rough and inaccurate. (PX05123 (Solorio Dep. at 77)). Several other witnesses testified similarly to Ms. Solorio. (Schneider, Tr. 4564 ("it's also very important to note that these are absolute estimates at this time, and we had no idea of really what was in the market"). Ottobock has no access to the sales numbers of private manufacturers like Nabtesco and Endolite. Ottobock's internal estimates of market share cannot be used to support Dr. Morton's calculations.

968. [redacted]

Response to Finding No. 968:

Complaint Counsel's proposed finding is irrelevant and misleading. [redacted]

Ottobock's internal attempts to generate market share estimates based on assumptions about CMS data and are predicated mostly on out-of-date data provided by CMS. (Schneider, Tr. 4564). Cali Solorio testified that Ottobock's market share estimates are rough and inaccurate. (PX05123 (Solorio Dep. at 77)). Several other witnesses testified similarly to Ms. Solorio. (Schneider, Tr. 4564 ("it's also very important to note that these are absolute estimates at this time, and we had no idea of really what was in the market"). Despite its leading position, Ottobock has not been able to raise prices and has not discontinued its innovation. (Schneider, Tr. 4540 (discussing Ottobock's innovation and future launch of the C-Leg 6). [redacted]

(Schneider, Tr. 4322 (discussing the recent introductions of the Nabtesco Allux and DAW Stealth).

969. At the time of the C-Leg 4 launch in early 2015, Otto Bock estimated that, in the MPK market, it had a 78% market share, Freedom had an 11% market share, Össur had 10% market share, and Endolite had 1% market share, as shown in the chart below. (PX01518 (Otto Bock) at 009, 050; PX01382-02).

(PX01518 (Otto Bock) at 009).

Response to Finding No. 969:

Complaint Counsel's proposed finding is irrelevant and misleading. At the time of the C-Leg 4 launch in early 2015, PX01518 at 009; *see also* Schneider, Tr. 4434). Additionally, Jack Sanders of United HealthCare also testified that the MPK market in the United States has been contracting. (Sanders (United), Tr. 5453-5556). Ottobock also noted that "Competitors push for acceptance of substitute MPK products." (PX01518 at 009). Ottobock also measured the share in units, as opposed to revenue. (PX01518 at 009). According to Dr. Scott Morton, there were over 6,000 MPKs sold in the United States, (PX06001A at 83, Tables 6 & 7

(Scott Morton Report) *(in camera)*), [redacted]

970. Otto Bock's "2016 Marketing Plan" for "Lower Limb Mechatronics" indicated that Otto Bock had an 81% market MPK share, Freedom had a 10% MPK market share, Össur had an 8% MPK market share, and Endolite had a 1% MPK market share. (PX01002 (Otto Bock) at 005; *see also* [redacted]

[redacted]

(PX01002 (Otto Bock) at 005).

Response to Finding No. 970:

Complaint Counsel's proposed finding is irrelevant and misleading. Ottobock's "2016 Marketing Plan" is based on "CMS HCPC Code Utilization 2011-2013 trend analysis" data. (PX01002 at 005). The "2016 Marketing Plan" also [redacted]

[redacted]

971. [redacted] (PX01623 (Otto Bock) at 009, 010) (*in camera*). [redacted]

Response to Finding No. 971:

Complaint Counsel's proposed finding is irrelevant and misleading. [redacted] Neither PX01623 nor PX01628 define the market in which the rough estimates are calculated. [redacted]. Ottobock's internal attempts to generate market share estimates are based on assumptions about CMS data and are predicated mostly on out-of-date data provided by CMS. (Schneider, Tr. 4564). Cali Solorio testified that Ottobock's market share estimates are rough and inaccurate. (PX05123 (Solorio, Dep. at 77)). Several other witnesses testified similarly to Ms. Solorio. (Schneider, Tr. 4564 ("it's also very important to note that these are absolute estimates at this time, and we had no idea of really what was in the market")).

972. [redacted]

[redacted]

(PX01473 (Otto Bock) at 010) (*in camera*)).

Response to Finding No. 972:

Complaint Counsel's proposed finding is inaccurate, irrelevant and misleading. It ignores the fact that PX01473 is clearly marked "Draft." [redacted] PX01473 does not define the market in which the rough estimates are calculated. Complaint's Counsel's proposed finding is false, as well. [redacted] Numerous witnesses testified about the information in this slide, which was drafted by Gück and Rössing. The only witness cited by Complaint Counsel, is not either author, Gück nor Rössing, nor anyone with any knowledge of the due diligence information contained therein, e.g., Schneider or Kannenberg. The only witness cited by Complaint Counsel is Swiggum, who did not participate in any commercial due diligence efforts with respect to Ottobock's acquisition of Freedom, nor did Mr. Swiggum participate in any team meetings for Project Roosevelt. (Schneider, Tr. 4408-4411).

[redacted] Ottobock's internal attempts to generate market share estimates are predicated mostly on out-of-date data provided by CMS. (Schneider, Tr. 4564). Cali Solorio testified that Ottobock's market share estimates are rough and inaccurate. (PX05123 (Solorio Dep. at 77)). Several other witnesses testified similarly to Ms. Solorio. (Schneider, Tr. 4564 ("it's also very important to note that these are absolute estimates at this time, and we had no idea of really what was in the market.").

973. [redacted]

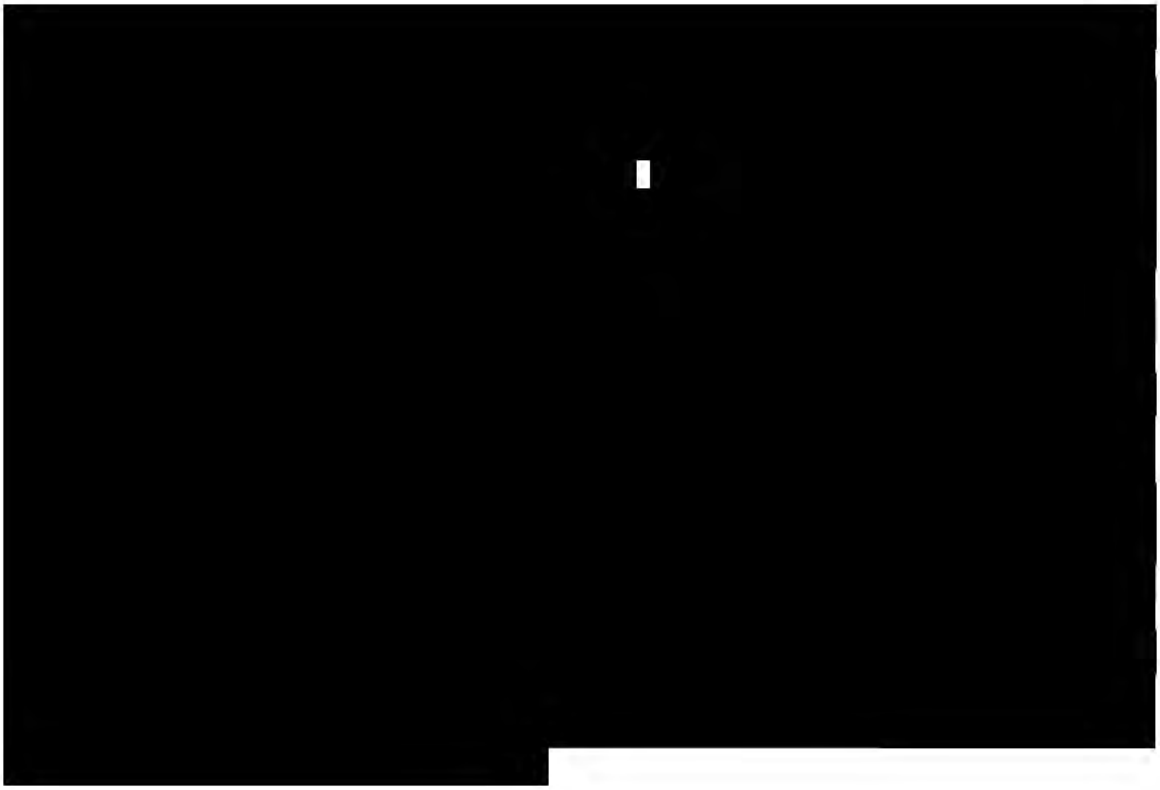
[redacted] (PX01024 (Freedom) at 006) (*in camera*)).

(PX01024 (Freedom) at 006) (*in camera*)).

Response to Finding No. 973:

Complaint Counsel's proposed finding is irrelevant and misleading. It is unclear where this "analysis" is coming from, there is no source material, it is not clear if it is based on units or revenues, etc. (PX01024 at 006). Further, this "analysis" ignores other manufacturers of MPKs, such as Nabtestco and DAW. (PX01024 at 006). PX01024 also calculated market share, assuming

a "summer 2018 launch" of the Quattro—the Quattro has yet to launch and it is speculative when, if ever, it will launch. (PX01024 at 004).

974. 

(PX01302 (Otto Bock) at 074) (*in camera*)).

(PX01302 (Otto Bock) at 076) (*in camera*)).

Response to Finding No. 974:

Complaint Counsel's proposed finding is inaccurate and misleading. PX01302 is an internal Ottobock document containing rough estimates of market share. There are numerous issues with these market estimates. First, the Plié 3 is not a Swing and Stance controlled MPK; rather, unlike the C-Leg 4, Rheo and other MPKs, requires the use of an Allen wrench and an air pump to manually adjust resistances for the swing phase (Kannenberg, Tr. 1953; DeRoy, Tr. 3639-3640). Second, Complaint Counsel ignores the fact that PX01302 states that the size of the MPK swing and stance control segment may be underestimated. Third, these market share estimates are based upon 2016 numbers and Ottobock's internal attempts to generate market share estimates are predicated mostly on out-of-date data provided by CMS. (Schneider, Tr. 4564). Cali Solorio

testified that Ottobock's market share estimates are rough and inaccurate. (PX05123 (Solorio, Dep. at 77)). Several other witnesses testified similarly to Ms. Solorio. (Schneider, Tr. 4564 ("it's also very important to note that these are absolute estimates at this time, and we had no idea of really what was in the market.").

975. [redacted] (Solorio (Otto Bock) Tr. 1602-06 (*in camera*) (discussing PX00867 (Otto Bock) at 021) (*in camera*))).

Response to Finding No. 975:

Complaint Counsel's proposed finding is misleading because it ignores the fact that PX00867 is a 2018 estimate "based upon outdated 2015 CMS usage data". (PX00867 at 021).

b) Respondent's Ordinary Course Market Share Estimates are Consistent Across Different Business Settings

976. During the product development and launch preparation of the C-Leg 4, Otto Bock estimated that it had a 78% market share in the MPK market, Freedom had an 11% market share, Össur had a 10% market share, and Endolite had a 1% market share. (PX01518 (Otto Bock) at 009); PX01382 (Otto Bock) at 002)).

Response to Finding No. 976:

Complaint Counsel's proposed finding is misleading. These slides contain Ottobock's internal attempts to generate market share estimates, which are based on assumptions and are predicated mostly on out-of-date data provided by CMS. (Schneider, Tr. 4564). Cali Solorio testified that Ottobock's market share estimates are rough and inaccurate. (PX05123 (Solorio, Dep. at 77)). Several other witnesses testified similarly to Ms. Solorio. (Schneider, Tr. 4564 ("it's also very important to note that these are absolute estimates at this time, and we had no idea of really what was in the market."). Since this slide was created, new competitors have released

MPKs. (Schneider, Tr. 4322 (discussing the recent introductions of the Nabtesco Allux and DAW Stealth).

977. [redacted] (PX01473 (Otto Bock) at 010) (*in camera*); (Swiggum (Otto Bock) Tr. 3376-380 (*in camera*) (discussing PX01473-010)).

Response to Finding No. 977:

Complaint Counsel's proposed finding is duplicative of CCFOF ¶ 972 and is inaccurate, irrelevant and misleading. It references a document marked "Draft." [redacted] PX01473 does not define the market in which the rough estimates are calculated. Complaint's Counsel's proposed finding is false, as well. [redacted] Numerous witnesses testified about the information in this slide, which was drafted by Gück and Rössing. The only witness cited by Complaint Counsel, is not either author, Gück nor Rössing, nor anyone with any knowledge of the due diligence information contained therein, e.g., Schneider or Kannenberg. The only witness cited by Complaint Counsel is Swiggum, who did not participate in any commercial due diligence efforts with respect to Ottobock's acquisition of Freedom, nor did Mr. Swiggum participate in any team meetings for Project Roosevelt. (Schneider, Tr. 4408-4411).

[redacted]. Ottobock's internal attempts to generate market share estimates are predicated mostly on out-of-date data provided by CMS. (Schneider, Tr. 4564). Cali Solorio testified that Ottobock's market share estimates are rough and inaccurate. (PX05123 (Solorio, Dep. at 77)). Several other witnesses testified similarly to Ms. Solorio. (Schneider, Tr. 4564 ("it's also very important to note that these are absolute estimates at this time, and we had no idea of really what was in the market.").

978. [redacted] (PX01024 (Freedom) at 006) (*in camera*)).

Response to Finding No. 978:

Complaint Counsel's proposed finding is duplicative of CCFOF ¶ 973 and is irrelevant and misleading. It is unclear where this "analysis" is coming from, there is no source material, it is not clear if it is based on units or revenues, etc. (PX01024 at 006). Further, this "analysis" ignores other manufacturers of MPKs, such as Nabtestco and DAW. (PX01024 at 006). [redacted]

979. [redacted] (PX01302 (Otto Bock) at 074, 076) (*in camera*)).

Response to Finding No. 979:

Complaint Counsel's proposed finding is duplicative of CCFOF ¶ 974 and is inaccurate and misleading. PX01302 is an internal Ottobock document containing rough estimates of market share. There are numerous issues with these market estimates. First, the Plié 3 is not a Swing and

Stance controlled MPK; rather, unlike the C-Leg 4, Rheo and other MPKs, requires the use of an Allen wrench and an air pump to manually adjust resistances for the swing phase (Kannenberg, Tr. 1953; DeRoy, Tr. 3639-3640). Second, Complaint Counsel ignores the fact that PX01302 states that the size of the MPK swing and stance control segment may be underestimated. Third, these market share estimates are based upon 2016 numbers and Ottobock's internal attempts to generate market share estimates are based on assumptions about the composition of the market and are predicated mostly on out-of-date data provided by CMS. (Schneider, Tr. 4564). Cali Solorio testified that Ottobock's market share estimates are rough and inaccurate. (PX05123 (Solorio, Dep. at 77)). Several other witnesses testified similarly to Ms. Solorio. (Schneider, Tr. 4564 ("it's also very important to note that these are absolute estimates at this time, and we had no idea of really what was in the market.").

980. [redacted]

(PX00867 (Otto Bock) at 021) (*in camera*)).

Response to Finding No. 980:

Complaint Counsel's proposed finding is misleading and incomplete. It ignores important information for the market going forward, such as:

3. Third-Party MPK Market Concentration Assessments

981.

[redacted]

Response to Finding No. 981:

Complaint Counsel's proposed finding is misleading and lacks foundation. Jack Sanders testified that [redacted]

982. [redacted]

Response to Finding No. 982:

Complaint Counsel's proposed finding is inaccurate and misleading because it ignores the fact that [redacted]

983. [redacted]

Response to Finding No. 983:

Complaint Counsel's proposed finding is incomplete. Mr. Asar also testified that [redacted]

[redacted]

984. Scott Sabolich, owner and clinical director of Scott Sabolich Prosthetics and Research, LLC, testified that the "main three [MPKs] used in the United States" with Medicare reimbursement are the Otto Bock C-Leg, the Össur Rheo, and the Freedom Plié. (PX05132 (Sabolich (Scott Sabolich Prosthetics) Dep. at 69)).

Response to Finding No. 984:

Respondent has no specific response.

4. Respondent's Expert Agrees the Merger is Presumptively Unlawful

985. Respondent's economic expert witness, Dr. Argue, calculated market shares for a market that included microprocessor knees (except high-end and integrated types) as well as K3-level and K4-level non-MPKs sold in the United States. (RX-1049 at 35 (¶ 58) (Argue Report)). Dr. Argue's market share calculations are reproduced below.

Table 3: Market for MPK/K3/K4 Prosthetic Knees Numbers of Knees, 2016

[redacted]

(RX-1049 at 37, Table 3 (Argue Report) (*in camera*)).

Response to Finding No. 985:

Respondent has no specific response.

986. [redacted] (RX-1049 at 37, Table 3 (Argue Report) (*in camera*); PX08040 at 018-19 (§ 5.3) (Merger Guidelines)).

Response to Finding No. 986:

Complaint Counsel's proposed finding is incomplete because it ignores the language in the Merger Guidelines that the "presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power. (PX08040 at 019).

987. Dr. Argue testified in his deposition that his proposed relevant market is highly concentrated and the Merger raises the presumption of competitive harm. (PX05173 (Argue Dep. at 91-92)).

Response to Finding No. 987:

Complaint Counsel's proposed finding is inaccurate. Dr. Argue testified only that the proposed relevant market raises the presumption "that it's some likelihood of causing harm to competition." (PX05173 (Argue, Dep. at 91-92)).

988. Dr. Scott Morton concluded that "even given Dr. Argue's relevant market definition, a merger between Otto Bock and Freedom is presumptively anticompetitive." (PX06003 at 19 (¶ 36) (Scott Morton Rebuttal Report)).

Response to Finding No. 988:

Respondent has no specific response.

989. Dr. Scott Morton concluded that Dr. Argue's use of units to calculate market shares was less appropriate than using revenue to calculate market shares. (PX06003 at 19 (¶¶ 37-38) (Scott Morton Rebuttal Report)).

Response to Finding No. 989:

Complaint Counsel's proposed finding is incomplete and misleading. Although Dr. Scott Morton did make that conclusion, the conclusion is contrary to economic principles and the Merger Guidelines, which both provide that units sold is more appropriate than revenue in calculating market share for differentiated products that may not be perfect substitutes but there is a one-for-one substitution, as is the case here. (PX08040 at 020; Argue, Tr. 6194-6195).

990. Dr. Scott Morton calculated market shares based on revenue for Dr. Argue's proposed market and concluded that the pre-Merger HHI and change in HHI were similar to the pre-Merger HHI and change in HHI for the relevant market she defined. (PX06003 at 20-21 (¶¶ 40-41) (Scott Morton Rebuttal Report)). Dr. Scott Morton's market share calculations are reproduced below.

Table 2: Dr. Argue's Candidate Prosthetic Knee Market Revenue Shares

(PX06003 at 20-21, Table 2 (Scott Morton Rebuttal Report) (*in camera*)).

Response to Finding No. 990:

Complaint Counsel's proposed finding is incomplete and misleading. First, although Dr. Scott Morton did make that conclusion, the conclusion is contrary to economic principles and the Merger Guidelines, which both provide that units sold is more appropriate than revenue in calculating market share for differentiated products that may not be perfect substitutes but there is a one-for-one substitution, as is the case here. (PX08040 at 020; Argue, Tr. 6194-6195). Second, Dr. Morton annualized sales for all manufacturers in 2017, [redacted]

IX. THE MERGER SUBSTANTIALLY REDUCED COMPETITION IN THE U.S. MPK MARKET

991. Otto Bock "admits that it competed with Freedom Innovations prior to the Merger." (PX07049 at 004 (Otto Bock Amended Answer)). Specifically, Otto Bock and Freedom competed in the sale of MPKs. (Kannenberg (Otto Bock) Tr. 1884-85; Swiggum (Otto Bock) Tr. 3343-3344 (*in camera*)).

Response to Finding No. 991:

Complaint Counsel's proposed finding of fact is misleading in two respects. First, Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that Freedom sells a microprocessor swing-and-stance control knee, because it does not. Unlike Ottobock, Freedom does not sell a true swing-and-stance MPK (Carkhuff, Tr. 335-336). Second, Complaint Counsel's proposed finding of fact is also misleading to the extent Complaint Counsel is attempting to create an inference that Ottobock have not and do not continue to compete in the United States, because they have and do. Ottobock and Freedom compete in the sale of prosthetic knees and feet to prosthetic clinics for K-3 and K-4 users in the United States. (Solorio, Tr. 1630, 1647-1648).

992. According to the Merger Guidelines, "A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger." (PX08040 at 022 (§ 6.2) (Merger Guidelines)).

Response to Finding No. 992:

Complaint Counsel's proposed finding of fact is actually a proposed conclusion of law and requires no response. In an abundance of caution, Respondent responds as follows: according to the *Merger Guidelines*, the closeness of competition between the products of the merging parties is critical to anticompetitive effects analysis. (PX08040 *Merger Guidelines* § 6.1.)

993. Prior to the Merger, Otto Bock was Freedom's biggest competitor in terms of size. (Kim (Freedom) Tr. 2538; Carkhuff (Freedom) Tr. 621; [redacted]). [redacted] (Kim (Freedom) Tr. 2595 (*in camera*); PX01319 at 001 (Freedom)).

Response to Finding No. 993:

Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel is attempting to create an inference that Ottobock and Freedom are close competitors simply because Ottobock is the leading prosthetics provider in the world, because they are not close competitors. Ottobock is the leading prosthetics maker in the world, and [redacted]

994. Moreover, in terms of function, Otto Bock and Freedom are each other's closest competitors. In 2015, 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. (PX08008 at 001 (Plié 3 Fact Sheet); (Carkhuff (Freedom) Tr. 348-350)).

(PX08008 at 001 (Plié 3 Fact Sheet)).

Response to Finding No. 994:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it misleading, unsupported by record evidence, and contrary to the record evidence. The first sentence should not be considered by the Court because it is unsupported by any citation to record evidence. The lack of attribution by Complaint Counsel is unsurprising given the gross inaccuracy of claim.

The second sentence is misleading to the extent that Complaint Counsel is attempting to create an inference that Freedom's Plié 3 and Ottobock's C-Leg 4 have similar functionality based only on Freedom's marketing material. Complaint Counsel's proposed finding of fact is also misleading to the extent Complaint Counsel is attempting to create the inference that any of the claims made by Freedom in the cited marketing material are actually true.

Complaint Counsel asked Freedom's Vice President of Marketing and Product Development about the marketing material in Complaint Counsel's proposed finding of fact. (Ferris, Tr. 2296, 2461-2462 (referring to PX01214-030, which is the same marketing document)).

[redacted]

Complaint Counsel attempted to ask Ottobock's Vice President of Government Affairs, Medical Affairs, and Future Development about Freedom's marketing claims at trial, and he provided the following testimony:

> Q. PX08008 is titled Plié 3 Microprocessor Knee Fact Sheet, right?
>
> A. Yes.

Q. You've seen this document before?

A. I have.

Q. And if you look on the bottom half of the document, you see there's a chart called Otto Bock Claims vs Reality, right?

A. I do.

Q. This is referencing claims by Otto Bock about the Plié, right?

A. It says, "From C-Leg 4 vs Competition."

Q. And one of those items listed below, the first, says, "Real-time swing and stance control." Do you see that?

A. Yes.

Q. And there's a checked box for the C-Leg 4 and there's also a checked box under Plié 3 Truth, right?

A. There is a checked box there.

Q. Freedom Innovations was claiming that the Plié 3 has real-time swing and stance control, right?

A. That's their claim.

Q. They claim under the heading Reality, "Both Plié 3 and C-Leg 4 have swing and stance control," right?

A. That's what their claim is.

Q. And going two down to the third row, do you see it reads, "Clinically proven stumble recovery." Do you see that?

A. Yes.

Q. And there's a checked box for both the C-Leg 4 and the Plié 4, right?

A. Yes.

Q. And Freedom claimed, "In various head to head clinical settings comparison, Plié 3 has been the preferred choice by patients and prosthetists," right?

> A. Both of these claims are claims without any validation, without any footnoting, without any science.

(Schneider, Tr. 4731-4733).

Complaint Counsel's proposed finding of fact is also contrary to the weight of record evidence. Ottobock and Freedom are not closest competitors, and with respect to function, overwhelming evidence establishes that they are quite distant competitors. (Schneider, Tr. 4351; [redacted]; Kannenberg, Tr. 1881; Solorio, Tr. 1646-1647; Sabolich, Tr. 5859-5860). The microprocessor in the Plié works differently than all of those products. (Schneider, Tr. 4322-4323). Freedom's own engineer, Dr. Prince, testified that the Plié 3 is materially different from virtually all other MPKs on the market because it lacks variable resistance control. (Prince, Tr. 2807-2808. Specifically, Dr. Prince testified as follows:

> Q. Can you please describe for the court how variable resistance control works.
>
> A. Yes. Basically the ability to go from a -- from either a fully locked position to a fully open position and everything in between, so you're able to flow or change the resistance across a larger range of motion.
>
> Q. Does the Plié 3 utilize variable resistance control?
>
> A. No, it does not. It uses a solenoid valve that switches between a predetermined swing extension and flexion resistance.
>
> Q. Do other microprocessor knees on the market in the U.S. utilize variable resistance control?
>
> A. Yes, they do.
>
> Q. What are the knees in the United States that use variable resistance control?
>
> A. The C-Leg 4, the X3, the Genium, Össur's Rheo, Rheo XC, Endolite's Orion2, Orion3, Nabtesco's Allux, to name a few.

JUDGE CHAPPELL: Isn't that all of them except the Plié 3?

THE WITNESS: Yes.

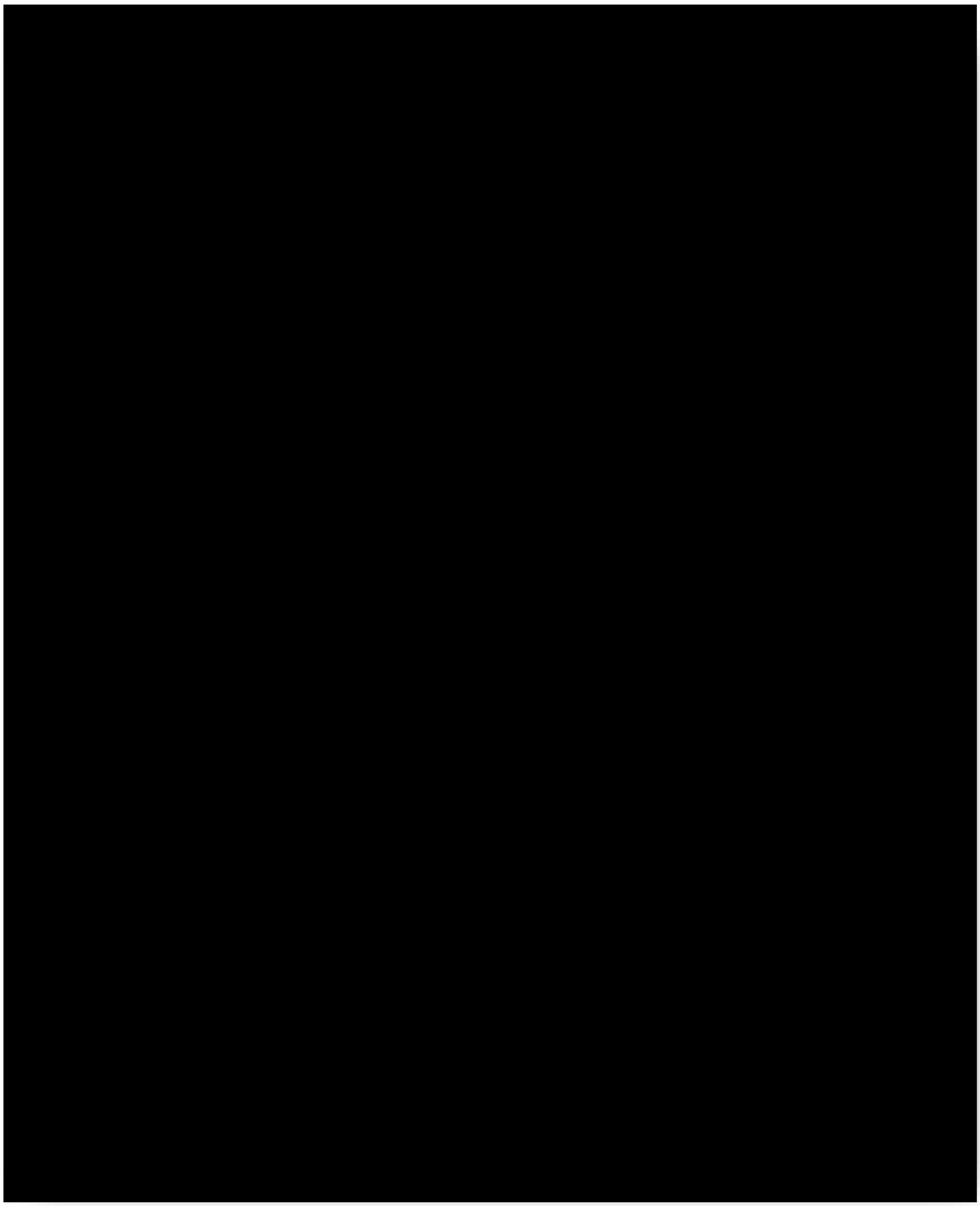
(Prince, Tr. 2807-2808).

The variable resistance is what's important to K-3 and K-4 patients because it can adjust and vary the resistance to make the gait of the knee more natural, safe gait. (Schneider, Tr. 4323). If a user has a Plié 3 and wants to change the resistance level for the stance phase of his or her Plié 3, they have to make an appointment with the prosthetist for an adjustment. (Schneider, Tr. 4312). Prosthetists do not like the fact that Plié 3 users must pump the pneumatic cylinder with air using a bike pump. (Sabolich, Tr. 5861). [redacted]

The weight of the record evidence actually establishes that the Plié 3 is more similar to a Sophisticated Non-MPK than it is to the C-Leg 4. (Doug Smith, Tr. 6020; Sabolich, Tr. 5859-5860; Solorio, Tr. 1646; Kannenberg, Tr. 1981-82; [redacted]. Indeed, Freedom's former CEO and Current Chairman testified at trial that 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." (Carkhuff, Tr. 619-620).

Ottobock prepared the following slide after Freedom started to recommend that prosthetists seek reimbursement for the Plié 3 under the L-Code for microprocessor swing and stance control:



[redacted]

995. The Plié 3 fact sheet 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, weatherproof with IP67 rating, adjustable modes for special activities, and No-charge reimbursement support. (PX08008 at 001 (Plié 3 Fact Sheet)).

Response to Finding No. 995:

Complaint Counsel's proposed finding of fact is misleading and not supported by the weight of record evidence. The first sentence of Complaint Counsel's proposed finding of fact is misleading because the "fact sheet" is nothing more than marketing puffery, [redacted]

The second sentence of Complaint Counsel's proposed finding of fact is misleading and not supported by record evidence. The second sentence is misleading to the extent that Complaint Counsel are attempting to create an inference that "real-time swing and stance control" is the same as microprocessor swing and stance control, because they are not. Sophisticated Non-MPKs, the Plié 3, and the C-Leg 4 provide real-time swing and stance control. (RFOF ¶¶ 140-173, 191-197). Sophisticated Non-MPKs provide swing and stance control using a mechanical system that changes between the two phases in real-time. (RFOF ¶¶ 140, 146, 153). The Plié 3 uses a microprocessor to switch the knee between the two phases, but like Sophisticated Non-MPKs, it provides fixed stance phase resistance and fixed swing phase resistance. (RFOF ¶ 168; (Prince,

Tr. 2807-2808 (testifying that the Plié 3 does not offer variable resistance control)). MPKs that provide microprocessor swing and stance control function much different; they provide variable resistance control in both the swing and stance phases of the gait cycle. (RFOF ¶¶ 189-197; Prince, Tr. 2807-2808).

The second sentence is misleading and unsupported by the record evidence to the extent that Complaint Counsel are attempting to create an inference that the Plié 3 offers clinically proven stumble recovery, because it does not. Complaint Counsel asked Freedom's Vice President of Marketing and Product Development about the marketing material in Complaint Counsel's proposed finding of fact. (Ferris, Tr. 2296, 2461-2462 (referring to PX01214-030, which is the same marketing document)). Freedom's Vice President of Marketing and Product Development testified at trial that, contrary to the marketing material's claim, no clinical study has ever proven that the Plié 3 provides stumble recovery. (Ferris, Tr. 2463). Ottobock's 3R80, a Sophisticated Non-MPK, offers stumble recovery. (Schneider, Tr. 147).

996. According to Maynard Carkhuff, Freedom's CEO at the time, the Plié 3 Fact Sheet also highlights a number of features where the Plié 3 compares favorably to the C-Leg 4. (Carkhuff (Freedom) Tr. 348).

Response to Finding No. 996:

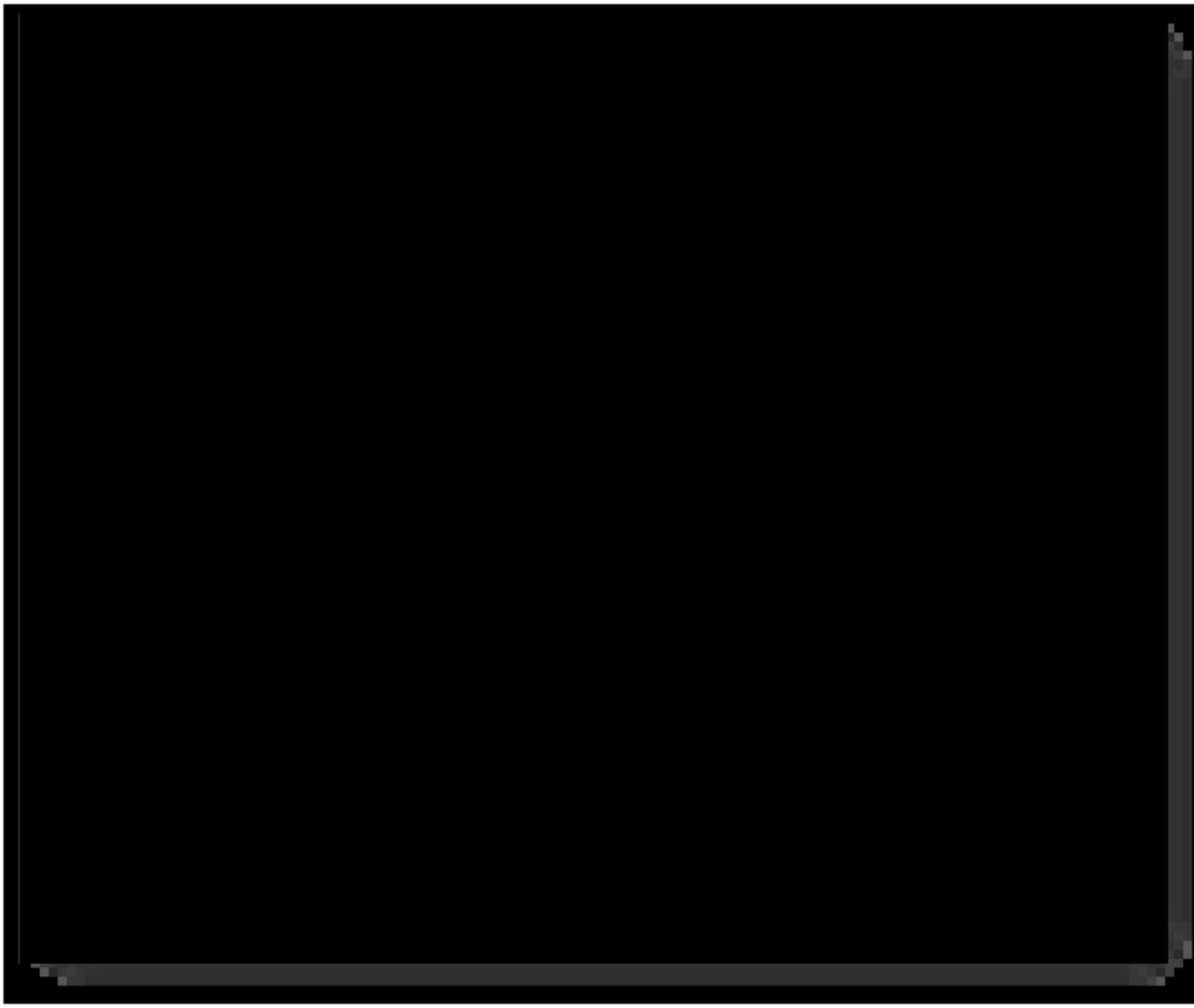
Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel are attempting to create an inference that Freedom's marketing material accurately reflects the functionality of either the Plié 3 or the C-Leg 4 and to the extent that Complaint Counsel are attempting to create an inference that Freedom's marketing material is evidence of closeness of competition between the Plié 3 and the C-Leg 4. Freedom's marketing puffery in the PX08008 are not supported by the weight of the record. (*see* Responses to CCFF ¶¶ 994-995).

997. For example, the Plié 3 Fact Sheet shows that the Plié 3 has a faster microprocessor response time than Otto Bock's C-Leg 4, a customizable stumble recovery feature (C-Leg 4 is not customizable), seamless variable speeds that are superior to the C-Leg 4, and the ability to be fully submersed in water (C-Leg 4 cannot be submersed). (PX08008 at 001 (Plié 3 Fact Sheet); (Carkhuff (Freedom) Tr. 348-349)).

Response to Finding No. 997:

Complaint Counsel's proposed finding of fact is misleading and not supported by the record evidence. Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel are attempting to create an inference that Freedom's marketing material accurately reflects the functionality of either the Plié 3 or the C-Leg 4 and to the extent that Complaint Counsel are attempting to create an inference that Freedom's marketing material is evidence of closeness of competition between the Plié 3 and the C-Leg 4.

Complaint Counsel's proposed finding of fact is not supported by the record evidence [redacted]. For example, before the C-Leg 4 launched, Ottobock put together the follows slide comparing the Plié 3 to the C-Leg 3, Össur Rheo 3, and Endolite Orion, among other MPKs:



[redacted] Specifically, Scott Schneider, Ottobock's Vice President of Government Affairs, Medical Affairs, and Future Development, and who led Ottobock's commercial due diligence efforts on the Acquisition testified as follows regarding claims made by Freedom:

Regarding the microprocessor speed of the Plié 3 (which does not control the resistance of the swing or stance phase of the knee), Ottobock found as follows:

(PX01499 at 013).

Even though Ottobock markets the C-Leg 4 as "weatherproof," it has the same IP rating as the Plié 3, meaning both the C-Leg 4 and Plié 3 can be submersed in fresh water. (RFOF ¶¶ 609-610). Unlike the Plié 3 and C-Leg 4, Ottobock's 3R80 (RDX-003 at trial) is completely waterproof and corrosion resistant. (RFOF ¶ 147). Ottobock's X3 is the only waterproof MPK, with an IP rating of IP68. (RFOF ¶ 505, 217).

998. Clinic customers confirm that the Plié 3 and C-Leg 4 compete closely. (Ford (POA) Tr. 948-49; [redacted]; De Roy (Össur) Tr. 3592-93). [redacted]

Response to Finding No. 998:

Complaint Counsel's proposed finding of fact is misleading and not supported by the record. Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that Mark Ford (POA) and Vinit Asar (Hanger) have the necessary foundation on the functional differences between prosthetic products, because they do not. Ford is not a prosthetist, does not fit patients with prosthetic devices, and is not familiar with the functionality and features of the Plié 3 or the C-Leg 4. (Ford, Tr. 918, 922). [redacted]

Complaint Counsel's proposed finding of fact is also misleading to the extent Complaint Counsel are attempting to create an inference that all products with the same manufacturer-recommended L-Code are equivalent.

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel are attempting to create an inference that Kim DeRoy, Executive Vice President for

Research and Development at Össur, is a clinic customer. The DeRoy testimony cited by Complaint Counsel discusses different technology platforms in the knees, rather than the functionality of the Rheo relative to either the Plié 3 or C-Leg 4. (DeRoy, Tr. 3592-3593). As discussed above, Plié 3 and C-Leg 4 are not close competitors. (Responses to ¶¶ 991-997).

999. Mark Ford, President and Managing Partner of Prosthetic and Orthotic Associates ("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." (Ford (POA) Tr. 948-49).

Response to Finding No. 999:

Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel is attempting to create an inference that the Plié 3 and C-Leg 4 function similarly based only on the testimony of Ford. Ford is not a prosthetist and has never fit a patient with a prosthetic knee. (Ford, Tr. 918). Ford's testimony is further misleading because while he has worked at POA, [redacted]. Complaint Counsel's proposed finding of fact is also misleading because Ford also testified that the prosthetists that work at POA for Ford all believe that "the C-Leg is a better product than the Plie." (Ford, Tr. 1044). Ford also testified that, despite the fact that POA clinics fit Ottobock C-Legs "almost exclusively," that POA's prosthetists consider Össur's Rheo and Endolite's Orion 3 to be in the same category as the C-Leg as a microprocessor knee. (Ford, Tr. 1050). Certified prosthetists that testified at trial who have experience with all MPKs on the market consider the Össur Rheo to be the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; Oros, Tr. 4816-4817).

1000. Otto Bock admits that, prior to the Merger, Otto Bock "competed with the Freedom Business for the sale of prosthetic device components including prosthetic knees to prosthetic clinics on several bases" including price. (PX07008 at 005 (Respondent's

Responses to Complaint Counsel's First Set of Requests for Admissions); Kannenberg (Otto Bock) Tr. 1884-85).

Response to Finding No. 1000:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that Ottobock's C-Leg 4 and Freedom's Plié 3 compete closely on price, because they do not. (RFOF ¶¶ 661-679 (outlining evidence that Freedom's Plié 3 competes most closely with Endolite's Orion 3 and Nabtesco's Allux for price-sensitive clinic customers).

Ottobock sells various prosthetic knees to prosthetic clinics for K-3 and K-4 users in the United States, including 3R80, 3R60, Kenevo and Compact that compete with the Freedom Plié 3. (Schneider, Tr. 4325). Those products offer functionality that is more similar to the Plié 3 than the C-Leg 4. (Schneider, Tr. 4325-4327). Ottobock does not consider the price of the Plié 3 when it is setting the price of the C-Leg 4, the Genium, or the X3. (Schneider, Tr. 4339, 4351).

1001. Otto Bock also admits that it "competed with the Freedom Business" for the sale of prosthetic knees on the basis of "product features." (PX07008 at 005 (Respondent's Responses to Complaint Counsel's First Set of Requests for Admissions); (PX07049 at 020 (Otto Bock Amended Answer)).

Response to Finding No. 1001:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that Ottobock's C-Leg 4 and Freedom's Plié 3 are close competitors, because they are not. (RFOF ¶¶ 607-616, 646-687).

Ottobock sells various prosthetic knees to prosthetic clinics for K-3 and K-4 users in the United States, including 3R80, 3R60, Kenevo and Compact that compete with the Freedom Plié 3. (Schneider, Tr. 4325;); *see also* PX07049 (Otto Bock Amended Answer) at 006, ¶ 8). Those

products offer functionality and features that are more similar to the Plié 3 than the C-Leg 4. (Schneider, Tr. 4325-4327; [redacted]; Carkhuff, Tr. 335; [redacted]). For example, the 3R80, 3R60, and Plié 3 all require manual adjustments to the swing and stance phases of the knee, making them markedly different functionally from microprocessor controlled swing and stance knees like the C-Leg 4, Rheo 3, Orion 3, and Allux. (Schneider, Tr. 4313; [redacted]; DeRoy, Tr. 3639).

1002. According to Otto Bock, "Ottobock's and Freedom Innovations' microprocessor controlled prosthetic knees have provided amputees with significant improvements in prosthetic devices used by amputees." (PX07049 at 003 (Otto Bock Amended Answer)).

Response to Finding No. 1002:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that Freedom's Plié 3 provides any benefits to amputees relative to Sophisticated Non-MPKs, because it does not. (RFOF ¶¶ 350-381 (outlining evidence establishing that no clinical studies show any benefits of the Freedom Plié 3 relative to Sophisticated Non-MPKs)).

1003. Many of Otto Bock's and Freedom's clinic customers view Otto Bock and Freedom as their first and second choices for MPKs. ([redacted]; Ford (POA) Tr. 937; Ell (Mid-Missouri O&P) Tr. 1731). According to Mr. Ford of POA, "C-Legs and the Plié knees are our clinicians' preference." (Ford (POA) Tr. 937).

Response to Finding No. 1003:

Complaint Counsel's proposed finding of fact is misleading and should not be adopted by the Court. Complaint Counsel's proposed finding of fact misleading to the extent Complaint Counsel is attempting to create an inference that clinics top-two choices is evidence of closeness of competition, because it is not. (Argue, Tr. 6336 ("Evidence by clinics that [Plié 3 and C-Leg 4] are their top choices is not necessarily interpreted as being closest substitutes. They may have

specifically chosen two MPKs that were not very similar so they would be able to offer the variety to their clients or their patients.")).

Complaint Counsel's proposed finding of fact is also misleading because [redacted] —not that Ottobock and Freedom are Hanger's first and second choices. [redacted]). [redacted]

Complaint Counsel's proposed finding of fact is also misleading to the extent Complaint Counsel is attempting to create an inference that POA's clinicians preferences are indicative of closeness of competition, because they are not. Ford (POA) is an unreliable source for closeness of competition because he is not a prosthetist and has never fit a patient with a prosthetic knee. (Ford, Tr. 918). [redacted] Complaint Counsel's proposed finding of fact is also misleading because Ford also testified that the prosthetists that work at POA for Ford all believe that "the C-Leg is a better product than the Plie." (Ford, Tr. 1044). Ford also testified that, despite the fact that POA clinics fit Ottobock C-Legs "almost exclusively," that POA's prosthetists consider Össur's Rheo and Endolite's Orion 3 to be in the same category as the C-Leg as a microprocessor knee. (Ford, Tr. 1050).

Complaint Counsel's proposed finding of fact is also misleading to the extent Complaint Counsel attempts to create an inference that Ell provided reliable testimony on closeness of competition. Ell testified that "I do not have an extensive history or knowledge in fitting the other

knees besides the Ottobock line of knees and the Plié line of knees." (PX05129 (Ell, Dep. at 73)). Ell's testimony is therefore unreliable.

Certified prosthetists that testified at trial who have experience with all MPKs on the market consider the Össur Rheo to be the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; Oros, Tr. 4816-4817).

1004. Clinic customers have benefitted from head-to-head competition between Otto Bock and Freedom for their MPK business in terms of price and innovation. (Ford (POA) Tr. 1004-05, 1008; Ell (Mid-Missouri O&P) Tr.1750-51; [redacted]; **PX05108 (Yates (Jonesboro) , Dep. at 74) (*in camera*);** PX05128 (Senn (COPC) , Dep. at 34); PX05149 (Brandt (Ability) , Dep. at 70-72)).

Response to Finding No. 1004:

Complaint Counsel's proposed finding of fact is misleading and not supported by the record evidence. Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that innovation and competition with respect to MPKs is limited to Ottobock and Freedom, because it is not.

All MPK suppliers have updated their MPK offerings since 2014 when Freedom launched the Plié 3, and it is a mischaracterization to say that advancements have been exclusive to Freedom and Ottobock. Keith Senn is not a clinician, and he testified that he is not familiar with non-MPKs, does not know the difference between a fluid-controlled and a constant friction non-MPK, and has never observed a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 152-153, 173, 201, 251). The only foundation Complaint Counsel laid for Senn's knowledge of "patient care" was that he "*used to have* an office for about a decade within one of COPC's clinics." (Response to CCFF ¶ 715 (citing Senn, Tr. 163)). Ford's concern is also unsupported by the record. As of the time of trial, [redacted]

[redacted] Ford is not a prosthetist and therefore does not fit patients with prosthetic devices—he is not familiar with the functionality and features of the Plié or the C-Leg 4 and has no credibility to discuss innovation of these products. (Ford, Tr. 918, 922).

[redacted]

Complaint Counsel's reliance on Brandt is also misplaced. Brandt testified that Freedom's technology "has been around for a while," which was a reason for why its price had come down. (PX05149 (Brandt, Dep. at 71)). Brandt also testified "I mean, I don't know Ottobock's business there, so I don't know, like, if R&D costs have been captured or any of that kind of stuff." (PX05149 (Brandt, Dep. at 71)). Brandt's testimony on innovation and competition is also unreliable because he has not seen a patient at his clinic since 2012. (Brandt, Tr. 3755).

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). [redacted]

1005. One of Respondent's potential divestiture buyers, Ohio Willow Wood, also sees Freedom's Plié 3 as competing against Otto Bock's MPK. (Arbogast (Ohio Willow Wood) Tr. 5107-08 (*in camera*)). According to Ohio Willow Wood's CEO, Ryan Arbogast, if the divestiture were to go through, and Ohio Willow Wood were to own the Plié 3, "Otto Bock would be Willow Wood's largest competitor in the sale of MPKs." (Arbogast (Ohio Willow Wood) Tr. 5108 (*in camera*)).

Response to Finding No. 1005:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that [redacted]

1006. [redacted] (PX06001A at 087 (¶ 118) (Morton Expert Report); Morton Tr. 3938 (*in camera*)).

Response to Finding No. 1006:

Complaint Counsel's proposed finding of fact is unsupported by the record evidence and Dr. Scott Morton's expert testimony should be disregarded by the Court. Dr. Scott Morton's testimony is not reliable because she testified that she could have tested cross price elasticity to determine closeness of competition, but stated at trial that "I have not tried to do that." (Morton, Tr. 4199-4200). Dr. Scott Morton also testified as follows:

> Q. Do you know whether there's any difference between what the microprocessor does in the Plié 3 and what the microprocessor does in the C-Leg 4?
>
> A. I know they're different, but **I don't have a technical understanding of that.**

(Morton, Tr. 4202) (emphasis added).

Prosthetic industry participants, including distributors, prosthetists, physicians, and other manufacturers, consider Ottobock's C-Leg 4 to be the gold standard in the industry,. [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)). The launch materials for the C-Leg 4 focused more on Össur and Endolite than on the Plie. (Schneider, Tr. 4344, 4434-4436).

The record is clear that the Plié 3 is more similar to a Sophisticated 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]; Carkhuff, 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.").

1007. According to Dr. Morton, "[t]he impact of Otto Bock's acquisition of Freedom is likely to be a very substantial lessening of competition. That lessening of competition will arise because of the very strong nature of head-to-head competition between Freedom and Otto Bock, and it will have three main channels of effect: price, quality and innovation. And the decline in quality and innovation, the increase in price, all of these are harms, and these harms will affect the end users of these devices, namely the amputees. (Morton Tr. 3858-59).

Response to Finding No. 1007:

Complaint Counsel's proposed finding of fact is unsupported by the record evidence and should be disregarded by the Court. Dr. Scott Morton's testimony is not reliable because she testified that she could have tested cross price elasticity to determine closeness of competition, but "I have not tried to do that." (Morton, Tr. 4199-4200). Dr. Scott Morton also testified as follows:

> Q. Do you know whether there's any difference between what the microprocessor does in the Plié 3 and what the microprocessor does in the C-Leg 4?
>
> A. I know they're different, but **I don't have a technical understanding of that.**

(Morton, Tr. 4202) (emphasis added). It is beyond belief that Complaint Counsel's economic expert has no understanding of the differences in how the microprocessors in the Freedom Plié 3 and Ottobock C-Leg 4 work. (Morton, Tr. 4202). Dr. Scott Morton's lack of understanding of the critical functional element of MPKs renders her entire "closeness of competition" unreliable. (Morton, Tr. 4202; Schneider, Tr. 4324 (testifying that whether or not the microprocessor provides variable resistance control in the swing and stance phases of the knee is what is most important for a patient's safety); [redacted]).

Dr. Scott Morton's unsupported opinion is further belied by the fact that prosthetic industry participants consider the Plié 3 to be more similar to a Sophisticated Non-MPK than it is to the C-Leg 4, and they do not consider Plié 3 to be 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]

[redacted]; Carkhuff, 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.").

A. THE MERGER ELIMINATED THE AGGRESSIVE HEAD-TO-HEAD MPK COMPETITION BETWEEN OTTO BOCK'S C-LEG 4 AND FREEDOM'S PLIÉ 3

1. Otto Bock's MPK Market Dominance Prior to the Launch of the Plié 3

1008. Bradley Ruhl, Otto Bock's Managing Director for North America, testified that when Otto Bock launched the first version of its C-Leg in 1999, it commanded 100% of the MPK market. (PX05162 (Ruhl (Otto Bock) , Dep. at 92-93)).

Response to Finding No. 1008:

Complaint Counsel's proposed finding of fact is misleading. In 1998, Ottobock launched the first microprocessor-controlled swing and stance knee in the United States. (Carkhuff, Tr. 616). [redacted]

1009. [redacted] (PX01054 (Otto Bock) at 005 (*in camera*)).

Response to Finding No. 1009:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference [redacted]

[redacted]

1010. [redacted] (PX05007 (Carkhuff (Freedom) , Dep. at 155-156 (*in camera*)). [redacted] (PX01054 at 005 (*in camera*)).

Response to Finding No. 1010:

Respondent has no specific response other than to note that a new firm that previously had zero share was able to enter and compete in Complaint Counsel's purported relevant market despite Ottobock's [redacted]. (CCFF ¶ 1010).

2. Freedom's Plié 3 Launch in 2014

1011. Freedom launched its current generation MPK, the Plié 3, in September 2014. (PX07049 at 004 (Otto Bock Amended Answer); PX05112 (Ammouri (Freedom) , Dep. at 107)).

Response to Finding No. 1011:

Respondent has no specific response other than to note that the Plié 3 is not a microprocessor swing and stance controlled knee. (RFOF ¶¶ 168-173; [redacted]). Ottobock had been developing the C-Leg 4 since 2012, and it finalized the requirements in April 2013, more than a year before the Plié 3 was launched in the United States. (PX01057 at 20). The design of the C-Leg 4 included as follows:

> New stance release and swing behavior.
> Dual stance function.
> Enhanced Stumble Recovery.
> Weatherproof (IP67).
> Cockpit App for Android.
> Full coverage via protector.
> Easy set up & adjustment process.
> Quick update course for C-Leg certified COPs.

(PX01057 at 20).

1012. [redacted] (Carkhuff (Freedom) Tr. 492 (*in camera*)).

Response to Finding No. 1012:

Complaint Counsel's proposed finding of fact is misleading and incomplete. It is well-documented that prosthetists are eager to try new products. (Testerman, Tr. 1097) ("the marketing team has to be prepared, in my opinion, at all times when a . . . new product is launched, something is shiny and new out there, to help prepare us to make sure that we can understand it and compete against it."). Nonetheless, Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that the Plié 3 has functionality similar to other MPKs, because it does not. [redacted]

a) Innovation of the Plié 3

1013. The Plié 3 improved upon Freedom's prior MPKs with "improved stance performance," "improved swing performance, "better control over a wider range of speeds," and "water resistance." (PX01165 (Freedom) at 005 (Freedom's Product Pipeline presentation, Nov. 15, 2012); PX01181 (Freedom) at 003-004).

Response to Finding No. 1013:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it is irrelevant and in any event, misleading. The pipeline presentation is dated nearly two full years before the Plié 3's launch in 2014. Also, no Freedom Plié knee—Plié 1, Plié 2, or Plié 3—offered microprocessor-controlled swing and stance control. [redacted]).

[redacted] Ottobock also concluded that "based on our review of the [Instructions For Use] and patents, we can find no evidence of any functional difference between the Plié 3 and Plié 2." (PX01499 at 009).

Additional evidence rebuts Complaint Counsel's proposed finding of fact. [redacted]

1014. [redacted] (Asar (Hanger) Tr. 1414-1415 (*in camera*)).

Response to Finding No. 1014:

Complaint Counsel's proposed finding of fact should be disregarded by the Court because it comes from an unreliable source. [redacted]

1015. 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. (Carkhuff (Freedom) Tr. 333).

Response to Finding No. 1015:

Complaint Counsel's proposed finding of fact is misleading. Carkhuff admitted that none of the claims Freedom makes about the Plié 3 have been clinically or academically verified. (Carkhuff, Tr. 353). These are marketing claims and are not substantiated by the record in this case. Moreover, Freedom's Plié 3 does not offer clinically proven "stumble recovery." (Ferris, Tr. 2462). The Plié 3 has never been subjected to any clinical rigor to determine whether it offers stumble recovery. (Ferris, Tr. 2462). There are no clinical studies showing any performance benefits of the Plié 3 relative to Sophisticated Non-MPKs. (Kannenberg, Tr. 1937). The Ottobock C-Leg 4, the Endolite Orion, and the Össur Rheo all provide clinically proven stumble recovery, but the Plié 3 does not. (Kannenberg, Tr. 1981). Dr. Kannenberg also testified as follows:

> Q. Based on your experience, what knees function most similarly to Freedom's Plié 3?

> A. Well, basically that are mechanical knees like the 3R80, the Mauch S&S, knees without microprocessor control but with hydraulic stance and swing control that is managed mechanically.

(Kannenberg, Tr. 1981).

1016. Freedom positioned the Plié 3 as a superior knee to Otto Bock's C-Leg. (Carkhuff (Freedom) Tr. 325). According to Mr. Carkhuff, the Plié 3 is, in fact, superior. (Carkhuff (Freedom) Tr. 325).

Response to Finding No. 1016:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create the inference that Freedom's marketing shows that the Plié 3 was actually a superior knee to the C-Leg (or any other MPK for that matter). Carkhuff admitted that none of the claims Freedom makes about the Plié 3 have been clinically or academically verified. (Carkhuff, Tr. 353). These are marketing claims and are not substantiated by the record in this case. Moreover, Freedom's Plié 3 does not offer "stumble recovery." (Ferris, Tr. 2462). The Plié 3 has never been subjected to any clinical rigor to determine whether it offers stumble recovery. (Ferris, Tr. 2462). Finally, no clinicians testified that the Plié 3 is superior to the C-Leg 4.

There are no clinical studies showing any performance benefits of the Plié 3 relative to Sophisticated Non-MPKs. (Kannenberg, Tr. 1937). The Ottobock C-Leg 4, the Endolite Orion, and the Össur Rheo all provide clinically proven stumble recovery, but the Plié 3 does not. (Kannenberg, Tr. 1981). Dr. Kannenberg also testified as follows:

> Q. Based on your experience, what knees function most similarly to Freedom's Plié 3?
>
> A. Well, basically that are mechanical knees like the 3R80, the Mauch S&S, knees without microprocessor control but with hydraulic stance and swing control that is managed mechanically.

(Kannenberg, Tr. 1981).

1017. Freedom differentiated the Plié 3 from Otto Bock's C-Leg, touting its customized stumble recovery, variable speeds, full submersibility, interchangeable batteries, remote access, and real-time data display. (PX01181 (Freedom) at 003-04; PX08014 (Freedom) at 002-03).

Response to Finding No. 1017:

Complaint Counsel's proposed finding of fact is misleading and not supported by record evidence. Carkhuff admitted that none of the claims Freedom makes about the Plié 3 have been clinically or academically verified. (Carkhuff, Tr. 353). These are marketing claims and are not substantiated by the record in this case. Moreover, Freedom's Plié 3 does not offer "stumble recovery." (Ferris, Tr. 2462). The Plié 3 has never been subjected to any clinical rigor to determine whether it offers stumble recovery. (Ferris, Tr. 2462). [redacted]

1018. The Plié 3 is the only MPK with an interchangeable battery, which "is a very good factor for patients who are in remote areas or just aren't technology oriented or, frankly, just forgets to charge their knee." (Carkhuff (Freedom) Tr. 340). In contrast, the C-Leg needs to be plugged in. (Carkhuff (Freedom) Tr. 341).

Response to Finding No. 1018:

Complaint Counsel's proposed finding of fact is misleading. Federal regulations prohibit prosthetic knee manufacturers from offering products with interchangeable batteries due to serious health and safety concerns. [redacted]). The second sentence is also intentionally misleading. All batteries in all MPKs

(except for Nabtesco's Hybrid knee), (Mattear, Tr. 5596-5597) need to be plugged in—otherwise they could not be charged. The average battery life on the Plié 3 is just one day (Schneider, Tr. 4391), which is significantly worse than other MPKs sold in the United States, including the Orion 3 (three days) (Blatchford, Tr. 2137), the Rheo (three days) (PX01482 at 009), and the C-Leg (minimum of two days) (Schneider, Tr. 4391).

1019. The Plié 3 also has a faster microprocessor than the C-Leg. (Carkhuff (Freedom) Tr. 348; PX08008 (Freedom) at 001).

Response to Finding No. 1019:

Complaint Counsel's proposed finding of fact is misleading. There is no evidence in the record that microprocessor speed is important to the user of the knee and the microprocessor in the Plié 3 does not control the resistance in either the swing or stance function of the knee. (Response to CCFF ¶ 998; *Cf*. (Blatchford, Tr. 2112; Kannenberg, Tr. 1972; Schneider, Tr. 4385).

1020. In addition, the Plié 3 is waterproof, whereas the C-Leg 3 was not. (Ford (POA) Tr. 1007; De Roy (Össur) Tr. 3598-99). This waterproof feature was particularly attractive to MPK customers. (Testerman (Freedom) Tr. 1174; PX05162 (Ruhl (Otto Bock) , Dep. at 93-94); PX05112 (Ammouri (Freedom) , Dep. at 96-97); PX05001 (Endrikat (Empire) IHT at 21); **PX05140 (Weott (Orthotic Prosthetic Center) , Dep. at 34))**.

Response to Finding No. 1020:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it is inaccurate and misleading. The Plié 3 is not waterproof: it has an IP67 rating meaning it can be submersed in one meter of fresh water for 30 minutes. (Kannenberg, Tr. 1987). It cannot be submersed in salt water or chlorinated water. (RFOF ¶ 197) The Ottobock X3 is the only waterproof MPK sold in the United States. (Kannenberg, Tr. 1988). The C-Leg 3 did not have an IP67 rating. Freedom's misleading sales claim that the Plié 3 was waterproof may have misled some customers. (Schneider, Tr. 4392); PX01499 at 025.

1021. According to Freedom's Chairman, Maynard Carkhuff, the Plié 3's technological advantages made it the new "industry standard" MPK. (PX05007 (Carkhuff) IHT at 284-85).

Response to Finding No. 1021:

Complaint Counsel's proposed finding of fact is unsupported by the record evidence and should be disregarded by the Court. These are marketing claims and are not substantiated by the record in this case. (*See, e.g.*, Response to CCFF ¶ 998). The record evidence is *overwhelming* that 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)). [redacted].

The launch materials for the C-Leg 4 focused more on Össur and Endolite than on the Plie. (Schneider, Tr. 4344, 4434-4436). 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]; Carkhuff, 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.").

1022. Freedom used the technological advancements of the Plié 3 to sell the product to customers. (Testerman (Freedom) Tr. 1180-1181).

Response to Finding No. 1022:

Respondent has no specific response, other than that Freedom made several false and misleading claims about the "technological advancements" of the Plié 3, as analyzed in PX01499, and the record is clear that the Plié 3 is technologically and functionally superior to all other MPKs on the U.S. market. (*See, e.g.*, Response to ¶¶ 998, 1021).

1023. Clinic customers liked the Plié 3. Keith Senn, President of COPC testified that "based on the feedback of practitioners . . . they like the Plié 3" and it "works well with their patients." (Senn (COPC) Tr. 180). [redacted]

Response to Finding No. 1023:

Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel is attempting to create an inference that clinic customers like the Plié 3 for any reason other higher margins, because they do not. Keith Senn is not a clinician, and he testified that he is not familiar with non-MPKs, does not know the difference between a fluid-controlled and a constant friction non-MPK, and has never observed a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 152-153, 173, 201, 251). The only foundation Complaint Counsel laid for Senn's knowledge of "patient care" was that he "*used to have* an office for about a decade within one of COPC's clinics." (Response to CCFF ¶ 715 (citing Senn, Tr. 163)). Asar's testimony is equally unreliable. [redacted]

[redacted]

b) Pricing of the Plié 3

1024. [redacted] (Carkhuff (Freedom) Tr. 388 (*in camera*); PX01023 (Freedom) at 003-04 (*in camera*); PX01024 (Freedom) at 004 (*in camera*)); PX05130 (Governor (Otto Bock) , Dep. at 131-32)).

Response to Finding No. 1024:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Freedom [redacted] Ottobock and Freedom compete in different segments depending on the price sensitivity of the user or the clinic. [redacted] 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. [redacted] Doug Smith, Tr. 6020; Sabolich, Tr. 5858). C-Leg 4 does not compete with Plié 3 on price. [redacted]

[redacted] 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; [redacted] The Plié 3 is priced more competitively with the Endolite Orion 3 and Nabtesco Allux. (Schneider, Tr. 4355); RX-0268; (Testerman, Tr. 1275).

1025. [redacted] (Carkhuff (Freedom) Tr. 491-92 (*in camera*); PX02025 (HEP) at 003; PX01506 (Otto Bock) at 002; PX05162 (Ruhl (Otto Bock) , Dep. at 92-93)). [redacted] (Asar (Hanger) Tr. 1389-1390 (*in camera*)).

Response to Finding No. 1025:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. The launch of the Plié 3 increased Freedom's sales but had a very small impact on Ottobock's share of the MPK segment. Even after the launch of Freedom's Plié 3 over four years ago in September 2014, [redacted]

[redacted]

c) Impact of Plié 3 Launch on Otto Bock

1026. After the Plié 3 launched, Otto Bock's MPK sales decreased. Otto Bock executives attributed its sales decline to the launch of Freedom's Plié 3. (PX05162 (Ruhl (Otto Bock) , Dep. at 92-93 (explaining that improvements to the Plié; allowed it to "gain market share" at the same time Otto Bock was "steadily losing market share"); PX01506 (Otto Bock) at 001, 002 (noting Freedom made "inroads" with the Plié 3)).

Response to Finding No. 1026:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it is misleading and inaccurate. Ruhl's testimony was in the context of Ottobock essentially creating the US MPK market: "But for a fully programmable microprocessor-controlled knee, we were the only one in the market. So we created this market. And ever since then, there's been competition. So we've been steadily losing market share, which you would expect as competition comes in. And, you know, my job is to continue to try to grow the whole market and to maintain as strong a position in the market as -- as we can. And so clearly, Össur and Freedom were competitors, our competitors, and they continued to improve their product and -- and to gain market share." (PX05162 (Ruhl , Dep. at 92-93)). Also, Ottobock was having quality issues with the C-Leg 3 and needed to introduce a new product to the market. (PX05010 (Schneider, IHT at 115-117)).

1027. Otto Bock's Executive Medical Director for North America testified that, "Freedom was driving a very aggressive marketing and promotional campaign with pretty high discounts and giveaways of additional products." (PX05150 (Kannenberg (Otto Bock) , Dep. at 127)).

Response to Finding No. 1027:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Dr. Kannenberg (and other witnesses) testified that 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. (Kannenberg, Tr. 1981-1982). Notably, [redacted]

3. Otto Bock's Competitive Response to the Plié 3 from 2014-2015

a) Pricing and Promotional Responses

1028. [redacted] (PX01331 (Otto Bock) at 004-05; PX03008 (Madison Capital Funding) at 004 (*in camera*)).

Response to Finding No. 1028:

Complaint Counsel's proposed finding is misleading. Ottobock released its C-Leg 4 just months after Freedom launched its Plié 3. (Schneider, Tr. 4342; Carkhuff, Tr. 294). Because it had a new version of the C-Leg on the market, Ottobock lowered the price on its C-Leg 3, consistent with prior practice related to outdated products upon launch of new products. The discounted price on the C-Leg 3 was unrelated to the launch of the Plié 3. Further, Complaint Counsel's proposed finding of fact relies solely upon two documents which were not used at trial and thus were not subject to cross-examination before the Court. Moreover, after Plié 3's launch in the United States, Ottobock's former Executive Vice President of Sales, Matt Swiggum, warned

his National Sales Director that "Plie is NOT the competition. Rheo Is. Plié is a fly and Rheo is a vulture." (RX-0047 at 002; Swiggum, Tr. 3437).

1029. According to Walter Governor, Otto Bock's National Sales Director, in the first quarter of 2015 Otto Bock sold 44 C-Leg 3 MPKs to customers under a promotion, 21 of which received a $2,500 discount. (PX01519 (Otto Bock at 001)). In response to this information, Brad Ruhl, then the President of Prosthetics Business Unit for North America, wrote "Feels like momentum BABY!!" (PX01519 (Otto Bock at 001)).

Response to Finding No. 1029:

Complaint Counsel's proposed finding of fact is misleading. Ottobock released its C-Leg 4 just months after Freedom launched its Plié 3. (Schneider, Tr. 4342; Carkhuff, Tr. 294). Because it had a new version of the C-Leg on the market, Ottobock lowered the price on its C-Leg 3, consistent with prior practice related to outdated products upon launch of new products. The discounted price on the C-Leg 3 was unrelated to the launch of the Plié 3. Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1030. Dr. Helmut Pfuhl, Otto Bock's executive vice president, wrote to colleagues in early 2015 that "pricing keeps me up at night more than anything else!" while highlighting that Freedom was pricing the Plié 3 significantly below the C-Leg 3, which in his view was a significant reason Otto Bock was losing sales. (PX01506 (Otto Bock) at 001).

Response to Finding No. 1030:

Complaint Counsel's proposed finding is misleading. Ottobock released its C-Leg 4 just months after Freedom launched its Plié 3. (Schneider, Tr. 4342; Carkhuff, Tr. 294). Because it had a new version of the C-Leg on the market, Ottobock lowered the price on its C-Leg 3, consistent with prior practice related to outdated products upon launch of new products. The discounted price on the C-Leg 3 was unrelated to the launch of the Plié 3.

1031. [redacted] (PX05140 (Weott (Orthotic & Prosthetic Centers) , Dep. at 40) (*in camera*)).

Response to Finding No. 1031:

This proposed fact is misleading and should not be considered by the Court. [redacted]

[redacted]

(PX05140 (Weott , Dep. at 40)) (*in camera*).

1032. Another customer testified that after he began purchasing more Plié 3 MPKs, Otto Bock offered "increasingly aggressive pricing on their MPKs." (PX05128 (Senn (COPC) , Dep. at 24-25)).

Response to Finding No. 1032:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Senn testified at his deposition that in 2015 Ottobock offered "increasingly 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, we can reach dollar thresholds for

increased discounts." (PX05128 (Senn , Dep. at 24-25)). Senn could not remember any specifics

1033. In addition to more aggressive pricing, Otto Bock provided its sales and marketing team 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." (PX05150 (Kannenberg (Otto Bock) , Dep. at 128-29); PX01499 (Otto Bock) (presentation entitled "Responding to Marketing Claims Freedom Innovation Plie")).

Response to Finding No. 1033:

Complaint Counsel's proposed finding of fact is misleading and incomplete. During this time,

b) Otto Bock's Launch of the C-Leg 4 in 2015

1034. In mid-2015, Otto Bock launched its next generation MPK, the C-Leg 4. (Carkhuff (Freedom) Tr. 478 (*in camera*); PX07049 at 021 (Otto Bock Amended Answer); PX08077 (Otto Bock) at 001 (Press release announcing the C-Leg 4 launch in North America)).

Response to Finding No. 1034:

Respondent has no specific response.

(1) C-Leg 4 Launch Goals, Strategies, and Pricing

1035. Prior to the launch of the C-Leg 4, a cross-functional team comprised of Otto Bock sales, marketing, clinical, and service employees created various launch materials for the C-Leg 4. These contained information on the C-Leg 4's benefits, features, functions,

reimbursement opportunities, launch tasks and timeline, and marketing materials. (PX01518 (Otto Bock)).

Response to Finding No. 1035:

Respondent has no specific response.

1036. According to Bradley Ruhl, then President of Otto Bock Healthcare North America, who led the C-Leg 4 launch in the United States, the purpose of the launch materials was "to prepare our employees, our sales team, our professional and clinical service team, marketing teams, to ultimately be in a position to launch product in the market and help customers learn and become educated …about the product." (PX05162 (Ruhl (Otto Bock) Dep. at 51-52)).

Response to Finding No. 1036:

Respondent has no specific response.

1037. The C-Leg 4 launch materials touted the C-Leg 4 as "quite simply the best C-Leg of all time, significantly improving users' ability to handle their daily activity." (PX01518 (Otto Bock) at 024).

Response to Finding No. 1037:

Respondent has no specific response.

1038. The C-Leg 4's new features included a lower system height, new carbon frame construction, integration of all sensors, Bluetooth compatibility, a knee-bending angle of 130 degrees, and weatherproofing. (PX01518 (Otto Bock) at 024, 027 (Mechatronics Launch Package); PX05162 (Ruhl (Otto Bock) , Dep. at 42).

Response to Finding No. 1038:

Respondent has no specific response.

1039. The C-Leg 4 launch materials focused extensively on the Plié 3. For example, the launch packet circulated on February 20, 2015 contained market share estimates for a market described as "MPK," estimating that Otto Bock had a 78% share and identifying Freedom as the next-largest competitor with an 11% share. (PX01518 (Otto Bock) at 009, 050).

Response to Finding No. 1039:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. The first sentence is unsupported by record evidence. The second sentence is misleading. It ignores the fact that Ottobock's C-Leg 4 launch materials also noted the serious problems with the Plié 3 and the fact that it is not a real swing-and-stance knee. (PX01057 at 074). Complaint Counsel's proposed finding of fact is also contrary to the weight of evidence which shows that Ottobock's C-Leg 4 launch was a response to new product offerings from Össur and Endolite, not Freedom. RFOF ¶ 609.

Ottobock had been developing the C-Leg 4 since 2012, and it finalized the requirements in April 2013, more than a year before the Plié 3 launched in the United States. (PX01057 at 20). The design of the C-Leg 4 included as follows:

> New stance release and swing behavior.
> Dual stance function.
> Enhanced Stumble Recovery.
> ***Weatherproof (IP67).***
> Cockpit App for Android
> Full coverage via protector
> Easy set up & adjustment process
> Quick update course for C-Leg certified CPOs

(PX01057 at 20) (emphasis added). Plié 3 lacks all of the benefits identified above except for the IP67 rating. (Schneider, Tr. 4359-4360).

After Plié 3's launch in the United States, Ottobock's former Executive Vice President of Sales, Matt Swiggum, warned his National Sales Director that "Plie is NOT the competition. Rheo Is. Plié is a fly and Rheo is a vulture." (RX-0047 at 002; Swiggum, Tr. 3437).

1040. Additionally, the February 2015 launch packet compared L-codes, reimbursement, and list prices for the C-Leg 4 versus the Plié, Rheo, and Orion. (PX01518 (Otto Bock) at 036 (C-Leg 4 Launch Packet)).

Response to Finding No. 1040:

Respondent has no specific response.

1041. [redacted] (PX01057 (Otto Bock) at 016 (C-Leg 4 Launch Plan) (*in camera*)).

Response to Finding No. 1041:

Respondent has no specific response.

1042. [redacted] (PX01057 (Otto Bock) at 018 (C-Leg 4 Launch Plan) (*in camera*)).

Response to Finding No. 1042:

Respondent has no specific response.

1043. [redacted] (PX01057 (Otto Bock) at 023 (C-Leg 4 Global Launch Plan) (*in camera*); Schneider (Otto Bock) Tr. 4556-57 (*in camera*); PX05163 (Stuch (Otto Bock) , Dep. at 225-27); PX05157 (Pfuhl (Otto Bock) , Dep. at 70)).

Response to Finding No. 1043:

Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel ignores the fact that this is a reference to 2014—which was the last full year prior to the launch. The slide referenced in Complaint Counsel's proposed finding shows that Ottobock wanted to gain share from all competitors. PX01057 also sets forth the numerous issues and deficiencies of the Plié. (PX01057 at 074).

1044. [redacted]

Response to Finding No. 1044:

Complaint Counsel's proposed finding ignores the fact that the referenced Ottobock strategy was from 2014 market share—almost five-year-old market share data.

1045. [redacted] (Schneider (Otto Bock) Tr. 4556-57 (*in camera*); (PX05010 (Schneider (Otto Bock) IHT at 122 (*in camera*))

Response to Finding No. 1045:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Complaint Counsel is referencing nearly four-year-old market share and sales data. Further, the C-Leg 3 was becoming aging technology, which was a reason why Ottobock was launching the C-Leg 4. (Solorio, Tr. 1586).

1046. [redacted] (PX01572 (Otto Bock) at 001 (*in camera*)).

Response to Finding No. 1046:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1047. The C-Leg 4 responded to the "additional user benefits" introduced by the Plié 3. (PX05010 (Schneider (Otto Bock) IHT at 115-16). Among these benefits included the ability to walk backwards, weatherproofing, and an improved battery life. (Testerman (Freedom) Tr. 1173-1176; Ford (POA) Tr. 1007-08; PX01213 (Freedom)).

Response to Finding No. 1047:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. The only improvement introduced by the Plié 3 and that was shared by the C-Leg 4 was the weatherproofing; (Schneider, Tr. 4359-4360) however, the record is clear that Ottobock had been developing the C-Leg 4 as an IP67 rated product since 2012. (Response to CCFF ¶ 1011 (citing PX01057 at 20)).

1048. [redacted] (Carkhuff (Freedom) Tr. 497 (*in camera*)). [redacted] (Carkhuff (Freedom) Tr. 497 (*in camera*); PX02025 (HEP) at 004).

Response to Finding No. 1048:

Complaint Counsel's proposed finding of fact is misleading because it ignores testimony from clinicians, and others, that **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 given its difference in functionality, quality, and price. (RFOF ¶ 596 (citing Doug Smith, Tr. 6020; Sabolich, Tr. 5859-5860; Solorio, Tr. 1646; Kannenberg, Tr. 1981-1982; Oros, Tr. 4817)).** There is no clinician testimony to support Complaint Counsel's proposed finding.

1049. Otto Bock differentiated the C-Leg 4 from the Plié 3, noting that the C-Leg 4 has a greater knee flexion angle, longer battery life, Bluetooth compatibility, and a protective cover. (PX01518 (Otto Bock) at 003).

Response to Finding No. 1049:

Complaint Counsel's proposed finding of fact is incomplete, inaccurate and misleading. Among many other differences, the C-Leg 4, unlike the Plié 3, was a microprocessor controlled swing-and-stance knee. **(RFOF ¶ 599 (citing Prince, Tr. 2821-2822))**.

1050. According to notes from an internal Otto Bock call, "C-Leg 4 is going to blow the Plié out of the water – no comparison—Brad wasn't excited before—but is very excited about this MPK—your customers will be blown out of the water." (PX01570 (Otto Bock) at 001).

Response to Finding No. 1050:

Complaint Counsel's proposed finding of fact is misleading. **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 given its difference in functionality, quality, and price. (RFOF ¶ 596 (citing Doug Smith, Tr. 6020; Sabolich, Tr. 5859-5860; Solorio, Tr. 1646; Kannenberg, Tr. 1981-1982; Oros, Tr. 4817)). Unlike an MPK, the Plié 3's stance flexion resistance is not controlled by a microprocessor; it is manually set using an Allen wrench or a hex key to adjust that resistance. The swing extension on the Plié is also manually set with a tool and not controlled by a microprocessor, which is unlike other MPKs on the market (RFOF ¶ 599 (citing Prince, Tr. 2821-2822))**. Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1051. Otto Bock also sent letters to insurers to convince them of the benefits of the C-Leg 4 over the Plié 3 for reimbursement purposes. (PX01548 (Otto Bock); PX01491 (Otto Bock); PX01855 (Otto Bock)).

Response to Finding No. 1051:

Complaint Counsel's proposed finding of fact is inaccurate, misleading and is a mischaracterization of the testimony and documents. [redacted]

[redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon two documents which were not used at trial and thus were not subject to cross-examination before the Court.

1052. [redacted] (PX01524 (Otto Bock) at 004, 007 (*in camera*)).

Response to Finding No. 1052:

Complaint Counsel's proposed finding is incomplete and misleading. **Reimbursement is the most important factor, as demonstrated by the fact that PX01524 dedicates three pages to coding strategy, and only half of a page to competitor pricing. (PX01524). According to certified prosthetist Scott Sabolich:**

> Q. 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?
>
> A. Completely.
>
> Q. Why?
>
> A. 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, Tr. 5831-5832). Michael Oros, a certified prosthetist with Scheck & Siress testified at trial that

> Q. Based on your many years of experience in the prosthetics industry, and as a clinician, and as the CEO of a large clinical organization, do you believe that the insurance reimbursement system that is in place in this country puts constraints on the ability of prosthetic device manufacturers to raise the prices of prosthetic knees, including microprocessor knees?
>
> A. Yes.
>
> Q. Why?
>
> A. A. It's really not an open market. I mean, the reality of it is, they can't, if they -- and it's like this with not just prosthetic knees, but really many of the services we provide is ultimately if the acquisition cost as a provider becomes too high, and the reimbursement is a fixed amount, there's no way to – to make that up as a provider.

(Oros, Tr. 4804-4805). Oros testified further than commercial payors reimburse at rates well below Medicare, putting additional downward pressure on prices prosthetics suppliers are able to charge. (Oros, Tr. 4801-4802). [redacted]).

[redacted]

1053. As then-President of the US Prosthetics Business (and current Managing Director of Otto Bock North America) explained, Otto Bock considered the prices of those three products because those are the three microprocessor knees that were "most prevalent in the market" at that time. (PX05162 (Ruhl (Otto Bock) , Dep. at 109-110)).

Response to Finding No. 1053:

Complaint Counsel's proposed finding of fact is inaccurate. Mr. Ruhl testified that that "I think" that Ottobock considered prices of those three products for the reasons above. (PX05162 (Ruhl , Dep. at 109-110)). However, Mr. Schneider testified that **Ottobock does not, and did not, consider the price of the Plié 3 when it set the price of the C-Leg 4 because the Plié 3 is not a microprocessor-controlled swing-and-stance knee, whereas the C-Leg 4 is.. (Schneider, Tr. 4344)**.

1054. The sales and marketing team also developed "battle cards" for the C-Leg 4 that contrasted the features and functions of the C-Leg 4 versus the Plié, Rheo, and Orion. (PX01526 (Otto Bock) at 002-003 (C-Leg 4 Battle Card); PX05162 (Ruhl (Otto Bock) Dep. at 114-116)).

Response to Finding No. 1054:

Complaint Counsel's proposed finding lacks support. Mr. Ruhl testified that Ottobock has "done some product comparisons, but I don't think we've used the term 'battle card.'" (PX05162 (Ruhl , Dep. at 115)).

1055. The battle cards were used by the sales and marketing team, as well as published in industry periodicals. (PX05162 (Ruhl (Otto Bock) Dep. at 114-116)).

Response to Finding No. 1055:

Complaint Counsel's proposed finding lacks support. Mr. Ruhl testified that Ottobock has "done some product comparisons, but I don't think we've used the term 'battle card.'" (PX05162 (Ruhl , Dep. at 115)).

(2) Impact of the C-Leg 4 on Freedom's Plié 3 Sales

1056. [redacted] (Carkhuff (Freedom) Tr. 492 (*in camera*); PX02025 (HEP) at 003; PX01158 (Freedom) at 001 (email from Kim to Freedom board of directors dated Aug. 7, 2015); Kim (Freedom) Tr. 2552 (*in camera*)).

Response to Finding No. 1056:

Complaint Counsel's proposed finding of fact is incomplete and misleading. The C-Leg 4 led to a significant decrease in many different manufacturers' sales. (DeRoy, Tr. 3679-3680; PX03245 at 006).

1057. [redacted] (Carkhuff (Freedom) Tr. 478 (*in camera*); *see also* PX02017 (HEP) at 006; Carkhuff (Freedom) Tr. 478-479 (*in camera*)).

Response to Finding No. 1057:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1058. [redacted] (PX01158 (Otto Bock) at 001); (Carkhuff (Freedom) Tr. 408 (*in camera*)).

Response to Finding No. 1058:

Complaint Counsel's proposed finding of fact is misleading and lacks foundation because Lee Kim was CFO, and was not involved in pricing, sales, or marketing. **Additionally, the people that were involved with pricing, sales and marketing, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2314; Testerman, Tr. 1201).**

1059. [redacted] (PX02016 (HEP) at 006 (Management Report for the Month Ended July 31, 2015); (Carkhuff (Freedom) Tr. 467-68 (*in camera*).).

Response to Finding No. 1059:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1060. [redacted] (PX01031 (Freedom) at 002); (Carkhuff (Freedom) Tr. 472, 476 (*in camera*).

Response to Finding No. 1060:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1061. In October 2015, Rob Cripe, Freedom's Executive Vice President for North American Commercial Ops and Global Marketing, wrote to Maynard Carkhuff after the launch of the C-Leg 4 that "[w]ith the C-leg, we are up against a new product and everyone wants to try it – you know the drill. Fending off someone trying it is the fight we are in … down the road, the fight will be on reordering it. We have tools, promos and action plans in place to combat this… rolling out as we speak." (PX01163 (Freedom) at 001) (ellipsis in original).

Response to Finding No. 1061:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]. Complaint Counsel cites a former Freedom employee who was not called to testify in support of Complaint Counsel's proposed finding. Further, the actual document being cited in Complaint Counsel's proposed

finding of fact is a document which was not used at trial and thus was not subject to cross-examination before the Court.

1062. In November 2015, Lee Kim, Freedom's CFO, sent another management report to Freedom's creditors, stating, "Plié MPC knee and related product sales decreased 28% compared to the prior year. MPC knee unit sales decreased from 93 to 64. Plié sales in the U.S. were impacted by the introduction of the updated Otto Bock MPC knee. Total revenues for October 2015 were 89% of plan and are at 97% of plan year to date. Foot and related revenue attainment against plan for the month was 96% and knee and related revenues attained 80% of plan. The shortfall from plan was largely due to competitive challenges in the Hanger and SPS Independent channels due largely to the release of an updated MPC knee by Otto Bock." (PX02017 (HEP) at 006 (Management Report For the Month Ended October 31, 2015)).

Response to Finding No. 1062:

Complaint Counsel's proposed finding of fact is incomplete, misleading and lacks foundation. [redacted]. Additionally, this was a financial report created by Lee Kim, who was CFO, and was not involved in pricing, sales, or marketing.

1063. In December 2015, Lee Kim, Freedom's CFO, sent another management report to Freedom's creditors, stating, "Plié sales in the U.S. have been impacted by the introduction of the updated Otto Bock MPC knee." (PX02018 (HEP) at 006). Mr. Kim also wrote, "Total revenues for November 2015 were 79% of plan and are at 93% of plan year to date. Foot and related revenue attainment against plan for the month was 84% and knee and related revenues attained 79% of plan. The shortfall from plan was largely due to competitive challenges in the Hanger and SPS Independent channels due largely to the release of an updated MPC knee by Otto Bock." (PX02018 (HEP) at 006).

Response to Finding No. 1063:

Complaint Counsel's proposed finding of fact is incomplete, misleading and lacks foundation. [redacted] Additionally,

this was a financial report created by Lee Kim, who was CFO, and was not involved in pricing, sales, or marketing.

1064. In March 2016, Maynard Carkhuff, Freedom's then-CEO, sent a graph illustrating the effect of the C-Leg 4 launch on Plié 3 sales to Freedom board member Ned Brown as part of a "Diagnostics" assessment of Freedom's revenue decline, as shown below. (PX02025 (HEP) at 003; *see also* PX05007 (Carkhuff (Freedom) IHT at 158-59)).

(PX02025 (HEP) at 003).

Response to Finding No. 1064:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Maynard Carkhuff, who sent this graph, [redacted]

[redacted]

1065. In this graph, Freedom's worldwide sales are depicted by an orange line. (PX02025 (HEP) at 003; PX05007 (Carkhuff (Freedom) IHT at 160)).

Response to Finding No. 1065:

Respondent has no specific response.

1066. According to this graph, after the Plié 3 was released, worldwide and U.S. direct sales increased right up until the launch of the C-Leg 4. (PX02025 (HEP) at 003; PX05007 (Carkhuff (Freedom) IHT at 160-61).

Response to Finding No. 1066:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Maynard Carkhuff, who sent this graph, [redacted]

1067. After the C-Leg 4 was introduced, Freedom's worldwide, U.S. direct, Hanger, and SPS sales all decreased. (PX02025 (HEP) at 003; PX05007 (Carkhuff (Freedom) IHT at 160-61)).

Response to Finding No. 1067:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Maynard Carkhuff, who sent this graph, [redacted]

1068. Accompanying this graph, Mr. Carkhuff noted in a page titled "Diagnostic" that Freedom achieved growth through June 2015, but in July 2015, "Otto Bock introduced the C-leg 4 which closed the technology gap with Freedom's Plié MPC knee." (PX02025 (HEP) at 004).

Response to Finding No. 1068:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Maynard Carkhuff, who sent this graph, [redacted] Additionally, Complaint Counsel's proposed finding of fact is misleading because it ignores testimony from clinicians, and others, that **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 given its difference in functionality, quality, and price. (RFOF ¶ 596 (citing Doug Smith, Tr. 6020; Sabolich, Tr. 5859-5860; Solorio, Tr. 1646; Kannenberg, Tr. 1981-1982; Oros, Tr. 4817)).** There is no clinician testimony to support Complaint Counsel's proposed finding

1069. [redacted] (PX03008 (Madison Capital Funding) at 005) (*in camera*).

Response to Finding No. 1069:

Complaint Counsel's proposed finding of fact is inaccurate, irrelevant and lacks foundation, and should be disregarded. Complaint Counsel's proposed finding references a document created by one of Freedom's lenders. Freedom's lenders—not a Freedom employee or

board member. [redacted] Complaint Counsel's proposed finding of fact is also contradicted by overwhelming direct evidence that Ottobock's C-Leg 4 is the "gold standard" in the industry and is far superior to the Freedom Plié 3. (Cite RFOF ¶¶ 607 & 596 (citing **Collins, Tr. 3292; Ferris, Tr. 2409**; Oros, Tr. 4794-4795; Blatchford, Tr. 2144-2145, Ell, Tr. 1797-1798; DeRoy, Tr. 3591)). Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not introduced at trial, and thus not subject to cross-examination before this Court.

1070. [redacted] (Carkhuff (Freedom) Tr. 492-93 (*in camera*); PX02071 (HEP) at 001; PX01610 (Freedom) at 003) (draft of No. Am. Commercial slides emailed Feb. 10, 2016).

Response to Finding No. 1070:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

1071. [redacted] (Carkhuff (Freedom) Tr. 505 (*in camera*)).

Response to Finding No. 1071:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

1072. [redacted] (PX01520 (Otto Bock) at 001 (*in camera*)).

Response to Finding No. 1072:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that the launch of the C-Leg 4 led to a significant decrease in many different manufacturers' sales. (DeRoy, Tr. 3679-3680; PX03245 at 006). Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1073. In March 2016, Ned Brown, a member of Freedom's board of directors, wrote to Thomas Chung, Vice President of HEP, and others at HEP that, "The Hangar [sic] 2015 softness is related primarily to knees (vs the more general description of the 'Hangar [sic] Channel') – I would be more specific, and I would highlight the impact of OB's new C leg launch which correlates exactly with the decline in our Hangar [sic] knee business. We didn't respond fast enough to their competitive attack, and we are seeing a broadening competitive impact across our knee business into 2016." (PX02071 (HEP) at 001; *see also* PX05113 (Chung (HEP) , Dep. at 87-88)).

Response to Finding No. 1073:

Complaint Counsel's proposed finding of fact is misleading and lacks foundation. The proposed finding, regarding Freedom, cites testimony from an HEP witness and HEP documents instead of any Freedom documents or witnesses. [redacted]

[redacted]

4. Freedom's Response to the C-Leg 4 Launch in 2015-2017

1074. In July 2015, in a management report from Lee Kim, Freedom's CFO, to Freedom's creditors, Mr. Kim explained that, in light of the decline in Plié sales as a result of the C-Leg 4 launch, "[w]e have developed promotions and other sales materials to regain momentum in knee sales." (PX02016 (HEP) at 006).

Response to Finding No. 1074:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it is irrelevant. Kim is CFO of Freedom; he has never been involved in pricing, sales, or marketing of the Plié. Moreover, this document is from 2015.

1075. In a contemporaneous memo to the sales team at Freedom, Freedom equipped its sales team with new materials specifically highlighting the advantages of the Plié 3 over the C-Leg 4. (PX01213 (Freedom) at 001-003).

Response to Finding No. 1075:

Respondent has no specific response, other than that every MPK manufacturer has tried to market against the C-Leg 4 because it is the market leader.

1076. This memo instructed the sales team, "don't forget that our positioning statement, STRONGER, SMARTER, SUBMERSIBLE is still true, and we already have examples of head-to-head trials against the C-leg 4 where we have won when we sell the benefits." (PX01213 (Freedom) at 003).

Response to Finding No. 1076:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

These five issues were raised by the SMC team regarding decline in Plié 3 sales. (RX-1299 at 001-004). Also, [redacted]

1077. In that same memo, the sales team was told "[t]he presence of new competition means we/you have made an impact – now go defend it! Stay tuned for additional tools being created to demonstrate the [sic] how well Plié 3 stands up to this new competitor and others in the market." (PX01213 (Freedom) at 003).

Response to Finding No. 1077:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

These five issues were raised by the SMC team regarding decline in Plié 3 sales. (RX-1299 at 001-004). Also, [redacted]

1078. In a fall 2015 Sales Meeting, Freedom sales members, marketing members, and executives reviewed a detailed "Competitor Info" comparison on the Plié 3 versus the C-Leg 4. (PX01168 (Freedom) at 001-02 (email and attachment sent by Ammouri on Mar. 19, 2016, referencing meeting). The Freedom sales team, members of the executive team, and marketing team attended this meeting. (PX05112 (Ammouri) , Dep. at 107). At this meeting, the various Freedom employees "spent a lot of time discussing" the C-Leg 4 versus the Plié**.** (PX05112 (Ammouri) , Dep. at 108). The "Competitor Info" document was created to help the Freedom sales and marketing team win versus the C-Leg 4. (PX05112 (Ammouri) , Dep. at 114). Winning versus the C-Leg 4 means a customer buying the Plié 3. (PX05112 (Ammouri) , Dep. at 114).

Response to Finding No. 1078:

Complaint Counsel's proposed finding of fact is misleading and incomplete. At her deposition, Ammouri specifically testified about these documents, stating that the Freedom sales teams "*never isolate just C-Leg 4. We want to make sure they know about the Rheo and the Orion as well, and any other products, like Allux.* So this e-mail communication, while it's highlighting the C-Leg, that wasn't the only thing we talked about at the sales meeting. Usually when we talk about other microprocessor knees, it's lumped together with a broad view of it. *We might spend a little bit more time on the C-Leg primarily because it is the main leader in units sold in the U.S., so we want to ensure that our reps are able to discuss it with their customers.*" (PX05112 (Ammouri , Dep. at 108)) (emphasis added). Further, Freedom's ordinary course documents *later that same year* listed reasons why Plié 3 sales were declining in 2016. RX-1299; (Testerman, Tr. 1296). [redacted] These five issues were raised by the SMC team regarding decline in Plié 3 sales. RX-1299 at 001-004.

a) Creation of the Ideal Combo

1079. [redacted]
(Testerman (Freedom) Tr. 1201; (Ferris (Freedom) Tr. 2395 (*in camera*); Solorio (Otto Bock) Tr. 1588, 1607 (*in camera*); PX00867 (Otto Bock) at 022 (*in camera*) (2018 North America Marketing & Sales Plan)).

Response to Finding No. 1079:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Freedom offered promotions on its Plié that focused on bundles pairing Freedom's prosthetic feet with its

Plié knee *before* the launch of the C-Leg 4. (PX05137 (Mathews , Dep. at 174)) (A bundle is "one of the tools we use and have used for a while.").

1080. [redacted]

Response to Finding No. 1080:

Complaint Counsel's proposed finding of fact is misleading. Individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). 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). Indeed, it was started prior to the launch of the C-Leg 4—Freedom offered the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

[redacted]

1081. 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." (PX05010 (Schneider) IHT at 123-124). Mr. Schneider saw these promotions being offered by Freedom through September 2017. (PX05010 (Schneider) IHT at 123-124).

Response to Finding No. 1081:

Complaint Counsel's proposed finding of fact is misleading. Individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). 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). Indeed, it was started prior to the launch of the C-Leg 4—Freedom offered the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

[redacted]

[redacted]

1082. Otto Bock's Senior Prosthetics Marketing Manager, Cali 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." (PX01272 (Otto Bock) at 001); Solorio (Otto Bock) Tr. 1589-91).

Response to Finding No. 1082:

Complaint Counsel's proposed finding of fact is incomplete. Solorio testified that as marketing manager at Ottobock, "it's part of our responsibility to make sure the sales team knows what's out there." (Solorio, Tr. 1591).

1083. [redacted]

Response to Finding No. 1083:

Complaint Counsel's proposed finding of fact is misleading. Individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). Freedom uses the Ideal Combo to compete against all competitor knees, including the C-Leg 4, Orion 3, or the Rheo 3, and the Ideal Combo was not developed to combat the C-Leg 4 launch. (Testerman, Tr. 1146, 1201; Ferris, Tr. 2314, 2316). Indeed, it was started prior to the launch of the C-Leg 4—Freedom offered the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

1084. The "Ideal Combo" provides free or discounted prosthetic feet to prosthetic clinics with the purchase of Freedom's Plié 3. (Testerman (Freedom) Tr. 1145-46; *see also* [redacted].

Response to Finding No. 1084:

Complaint Counsel's proposed finding of fact is misleading. Individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). 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). Indeed, it was started prior to the launch of the C-Leg 4—Freedom offered the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

[redacted]

1085. One version of the Ideal Combo involved offering a discount off of Freedom's Kinterra prosthetic ankle system with the purchase of a Plié 3. (PX01181 (Freedom) at 005; Testerman (Freedom) Tr. 1145-46; PX01158 (Freedom) at 001). The discount off of the Kinterra has at times been as high as $1,000. (PX00824 (Freedom) at 002).

Response to Finding No. 1085:

Complaint Counsel's proposed finding of fact is misleading. The Ideal Combo is a discount program—individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). 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). Indeed, it was started prior to the launch of the C-Leg 4—Freedom offered the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

[redacted]

1086. 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. (*see, e.g.*, PX00824 (Freedom) at 002). Below is an example of a Freedom advertisement promoting this version of the Ideal Combo, as well as the version offering a discount off of the Kinterra.

(PX00833 (Freedom) at 007).

Response to Finding No. 1086:

Complaint Counsel's proposed finding of fact is misleading. Individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). 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). Indeed, it was started prior to the launch of the C-Leg 4—Freedom offered the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted] Further, Complaint Counsel's proposed finding of fact relies on a document, PX00833, which was not used at trial and thus was not subject to cross-examination before the Court.

1087. The Agilix, DynAdapt, Highlander, and Kinterra are top selling feet pursuant to the Ideal Combo promotion. (Carkhuff (Freedom) Tr. 712-13 (discussing RX0439 (Freedom) at 004)). [redacted]

[redacted]

Response to Finding No. 1087:

Complaint Counsel's proposed finding of fact should be disregarded by the Court because it is grossly inaccurate. In reality, Carkhuff testified that he does not analyze relative purchase volumes under the Ideal Combo. (Carkhuff, Tr. 713) ("I can attest . . . to which of the products tend to be big sellers, period, but I don't . . . really look or analyze *and I don't even think I receive information about the relative purchases under the Ideal Combo.*") (emphasis added). [redacted]

1088. [redacted] (Solorio (Otto Bock) Tr. 1611 (*in camera*); PX05116 (Endrikat (Empire) , Dep. at 61)).

Response to Finding No. 1088:

Complaint Counsel's proposed finding of fact is misleading. Individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). 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). Indeed, it was started prior to the launch of the C-Leg 4—Freedom developed the Ideal Combo in 2015 and has continued to offer

it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted] Finally, Endrikat testified that he has never seen Ottobock respond to Freedom's national Ideal Combo promotion. (PX05116 (Endrikat Dep., at 67-68)).

1089. Freedom advertised and promoted its Ideal Combo at the October 2015 AOPA conference. Freedom's promotional materials for this conference stated "[d]iscover why the 'ideal combo' of pairing the Kinterra foot/ankle system with a Plié 3 MPC Knee provides AK users with rock solid stability and safety, while maintaining a gait that is fluid and natural on all terrains. The features and benefits of the Kinterra and the Plié 3 will be closely examined in an interactive hands-on setting with patient models along with a live demonstration of the Plié 3 MPC Knee programming." (PX00803 (Freedom) at 003).

Response to Finding No. 1089:

Complaint Counsel's proposed finding of fact is misleading. Individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). 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). Indeed, it was started prior to the

launch of the C-Leg 4—Freedom developed the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

1090. [redacted]
(Ferris (Freedom) Tr. 2395 (*in camera*)).

Response to Finding No. 1090:

Complaint Counsel's proposed finding of fact is misleading. Individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). 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). Indeed, it was started prior to the launch of the C-Leg 4—Freedom developed the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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).

1091. (Ferris (Freedom) Tr. 2396 (*in camera*)).

Response to Finding No. 1091:

Complaint Counsel's proposed finding of fact is misleading. Individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). 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). Indeed, it was started prior to the launch of the C-Leg 4—Freedom developed the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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).

[redacted]

1092. [redacted] (Carkhuff (Freedom) Tr. 408 (*in camera*); Swiggum (Otto Bock) Tr. 3340-3341 (*in camera*); Solorio (Otto Bock) Tr. 1648).

Response to Finding No. 1092:

Complaint Counsel's proposed finding of fact is misleading. Individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). 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). Indeed, it was started prior to the launch of the C-Leg 4—Freedom developed the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

[redacted]

[redacted] Plus, Complaint Counsel's proposed finding of fact should not be adopted by the Court because it comes from an unreliable source: Swiggum was terminated for not making Ottobock's sales forecast. (Schneider, Tr. 4275; Swiggum, Tr. 3430).

1093. [redacted] (Solorio (Otto Bock) Tr. 1648; Ferris (Freedom) Tr. 2396 (*in camera*); Swiggum (Otto Bock) Tr. 3340-3341, 3343 (*in camera*); Ford (POA) Tr. 943-44).

Response to Finding No. 1093:

Complaint Counsel's proposed finding of fact is misleading. It is merely logical to say that any form of discounts offers a benefit to clinics. Individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). 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). Indeed, it was started prior to the launch of the C-Leg 4—Freedom developed the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

[redacted]

[redacted] Plus, Complaint Counsel's proposed finding of fact should not be adopted by the Court because it comes from an unreliable source: Swiggum was terminated for not making Ottobock's sales forecast. (Schneider, Tr. 4275; Swiggum, Tr. 3430).

1094. [redacted]

Response to Finding No. 1094:

Complaint Counsel's proposed finding of fact is misleading. It is merely logical to say that discounts increases the margin for a clinic. Individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). 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). Indeed, it was started prior to the launch of the C-Leg 4—Freedom developed the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

[redacted]

1095. [redacted] (Solorio (Otto Bock) Tr. 1614 (*in camera*)).

Response to Finding No. 1095:

Complaint Counsel's proposed finding of fact is misleading. It is merely logical to say that discounts increase a clinics margin. Individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148). 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). Indeed, it was started prior to the launch of the C-Leg 4—Freedom developed the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

[redacted]

1096. [redacted]

Response to Finding No. 1096:

Complaint Counsel's proposed finding of fact is misleading because it is incomplete. Margins to cover costs associated providing services. 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]

1097. [redacted] (Argue, Tr. 6388 (*in camera*)).

Response to Finding No. 1097:

Respondent has no specific response, except to say that Complaint Counsel's proposed finding of fact is consistent with testimony that Freedom offered a bundle of its feet with its Plié in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

[redacted]

b) Discounted Plié 3 Pricing and Aggressive Marketing versus the C-Leg 4

1098. Following the launch of the C-Leg 4, Freedom's sales team sought to regain market share from Otto Bock. A bulletin to Freedom's sales team concerning the response to the launch of the C-Leg 4 stated, "[t]he presence of new competition means we/you have made an impact – now go defend it!" (PX01213 (Freedom) at 003).

Response to Finding No. 1098:

Complaint Counsel's proposed finding of fact is duplicative of its proposed finding of fact at ¶ 1077, and Respondent incorporates by reference its response to CCFF ¶ 1077.

1099. Freedom's Vice President of National and Key Accounts, Mark Testerman, testified that, when the C-Leg 4 was launched, it was "important for our sales team to understand how we're going to compete versus that product." (Testerman (Freedom) Tr. 1178-1179). Accordingly, Freedom marketing and clinical teams created presentations comparing the features of the Plié 3 to the C-Leg 4. (Testerman (Freedom) Tr. 1178-1179 (discussing PX01213 (Freedom))).

Response to Finding No. 1099:

Complaint Counsel's proposed finding of fact is misleading because it suggests that Freedom only created presentations in response to the launch of the C-Leg 4, when it actually created presentations against other products as well, and would do so against any new product. Freedom's marketing and clinical teams created presentations comparing the features of the Plié 3 many new products that have launched in the United States since 2014 when the Plié 3 hit the market, including the C-Leg 4 (PX08008), the Rheo 3, (PX01176-003), the Orion 3, (PX01176-005), and most recently, the Allux. Further, Testerman testified that these presentations are no more than the effort Freedom would make to combat the launch of any new product. Testerman

stated that "we would design tactics to attack *any other new product* that has been launched, because we need to make sure we're prepared to compete." (Testerman, Tr. 1187) (emphasis added).

1100. Freedom's marketing team contemplated several actions to take in response to the C-Leg 4 launch, including "initiate a value-added selling model versus C-Leg 4," launching a Plié 3 "demo program with our top Key Accounts," and "revisit [the Plié 3] pricing structure and overall terms." (Testerman (Freedom) Tr. 1190-1194 (discussing PX01247 (Freedom) at 001).

Response to Finding No. 1100:

Complaint Counsel's proposed finding of fact is misleading and fails to acknowledge that the cited document also refers to other manufacturers. Indeed, PX01247 also suggests that Freedom "[r]efocus an attack strategy vs. Rheo 3 and the ORION." (PX01247-0001). At trial, while Testerman acknowledged that this e-mail was an effort to brainstorm ideas to combat the launch of a new product, he also noted that "there were a lot of other things that were going on at the time that we would discuss as relates to other products as well." (Testerman, Tr. 1194, 1204-1205). Testerman further testified that the Key Account demo program, referenced here, has been effective in both gaining knee business and protecting business versus "C-Leg 4 and the Orion 3 and the Rheo, other microprocessor knees." (Testerman, Tr. 1193). Further, PX01247 is no more than the effort Freedom would make to combat the launch of any new product. At trial, Testerman clarified that "we would design tactics to attack *any other new product* that has been launched, because we need to make sure we're prepared to compete." (Testerman, Tr. 1187) (emphasis added).

1101. [redacted]

Response to Finding No. 1101:

Complaint Counsel's proposed finding of fact is misleading to the extent it purports that the C-Leg 4 launch was the sole basis of Freedom's promotions and sales. The cited testimony clarifies that Freedom's efforts were not designed to regain momentum specifically from the C-Leg 4. (Carkhuff, Tr. 469). Indeed, these promotions and sales materials were intended to address a number of issues, as Carkhuff testified at trial: "I would say that RAC audits, as I mentioned earlier[...] were still impacting the market. I think there was kind of a confluence of issues. RAC audits continued. This limited – or local coverage determination that hit or commonly known as LCD was threatening to change tremendously the usage of MPC knees. Prosthetists were a little chilled on using MPCs, billing those and not getting paid or having the revenue clawed back, so they were very concerned at that time. [...] I wasn't at and I think most everybody was either totally [...] unaware or had underestimated the number of quality products [sic] that we were having with the Plié that had been reported by the sales department from their customers but was not really being addressed or wasn't recognized as such." (Carkhuff, Tr. 469-470). At trial, Testerman also clarified that "we would design tactics to attack *any other new product* that has been launched, because we need to make sure we're prepared to compete." (Testerman, Tr. 1187) (emphasis added).

1102. Freedom's sales materials touted the benefits of the Plié 3 over the C-Leg 4, positioning the Plié 3 as "STRONGER, SMARTER, SUBMERSIBLE." (PX08008 (Freedom) 002; Carkhuff (Freedom) Tr. 330-331 (discussing PX08008); PX01213 (Freedom) at 003). According to Mr. Carkhuff, "the marketing team came up with these categories of stronger, smarter, submersible to really distinguish and kind of categorize the new features and improvements in the product." (Carkhuff (Freedom) Tr. 331-33).

Response to Finding No. 1102:

Complaint Counsel's proposed finding of fact is misleading for the reasons Respondent set forth in its responses to CCFF ¶ 995, and Respondent incorporates its response to CCFF ¶ 995 here by reference. Respondent further responds that Carkhuff testified at trial that the purpose of PX08008 was to reposition the Plié 3 following a number of product upgrades from the Plié 2. (Carkhuff, Tr. 331, 473-474).

1103. Freedom also created a publically available "Fact Sheet," in part to rebut certain claims that Otto Bock had made about the Plié 3. (PX08008 (Freedom) at 001).

Response to Finding No. 1103:

Complaint Counsel's proposed finding of fact is misleading for the reasons Respondent set forth in its responses to CCFF ¶ 995, and Respondent incorporates its response to CCFF ¶ 995 here by reference.

1104. For example, Freedom publicly stated in this Fact Sheet 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." (PX08008 (Freedom) at 001 ("Ottobock Claims vs Reality").

Response to Finding No. 1104:

Complaint Counsel's proposed finding of fact is misleading for the reasons Respondent set forth in its responses to CCFF ¶ 995, and Respondent incorporates its response to CCFF ¶ 995 here by reference.

1105. The Fact Sheet also stated that the Plié 3 has "Reliable stance release on challenging surfaces." (PX08008 (Freedom) at 001).

Response to Finding No. 1105:

Complaint Counsel's proposed finding of fact is misleading for the reasons Respondent set forth in its responses to CCFF ¶ 995, and Respondent incorporates its response to CCFF ¶ 995 here by reference.

1106. The Fact Sheet also stated that the Plié 3 has "Clinically proven stumble recovery." The Fact Sheet elaborated that, "In various head to head clinical settings comparison[s], Plié 3 has been the preferred choice by patients and prosthetists." (PX08008 (Freedom) at 001).

Response to Finding No. 1106:

Complaint Counsel's proposed finding of fact is misleading for the reasons Respondent set forth in its responses to CCFF ¶ 995, and Respondent incorporates its response to CCFF ¶ 995 here by reference.

1107. The Fact Sheet also stated that the Plié 3 is "Weatherproof with IP67 rating" and "submersible up to 3 feet for 30 minutes." (PX08008 (Freedom) at 001).

Response to Finding No. 1107:

Complaint Counsel's proposed finding of fact is misleading for the reasons Respondent set forth in its responses to CCFF ¶ 995, and Respondent incorporates its response to CCFF ¶ 995 here by reference.

1108. The Fact Sheet also stated that the Plié 3 has "Adjustable modes for special activities" and "allows the user to make manual adjustments to adapt to a wide range of activities with different settings." (PX08008 (Freedom) at 001).

Response to Finding No. 1108:

Complaint Counsel's proposed finding of fact is misleading for the reasons Respondent set forth in its responses to CCFF ¶ 995, and Respondent incorporates its response to CCFF ¶ 995 here by reference.

1109. The Fact Sheet also addressed Otto Bock's claim that the Plié 3 is not PDAC verified, explaining that, "PDAC is not required for reimbursement." (PX08008 (Freedom) at 001). Indeed, Maynard Carkhuff, Freedom's former CEO and current Chairman, testified at trial that despite not having PDAC verification, Freedom has made a lot of sales in the marketplace. (Carkhuff (Otto Bock) Tr. 357-358).

Response to Finding No. 1109:

Complaint Counsel's proposed finding of fact is misleading for the reasons Respondent set forth in its responses to CCFF ¶ 995, and Respondent incorporates its response to CCFF ¶ 995 here by reference. Respondent further responds that, while PDAC is not required for reimbursement, [redacted] In contrast to the Plié 3, 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).

1110. [redacted] (PX05114 (Ferris (Freedom) , Dep. at 175-76; Solorio (Otto Bock) Tr. 1588; Carkhuff (Freedom) Tr. 485 (*in camera*); (Testerman (Freedom) Tr. 1202-04 (one pricing action was to discuss reduced pricing for Freedom's largest customer, Hanger); PX00859 (Freedom) at 003 (same); PX01173 (Freedom) at 004 ("$750 P3 DISCOUNT WITHIN HANGER: ACTIVATED") (*in camera*); PX05153B (Asar (Hanger) , Dep. at 103-104 (*in camera*)). [redacted] (Swiggum (Otto Bock) Tr. 3344 (*in camera*)).

Response to Finding No. 1110:

Complaint Counsel's proposed finding of fact is misleading. Freedom always sold the Plié 3 at a price lower than the C-Leg 3 and the C-Leg 4. Indeed, Freedom uses one promotion, 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). Indeed, Freedom used one promotion, the Ideal Combo, to compete against all competitor knees, including the C-Leg 4, Orion 3, or the Rheo 3. (Testerman, Tr. 1146, 1201; Ferris, Tr. 2314, 2316). Freedom started this promotion in 2015—prior to the launch of the C-Leg 4—and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616).

1111. Cali Solorio, Senior Prosthetics Marketing Manager at Otto Bock, testified that after the launch of the C-Leg 4, she saw Freedom react to the competitive pressure by dropping prices of its Plié microprocessor knee. (Solorio (Otto Bock) Tr. 1588). Ms. Solorio wrote in August 2015 that Freedom is "surely feeling the pressure and as a result, dropping prices." (PX01269 (Otto Bock) at 001).

Response to Finding No. 1111:

Complaint Counsel's proposed finding of fact is misleading because it does not acknowledge that in Solorio's opinion, the C-Leg 4 put competitive pressure on all MPKs. At trial, Solorio testified that in her opinion, she felt that the launch of the C-Leg 4 put competitive pressure on all of the other microprocessor knees on the market. (Solorio, Tr. 1588). While Solorio testified that pricing changes and promotions occurred after the launch of the C-Leg 4, other trial testimony illustrates that these changes actually occurred prior to the launch of the C-Leg 4. Indeed, Freedom used one promotion, the Ideal Combo, to compete against all competitor knees, including the C-Leg 4, Orion 3, or the Rheo 3. (Testerman, Tr. 1146, 1201; Ferris, Tr. 2314, 2316). Freedom started this promotion in 2015—prior to the launch of the C-Leg 4—and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616).

1112. [redacted] (PX01002 (Otto Bock) at 006 (*in camera*)). By "pressure," Ms. Solorio testified that she meant competitive pressure from the launch of the C-Leg 4." (Solorio (Otto Bock) Tr. 1596).

Response to Finding No. 1112:

Complaint Counsel's proposed finding of fact is misleading because it does not acknowledge that in Solorio's opinion, the C-Leg 4 put competitive pressure on all MPKs. PX01002 also refers to an assessment of the pricing of other prosthetic knee devices, including the Rheo 3 and Rheo XC, and the Orion 2. At trial, Solorio testified that in her opinion, she felt that the launch of the C-Leg 4 put competitive pressure on all of the other microprocessor knees on the market. (Solorio, Tr. 1588).

1113. Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs, and Future Development, testified that Freedom began to offer its reduced pricing "shortly after the launch of C-Leg 4." (PX05010 (Schneider) IHT at 124). Mr. Schneider explained that Freedom responded to competition from Otto Bock's C-Leg 4 with "reduced price or aggressive pricing" as well as an increased discount structure. (PX05010 (Schneider) IHT at 123).

Response to Finding No. 1113:

Complaint Counsel's proposed finding of fact is misleading because it fails to acknowledge that Schneider was testifying based on his opinion as a third-party outsider to Freedom, without first-hand knowledge of why Freedom began offering reduced pricing and promotional packages. (See (PX05010 (Schneider) IHT at 123 (noting that he was testifying in his opinion). Indeed, Freedom's own Chairman Maynard Carkhuff testified that Freedom's promotions and sales materials were intended to address a number of issues: "I would say that RAC audits, as I mentioned earlier[...] were still impacting the market. I think there was kind of a confluence of issues. RAC audits continued. This limited – or local coverage determination that hit or commonly

known as LCD was threatening to change tremendously the usage of MPC knees. Prosthetists were a little chilled on using MPCs, billing those and not getting paid or having the revenue clawed back, so they were very concerned at that time. [...] I wasn't and I think most everybody was either totally [...] unaware or had underestimated the number of quality products [sic] that we were having with the Plié that had been reported by the sales department from their customers but was not really being addressed or wasn't recognized as such." (Carkhuff, Tr. 469-470). For instance, Freedom offered a bundle of its feet with its Plié in 2015 and has continued to offer that promotion because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

1114. [redacted]

Response to Finding No. 1114:

Respondent has no specific response, other than that Complaint Counsel's proposed finding of fact is consistent with the fact that Freedom always offered the Plié 3 at a discount due to its inferior technology. The discount on the Plié 3 was even greater when factoring in the Ideal Combo promotion. 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). Indeed, it was started prior to the launch of the C-Leg 4—Freedom developed the Ideal Combo in 2015 and has continued to offer it because of the Plié 3's dated technology. (PX05109 (Carkhuff , Dep. at 114); Carkhuff, Tr. 616).

1115. As Keith Senn, President of COPC testified, "[w]e have a higher margin on the Freedom Plié" than on the Otto Bock C-Leg. (Senn (COPC) Tr. 207-208).

Response to Finding No. 1115:

Respondent has no specific response, except to say that Complaint Counsel's proposed finding of fact is consistent with the fact that Freedom always offered the Plié 3 at a discount due to its inferior technology, which gave clinics a higher margin on the Plié over certain other technologically superior prosthetic knee devices, including the C-Leg.

1116. [redacted]

Response to Finding No. 1116:

Complaint Counsel's proposed finding of fact is misleading. First, at trial Ferris testified that PX01184 referred to Hanger and Freedom's direct channel for sales. (Ferris, Tr. 2411). Freedom was lowering the price of the Plié in 2017 to dress itself up for sale. Ottobock never lowered the price of the C-Leg 4 to compete with the Plié 3. There is no evidence in the record that Ottobock lowered the price of its C-Leg 4 in 2017 to compete with the Plié 3, despite huge document production and testimony in this case.

c) Plié 3 Quality Improvements

1117. In addition to offering new promotions as well as lowering the price of the Plié, Freedom continued to make quality improvements to the Plié 3 after the launch of the C-Leg 4. David Smith, Freedom's CEO at the time, [redacted] (Smith (HEP) Tr. 6537, 6543 (*in camera*)).

Response to Finding No. 1117:

Complaint Counsel's proposed finding of fact is incomplete. The Plié 3 suffered from serious quality issues in 2016. RX-0277. 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 (v) 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 001-004. 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). At trial, Testerman testified that "unfortunately, the Plié 3 was having quality issues. We were having some out-of-the-box failures, and it was costing us some credibility in the marketplace." (Testerman, Tr. 1296). [redacted]

1118. Specifically, in 2016, Freedom put initiatives in place to improve the quality of the Plié 3. (Kim (Freedom) Tr. 2515; *see also* (PX02034 (HEP) at 049 (*in camera*) [redacted]).

Response to Finding No. 1118:

Complaint Counsel's proposed finding of fact is incomplete. The Plié 3 suffered from serious quality issues in 2016. RX-0277. 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 (v) 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 001-004. At trial, Testerman testified that "unfortunately, the Plié 3 was having quality issues. We were having some out-of-the-box failures, and it was costing us some credibility in the marketplace." (Testerman, Tr. 1296). These quality issues were unrelated to the fact that the Plié 3 was also a dying technology [redacted] and that the improvements were to the quality issues, not the overall technology. Testerman also testified regarding loaner issues that "When a patient's Plié 3 would come up for warranty, we would have a loaner knee available for them as they would send their knee in to be repaired and updated. The problem was the amount of time that it took for the loaner knee to get to the practitioner but, more importantly, how much time it took for that repaired, updated knee to get back to the prosthetist and patient, and it was causing everyone angst. (Testerman, Tr. 1296-1297). [redacted]

1119. Freedom's quality improvements to the Plié included addressing the length of time it took to program the Plié 3. (PX05114 (Ferris) , Dep. at 175-176).

Response to Finding No. 1119:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

1120. These quality improvements also included making the Plié 3 more durable. (PX05114 (Ferris) , Dep. at 175-176).

Response to Finding No. 1120:

Respondent has no specific response.

1121. Dr. Prince, Freedom's Quattro Project Manager and Technical Lead, testified that subsequent to the Plié 3's release, he assisted with diaphragm material improvements "to find a suitable replacement." (Prince (Freedom) Tr. at 2674-75).

Response to Finding No. 1121:

Respondent has no specific response, other than that Dr. Prince helped with the battery lid design. (Prince, Tr. 2674).

1122. Dr. Prince testified that he helped guide "some new engineers working on the electrical system" for the Plié 3. (Prince (Freedom) Tr. at 2675); *see also* (PX05111 (Prince (Freedom) , Dep. at 12) (testifying that he worked on "sustaining efforts" for the Plié 3including "the diaphragm material improvements" and improving the battery lid, as well as help to "guide other engineers on other discipline aspects of the project such as cable routing and process improvements to the product.").

Response to Finding No. 1122:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1123. [redacted] (PX05111 (Prince (Freedom) , Dep. at 53) (*in camera*)).

Response to Finding No. 1123:

Respondent has no specific response, other than that Freedom's engineers work on sustaining efforts for every product, including the Plié 3. (Prince, Tr. 2832).

1124. [redacted] (PX05115 (Robertson (Freedom) , Dep. at 101-02 (*in camera*)).

Response to Finding No. 1124:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1125. [redacted] (PX05115 (Robertson (Freedom) , Dep. at 102-03 (*in camera*)).

Response to Finding No. 1125:

Respondent has no specific response.

1126. [redacted] (PX05115 (Robertson (Freedom) , Dep. at 103 (*in camera*)).

Response to Finding No. 1126:

Respondent has no specific response, other than that [redacted]

1127. [redacted] (Smith (HEP) Tr. 6545 (*in camera*)).

Response to Finding No. 1127:

Complaint Counsel's proposed finding of fact is misleading. [redacted] (Smith, Tr. 6422-6423; [redacted] Smith, Tr. 6426; 6429).

1128. [redacted] (PX05137 (Mathews (Freedom) , Dep. at 205-06) (*in camera*)).

Response to Finding No. 1128:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1129. [redacted] (PX05137 (Mathews (Freedom) , Dep. at 196) (*in camera*)).

Response to Finding No. 1129:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

d) Impact of Freedom's Competitive Responses on Otto Bock's MPK Sales

1130. [redacted] (Carkhuff (Freedom) Tr. 488 (*in camera*); PX01030 (Freedom) at 001); PX05137 (Mathews (Freedom) , Dep. at 196) (*in camera*); PX01644 (Freedom) at 004-05 (*in camera*); PX01842 (Freedom) at 002 (*in camera*); PX02018 (HEP) at 006)).

Response to Finding No. 1130:

Respondent has no specific response.

1131. In a November 2015 compliance package that Lee Kim, Freedom's CFO, sent to Freedom's creditors, Mr. Kim stated "Plié MPC knee and related product sales increased 32% compared to the prior year. MPC knee unit sales increased from 70 to 98. Plié sales in the U.S. have been impacted by the introduction of the updated Otto Bock MPC knee. However, it appears that the marketing initiatives launched recently to recapture knee trials are having success. Monthly U.S. knee unit sales increased from 53 in October to 78 in November." (PX02018 (HEP) at 006).

Response to Finding No. 1131:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. Also in November 2015, Kim sent another management report to Freedom's creditors, stating, "Plié MPC

knee and related product sales *decreased* 28% compared to the prior year. MPC knee unit sales *decreased* from 93 to 64." PX02017 at 006 (emphasis added). Kim is CFO of Freedom; he has never been involved in pricing, sales, or marketing of the Plié. Moreover, the individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148).

1132. Additionally, in a November 2015 flash report that Mr. Kim was preparing for the board of directors, he noted that, "knee unit sales did increase substantially from October. As mentioned in Maynard's email last month, the sales teams have been given new marketing programs to counter the impact of the new C-leg 4 on customer trials and it appears these programs are having a positive impact." (PX01030 (Freedom) at 001).

Response to Finding No. 1132:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. Also in November 2015, Kim sent another management report to Freedom's creditors, stating, "Plié MPC knee and related product sales *decreased* 28% compared to the prior year. MPC knee unit sales *decreased* from 93 to 64." PX02017 at 006 (emphasis added). Kim is CFO of Freedom; he has never been involved in pricing, sales, or marketing of the Plié. Moreover, the individuals at Freedom who were responsible for pricing, sales, or marketing of the Plié, Ferris and Testerman, testified that the Ideal Combo was not created in response to the C-Leg 4 launch. (Ferris, Tr. 2402-2404; Testerman, Tr. 1148).

1133. Otto Bock executives recognized that "[p]ressure from the C-Leg 4 has driven lower prices and bundle promotions with feet" from Freedom. (Solorio (Otto Bock) Tr. 1596; PX01002 (Otto Bock) at 006; PX5010 (Schneider (Otto Bock) IHT at 123)). [redacted] (PX05123 (Solorio (Otto Bock) , Dep. at 116) (*in camera*)).

Response to Finding No. 1133:

Complaint Counsel's proposed finding of fact is misleading. Testerman testified that rather than focusing only on C-Leg 4, Freedom "want[s] to take market share wherever we can take market share," which includes Ottobock. (Testerman, Tr. 1128).

1134. [redacted] (PX01278 (Otto Bock) at 001 (*in camera*); Solorio (Otto Bock) Tr. 1617-18 (*in camera*)).

Response to Finding No. 1134:

Respondent has no specific response, other than that 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).

1135. In response to Freedom's promotions, Otto Bock provided its sales team with guidance on "Countering Freedom's Latest Promo." (PX01272 (Otto Bock) at 001). Otto Bock also offered customers various promotions of its own, including a $2,500 discount on the C-Leg 4. (PX01519 (Otto Bock) at 001).

Response to Finding No. 1135:

Complaint Counsel's proposed finding of fact is false and should not be considered by the Court. In March 2015, at least a month before the C-Leg 4 even launched, Ottobock was offering customer various promotions on its C-Leg 3 because it was starting to roll the C-Leg 3 off the market in anticipation of the C-Leg 4. PX01272 at 001; CCFF ¶ 1029. Complaint Counsel admit that the $2,500 discount in March 2015 was on C-Leg 3 and not C-Leg 4. (CCFF ¶ 1029). Also, the first sentence is misleading because it refers to an email from 2015 regarding the margins on Ottobock's products being greater than the margins on Freedom's products, despite Freedom's discounts. PX01272 at 001. In September 2015, Cali Solorio sent a note for the weekly newsletter

to remind the sales team that clinics can earn a higher margin on Ottobock products than on Freedom products, even if Freedom offers the "Buy a Plié 3 and get 50% off a Kinterra" promotion. PX01272 at 001. Ottobock did not offer a discount on the C-Leg 4 in response to Freedom's promotion. PX01272 at 001. Further, Complaint Counsel's proposed finding of fact relies upon PX01519, a document which was not introduced at trial and thus not subject to cross-examination before the Court.

1136. [redacted] (PX01334 (Otto Bock) at 002-003 (*in camera*)). [redacted] (PX00862 (Freedom) at 004 (*in camera*)). (PX00862 (Freedom) at 001- 004 (*in camera*)).

Response to Finding No. 1136:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

Further, Complaint Counsel's proposed finding of fact is based solely upon two documents, both of which were not introduced at trial and thus were not subject to cross-examination before the Court.

e) Initiation of Development of the Quattro MPK

1137. Freedom began working on its next-generation MPK to further combat Otto Bock's C-Leg 4. (PX05111 (Prince (Freedom , Dep. at 88).

Response to Finding No. 1137:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1138. Dr. Stephen Prince, Freedom's Quattro Project Manager and Technical Lead, testified that the C-Leg 4 "was targeted early on in the [Quattro] project." (PX05111 (Prince (Freedom , Dep. at 88).

Response to Finding No. 1138:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

[redacted]

1139. [redacted] (PX05111 (Prince (Freedom) , Dep. at 108 (*in camera*)).

Response to Finding No. 1139:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

5. Customers Benefitted from this Head-to-Head Competition between Otto Bock and Freedom through Lower Prices

1140. Customers and amputees benefitted from aggressive head-to-head competition between Otto Bock and Freedom by receiving lower prices, better technology, and improved customer service. (*See, e.g.,* Ell (Mid-Missouri O&P) Tr. 1750-51; PX05129 (Ell (Mid-Missouri O&P) , Dep. at 78-79); Ford (POA) Tr. 1004-06; [redacted]; PX05128 (Senn (COPC) , Dep. at 34); PX05149 (Brandt (Ability Prosthetics & Orthotics) , Dep. at 70-72)).

Response to Finding No. 1140:

Complaint Counsel's proposed finding of fact is too vague to adequately respond. It is unclear what "competition" Complaint Counsel is referring to, *i.e.*, whether it is just competition related to prosthetic knees or is it competition involving all lower limb prosthetic components sold by Freedom and Ottobock. Moreover, Complaint Counsel's proposed finding of fact should not be adopted by the Court because it comes from unreliable witnesses. As of the time of trial, [redacted] Keith Senn is not a clinician, and he testified that he is not familiar with non-MPKs, does not know the difference between a fluid-controlled and a constant friction non-MPK, and has never observed a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 152-153, 173, 201, 251). The only foundation Complaint Counsel laid for Senn's knowledge of "patient care" was that he "*used to have* an office for about a decade within one of COPC's clinics." (Response to CCFF ¶ 715 (citing Senn, Tr. 163)).

a) Customers Benefited from Price Competition between the Plié and C-Leg

1141. [redacted] (Solorio (Otto Bock) Tr. 1606-07 (*in camera*)). [redacted] (PX00867 (Otto Bock) at 022 (*in camera*) (2018 North America Marketing & Sales Plan)).

Response to Finding No. 1141:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. 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]

The two lowest priced MPKs are the Plié and the Orion. (DeRoy, Tr. 3596). They are lower priced than the Össur Rheo and Ottobock C-Leg. (DeRoy, Tr. 3597). There is substantial evidence in the record that Plié 3's technology is more similar to a Sophisticated Non-MPK than it is to the Ottobock C-Leg 4, the Össur Rheo, the Endolite Orion 3, or the Nabtesco Allux. (DeRoy, Tr. 3649-3650 (referring to PXD0001 and testifying that the swing phase of the Plié 3, unlike the Rheo and C-Leg 4, is set with an air pump); Schneider, Tr. 4322-4323). The record evidence establishes that, from a functionality perspective, the Rheo and C-Leg 4 compete most closely. (PX03245 at 011; DeRoy, Tr. 3671 (testifying that the Plié 3's closest competitors are the Orion 3 and Nabtesco Allux); DeRoy, Tr. 3677-3683 (testifying that Össur and Ottobock's MPKs compete most closely on functionality and quality and that Endolite's Orion 3 and Nabtesco's Allux would be appear closer to the Plié 3 at PX03245 at 011)).

1142. [redacted]
(Solorio (Otto Bock) Tr. 1608 (*in camera*)).

Response to Finding No. 1142:

Respondent has no specific response, other than that Freedom's pricing strategy pre-dated the launch of the C-Leg 4. The Plié has been priced lower consistent with its inferior technology. The two lowest priced MPKs are the Plié and the Orion. (DeRoy, Tr. 3596). They are lower priced than the Össur Rheo and Ottobock C-Leg. (DeRoy, Tr. 3597). There is substantial evidence in the record that Plié 3's technology is more similar to a Sophisticated Non-MPK than it is to the Ottobock C-Leg 4, the Össur Rheo, the Endolite Orion 3, or the Nabtesco Allux. (DeRoy, Tr. 3649-3650 (referring to PXD0001 and testifying that the swing phase of the Plié 3, unlike the Rheo and C-Leg 4, is set with an air pump); Schneider, Tr. 4322-4323). This is consistent with Dr. Scott Morton's testimony about prices reflecting quality. (Morton, Tr. 3923).

1143. [redacted] (PX01004 (Otto Bock) at 005 (*in camera*) (Due Diligence Report)).

Response to Finding No. 1143:

Respondent has no specific response, other than that the Plié has been priced lower consistent with its inferior technology. The two lowest priced MPKs are the Plié and the Orion. (DeRoy, Tr. 3596). They are lower priced than the Össur Rheo and Ottobock C-Leg. (DeRoy, Tr. 3597). There is substantial evidence in the record that Plié 3's technology is more similar to a Sophisticated Non-MPK than it is to the Ottobock C-Leg 4, the Össur Rheo, the Endolite Orion 3, or the Nabtesco Allux. (DeRoy, Tr. 3649-3650 (referring to PXD0001 and testifying that the swing phase of the Plié 3, unlike the Rheo and C-Leg 4, is set with an air pump); Schneider, Tr. 4322-4323). This is consistent with Dr. Scott Morton's testimony about prices reflecting quality. (Morton, Tr. 3923).

1144. [redacted] (Carkhuff (Freedom) Tr. 386-87) (*in camera*); *see also* PX01023 (Freedom) at 001 (*in camera*)). [redacted] (PX01023 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1144:

Respondent has no specific response, other than that [redacted]

1145. Maynard Carkhuff, Freedom's Chairman, testified that Freedom sells high quality products but is willing to price competitively to win business. (PX05109 (Carkhuff (Freedom) , Dep. at 192).

Response to Finding No. 1145:

Complaint Counsel's proposed finding of fact is misleading and incomplete. At trial, [redacted]

1146. When asked how he would describe Freedom's pricing of the Plié 3 as compared to the pricing of other MPK manufacturers, Stephen Blatchford, Executive Chairman of Endolite, stated, "Well, our understanding of their pricing is that they tend to be lower than the other manufacturers." (Blatchford (Endolite) Tr. 2148).

Response to Finding No. 1146:

Respondent has no specific response, other than that the Plié has been priced lower consistent with its inferior technology. The two lowest priced MPKs are the Plié and the Orion. (DeRoy, Tr. 3596). They are lower priced than the Össur Rheo and Ottobock C-Leg. (DeRoy, Tr. 3597). There is substantial evidence in the record that Plié 3's technology is more similar to a Sophisticated Non-MPK than it is to the Ottobock C-Leg 4, the Össur Rheo, the Endolite Orion 3,

or the Nabtesco Allux. (DeRoy, Tr. 3649-3650 (referring to PXD0001 and testifying that the swing phase of the Plié 3, unlike the Rheo and C-Leg 4, is set with an air pump); Schneider, Tr. 4322-4323). This is consistent with Dr. Scott Morton's testimony about prices reflecting quality. (Morton, Tr. 3923).

1147. Customers testified that they pay much less for the Plié 3 than they do the C-Leg 4. For example, Michael Bright, owner of North Bay Prosthetics, pays approximately $15,000 for the Plié and about one thousand dollars more for the C-Leg. (PX05141 (Bright (North Bay) , Dep. at 125)). [redacted] (Senn (COPC) Tr. 222-223 (*in camera*)). Tracy Ell, from Mid-Missouri O&P, pays "$2,000 less" for the Plié 3 than the C-Leg 4. (Ell (Mid-Missouri O&P) Tr. 1742). Mark Ford, from POA, pays "[t]hree to four thousand dollars less" for the Plié than the C-Leg. (Ford (POA) Tr. 947).

Response to Finding No. 1147:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that Plié 3 and C-Leg compete on price. Plié 3 competes for more price-sensitive customers. [redacted]

1148. According to Dr. Kannenberg, Otto Bock's Executive Medical Director, "[t]he primary reason [that prosthetists choose Freedom's Plié 3] was the lower price and the better margin, because the reimbursement for all microprocessor knees by health insurances is the same." (Kannenberg (Otto Bock) Tr. 1990).

Response to Finding No. 1148:

Respondent has no specific response.

1149. [redacted] (PX05108 (Yates (Jonesboro) , Dep. at 61-62) (*in camera*)).

Response to Finding No. 1149:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

1150. Keith Senn, President of Kentucky/Indiana Operations for the COPC, testified that COPC purchased a majority of its MPKs from Freedom in 2017 because "the prosthetists like the MPK from Freedom and we have a very good discount agreement with them." (Senn (COPC) Tr. 190). Mr. Senn further testified that COPC increased its purchases of Freedom's Plié in 2017 due to "[t]he competitive pricing that we received from them." (Senn (COPC) Tr. 191).

Response to Finding No. 1150:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. Keith Senn is not a clinician, and he testified that he is not familiar with non-MPKs, does not know the difference between a fluid-controlled and a constant friction non-MPK, and has never observed a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 152-153, 173, 201, 251). The only foundation Complaint Counsel laid for Senn's knowledge of "patient care" was that he "*used to have* an office for about a decade within one of COPC's clinics." (Response to CCFF ¶ 715 (citing Senn, Tr. 163)). Senn also testified that [redacted]

[redacted] (Smith, Tr. 6422-6423; [redacted] Smith, Tr. 6426; 6429).

1151. Keith Senn, President of Kentucky/Indiana Operations for the COPC, 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." (PX05128 (Senn (COPC) , Dep. at 34)).

Response to Finding No. 1151:

Respondent has no specific response, other than that Senn's testimony at his deposition (as opposed to at trial) was not limited to any specific benefits from any specific products or manufacturers. (PX05128 (Senn, Dep. at 34)). ("Q. Is COPC able to pass on benefits to patients? A. Yes. Q. How is COPC able to pass on benefits to patients? A. You know, as the company does well or does -- does better, we can work more with staff -- with hiring residents with facilities, with programs that we put in support of the patient care, such as compliance."). Also, Keith Senn is not a clinician, and he testified that he is not familiar with non-MPKs, does not know the difference between a fluid-controlled and a constant friction non-MPK, and has never observed a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 152-153, 173, 201, 251). The only foundation Complaint Counsel laid for Senn's knowledge of "patient care" was that he "*used to have* an office for about a decade within one of COPC's clinics." (Response to CCFF ¶ 715 (citing Senn, Tr. 163)).

1152. [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 . . . .")).

Response to Finding No. 1152:

Complaint Counsel's proposed finding of fact is misleading. [redacted] Keith Senn is not a clinician, and he testified that he is not familiar with non-MPKs, does not know the difference between a fluid-controlled and a constant friction non-MPK, and has never observed a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 152-153, 173, 201, 251). The only foundation Complaint Counsel laid for Senn's knowledge of "patient care" was that he "*used to have* an office for about a decade within one of COPC's clinics." (Response to CCFF ¶ 715 (citing Senn, Tr. 163)).

1153. [redacted] (PX03118 (COPC) at 001 (*in camera*)).

Response to Finding No. 1153:

Complaint Counsel's proposed finding of fact should not be considered by the Court because [redacted]

[redacted]

[redacted] Further, Complaint Counsel's proposed finding of fact is based solely on a document which was not introduced at trial and thus was not subject to cross-examination.

1154. [redacted]

(Asar (Hanger) Tr. 1401-1403 (*in camera*))

Response to Finding No. 1154:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

1155. [redacted] (PX05153B (Asar (Hanger) , Dep. at 124-125) (*in camera*)).

Response to Finding No. 1155:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

1156. [redacted] (PX05149 (Brandt (Ability Prosthetics & Orthotics) , Dep. at 71 (*in camera*)).

Response to Finding No. 1156:

Respondent has no specific response.

1157. Jeff Brandt, CEO of Ability Prosthetics & Orthotics, 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." (PX05149 (Brandt (Ability Prosthetics & Orthotics) , Dep. at 71)). Mr. Brandt 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." (PX05149 (Brandt (Ability Prosthetics & Orthotics) , Dep. at 71-72)).

Response to Finding No. 1157:

Respondent has no specific response, other than that Brandt did not specifically testify about Ottobock lowering their price in response to Freedom and Brandt has no knowledge of Respondent's pricing strategies.. This testimony was speculative and without any factual basis. Also, all prosthetics prices have been declining due to reimbursement constraints. [redacted]

1158. **Robert Yates, President and CEO of Jonesboro, testified that competition between Otto Bock and Freedom led to "relatively competitive pricing structures from both manufacturers," "demo units for use in our offices," "educational support, robust customer service," and "education/marketing opportunities to the physical therapy community from both Otto Bock and Freedom."** (PX05108 (Yates (Jonesboro) , Dep. at 74)).

Response to Finding No. 1158:

Respondent has no specific response, other than that Complaint Counsel did not call [redacted] to testify at trial and Yates has no knowledge of Respondent's pricing and marketing strategies and this testimony was speculative. [redacted]

1159. Tracy Ell, the owner and Chief Prosthetist at Mid-Missouri Orthotics and Prosthetics, testified that his clinic has benefited from competition between Otto Bock and Freedom "in two manners[:] . . . one being the potential to reduce a service purchase price as well as

facilitate the continued evolution of technology in microprocessor control knee field, that then benefits my business as well as the patients." (PX05129 (Ell (Mid-Missouri) , Dep. at 78-79)).

Response to Finding No. 1159:

Complaint Counsel's proposed finding of fact is misleading. At trial, Ell testified that the Acquisition has not harmed any facet of his business, and Freedom has not introduced a new knee for K-3 and K-4 patients since the Plié 3 in 2014. (Ell, Tr. 1798-1800, 1747).

1160. Mark 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. (Ford (POA) Tr. 1004-05).

Response to Finding No. 1160:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it comes from an unreliable witness. As of the time of trial, [redacted]

1161. Clinic customers are concerned that, now that Freedom is owned by Otto Bock, they will lose leverage in negotiations against Otto Bock for MPKs. Mark Ford of POA testified that he is concerned "that the price of MPKs can go up over time" and that POA would lose leverage in negotiations against Otto Bock for MPKs. (Ford (POA) Tr. 1014-15).

Response to Finding No. 1161:

Complaint Counsel's proposed finding of fact is misleading because it uses the plural "clinic customers" when the citation is to only one clinic customer, Mark Ford of POA. Further, Complaint Counsel's proposed finding of fact should not be adopted by the Court because it comes from an unreliable witness. As of the time of trial, [redacted]

1162. [redacted] (Senn (COPC) Tr. 227-28 (*in camera*)).

Response to Finding No. 1162:

Complaint Counsel's proposed finding of fact is misleading and unreliable. Senn testified that at trial that Endolite's Orion 3 was a preferred knee at COPC without any volume discount and that COPC could easily shift volume to Endolite and earn a volume discount if it wanted to do so. (Senn, Tr. 254-255). Senn testified that COPC would "definitely" consider buying more Orions if the Plié 3 were discontinued or increased in price post-Acquisition. (Senn, Tr. 256).

Moreover, Keith Senn is not a clinician, and he testified that he is not familiar with non-MPKs, does not know the difference between a fluid-controlled and a constant friction non-MPK, and has never observed a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 152-153, 173, 201, 251). The only foundation Complaint Counsel laid for Senn's knowledge of "patient care" was that he "*used to have* an office for about a decade within one of COPC's clinics." (Response to CCFF ¶ 715 (citing Senn, Tr. 163)).

b) Customers Benefitted from Innovation Competition Between Freedom and Otto Bock

1163. [redacted] (PX07008 at 005 (¶ 12) (*in camera*) (Respondent's Responses to Complaint Counsel's First Set of Requests for Admissions)).

Response to Finding No. 1163:

Complaint Counsel's proposed finding of fact is misleading and incomplete. 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]

[redacted]

The two lowest priced MPKs are the Plié and the Orion. (DeRoy, Tr. 3596). They are lower priced than the Össur Rheo and Ottobock C-Leg. (DeRoy, Tr. 3597). There is substantial evidence in the record that Plié 3's technology is more similar to a Sophisticated Non-MPK than it is to the Ottobock C-Leg 4, the Össur Rheo, the Endolite Orion 3, or the Nabtesco Allux. (DeRoy, Tr. 3649-3650 (referring to PXD0001 and testifying that the swing phase of the Plié 3, unlike the Rheo and C-Leg 4, is set with an air pump); Schneider, Tr. 4322-4323). The record evidence establishes that, from a functionality perspective, the Rheo and C-Leg 4 compete most closely. (PX03245 at 011; DeRoy, Tr. 3671 (testifying that the Plié 3's closest competitors are the Orion 3 and Nabtesco Allux); DeRoy, Tr. 3677-3683 (testifying that Össur and Ottobock's MPKs compete most closely on functionality and quality and that Endolite's Orion 3 and Nabtesco's Allux would be appear closer to the Plié 3 at PX03245 at 011)).

1164. [redacted] (Carkhuff (Freedom) Tr. 468 (*in camera*)). For example, when Freedom introduced a waterproof MPK, "the demand for waterproofing and weatherproofing did increase." As a result, Otto Bock and Össur responded with a waterproof solution of their own. (De Roy (Össur) Tr. 3597-99).

Response to Finding No. 1164:

Respondent has no specific response, other than that all manufacturers have updated their MPK offerings since 2014 when Freedom launched the Plié 3. At trial, Carkhuff stated that Plié is at the very end of its product life cycle. (Carkhuff, Tr. 616). Carkhuff also 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).

[redacted]

1165. [redacted]

Response to Finding No. 1165:

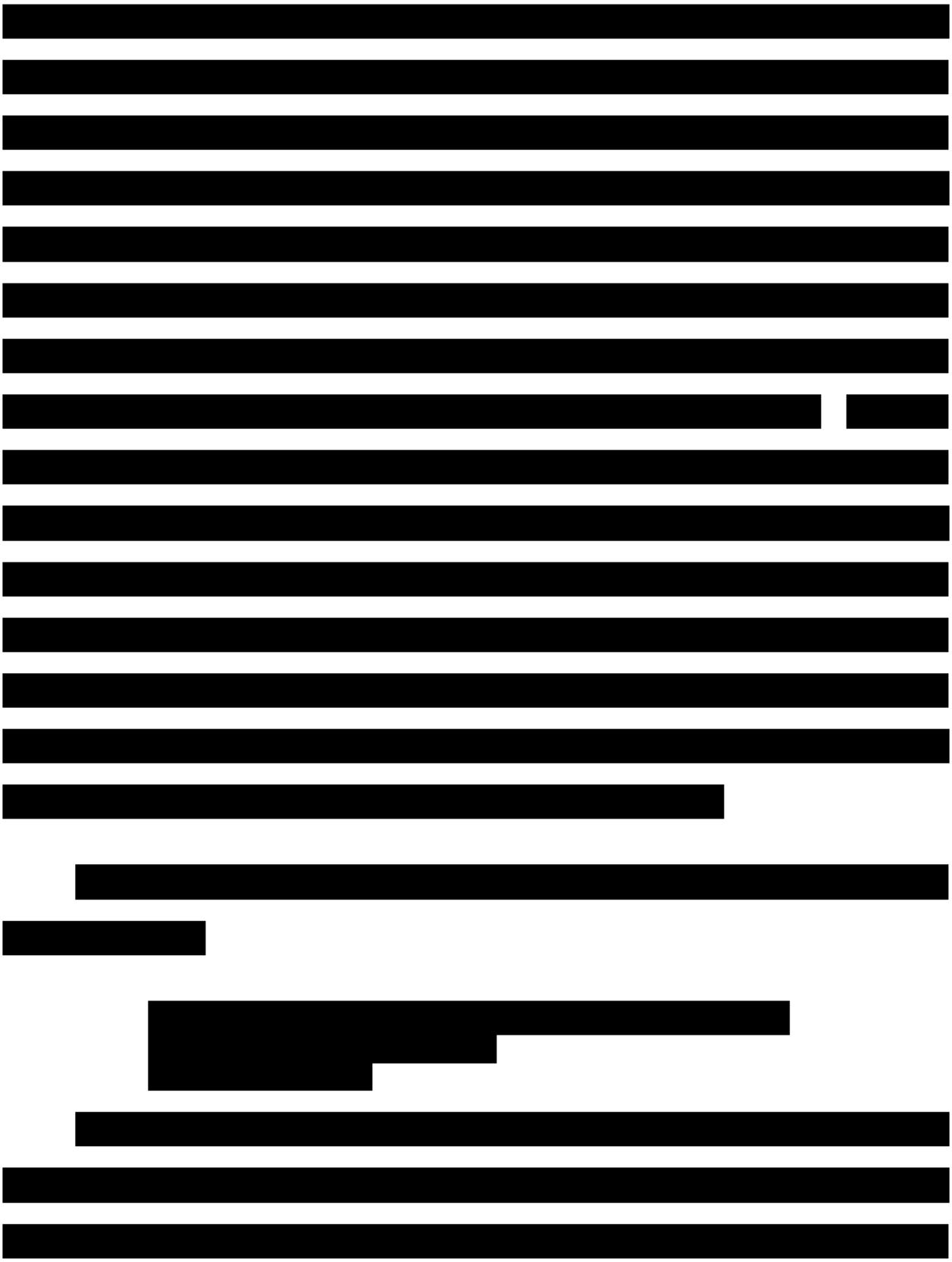
Complaint Counsel's proposed finding of fact is incomplete. The C-Leg 4 and Össur Rheo are PDAC verified for L5856, *i.e.*, CMS has confirmed their functionality conforms to the L-Code for microprocessor-controlled swing and stance. (Schneider, Tr. 4381-4382, 4294; Kannenberg,

Tr. 2000). The Plié 3 has not been submitted for PDAC verification. (Schneider, Tr. 4381-82). Ottobock's C-Leg is PDAC verified. (DeRoy, Tr. 3646-3648).

1166. [redacted]

Response to Finding No. 1166:

Complaint Counsel's proposed finding of fact is incomplete. All manufacturers have updated their MPK offerings since 2014 when Freedom launched the Plié 3. At trial, Carkhuff stated that Plié is at the very end of its product life cycle. (Carkhuff, Tr. 616). Carkhuff also 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). [redacted]



[redacted]

[redacted]

1167. Mark Ford, President and Managing Partner of POA, testified that he has observed Freedom and Otto Bock engage in an innovative tit-for-tat between each other in terms of MPK features. (PX5145 (Ford (Prosthetic & Orthotic Associates) , Dep. at 66-67)). He explained that "[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." (Ford (POA) Tr. 1015-1016).

Response to Finding No. 1167:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it comes from an unreliable witness. As of the time of trial, [redacted]

[redacted] Ford is not a prosthetist and therefore does not fit patients with prosthetic devices—he is not familiar with the functionality and features of the Plié or the C-Leg 4 and has no credibility to discuss innovation of these products. (Ford, Tr. 918, 922).

1168. Mr. Ford, testified that competition between Otto Bock and Freedom "has made them both better. They make the product better because they have to continue to essentially grab attention from our clinicians, so they make the products better." (PX5145 (Ford (POA) , Dep. at 64-65)). For example, Mr. Ford observed improvements to the Plié 3 that made it superior to the C-Leg 3, including waterproofing and longer battery life. (Ford (POA) Tr. 1007).

Response to Finding No. 1168:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it comes from an unreliable witness. As of the time of trial, [redacted]

[redacted] Ford is not a prosthetist and therefore does not fit patients with prosthetic devices—

he is not familiar with the functionality and features of the Plié or the C-Leg 4 and has no credibility to discuss innovation of these products. (Ford, Tr. 918, 922).

1169. Mark Ford, President and Managing Partner of POA, testified that when the C-Leg 4 was released, it included improvements to its battery life, software, and water-resistance. (Ford (POA) Tr. 1007). For example, the C-Leg 4 introduced "[i]mproved battery life and the improved ability to deal with water" which Freedom's Plié already had. (Ford (POA) Tr. 1007-08). Mr. Ford testified that POA patients have benefited from product improvements to the Plié 3 and C-Leg 4. (Ford (POA) Tr. 1008).

Response to Finding No. 1169:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it comes from an unreliable witness. As of the time of trial, [redacted] Ford is not a prosthetist and therefore does not fit patients with prosthetic devices—he is not familiar with the functionality and features of the Plié or the C-Leg 4 and has no credibility to discuss innovation of these products. (Ford, Tr. 918, 922).

1170. [redacted] (Asar (Hanger) Tr. 1408-1409 (*in camera*)).

Response to Finding No. 1170:

Complaint Counsel's proposed finding of fact is misleading. All manufacturers have updated their MPK offerings since 2014 when Freedom launched the Plié 3, and it is a mischaracterization to say that advancements have been exclusive to Freedom and Ottobock.

1171. [redacted] (Asar (Hanger) Tr. 1458 (*in camera*)).

Response to Finding No. 1171:

Respondent has no specific response.

1172. Mr. Asar testified, "I know when the C-Leg 3 came out, Freedom was working on their Plié, and so you'll always see, every time a new generation from one manufacturer comes out, the other manufacturer is working on something to leapfrog it." (Asar (Hanger) Tr. 1408-1409 (*in camera*); *see also* (Asar (Hanger) Tr. 1411 (stating that Hanger has benefited from the presence of an independent Freedom in terms of its MPK spend due in part to "technology leapfrogging")).

Response to Finding No. 1172:

Complaint Counsel's proposed finding of fact is misleading. All manufacturers have updated their MPK offerings since 2014 when Freedom launched the Plié 3, and it is a mischaracterization to say that advancements have been exclusive to Freedom and Ottobock.

1173. Tracy Ell, the owner and Chief Prosthetist at Mid-Missouri Orthotics and Prosthetics, testified that his clinic has benefited from competition between Freedom and Otto Bock through the "general progression and growth of technology." (Ell (Mid-Missouri O&P) Tr. 1750). Mr. Ell explained, "Generally, if you have a design of a component and their competitor exceeds the design by some characteristic, then it's only common nature to evolve your product, as in the C-Leg 1 through 4 and the Plié 1, 2, and 3." (Ell (Mid-Missouri O&P) Tr. 1750-51).

Response to Finding No. 1173:

Complaint Counsel's proposed finding of fact is misleading. All manufacturers have updated their MPK offerings since 2014 when Freedom launched the Plié 3, and it is a mischaracterization to say that advancements have been exclusive to Freedom and Ottobock.

1174. Accordingly, customers are concerned that the Merger will lead to decreased innovation. [redacted] (Senn (COPC) Tr. 227-028 (*in camera*)). Similarly, Mark Ford, of POA, testified he is concerned by the Merger, and stated, "what will happen with the future development of MPKs, if there's less competition, how will they continue to improve for patients." (Ford (POA) Tr. 1014-1015).

Response to Finding No. 1174:

Complaint Counsel's proposed finding of fact is misleading and contrary to the weight of evidence. All manufacturers have updated their MPK offerings since 2014 when Freedom launched the Plié 3, and it is a mischaracterization to say that advancements have been exclusive to Freedom and Ottobock. Keith Senn is not a clinician, and he testified that he is not familiar with non-MPKs, does not know the difference between a fluid-controlled and a constant friction non-MPK, and has never observed a patient wearing an MPK navigate terrain such as hills or stairs. (Senn, Tr. 152-153, 173, 201, 251). The only foundation Complaint Counsel laid for Senn's knowledge of "patient care" was that he "*used to have* an office for about a decade within one of COPC's clinics." (Response to CCFF ¶ 715 (citing Senn, Tr. 163)). Ford's concern is also unsupported by the record. As of the time of trial, [redacted] Ford is not a prosthetist and therefore does not fit patients with prosthetic devices—he is not familiar with the functionality and features of the Plié or the C-Leg 4 and has no credibility to discuss innovation of these products. (Ford, Tr. 918, 922).

B. THE MERGER ELIMINATED COMPETITION THAT WAS SET TO INTENSIFY BETWEEN FREEDOM AND OTTO BOCK'S NEXT-GENERATION MPKS

1175. [redacted] (Carkhuff (Freedom) Tr. 422 (*in camera*); PX05111 (Prince (Freedom) , Dep. at 58); PX07049 at 022 (¶¶ 49-50) (Otto Bock Amended Answer) (*in camera*)).

Response to Finding No. 1175:

Complaint Counsel's proposed finding of fact is incomplete. Freedom has been working on the project that is now known as the Quattro since before 2012. (Carkhuff, Tr. 391).

1176. [redacted] (Carkhuff (Freedom) Tr. 679 (*in camera*)).

Response to Finding No. 1176:

Complaint Counsel's proposed finding of fact is incomplete. Freedom has been working on the project that is now known as the Quattro since before 2012. (Carkhuff, Tr. 391).

1177. [redacted] (Carkhuff (Freedom) Tr. 498-99 (*in camera*); PX02025 (HEP) at 004).

Response to Finding No. 1177:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1178. [redacted] (PX05006 (Robertson (Freedom) IHT at 61) (*in camera*)). [redacted] (PX05006 (Robertson (Freedom) IHT at 61) (*in camera*)). [redacted] (PX02010 (HEP) at 001; Smith (HEP) Tr. 6535-36 (*in camera*)).

Response to Finding No. 1178:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Freedom employees have a history of making claims about their products and development projects that turn out to be overstated, and there have been serious development issues related to Quattro. *See, e.g.*, RFOF ¶¶ 688-741.

1. Quattro was Poised to Intensify MPK Competition between Freedom and Otto Bock and Likely Would Have Been C-Leg 4's Closest Competitor Absent the Merger

a) Pre-Merger Development of Quattro and Launch Estimates

1179. [redacted] (Carkhuff (Freedom) Tr. 565-566 (*in camera*); PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1179:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. Freedom started development on a knee that it hoped would actually provide microprocessor controlled swing and stance functionality before 2012, more than three years before the C-Leg 4 was launched. (Carkhuff, Tr. 391). [redacted]

1180. [redacted] (PX05006 (Robertson (Freedom) IHT at 20) (*in camera*)).

Response to Finding No. 1180:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

1181. [redacted] (Prince (Freedom) Tr. 2679 (*in camera*)). [redacted] (Prince (Freedom) Tr. 2711-12 (*in camera*); Carkhuff (Freedom) Tr. 426-27 (*in camera*); PX01155 (Freedom) at 042 (*in camera*)).

Response to Finding No. 1181:

Respondent has no specific response.

1182. [redacted] (PX05006 (Robertson (Freedom) IHT at 25-26 (*in camera*)).

Response to Finding No. 1182:

Respondent has no specific response.

1183. [redacted] (Prince (Freedom) Tr. 2676-78 (*in camera*); Carkhuff (Freedom) Tr. 427-28 (*in camera*); PX01155 (Freedom) 042 (*in camera*)).

Response to Finding No. 1183:

Respondent has no specific response.

1184. [redacted] (Prince (Freedom) Tr. 2691-93 (*in camera*) (discussing PX01849 (Freedom) at 21 (*in camera*))).

Response to Finding No. 1184:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1185. Internally Freedom refers to its process for developing a product as the "product development process" ("PDP"). The PDP consists of six phases—Phase A through Phase F. In order for a project to proceed, a "product approval committee" ("PAC") must approve each stage of the PDP following a "PAC review meeting." The product approval committee includes Freedom's CEO, CFO, VP of marketing, VP of R&D, and senior director of quality. (Prince (Freedom) Tr. 2680-81). Phase E is the product release phase. (Prince (Freedom) Tr. 2777). Phase F is the "market surveillance phase," and occurs after the product has become commercially available. (Prince (Freedom) Tr. 2778).

Response to Finding No. 1185:

Respondent has no specific response.

1186. [redacted] (PX01032 (Freedom) at 024 (*in camera*)).

Response to Finding No. 1186:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1187. [redacted]

[redacted] (Prince (Freedom) Tr. 2683-84 (*in camera*)).

Response to Finding No. 1187:

Respondent has no specific response.

1188. [redacted] (PX01032 (Freedom) at 020 (*in camera*).

Response to Finding No. 1188:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1189. [redacted] (Prince (Freedom) Tr. 2684 (*in camera*)).

Response to Finding No. 1189:

Respondent has no specific response.

1190. [redacted] (PX01849 (Freedom) at 018 (*in camera*)).

Response to Finding No. 1190:

Respondent has no specific response.

1191. [redacted] (Prince (Freedom) Tr. 2684-85 (*in camera*)).

Response to Finding No. 1191:

Respondent has no specific response.

1192. [redacted] (PX01849 (Freedom) at 017 (*in camera*); *see also* Prince (Freedom) Tr. 2689-90 (*in camera*)).

Response to Finding No. 1192:

Respondent has no specific response.

1193. [redacted] (Prince (Freedom) Tr. 2690, 99 (*in camera*)).

Response to Finding No. 1193:

Respondent has no specific response.

1194. [redacted] (Prince (Freedom) Tr. 2699 (*in camera*)).

Response to Finding No. 1194:

Respondent has no specific response.

1195. [redacted] (Prince (Freedom) Tr. 2699-700 (*in camera*)). [redacted] (Prince (Freedom) Tr. 2700-01 (*in camera*)).

[redacted] (Prince (Freedom) Tr. 2701 (*in camera*)).

Response to Finding No. 1195:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1196. [redacted] (Prince (Freedom) Tr. 2700 (*in camera*)).

Response to Finding No. 1196:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

1197. [redacted] (Prince (Freedom) Tr. 2703-04 (*in camera*)).

Response to Finding No. 1197:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

1198. [redacted] (Prince (Freedom) Tr. 2701-02 (*in camera*)).

Response to Finding No. 1198:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1199. [redacted] (Prince (Freedom) Tr. 2701-02 (*in camera*)).

Response to Finding No. 1199:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1200. [redacted] (Prince (Freedom) Tr. 2743 (*in camera*)).

Response to Finding No. 1200:

Respondent has no specific response.

1201. [redacted] (Prince (Freedom) Tr. 2717 (*in camera*)).

Response to Finding No. 1201:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1202. [redacted] (Prince (Freedom) Tr. 2743 (*in camera*)).

Response to Finding No. 1202:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1203. [redacted] (Prince (Freedom) Tr. 2719-20 (*in camera*)).

Response to Finding No. 1203:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

1204. [redacted] (PX01116 (Freedom) at 008 (*in camera*); Prince (Freedom) Tr. 2744 (*in camera*)). [redacted] (Prince (Freedom) Tr. 2720 (*in camera*), 2744 (*in camera*)).

Response to Finding No. 1204:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

1205. [redacted] (PX01116 (Freedom) at 008 (*in camera*); Prince (Freedom) Tr. 2743 (*in camera*)).

Response to Finding No. 1205:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1206. [redacted] (Prince (Freedom) Tr. 2743 (*in camera*)).

Response to Finding No. 1206:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1207. [redacted] (PX02032 (Freedom) at 13 (*in camera*) (Board of Directors Meeting Presentation, April 19, 2017); Carkhuff (Freedom) Tr. 566 (*in camera*)).

Response to Finding No. 1207:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1208. [redacted] (PX01157 (Freedom) at 011 (*in camera*)).

Response to Finding No. 1208:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted] Further, not only is Complaint Counsel's proposed finding of fact irrelevant, but its sole support is a document which was not introduced at trial and not subject to cross-examination.

1209. [redacted]

Response to Finding No. 1209:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

b) Post-Merger Development of Quattro and Launch Estimates

1210. [redacted] (Prince (Freedom) Tr. 2752 (*in camera*)). [redacted] (Prince (Freedom) Tr. 2753-54 (*in camera*)).

Response to Finding No. 1210:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1211. [redacted] (Prince (Freedom) Tr. 2772 (*in camera*); *see also* PX01117 (Freedom) at 034 ("With the approval of the PAC, the team recommends preceding (sic) with a Phase C Exit…and continuing with Process Development and Design Validation in Phase D.") (*in camera*)).

Response to Finding No. 1211:

Respondent has no specific response.

1212. [redacted] (PX01117 (Freedom) at 014 (*in camera*); *see also* PX05114 (Ferris (Freedom) , Dep. at 95) (*in camera*) ("[W]e do believe in our plan that the Quattro would launch probably late summer, mid-year.").

Response to Finding No. 1212:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

1213. [redacted] (Prince (Freedom) Tr. 2773-74 (*in camera*)).

Response to Finding No. 1213:

Respondent has no specific response, other than that [redacted]

1214. [redacted] (Prince (Freedom) Tr. 2776 (*in camera*)). [redacted] (Prince (Freedom) Tr. 2776 (*in camera*)).

Response to Finding No. 1214:

Respondent has no specific response.

1215. [redacted] (Prince (Freedom) Tr. 2776 (*in camera*)).

Response to Finding No. 1215:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1216. [redacted] (Carkhuff (Freedom) Tr. 424 (*in camera*)).

Response to Finding No. 1216:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted] Freedom was also optimistic about the Kinnex, which has been pulled from the market. (Testerman, Tr. 1250-1251; [redacted]).

1217. [redacted] (PX05006 (Robertson (Freedom) IHT at 61) (*in camera*)).

Response to Finding No. 1217:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

1218. [redacted] (PX01228 (Freedom) at 004 (*in camera*)).

Response to Finding No. 1218:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1219. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5117-18 (*in camera*); PX01223 (Freedom) at 005 (*in camera*)).

Response to Finding No. 1219:

Respondent has no specific response, other than that [redacted]

1220. [redacted] (PX05111 (Prince (Freedom) , Dep. at 75 (*in camera*)).

Response to Finding No. 1220:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

1221. [redacted] (Prince (Freedom) Tr. 2782-83 (*in camera*)).

Response to Finding No. 1221:

Complaint Counsel's proposed finding of fact is incomplete. Freedom stopped production of the Kinnex in 2018 because of "significant quality problems." (Carkhuff, Tr. 613; [redacted]

[redacted]

1222. [redacted] (Prince (Freedom) Tr. 2786 (*in camera*)).

Response to Finding No. 1222:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1223. [redacted]

(Prince (Freedom) Tr. 2785-86 (*in camera*)). [redacted] (Prince (Freedom) Tr. 2785-86 (*in camera*)). [redacted] (Prince (Freedom) Tr. 2791 (*in camera*)).

Response to Finding No. 1223:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1224. [redacted] (Carkhuff (Freedom) Tr. 731 (*in camera*)).

Response to Finding No. 1224:

Respondent has no specific response, other than that Carkhuff is not in charge of R&D at Freedom, and that [redacted]

1225. [redacted] (Prince (Freedom) Tr. 2796-97 (*in camera*)).

Response to Finding No. 1225:

Respondent has no specific response, other than that [redacted]

1226. [redacted] (Prince (Freedom) Tr. 2776, 2786 (*in camera*)).

Response to Finding No. 1226:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1227. [redacted] (Prince (Freedom) Tr. 2777 (*in camera*)).

Response to Finding No. 1227:

Respondent has no specific response, other than that [redacted]

1228. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5118 (*in camera*)).

Response to Finding No. 1228:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1229. [redacted]
(Mattear (Proteor Inc.) Tr. 5693-94; 5768 (*in camera*)).

Response to Finding No. 1229:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

c) Throughout its Development, Quattro Was Designed to Target the C-Leg 4

1230. [redacted]

Response to Finding No. 1230:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

1231. [redacted]

Response to Finding No. 1231:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1232. [redacted]

Response to Finding No. 1232:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that the October 2016 meeting focused mostly on the Quattro project, because it did not. The presentation given to Professor Näder by Maynard Carkhuff in October 2016 was eighty pages long, but only ten pages referred to the Quattro. (PX01068).

[redacted]

[redacted]

[redacted]

1233. (Carkhuff (Freedom) Tr. 519, 522, 525-26, 649 (*in camera*)). (Carkhuff (Freedom) Tr. 520-21 (*in camera*); PX01068 (Freedom) (*in camera*)).

Response to Finding No. 1233:

Respondent has no specific response.

1234.

Response to Finding No. 1234:

Complaint Counsel's proposed finding of fact is misleading and incomplete.

1235. [redacted]

Response to Finding No. 1235:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1236. [redacted] (De Roy (Ossur) Tr. 3607-08 (*in camera*)).

Response to Finding No. 1236:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1237. [redacted] (Carkhuff (Freedom) Tr. 423 (*in camera*)).

Response to Finding No. 1237:

Respondent has no specific response, other than that [redacted]

[redacted]

(1) Functionality and Features of the Quattro

1238. [redacted]

Dr. Prince testified that, from early on in its development, the Quattro was focused at the C-Leg 4. (Prince (Freedom) Tr. 2698) (*in camera*)).

Response to Finding No. 1238:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

[redacted]

1239. [redacted] (Prince (Freedom) Tr. 2698, 2715 (*in camera*)).

Response to Finding No. 1239:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1240. [redacted] (PX05109 (Carkhuff (Freedom) , Dep. at 52 (*in camera*)).

Response to Finding No. 1240:

Complaint Counsel's proposed finding of fact should not be considered because it misstates deposition testimony. [redacted]

[redacted]

1241. [redacted]

Response to Finding No. 1241:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

1242. [redacted]
(PX01155 (Freedom) at 087) (*in camera*)).

(PX01155 (Freedom) at 087) (*in camera*)).

Response to Finding No. 1242:

Respondent has no specific response, other than that [redacted]

1243. [redacted]

[redacted]

Response to Finding No. 1243:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1244. [redacted]

Response to Finding No. 1244:

Respondent has no specific response, other than that [redacted]

[redacted]

1245. David Smith, Freedom's CEO at the time, confirmed that one advantage of the Quattro design over other MPKs was a shorter build height. (Smith (HEP) Tr. 6528 (*in camera*)). As Mr. Carkhuff testified, the build height of the Quattro was expected to be superior to the C-Leg 4. (Carkhuff (Freedom) Tr. 533 (discussing PX01068 (Freedom) at 031); *see also* PX01117 (Freedom) at 017 (*in camera*)).

Response to Finding No. 1245:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1246. [redacted]

Response to Finding No. 1246:

Complaint Counsel's proposed finding of fact is misleading. [redacted] Moreover, Freedom stopped production of the Kinnex in 2018 because of "significant quality problems." (Carkhuff, Tr. 613; [redacted]). [redacted]

1247. [redacted]

Response to Finding No. 1247:

Complaint Counsel's proposed finding of fact should not be considered because [redacted]

1248. [redacted]

Response to Finding No. 1248:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

1249. [redacted]

Response to Finding No. 1249:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

1250. [redacted]

Response to Finding No. 1250:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1251. [redacted]

Response to Finding No. 1251:

Respondent has no specific response, other than that [redacted]

1252. [redacted]

Response to Finding No. 1252:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1253. [redacted]

Response to Finding No. 1253:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

[redacted]

1254. [redacted] (PX01132 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1254:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1255. [redacted]

Response to Finding No. 1255:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1256. [redacted] (PX01117 (Freedom) at 025 (*in camera*)).

Response to Finding No. 1256:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

[redacted]

1257. [redacted] (PX01117 (Freedom) at 017 (*in camera*); *see also* Prince (Freedom) Tr. 2763-64 (*in camera*)).

Response to Finding No. 1257:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

[redacted]

1258. [redacted] (PX01117 (Freedom) at 016 (*in camera*)).

Response to Finding No. 1258:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1259. [redacted]

Response to Finding No. 1259:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

[redacted]

1260. [redacted]

Response to Finding No. 1260:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1261. [redacted] (Prince (Freedom) Tr. 2771-72) (*in camera*)).

Response to Finding No. 1261:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1262. [redacted] (PX05006 (Robertson (Freedom) IHT at 80) (*in camera*)).

Response to Finding No. 1262:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1263. [redacted] (PX05006 (Robertson (Freedom) IHT at 65-66 (*in camera*)).

Response to Finding No. 1263:

Respondent has no specific response.

1264. [redacted]

Response to Finding No. 1264:

Respondent has no specific response, except to note that PX01046 was not introduced at trial and thus not subject to cross-examination before the Court.

1265. [redacted] (PX01228 (Freedom) at 004 (*in camera*)).

Response to Finding No. 1265:

Respondent has no specific response.

(2) Pricing of the Quattro

1266. [redacted]

Response to Finding No. 1266:

Complaint Counsel's proposed finding of fact should not be considered because [redacted]

1267. [redacted] (Carkhuff (Freedom) Tr. 398, 428-429 (*in camera*) (discussing PX01155 (Freedom) at 078 (*in camera*))).

Response to Finding No. 1267:

Complaint Counsel's proposed finding of fact should not be considered because [redacted]

1268. [redacted] (Carkhuff (Freedom) Tr. 429 (*in camera*); PX01155 (Freedom) at 078 (*in camera*)).

Response to Finding No. 1268:

Complaint Counsel's proposed finding of fact should not be considered because [redacted]

1269. [redacted]

Response to Finding No. 1269:

Complaint Counsel's proposed finding of fact should not be considered because [redacted]

d) Quattro Will Be a Close Competitor to the C-Leg 4

(1) Freedom's Projections and Internal Assessments Indicated Quattro Would Be a Close Competitor to the C-Leg 4

1270. [redacted]

Response to Finding No. 1270:

Complaint Counsel's proposed finding of fact should not be considered because it grossly mischaracterizes the witness's testimony. [redacted]

1271. [redacted] (PX01115 (Freedom) at 028 (*in camera*)).

Response to Finding No. 1271:

Complaint Counsel's proposed finding of fact is misleading. [redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial, and thus not subject to cross-examination before this Court.

1272. [redacted] (PX01318 (Freedom) at 060 (*in camera*)).

Response to Finding No. 1272:

Complaint Counsel's proposed finding of fact is misleading. [redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial, and thus not subject to cross-examination before this Court.

1273. [redacted]

Response to Finding No. 1273:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1274. [redacted]

Response to Finding No. 1274:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1275. [redacted] (PX05111 (Prince (Freedom) , Dep. at 128 (*in camera*))).

Response to Finding No. 1275:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1276. [redacted]

Response to Finding No. 1276:

Complaint Counsel's proposed finding of fact is misleading and should not be considered. [redacted]

[redacted]

1277. [redacted]

Response to Finding No. 1277:

Complaint Counsel's proposed finding of fact is misleading and should not be considered.

[redacted]

1278. [redacted]

Response to Finding No. 1278:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1279. [redacted]

[redacted]

Response to Finding No. 1279:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

(2) Freedom's Representations to Otto Bock Indicate that the Quattro Would Be a Close Competitor to the C-Leg 4

1280. [redacted] (Carkhuff (Freedom) Tr. 533, 535 (*in camera*)).

Response to Finding No. 1280:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

1281. [redacted]

Response to Finding No. 1281:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1282. [redacted]

[redacted]

Response to Finding No. 1282:

Respondent has no specific response, other than that [redacted]

[redacted]

1283. In July 2017, Rolf Classon, a Freedom board member, met with Hans Georg Näder, the CEO of Otto Bock, to discuss a potential sale of Freedom to Otto Bock. David Smith, another Freedom board member, provided Mr. Classon with talking points for the meeting. (PX05122 (Smith (HEP) , Dep. at 36-38; PX05005 (Smith (HEP) IHT at 73-74; *see also* PX02010 (HEP) at 001). [redacted] (PX02010 (HEP) at 001; Smith (HEP) Tr. 6535-36 (*in camera*)).

Response to Finding No. 1283:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

[redacted]

1284. [redacted]

Response to Finding No. 1284:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

1285. [redacted]

[redacted]

Response to Finding No. 1285:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it is from an unreliable source: [redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not introduced at trial, and thus not subject to cross-examination before this Court.

1286. [redacted]

Response to Finding No. 1286:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

(3) Freedom's Representations to Third Parties Indicate that the Quattro Would Be a Close Competitor to the C-Leg 4

1287. [redacted] (De Roy (Ossur) Tr. 3608 (*in camera*)).

Response to Finding No. 1287:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1288. [redacted]

Response to Finding No. 1288:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1289. [redacted] (PX01223 (Freedom) at 004 (*in camera*)).

Response to Finding No. 1289:

Complaint Counsel's proposed finding of fact is incomplete. [redacted] Moreover,

Freedom stopped production of the Kinnex in 2018 because of "significant quality problems." (Carkhuff, Tr. 613; [redacted]). [redacted]

Further, the sole basis of Complaint Counsel's proposed finding of fact is a document which was not introduced at trial, and thus not subject to cross-examination before this Court.

1290. [redacted]

Response to Finding No. 1290:

Respondent has no specific response, other than that [redacted] Further, Respondent notes that the

sole basis of Complaint Counsel's proposed finding of fact is a document which was not introduced at trial, and thus not subject to cross-examination before this Court.

1291. [redacted]

Response to Finding No. 1291:

Respondent has no specific response, other than that [redacted] Further, Respondent notes that the sole basis of Complaint Counsel's proposed finding of fact is a document which was not introduced at trial, and thus not subject to cross-examination before this Court.

1292. [redacted]

Response to Finding No. 1292:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted] Further, Respondent notes that the sole basis of Complaint Counsel's proposed finding of fact is a document which was not introduced at trial, and thus not subject to cross-examination before this Court.

1293. [redacted]

Response to Finding No. 1293:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted] Further, the sole basis of Complaint Counsel's proposed finding of fact is a document which was not introduced at trial, and thus not subject to cross-examination before this Court.

1294. [redacted]

Response to Finding No. 1294:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it relies on a not credible witness. [redacted]

Further, the sole basis of Complaint Counsel's proposed finding of fact is a document which was not introduced at trial, and thus not subject to cross-examination before this Court.

(4) Reactions of Clinicians and Amputees to the Quattro Confirm It Would Be a Close Competitor to the C-Leg 4

1295. [redacted] (Prince (Freedom) Tr. 2700–01) (*in camera*)).

Response to Finding No. 1295:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1296. [redacted]

Response to Finding No. 1296:

Respondent has no specific response, other than that [redacted]

1297. [redacted]

[redacted] (PX01137 (Freedom) at 001 (*in camera*); Prince (Freedom) Tr. 2723-24 (*in camera*)).

Response to Finding No. 1297:

Respondent has no specific response, other than that [redacted]

1298. [redacted]

Response to Finding No. 1298:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it is inaccurate and unreliable [redacted]

1299. [redacted]

[redacted] (PX01116 (Freedom) at 001 (*in camera*); Prince (Freedom) Tr. 2740-41 (*in camera*)).

Response to Finding No. 1299:

Complaint Counsel's proposed finding of fact is irrelevant.

1300. [redacted]

Response to Finding No. 1300:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

1301. [redacted]

Response to Finding No. 1301:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

[redacted]

1302. [redacted]

Response to Finding No. 1302:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

[redacted]

1303. [redacted]

Response to Finding No. 1303:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

[redacted]

1304. [redacted] (Prince (Freedom) Tr. 2770-71 (*in camera*)).

Response to Finding No. 1304:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

1305. [redacted]

[redacted]

Response to Finding No. 1305:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

1306. [redacted] (PX01117 (Freedom) at 005 (*in camera*)).

Response to Finding No. 1306:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

1307. [redacted]

Response to Finding No. 1307:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

1308. [redacted]

Response to Finding No. 1308:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

(5) Reactions of Proposed Divestiture [redacted] to the Quattro Confirm It Would Be a Close Competitor to the C-Leg 4

1309. [redacted]

Response to Finding No. 1309:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

[redacted]

1310. [redacted]

Response to Finding No. 1310:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

[redacted]

1311. [redacted] (Mattear (Proteor Inc.) Tr. 5768-69 (*in camera*)).

Response to Finding No. 1311:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1312. [redacted] (Mattear (Proteor Inc.) Tr. 5768-69, 5784-85 (*in camera*)).

Response to Finding No. 1312:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

(6) Otto Bock's Due Diligence and Post-Merger Analysis of Quattro Confirm It Would Be a Close Competitor to the C-Leg 4

1313. In August 2017, Jon Hammack from Moelis wrote to David Smith, Freedom's then-CEO, "They've now seen how attractive our pipeline is. They know Quattro is a game changer. They know what it means if Össur ends up with this." (PX01851 (Freedom) at 001).

Response to Finding No. 1313:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it is from an unreliable source: [redacted]

Further, the sole basis of Complaint Counsel's proposed finding of fact is a document which was not introduced at trial, and thus not subject to cross-examination before this Court.

1314. [redacted] (PX01473 (Otto Bock) at 004 (*in camera*)).

Response to Finding No. 1314:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

1315. [redacted]

[redacted] (PX01004 (Otto Bock) at 064 (*in camera*)).

Response to Finding No. 1315:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

1316. [redacted] (PX01004 (Otto Bock) at 064 (*in camera*)).

Response to Finding No. 1316:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

1317. Following an in-person evaluation of the Quattro by multiple Otto Bock employees, Scott Schneider on September 19, 2017 circulated to Alexander Gück (Director of Strategy and M&A), Linus Cremer (Manager, Corporate Strategy and M&A), Helmut Pfuhl (Head of Strategic Business Unit, Prosthetics), Sönke Rössing (Chief Strategy and Human Resource Officer), and others a "Roosevelt Q Product Summary," signed on behalf of the four Otto Bock attendees of the in-person Quattro testing. A chart attached to the summary identified "RISKS IF WE DO NOT CONTROL QUATTRO" that included we "will have to put more Genium functions in the C-Leg," "Össur could have something that will compete better with C-Leg 4 because the stance phase functions will be much better than Rheo can achieve [sic]" and "Anyone who takes this product will cut in to C-Leg 4 market share. Especially in the US." PX01471 (Otto Bock) at 003 (Roosevelt Q Product Summary)).

Response to Finding No. 1317:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

1318. After the Merger, Otto Bock's plans for the Quattro confirm it would be a close competitor to the C-Leg 4. (*See* CCFF ¶¶ 1405-1411, below). For example, in [redacted] (PX01302 (Otto Bock) at 083 (*in camera*)). [redacted] (PX01302 (Otto Bock) at 083 (*in camera*)). [redacted] (PX05157 (Pfuhl) , Dep. at 172). [redacted]

[redacted] (Swiggum (Otto Bock) Tr. 3424) (*in camera*)).

Response to Finding No. 1318:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

2. Otto Bock's Next Generation C-Leg 5

1319. [redacted] (PX01892 (Otto Bock) at 006 (*in camera*)).

Response to Finding No. 1319:

Respondent has no specific response, except to note that the sole basis of Complaint Counsel's proposed finding of fact is a document which was not introduced at trial, and thus not subject to cross-examination before this Court.

1320. Around February 2017, Otto Bock began its formal initiative to develop the C-Leg 5. (Schneider (Otto Bock) Tr. 4353-54; *see also* [redacted]

Response to Finding No. 1320:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

1321. [redacted] (PX01762 (Otto Bock) at 068 (*in camera*)).

Response to Finding No. 1321:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1322. [redacted] (PX01762 (Otto Bock) at 053 (*in camera*); *see also* PX07049 at 024 (*in camera*) (Otto Bock Amended Answer)).

Response to Finding No. 1322:

Respondent has no specific response, other than that [redacted]

1323. [redacted] (PX01762 (Otto Bock) at 068 (*in camera*)).

Response to Finding No. 1323:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1324. [redacted] (PX01155 (Freedom) at 091 (*in camera*)).

Response to Finding No. 1324:

Complaint Counsel's proposed finding of fact is misleading to the extent it states Freedom was aware of plans to release the next generation C-Leg. The document states it was "likely" Respondent will come out with a new generation product. Prosthetic knee manufacturers release competitive products on a regular basis. (Testerman, Tr. 1097) ("the marketing team has to be prepared, in my opinion, at all times when a product is launched, new product is launched, something is shiny and new out there, to help prepare us to make sure that we can understand it and compete against it.").

C. A Core Rationale for the Merger Was Eliminating a Competitor

1. Pre-Due Diligence Discussions between Otto Bock and Freedom Focused on Quattro, the "C-Leg 4 Killer"

1325. [redacted] (Carkhuff (Freedom) Tr. 649 (*in camera*)).

Response to Finding No. 1325:

Respondent has no specific response other than to note that [redacted]).

[redacted] (Smith (HEP) Tr. 6488 (*in camera*)).

Response to Finding No. 1326:

Respondent has no specific response other than to note that [redacted]

[redacted]

1327. [redacted] (Carkhuff (Freedom) Tr. 519, 649 (*in camera*)).

Response to Finding No. 1327:

Respondent has no specific response other than to note that [redacted]; Response to CCFF ¶ 1326).

1328. [redacted] (Carkhuff (Freedom) Tr. 522, 525-26, 649 (*in camera*)). [redacted] (Carkhuff (Freedom) Tr. 520-21 (*in camera*); PX01068 (Freedom) (*in camera*)).

Response to Finding No. 1328:

Respondent has no specific response other than to note that [redacted]

1329. [redacted] (Carkhuff (Freedom) Tr. 531 (*in camera*); PX01068 (Freedom) at 031).

Response to Finding No. 1329:

Complaint Counsel's proposed finding is misleading to the extent Complaint Counsel is attempting to create an inference that [redacted]

1330. [redacted]

Response to Finding No. 1330:

Complaint Counsel's proposed finding is misleading to the extent that Complaint Counsel is attempting to create an inference that the [redacted]

[redacted]

Complaint Counsel's proposed finding of fact is also misleading to the extent Complaint Counsel is attempting to create an inference that Freedom has a history of producing accurate financial projections, because it does not. [redacted]

1331. [redacted] **(Carkhuff (Freedom) Tr. 533, 535 (*in camera*)).**

Response to Finding No. 1331:

Complaint Counsel's proposed finding is misleading to the extent that Complaint Counsel is attempting to create an inference that the [redacted]

[redacted]

[redacted]

1332. [redacted] (Carkhuff (Freedom) Tr. 654-55 (*in camera*)).

Response to Finding No. 1332:

Complaint Counsel's proposed finding is misleading to the extent that Complaint Counsel is attempting to create an inference that the [redacted]

[redacted]

1333. [redacted] (Carkhuff (Freedom) Tr. 541-42 (*in camera*); Smith (HEP) Tr. 6491-92 (*in camera*); PX02034 (HEP) at 001 (*in camera*)).

Response to Finding No. 1333:

Respondent has no specific response.

1334. [redacted] (Carkhuff (Freedom) Tr. 542-43 (*in camera*)).

Response to Finding No. 1334:

Respondent has no specific response.

1335. [redacted] (PX02034 (HEP) at 025, 028 (*in camera*)).

Response to Finding No. 1335:

Complaint Counsel's proposed finding is misleading to the extent that Complaint Counsel is attempting to create an inference that the [redacted]

1336. [redacted]

Response to Finding No. 1336:

Complaint Counsel's proposed finding is misleading to the extent that Complaint Counsel is attempting to create an inference that the [redacted]

[redacted]

1337. [redacted] (Smith (HEP) Tr. 6500-02 (*in camera*); PX02034 (HEP) at 031 (*in camera*)).

Response to Finding No. 1337:

Complaint Counsel's proposed finding is misleading to the extent that Complaint Counsel is attempting to create an inference that the [redacted]

2. Due Diligence by Otto Bock Confirmed that Otto Bock Perceived both the Plié 3 and Quattro to be Significant Threats

1338. [redacted] (Swiggum (Otto Bock) Tr. 3345 (*in camera*); PX05127 (Rössing (Otto Bock) , Dep. at 118)).

Response to Finding No. 1338:

Respondent has no specific response.

1339. [redacted] (Swiggum (Otto Bock) Tr. 3346-47 (*in camera*)).

Response to Finding No. 1339:

Respondent has no specific response.

1340. [redacted] (Swiggum (Otto Bock) Tr. 3347-48 (*in camera*)).

Response to Finding No. 1340:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that the "debrief" related to due diligence or that former Ottobock executive Matt Swiggum was involved in the commercial due diligence related to the Acquisition, because he was not. (CCFF ¶¶ 1348-1391 (addressing commercial due diligence); RFOF ¶¶ 956-957 (citing Schneider, Tr. 4408-4411)).

1341. [redacted] (PX05131 (Gück (Otto Bock) , Dep. at 83-84)).

Response to Finding No. 1341:

Respondent has no specific response.

1342. [redacted] (PX01299 (Otto Bock) at 006 (*in camera*); PX05131 (Gück (Otto Bock) , Dep. at 85-86) (*in camera*)).

Response to Finding No. 1342:

Complaint Counsel's proposed finding is misleading because it ignores evidence and testimony related to [redacted]

1343. [redacted] (Swiggum (Otto Bock) Tr. 3348-49 (*in camera*)).

Response to Finding No. 1343:

Complaint Counsel's proposed finding is misleading to the extent Complaint Counsel is attempting to create an inference that the "debrief" was related to commercial due diligence, because it was not. (CCFF ¶¶ 1348-1391 (addressing commercial due diligence)). Complaint Counsel's proposed finding of fact also ignores Swiggum's testimony at trial that [redacted] (Swiggum, Tr. 3348-3349). [redacted]

1344. (Swiggum (Otto Bock) Tr. 3349-50 (*in camera*)).

Response to Finding No. 1344:

Complaint Counsel's proposed finding is misleading and incomplete because it ignores the context of Mr. Swiggum's testimony.

[redacted]

1345. [redacted] (Swiggum (Otto Bock) Tr. 3350 (*in camera*)).

Response to Finding No. 1345:

Complaint Counsel's proposed finding is misleading to the extent Complaint Counsel is cherry-picking small bits of testimony and ignoring Swiggum's complete trial testimony as follows:

[redacted]

(Swiggum, Tr. 3350).

1346. [redacted] (PX01465 (Otto Bock) at 2 (*in camera*)).

Response to Finding No. 1346:

Complaint Counsel's proposed finding is misleading to the extent Complaint Counsel is attempting to create an inference that [redacted]

Complaint because it cherry-picks a small portion of a document that Complaint Counsel chose not to introduce at trial. (PX01465 at 2). [redacted]

[redacted]

[redacted] Further, Respondent notes that the sole basis of Complaint Counsel's proposed finding of fact is a document which was not introduced at trial, and thus not subject to cross-examination before this Court.

1347. [redacted] (Swiggum (Otto Bock) Tr. 3354-55 (*in camera*)).

Response to Finding No. 1347:

Complaint Counsel's proposed finding is misleading and should not be adopted by the Court. [redacted]

a) North America Due Diligence Report

1348. [redacted] (PX01091 (Otto Bock) (*in camera*); Schneider (Otto Bock) Tr. 4450-52 (*in camera*)). [redacted] (Schneider (Otto Bock) Tr. 4583 (*in camera*)).

Response to Finding No. 1348:

Complaint Counsel's proposed finding is misleading to the extent Complaint Counsel is attempting to create an inference that Swiggum was involved in the preparation of the [redacted]

1349. [redacted] (PX01091 (Otto Bock) at 002 (*in camera*)).

Response to Finding No. 1349:

Complaint Counsel's proposed finding is misleading to the extent Complaint Counsel is attempting to create an inference that Swiggum was involved in the preparation of the [redacted]

1350. [redacted] (PX01091 (Otto Bock) at 004 (*in camera*)).

[redacted] (Schneider (Otto Bock) Tr. 4453, 4583-84 (*in camera*)).

Response to Finding No. 1350:

Complaint Counsel's proposed finding is misleading and inaccurate. [redacted]

[redacted]

(Schneider, Tr. 4454-4455).

[redacted]

[redacted]

(PX01091 at 4). [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1351. [redacted] (PX01091 (Otto Bock) at 012 (*in camera*)).

Response to Finding No. 1351:

Complaint Counsel's proposed finding is misleading because it fails to also cite the fact that Ottobock's diligence confirmed that the Plié 3 is not a microprocessor swing and stance controlled knee. [redacted]

[redacted]

[redacted]

[redacted]

1352. [redacted] (PX01091 (Otto Bock) at 024 (*in camera*)).

Response to Finding No. 1352:

Complaint Counsel's proposed finding is misleading to the extent that Complaint Counsel is attempting to create an inference that the [redacted]

b) August Due Diligence Discussions

1353. [redacted] (PX01462 (Otto Bock) at 001 (*in camera*)). [redacted] (PX05148 (Swiggum) , Dep. at 104 (*in camera*); *see also* [redacted]

Response to Finding No. 1353:

Complaint Counsel's proposed finding is misleading and not supported by the record evidence. Complaint Counsel's proposed finding is misleading to the extent Complaint Counsel is attempting to create an inference that [redacted]

[redacted]

[redacted]

1354. [redacted]); PX05131 (Gück (Otto Bock) , Dep. at 103-05)). Sönke Rössing, who supervised drafting of the report, testified that the summary was written "after the finishing of the due diligence." (PX05104 (Rössing (Otto Bock) , Dep. at 96-97)). [redacted] (Swiggum (Otto Bock) Tr. 3361 (*in camera*)).

Response to Finding No. 1354:

Complaint Counsel's proposed finding is misleading to the extent Complaint Counsel is attempting to create an inference that the [redacted]

[redacted]

[redacted]

1355. [redacted]
(PX01473 (Otto Bock) at 004 (*in camera*)). [redacted]
(PX01473 (Otto Bock) at 012 (*in camera*)). [redacted] (Schneider (Otto Bock) Tr. 4614-15 (*in camera*)).

Response to Finding No. 1355:

Complaint Counsel's proposed finding is misleading to the extent Complaint Counsel is attempting to create an inference that [redacted]

[redacted]

[redacted]

[redacted].

1356. [redacted] (Swiggum (Otto Bock) Tr. 3362-63 (*in camera*)).

Response to Finding No. 1356:

Complaint Counsel's proposed finding of fact is misleading to the extent it is based on [redacted]

[redacted]

Complaint Counsel's proposed finding of fact is also misleading to the extent it relies solely on [redacted]

[redacted]

1357. [redacted] (Swiggum (Otto Bock) Tr. 3362 (*in camera*)). [redacted] (Swiggum (Otto Bock) Tr. 3348-3350 (*in camera*)). [redacted] (Swiggum (Otto Bock) Tr. 3391-3392 (*in camera*); PX01471 (Otto Bock) at 003 (Roosevelt Q Product Summary)).

Response to Finding No. 1357:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that the [redacted]

[redacted]

1358. [redacted] (PX01473 (Otto Bock) at 004 (*in camera*)).

Response to Finding No. 1358:

Respondent has no specific response other than to note that [redacted] (PX01473 at 2).

1359. [redacted] (PX01473 (Otto Bock) at 007 (*in camera*)). [redacted] (PX01473 (Otto Bock) at 007 (*in camera*)).

Response to Finding No. 1359:

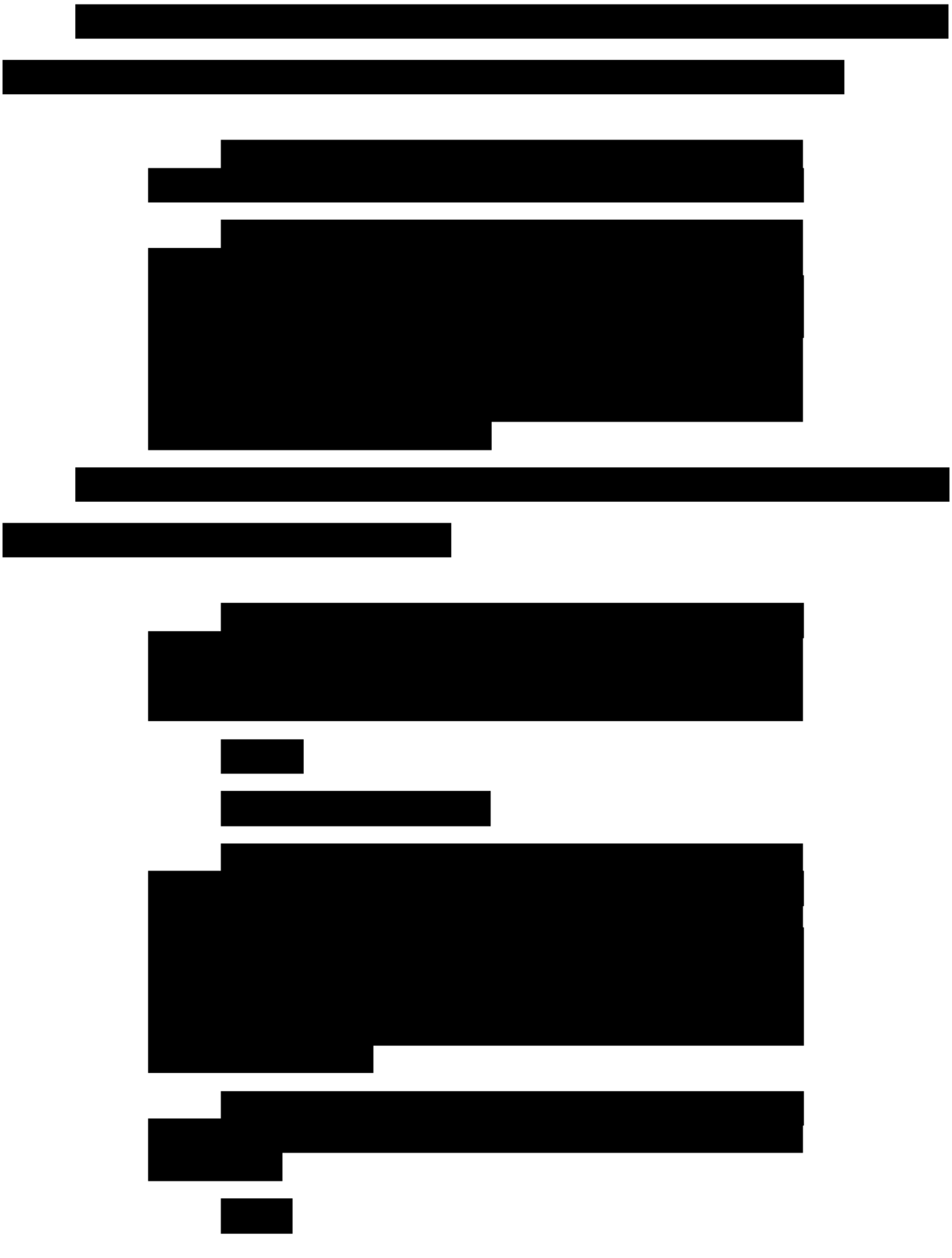
Complaint Counsel's proposed finding is misleading to the extent Complaint Counsel is attempting to create an inference that [redacted]

[redacted]

1360. [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. (PX05148 (Swiggum (Otto Bock) , Dep. at 106).

Response to Finding No. 1360:

Complaint Counsel's proposed finding is misleading and inaccurate. Complaint Counsel's proposed finding of fact is misleading to the extent it relies solely on testimony of [redacted]



[redacted]

1361. [redacted] (PX01473 (Otto Bock) at 008 (*in camera*)).

Response to Finding No. 1361:

Complaint Counsel's proposed finding is misleading to the extent Complaint Counsel is attempting to create an inference that [redacted]

[redacted]

[redacted]

1362. The Otto Bock Due Diligence Summary also contained [redacted] (PX01473 (Otto Bock) at 010 (*in camera*); (Swiggum (Otto Bock) Tr. 3376-380 (*in camera*)). [redacted] (PX01473 (Otto Bock) at 010 (*in camera*); (Swiggum (Otto Bock) Tr. 3376-380 (*in camera*)). [redacted] (Swiggum (Otto Bock) Tr. 3380 (*in camera*)).

[redacted]

Response to Finding No. 1362:

Complaint Counsel's proposed finding is misleading, contrary to record evidence, and should not be adopted by the Court. Complaint Counsel's proposed finding of fact is misleading in several respects. [redacted]

[redacted]

[redacted]

[redacted]

1363. [redacted] (PX01473 (Otto Bock) at 023 (*in camera*)). [redacted] (PX05148 (Swiggum (Otto Bock) Dep. at113) (*in camera*)). [redacted] (PX05148 (Swiggum (Otto Bock) Dep. at113-14) (*in camera*)). [redacted] (PX05148 (Swiggum (Otto Bock) Dep. at 114-15 (*in camera*)).

Response to Finding No. 1363:

Complaint Counsel's proposed finding of fact is misleading, contrary to record evidence, and should not be adopted by the Court. Complaint Counsel's proposed finding of fact is misleading in several respects. [redacted]

[redacted]

1364. [redacted]

Response to Finding No. 1364:

Complaint Counsel's proposed finding of fact is misleading, contrary to record evidence, and should not be adopted by the Court. Complaint Counsel's proposed finding of fact is misleading in several respects. First, [redacted]

[redacted]

[redacted]

c) Global Due Diligence Report

1365. [redacted] (PX01004 (Otto Bock) (*in camera*); Schneider (Otto Bock) Tr. 4479-80 (*in camera*); PX05104 (Rössing (Otto Bock) , Dep. at 112-14). [redacted] (Schneider (Otto Bock) Tr. 4461, 4591 (*in camera*)).

Response to Finding No. 1365:

Respondent has no specific response.

1366. [redacted] (PX01004 (Otto Bock) at 005 (*in camera*)).

Response to Finding No. 1366:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1367. [redacted] (PX01004 (Otto Bock) at 008 (*in camera*)). [redacted] (Swiggum (Otto Bock) Tr. 3384 (*in camera*)).

Response to Finding No. 1367:

Complaint Counsel's proposed finding is misleading. Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel is attempting to create an inference that Freedom's Plié 3 and Ottobock's C-Leg 4 are closest competitors, because they are not. [redacted]

[redacted]

Complaint Counsel's proposed finding is misleading to the extent Complaint Counsel is attempting to create an inference that [redacted]

[redacted]

[redacted]

1368. [redacted] (PX01004 (Otto Bock) at 008 (*in camera*)).

Response to Finding No. 1368:

Complaint Counsel's proposed finding is misleading to the extent Complaint Counsel is attempting to create an inference that Ottobock ever [redacted]

[redacted]

1369. [redacted] (PX01004 (Otto Bock) at 064 (*in camera*)). [redacted] (PX01004 (Otto Bock) at 064 (*in camera*)).

Response to Finding No. 1369:

Complaint Counsel's proposed finding is incomplete and misleading. [redacted]

[redacted]

1370. [redacted]

[redacted]

Response to Finding No. 1370:

Complaint Counsel's proposed finding is incomplete, misleading and repetitive of its previous proposed finding. [redacted]

d) September Quattro Due Diligence

1371. [redacted] (PX01296 (Otto Bock) at 003-04 (*in camera*)).

Response to Finding No. 1371:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not introduced at trial and thus not subject to cross-examination before the Court.

1372. [redacted] (PX01296 (Otto Bock) at 003 (emphasis in original) (*in camera*); PX05131 (Gück (Otto Bock) , Dep. at 91-95) (*in camera*)).

Response to Finding No. 1372:

[redacted]

1373. [redacted]

[redacted] (Schneider (Otto Bock) Tr. 4491-92, 4608 (*in camera*); PX01471 (Otto Bock)).

Response to Finding No. 1373:

Respondent has no specific response.

1374. [redacted] (Schneider (Otto Bock) Tr. 4627 (*in camera*)). [redacted] (Schneider (Otto Bock) Tr. 4635-4636 (*in camera*)).

Response to Finding No. 1374:

Respondent has no specific response.

1375. [redacted] (Schneider (Otto Bock) Tr. 4627-28, 4634 (*in camera*)). [redacted] (Schneider (Otto Bock) Tr. 4628 (*in camera*)). [redacted] (Schneider (Otto Bock) Tr. 4636 (*in camera*)).

Response to Finding No. 1375:

Complaint Counsel's proposed finding of fact is misleading because the first sentence makes it appear that Freedom's CEO is Freedom's clinical prosthetist; he is not.

1376. [redacted] (Swiggum (Otto Bock) Tr. 3388-89 (*in camera*); PX01471 (Otto Bock) at 001)).

Response to Finding No. 1376:

[redacted]

[redacted]

1377. [redacted] (Schneider (Otto Bock) Tr. 4626 (*in camera*)).

Response to Finding No. 1377:

Complaint Counsel's proposed finding is misleading to the extent that Complaint Counsel is attempting to create an inference that the prototype testing by Schneider was not all Alpha prototype that did not meet Quattro's design specifications, because it was. [redacted]

[redacted]

1378. [redacted] (PX05010 (Schneider (Otto Bock) IHT at 158-59) (*in camera*)).

Response to Finding No. 1378:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

[redacted]

[redacted]

1379. Following the in-person evaluation of the Quattro, Scott Schneider on September 19, 2017 circulated to Alexander Gück (Director of Strategy and M&A), Linus Cremer (Manager, Corporate Strategy and M&A), Helmut Pfuhl (Head of Strategic Business Unit, Prosthetics), Sönke Rössing (Chief Strategy and Human Resource Officer), and others a "Roosevelt Q Product Summary," signed on behalf of the four Otto Bock attendees of the in-person Quattro testing. (PX01471 (Otto Bock) at 001)).

Response to Finding No. 1379:

Respondent has no specific response.

1380. Mr. Schneider's summary concludes "Quick summary: The Quattro is better than we viewed in the Roosevelt videos. There are a few functions/features that are less than CLeg and a few that may be more than CLeg. As an aggregate of PROS and CONS, we believe the Quattro could be (we evaluated Alpha models – still challenges to reach Beta) a CLeg contender but will not meet the Genium level." (PX01471 (Otto Bock) at 001).

Response to Finding No. 1380:

Complaint Counsel's proposed finding is misleading because [redacted]

[redacted]

1381. [redacted] (Schneider (Otto Bock) Tr. 4638 (*in camera*); PX01471 (Otto Bock) at 003)). [redacted] (Schneider (Otto Bock) Tr. 4638-4639 (*in camera*)). (Schneider (Otto Bock) Tr. 4638–39 (*in camera*)).

Response to Finding No. 1381:

Complaint Counsel's proposed finding is incomplete and misleading to the extent Complaint Counsel is attempting to create an inference that the Alpha prototype tested by Schneider is similar to the Quattro's design specifications, because the record evidence establishes otherwise. [redacted]

[redacted]

1382. The "PROS" column of the chart noted that the Quattro "Appears '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." (PX01471 (Otto Bock) at 003). The "RISKS IF WE DO NOT CONTROL QUATTRO" included we "will have to put more Genium functions in the C-Leg," "Össur 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." (PX01471 (Otto Bock) at 003).

Response to Finding No. 1382:

Complaint Counsel's proposed finding is misleading. As to the "PROS" of the Quattro, Mr. Schneider testified extensively at trial, that the Quattro was still in such an early stage that it was difficult to truly assess. [redacted]

1383. [redacted] (PX01515 (Otto Bock) at 001 (*in camera*)). [redacted] (PX05157 (Pfuhl (Otto Bock) , Dep. at 143) (*in camera*)). [redacted] (PX05157 (Pfuhl (Otto Bock) , Dep. at 143) (*in camera*)). [redacted] (PX05157 (Pfuhl (Otto Bock) , Dep. at 143) (*in camera*)). [redacted] (PX05157 (Pfuhl (Otto Bock) , Dep. at 143) (*in camera*)).

Response to Finding No. 1383:

Complaint Counsel's proposed finding is misleading. [redacted]

D. POST-MERGER EVIDENCE CONFIRMS THE LIKELIHOOD OF UNILATERAL EFFECTS

1384. [redacted] (*See* Carkhuff (Freedom) Tr. 576, 578-84 (*in camera*); PX01306 (Otto Bock) at 002, 004) (*in camera*)). [redacted] (Carkhuff (Freedom) Tr. 576 (*in camera*); *see also* (PX01304 (Otto Bock) at 004 (Freedom Integration: Sales Workshop Meeting Minutes); PX01302 (Otto Bock) at 081-083 (*in camera*); (Swiggum (Otto Bock) Tr. 3398-3399 (*in camera*)).

Response to Finding No. 1384:

Respondent has no specific response.

1385. [redacted] (PX01306 (Otto Bock) at 002 (*in camera*); (Carkhuff (Freedom) Tr. 578-81 (*in camera*)).

Response to Finding No. 1385:

Respondent has no specific response.

1386. [redacted] (PX01306 (Otto Bock) at 002 (*in camera*); (Carkhuff (Freedom) Tr. 581-82) (*in camera*)).

Response to Finding No. 1386:

Respondent has no specific response.

1387. [redacted] (PX01306 (Otto Bock) at 002 (*in camera*); (Carkhuff (Freedom) Tr. 582 (*in camera*)).

Response to Finding No. 1387:

Respondent has no specific response.

1388. [redacted] (PX01306 (Otto Bock) at 001 (*in camera*)).

Response to Finding No. 1388:

Respondent has no specific response.

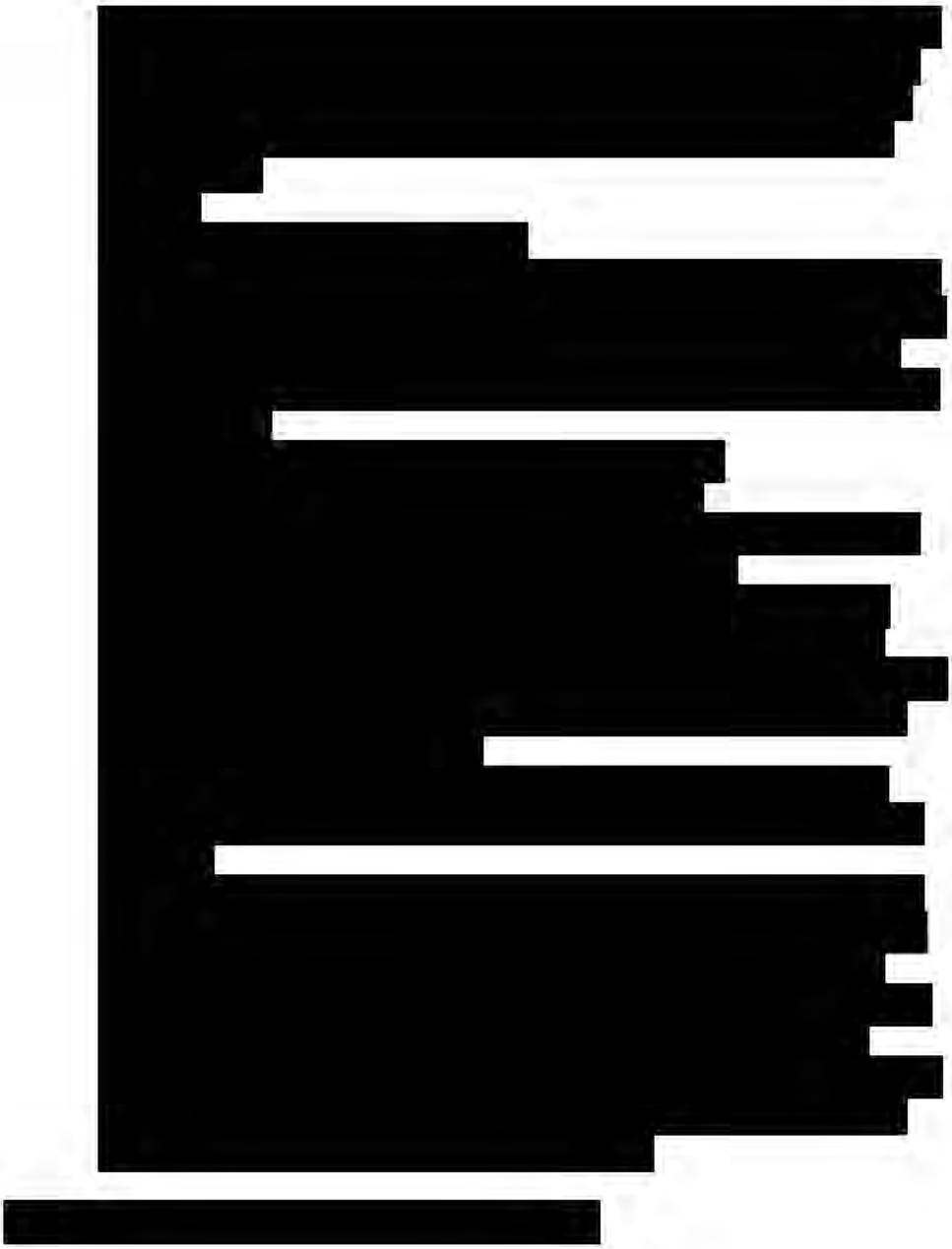
1389. [redacted] (Carkhuff (Freedom) Tr. 582 (*in camera*); PX01306 (Otto Bock) at 004) (*in camera*)). [redacted] (Swiggum (Otto Bock) Tr. 3401-02 (*in camera*)). [redacted] (Swiggum (Otto Bock) Tr. 3405) (*in camera*); (PX01302 (Otto Bock) at 003 (*in camera*)). [redacted] (Swiggum (Otto Bock) Tr. 3408-09) (*in camera*); (PX01302 (Otto Bock) at 073 (*in camera*)).

Response to Finding No. 1389:

Complaint Counsel's proposed finding of fact is misleading. The slide deck reflected in PX01302 was presented during the brainstorming sessions in Irvine, California on November 7

and 8, 2017. (Schneider, Tr. 4651-4652). [redacted]

[redacted]



[redacted]

Moreover, Freedom Innovations did not increase the price of the Plié 3 after the Acquisition, [redacted], 1065-1066 (testifying neither POA nor any other clinic that Ford is aware of has been impacted by the Acquisition; Sabolich, Tr. 5866-5867; [redacted]), and Ottobock decided to allow Freedom to operate as an independent entity. (PX01306 at 002 ("Freedom Innovations will be kept as a separate (standalone) brand in the US."); PX01306 at 005 (reflecting decision to keep Ottobock and Freedom sales forces separate)).

1390. [redacted] (PX01302 (Otto Bock) at 074, 076 (*in camera*)).

Response to Finding No. 1390:

Complaint Counsel's proposed finding of fact is duplicative of CCFF ¶ 974 and is inaccurate and misleading. PX01302 is an internal Ottobock document containing rough estimates of market share. There are numerous issues with these market estimates. First, the Plié 3 is not a Swing and Stance controlled MPK; rather, unlike the C-Leg 4, Rheo and other MPKs, requires the use of an Allen wrench and an air pump to manually adjust resistances for the swing phase (Kannenberg, Tr. 1953; DeRoy, Tr. 3639-3640). Second, Complaint Counsel ignores the fact that PX01302 states that the size of the MPK swing and stance control segment may be underestimated. Third, these market share estimates are based upon 2016 numbers and Ottobock's internal attempts to generate market share estimates are more art than science and are predicated mostly on out-of-date data provided by CMS. (Schneider, Tr. 4564). Cali Solorio testified that Ottobock's market share estimates are rough and inaccurate. (PX05123 (Solorio, Dep. at 77)). Several other

witnesses testified similarly to Ms. Solorio. (Schneider, Tr. 4564 ("it's also very important to note that these are absolute estimates at this time, and we had no idea of really what was in the market.").

1391. [redacted] (PX01302 (Otto Bock) at 74 (*in camera*)). (Swiggum (Otto Bock) Tr. 3411-3416 (*in camera*)).

Response to Finding No. 1391:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. PX01302 is an internal Ottobock document containing rough estimates of market share. The Plié 3 is not a Swing and Stance controlled MPK; rather, unlike the C-Leg 4, Rheo and other MPKs, requires the use of an Allen wrench and an air pump to manually adjust resistances for the swing phase. (Kannenberg, Tr. 1953; DeRoy, Tr. 3639-3640). Complaint Counsel cites Mr. Swiggum's testimony in support of its proposition; however, [redacted]

1. Otto Bock's Plans for Freedom's MPKs

a) Plié 3 plans

1392. 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." (PX05157 (Pfuhl (Otto Bock) , Dep. at 168)).

Response to Finding No. 1392:

Complaint Counsel's proposed finding of fact is incomplete. At the November 2017 meeting, Ottobock and Freedom executives discussed many topics, including prosthetic feet and the Dual Brand Strategy. (PX01302 at 008-009).

1393. During Dr. Pfuhl's November presentation, Otto Bock executives expressed concerns that continuing to sell the Plié post-Merger would take sales away from the C-Leg. (PX05148 (Swiggum (Otto Bock) , Dep. at 106)).

Response to Finding No. 1393:

Complaint Counsel's proposed finding of fact is misleading and lacks foundation. Mr. Swiggum played "very little" role in the due diligence and decision to acquire Freedom. Mr. Swiggum had only two or three comments during due diligence. Mr. Swiggum did not participate in any commercial due diligence meetings related to the Acquisition. (RFOF ¶¶ 956-957 (citing Schneider, Tr. 4408-4411)).

1394. [redacted] (PX01302 (Otto Bock) at 081 (*in camera*); PX05148 (Swiggum (Otto Bock) , Dep. at 175-176)). [redacted] (PX01302 (Otto Bock) at 081 (*in camera*)).

(PX01302 (Otto Bock) at 081 (*in camera*))

Response to Finding No. 1394:

Complaint Counsel's proposed finding of fact is misleading in incomplete. [redacted]

1395. [redacted]

[redacted]

Response to Finding No. 1395:

Complaint Counsel's proposed finding of fact is inaccurate, misleading and lacks foundation. First, Mr. Swiggum played "very little" role in the due diligence and decision to acquire Freedom. Mr. Swiggum had only two or three comments during due diligence. Mr. Swiggum did not participate in any commercial due diligence meetings related to the Acquisition. (RFOF ¶¶ 956-957 (citing Schneider, Tr. 4408-4411)). [redacted]

1396. [redacted] (PX01301 (Otto Bock) at 003, 005 (*in camera*); PX05148 (Swiggum (Otto Bock) , Dep. at 158-161) (*in camera*)). [redacted] (Morton Tr. 4171).

Response to Finding No. 1396:

Complaint Counsel's proposed finding of fact is inaccurate. Dr. Scott Morton's speculation is directly contradicted by trial testimony. Scott Schneider testified that [redacted]

1397. [redacted] (Swiggum (Otto Bock) Tr. 3421 (*in camera*)). Specifically, Matthew Swiggum, Otto Bock's CEO at the time, testified that, in the context of the dual brand strategy, he and other Otto Bock executives discussed adjusting the price of the Plié 3. (PX05148 Swiggum (Otto Bock) , Dep. at 158-59; PX01301 (Otto Bock) at 003, 005 (*in camera*)).

Response to Finding No. 1397:

Complaint Counsel's proposed finding of fact is inaccurate, misleading and lacks foundation. First, Mr. Swiggum played "very little" role in the due diligence and decision to acquire Freedom. Mr. Swiggum had only two or three comments during due diligence. Mr. Swiggum did not participate in any commercial due diligence meetings related to the Acquisition. (RFOF ¶¶ 956-957 (citing Schneider, Tr. 4408-4411)). [redacted]

1398. (Swiggum (Otto Bock) Tr. 3421-3422 (*in camera*); PX05148 (Swiggum (Otto Bock) Dep. at194-195 (*in camera*)).

Response to Finding No. 1398:

Complaint Counsel's proposed finding of fact is inaccurate, misleading and lacks foundation. First, Mr. Swiggum played "very little" role in the due diligence and decision to acquire Freedom. Mr. Swiggum had only two or three comments during due diligence. Mr. Swiggum did not participate in any commercial due diligence meetings related to the Acquisition. (RFOF ¶¶ 956-957 (citing Schneider, Tr. 4408-4411)).

1399. (PX05173 (Argue (Respondent) , Dep. at 108, 113-14 (*in camera*)).

(PX05173 (Argue) , Dep. at 108 (*in camera*)).

Response to Finding No. 1399:

Complaint Counsel's proposed finding of fact is incomplete and misleading. For the first sentence, [redacted]

[redacted]

1400. [redacted] (Carkhuff (Freedom) Tr. 583 (*in camera*); Ferris (Freedom) Tr. 2426 (*in camera*); [redacted] PX03216 (ATK) at 042 (*in camera*); PX05010 (Schneider (Otto Bock) IHT at 224-26 (*in camera*)). Otto Bock does not currently market the 3E80 MPK in the United States today. (PX05010 (Schneider (Otto Bock) IHT at 225)).

Response to Finding No. 1400:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

[redacted]

1401. [redacted] (PX01306 (Otto Bock) at 002 (*in camera*); Carkhuff (Freedom) Tr. 583 (*in camera*)).

Response to Finding No. 1401:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1402. [redacted]; PX05148 (Swiggum) , Dep. at 114, 121-122 (*in camera*)).

Response to Finding No. 1402:

Complaint Counsel's proposed finding of fact is misleading. The slide deck reflected in PX01302 was presented during the brainstorming sessions in Irvine, California on November 7 and 8, 2017. (Schneider, Tr. 4651-4652). [redacted]

A. Yes.

[redacted]

[redacted], 1065-1066 (testifying neither POA nor any other clinic that Ford is aware of has been impacted by the Acquisition; Sabolich, Tr. 5866-5867; [redacted]), [redacted]

1403. [redacted] (PX01306 (Otto Bock) at 004 (*in camera*)). [redacted] (PX01306 (Otto Bock) at 004 (*in camera*); Carkhuff (Freedom) Tr. 583 (*in camera*); Ferris (Freedom) Tr. 2427-2428 (*in camera*).

Response to Finding No. 1403:

Complaint Counsel's proposed finding of fact is misleading. The slide deck reflected in PX01302 was presented during the brainstorming sessions in Irvine, California on November 7 and 8, 2017. (Schneider, Tr. 4651-4652). [redacted]

[redacted]

, 1065-1066 (testifying neither POA nor any other clinic that Ford is aware of has been impacted by the Acquisition; Sabolich, Tr. 5866-5867; [redacted]

1404. [redacted] (PX01302 (Otto Bock) at 081 (*in camera*); *see also* PX05157 (Pfuhl (Otto Bock) , Dep. at 168); PX05148 (Swiggum) , Dep. at 193 (*in camera*)).

Response to Finding No. 1404:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

[redacted]

b) Quattro plans

1405. [redacted] (PX01301 (Otto Bock) at 003, 005 (*in camera*); PX05148 (Swiggum (Otto Bock) , Dep. at 158-161) (*in camera*)).

Response to Finding No. 1405:

Complaint Counsel's proposed finding of fact is inaccurate. This was never Ottobock's plan. [redacted]

1406. [redacted] (Swiggum (Otto Bock) Tr. 3397-3398 (*in camera*); PX05163 (Stuch (Otto Bock) , Dep. at 190 (*in camera*)); PX03215 (ATK) at 008 (*in camera*); PX01301 (Otto Bock) at 005 (*in camera*)).

Response to Finding No. 1406:

Complaint Counsel's proposed finding of fact is inaccurate and duplicative of CCFF ¶ 1405. This was never Ottobock's plan. [redacted]

[redacted]

1407. [redacted] (PX01302 (Otto Bock) at 083 (*in camera*)). [redacted] (PX01302 (Otto Bock) at 083 (*in camera*)). [redacted] (PX05157 (Pfuhl) , Dep. at 172). [redacted] (Swiggum (Otto Bock) Tr. 3424) (*in camera*)).

Response to Finding No. 1407:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1408. [redacted] (Swiggum (Otto Bock) Tr. 3386-3387 (*in camera*)). [redacted] (Swiggum (Otto Bock) Tr. 3387 (*in camera*)).

Response to Finding No. 1408:

Complaint Counsel's proposed finding lacks foundation and is inaccurate. [redacted]

[redacted]

[redacted]

1409. [redacted] (PX01306 (Otto Bock) at 004 (*in camera*)).

Response to Finding No. 1409:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. It ignores testimony [redacted]

1410. [redacted] (Carkhuff (Freedom) Tr. 583-84 (*in camera*)). [redacted] (Swiggum (Otto Bock) Tr. 3402 (*in camera*)). [redacted] (Swiggum (Otto Bock) Tr. 3402-03) (*in camera*)).

Response to Finding No. 1410:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. It ignores testimony [redacted]

[redacted]

1411. [redacted] (PX01306 (Otto Bock) at 004) (*in camera*); Swiggum (Otto Bock) Tr. 3404 (*in camera*); Carkhuff (Freedom) Tr. 584 (*in camera*)).

Response to Finding No. 1411:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

2. Dr. Scott Morton's GUPPI Analysis

1412. Complaint Counsel's expert, Dr. Fiona Scott Morton, conducted a Gross Upward Pricing Index ("GUPPI") analysis in this case. (PX06001A (Morton Expert Report) at 120-22). Dr. Morton's report explains that, "[a] GUPPI has two primary components—(1) the diversion rate between the product of one firm to the product of the merging partner; and (2) the margin on the product of its merging partner." (PX06001A (Morton Expert Report) at 120). She performed a separate GUPPI analysis on each product of the merging firms. (PX06001A (Morton Expert Report) at 120).

Response to Finding No. 1412:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Dr. Scott Morton's component of the diversion rate between the product of one firm to the product of the merging partner was proven to be inaccurate at trial. [redacted]

1413. Dr. Scott Morton calculated her GUPPI analysis for the Plié by multiplying the revenue-based diversion rate from the Plié 3 to the C-Leg 4 ("D_{PC}") by the percent margin on the C-Leg 4 ("M_C"). (PX06001A (Morton Expert Report) at 120).

Response to Finding No. 1413:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1414. For the Plié, Dr. Scott Morton relied on [redacted] (PX06001A (Morton Expert Report) at 120-21 (*in camera*) ("In other words, Otto Bock expects that it will be able to recapture [redacted] over that period.")). To calculate Otto Bock's gross margin, Dr. Scott Morton used internal Otto Bock documents and Table 3 from her report. (PX06001A (Morton Expert Report) at 121 & n.308 (*in camera*)). These calculations gave her a gross margin on the C-Leg 4 in 2017 of [redacted] (PX06001A (Morton Expert Report) at 121 & n.308 (*in camera*)). Dr. Scott Morton calculated a GUPPI for the Plié of [redacted] (PX06001A (Morton Expert Report) at 121-22 (*in camera*)).

Response to Finding No. 1414:

Complaint Counsel's proposed finding of fact is inaccurate, misleading and lacks foundation. Dr. Scott Morton's GUPPI analysis is based on strong, unreliable assumptions.

[redacted]

[redacted]

[redacted]

1415. Dr. Morton concluded that, "a GUPPI of [redacted] is associated with a strong incentive to increase the price of the Plié 3, and indicates likely harm to consumers from the merger." (PX06001A (Morton Expert Report) at 122 (*in camera*)).

Response to Finding No. 1415:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

[redacted]

3. Customers Have Testified about Their Concerns that the Transaction Will Deprive Them of the Benefit of Competition between Freedom and Otto Bock

1416. [redacted]

Response to Finding No. 1416:

Complaint Counsel's proposed finding of fact is incomplete and lacks foundation. [redacted]

[redacted]

1417. Several customers testified that Otto Bock eliminated a significant competitor in the MPK market by acquiring Freedom. (*See, e.g.*, [redacted] PX05140 (Weott (Orthotic Prosthetic Center) , Dep. at 39-40); PX05151 (Patton (Prosthetic Solutions) , Dep. at 122); (PX05145 (Ford (POA) , Dep. at 70)).

Response to Finding No. 1417:

Complaint Counsel's proposed finding of fact is incomplete and lacks foundation. [redacted]

1418. [redacted]

[redacted] (PX01441 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1418:

Complaint Counsel's proposed finding of fact is misleading and lacks foundation. Reissfelder's email is not evidence that customers had specific, reliable concerns. Reissfelder had only been appointed CEO after the Acquisition. (Carkhuff, Tr. 582). Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not introduced at trial and thus not subject to cross-examination before the Court.

1419. [redacted] (Asar (Hanger) Tr. 1435 (*in camera*)).

Response to Finding No. 1419:

Complaint Counsel's proposed finding of fact is misleading, irrelevant and lacks foundation. [redacted]

1420. Curt Patton, the President and owner of Prosthetic Solutions, testified that he is concerned that Otto Bock's acquisition of Freedom will eliminate competition between the companies that has previously benefited Prosthetic Solutions. (PX05151 (Patton (Prosthetic Solutions) , Dep. at 122)).

Response to Finding No. 1420:

Complaint Counsel's proposed finding of fact is misleading and incomplete. It ignores the fact that Patton's specific concern was the manufacturers would enter the patient care space. When

asked what he was concerned about specifically, Patton testified that "My biggest concern that we're going to have a couple of major players, and they're going to get into patient care, and they're going to have the microprocessor and all the good feet and products, and they're going to compete against us directly, like they do in Europe." (PX05151 (Patton , Dep. at 122)).

a) Concern that Prices will Rise

1421. Several customers testified that they believe prices of the Plié and C-Leg will rise because of the Merger. (PX05149 (Brandt (Ability P&O) , Dep. at 94); [redacted] PX05145 (Ford (POA) , Dep. at 72-73); [redacted]; PX05140 (Weott (Orthotic Prosthetic Center) , Dep. at 39-40)).

Response to Finding No. 1421:

Complaint Counsel's proposed finding of fact is misleading. The customer testimony cited is speculative. [redacted]

1422. Vinit Asar, CEO of Otto Bock and Freedom's largest customer, Hanger, testified that the Merger is "worrisome" because competition from Freedom had "made sure the other three [MPK' manufacturers] were being competitive." (PX05153B (Asar (Hanger) , Dep. at 123-25)).

Response to Finding No. 1422:

Complaint Counsel's proposed finding of fact is misleading. The customer testimony cited is speculative. [redacted]

[redacted]

[redacted].

1423. Mr. Asar, CEO of Otto Bock and Freedom's largest customer, Hanger, testified that "[w]e worry that Freedom in the past has been flexible on price, as evidenced especially in the last 12 to 24 months with the deals they have offered. Ottobock hasn't. So we worry that that price flexibility may go away from the marketplace for us at Hanger." (PX05002 (Asar (Hanger) IHT at 58) (*in camera*)).

Response to Finding No. 1423:

Complaint Counsel's proposed finding of fact is irrelevant and misleading. The testimony cited is speculative. [redacted]

1424. Mr. Asar, Hanger's CEO, testified that, with Otto Bock having such a high share after the Merger, "[w]e would have a tough time negotiating on price." (Asar (Hanger) Tr. 1439-40 (*in camera*) (discussing PX03205)).

Response to Finding No. 1424:

Complaint Counsel's proposed finding of fact is unreliable and misleading. The testimony cited is speculative. It ignores the fact that [redacted]

1425. In the event that Otto Bock were to raise prices after the Merger, Mr. Asar, Hanger's CEO, testified that "in the immediate term, [Hanger] would be forced to absorb the price increase." (PX05002 (Asar (Hanger) IHT at 52) (*in camera*)).

Response to Finding No. 1425:

Complaint Counsel's proposed finding of fact is unreliable and misleading. The testimony cited is speculative. It ignores the fact that [redacted]

1426. [redacted]

Response to Finding No. 1426:

Complaint Counsel's proposed finding of fact is incomplete and misleading. The testimony cited is speculative. [redacted]

1427. Mark Ford, President and Managing Partner of Prosthetic & Orthotic Associates, testified that he believes the price for the Plié 3 would creep upwards under the ownership of Otto Bock and that he would lose his ability to pit Freedom as an independent entity against Otto Bock to receive better pricing. (PX05145 (Ford (POA) , Dep. at 72-73)).

Response to Finding No. 1427:

Complaint Counsel's proposed finding of fact is misleading, unreliable and lacks foundation. The testimony cited is speculative. Ford testified that his clinic has maybe fit only a single Plié 3 in the last three years. (PX05145 (Ford , Dep. at 51)).

1428. Jeffrey Brandt from Ability Prosthetics and Orthotics testified that he is concerned "prices will start going back up" for the Plié and the C-Leg as a result of the Merger, and [redacted] (PX05149 (Brandt (Ability) , Dep. at 94-95) (*in camera*)).

Response to Finding No. 1428:

Complaint Counsel's proposed finding of fact is unreliable, misleading and lacks foundation. [redacted].

1429. Keith Senn, President of Kentucky/Indiana Operations at the Center for Orthotic and Prosthetic Care, testified that he is "concerned about cost" given that "there's a significant difference between the cost of a Pli3 [sic] and a C-Leg 4." (PX05004 (Senn (COPC) IHT at 42-43)).

Response to Finding No. 1429:

Complaint Counsel's proposed finding of fact is unreliable and lacks foundation. The testimony cited is speculative. **It ignores the fact that 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). Senn testified that, "I really don't know" whether the Acquisition will result in COPC's inability to obtain**

lower prices with Ottobock in the future. (PX05004 (Senn , Dep. at 42)). Senn testified that at trial that Endolite's Orion 3 was a preferred knee at COPC without any volume discount and that COPC could easily shift volume to Endolite and earn a volume discount if it wanted to do so. (Senn, Tr. 254-255). Senn testified that COPC would "definitely" consider buying more Orions if the Plié 3 were discontinued or increased in price post-Acquisition. (Senn, Tr. 256).Further, the difference in cost between the Plié 3 and C-Leg 4 is evidence that they are not particularly close competitors and is irrelevant.

1430. [redacted] (Senn (COPC) 227-28 (*in camera*)).

Response to Finding No. 1430:

Complaint Counsel's proposed finding of fact is unreliable and lacks foundation. The testimony cited is speculative. **It ignores the fact that Senn has no knowledge of the innovation of MPKs -- he 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).**

Senn testified that at trial that Endolite's Orion 3 was a preferred knee at COPC without any volume discount and that COPC could easily shift volume to Endolite and earn a volume discount if it wanted to do so. (Senn, Tr. 254-255). Senn testified that COPC would "definitely" consider buying more Orions if the Plié 3 were discontinued or increased in price post-Acquisition. (Senn, Tr. 256).

1431. [redacted]

[redacted]

Response to Finding No. 1431:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. Complaint Counsel misstates Senn's testimony. Senn testified that when he is negotiating with microprocessor knee manufacturers (not specifically Ottobock), the presence of Freedom has helped him negotiate. (Senn, Tr. 227). Moreover, Ford testified that his clinic has maybe fit only a single Plié 3 in the last three years. (PX05145 (Ford , Dep. at 51)). [redacted]

b) Concern that Otto Bock Will Lack Incentive to Improve Products

1432. [redacted] (*See, e.g.*, Ford (POA) Tr. 1015-16; Senn (COPC) Tr. 227-28 (*in camera*); (Asar (Hanger) Tr. 1458 (*in camera*); PX05004 (Senn (COPC) IHT at 42-43)).

Response to Finding No. 1432:

Complaint Counsel's proposed finding of fact is misleading and lacks foundation. Whereas Complaint Counsel cites third parties with no insight into Ottobock or Freedom's business decisions, [redacted]

[redacted]

1433. Mark Ford, President and Managing Partner at Prosthetic and Orthotic Associates, testified that the "similar ideas and similar platforms" used by Freedom and Otto Bock for the Plié and C-Leg, respectively, causes him concern that the "inherent stronger competition" between the companies will be lost. Mr. Ford further testified that, with respect to Össur's Rheo, that MPK "is used by a lot of practices, but it's certainly 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." (Ford (POA) Tr. 1015-16).

Response to Finding No. 1433:

Complaint Counsel's proposed finding of fact is inaccurate and lacks foundation. It ignores the fact that, despite Ford's testimony on the Plié, Ford testified that his clinic has maybe fit only a single Plié 3 in the last three years. (PX05145 (Ford , Dep. at 51)). [redacted]

1434. [redacted] (Asar (Hanger) Tr. 1458 (*in camera*)).

Response to Finding No. 1434:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

1435. [redacted]
(Senn (COPC) Tr. 227-28 (*in camera*)).

Response to Finding No. 1435:

Complaint Counsel's proposed finding of fact is unreliable and lacks foundation. **It ignores the fact that Senn has no knowledge of the innovation of MPKs -- he 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).**

1436. Mr. Senn further testified that he is worried about the potential lack of "increased innovation, you know, new product lines, increased opportunity for our patients" post-Merger. (PX05004 (Senn (COPC) IHT at 42-43)).

Response to Finding No. 1436:

Complaint Counsel's proposed finding of fact is unreliable and lacks foundation. [redacted]

c) Concern that Merger Will Harm End Users

1437. When prosthetic clinics receive lower prices for MPKs, customers testified that it increases the margin that the clinic receives on the device. (*See, e.g.*, Asar (Hanger) Tr. 1411; [redacted] PX05128 (Senn (COPC) , Dep. at 34)).

Response to Finding No. 1437:

Complaint Counsel's proposed finding of fact is incomplete and inaccurate because it ignores the impact of different reimbursement codes and additional service costs. [redacted]

1438. Prosthetic clinics testified that they use their increased margins to provide additional services to end users. [redacted] PX05128 (Senn (COPC) , Dep. at 34)).

Response to Finding No. 1438:

Complaint Counsel's proposed finding of fact is incomplete and inaccurate because it ignores the impact of different reimbursement codes and additional service costs. [redacted]

[redacted]

1439. For example, prosthetic clinics testified that they fund value-added services for patients with their additional profit. [redacted] (PX05108 (Yates (Jonesboro) , Dep. at 75-76) (*in camera*)).

Response to Finding No. 1439:

Complaint Counsel's proposed finding of fact is irrelevant. This does not support any allegation that margins will be eroded as a result of the Acquisition. If anything, Complaint Counsel's proposed finding supports Respondent's position that clinics will switch from MPKs to non-MPKs if there were any price increase, because gross margins for limbs that contain non-MPKs are higher than gross margins for limbs that contain MPKs. (Oros, Tr. 4826).

1440. [redacted] (Ford (POA) Tr. 1027-28 (*in camera*); PX05108 (Yates (Jonesboro) , Dep. at 74-75); PX05128 (Senn (COPC) , Dep. at 34)).

Response to Finding No. 1440:

Complaint Counsel's proposed finding of fact is irrelevant. This does not support any allegation that margins will be eroded as a result of the Acquisition. [redacted]

1441. Increased margins also translate to improved facilities for patients, according to prosthetic clinics who testified. [redacted].

Response to Finding No. 1441:

Complaint Counsel's proposed finding of fact is irrelevant. This does not support any allegation that margins will be eroded as a result of the Acquisition. [redacted]

1442. [redacted] (PX05002 (Asar (Hanger) IHT at 58-59) (*in camera*)).

Response to Finding No. 1442:

Respondent has no specific response.

1443. [redacted] (Asar (Hanger) Tr. 1411-12 (*in camera*)).

Response to Finding No. 1443:

Respondent has no specific response.

1444. In addition to price, Mark Ford of POA testified that "patients aren't going to benefit as much from new developments, new innovations and new support" after the Merger. (PX05145 (Ford (POA) , Dep. at 71)).

Response to Finding No. 1444:

Complaint Counsel's proposed finding of fact is unreliable. It ignores the fact that Ford has very little experience with the Plié as he testified that his clinic has maybe fit only a single Plié 3 in the last three years. (PX05145 (Ford , Dep. at 51)).

1445. [redacted] (Scott Morton Tr. 3916-17 (*in camera*)).

Response to Finding No. 1445:

Complaint Counsel's proposed finding of fact is unreliable and lacks foundation. Dr. Scott Morton is not an industry expert, and, accordingly, this is an improper fact. Dr. Scott Morton has zero experience in the orthotics and prosthetics industry, and has never worked in the industry nor has any technical experience in the industry. (Morton, Tr. 3967). Dr. Scott Morton's assertions in this proposed findings are all improper. For example, Dr. Scott Morton is not qualified to express an opinion on any of the following:

- **"[C]linics are spending their contribution margin not only on medical care and the prosthetists but on their facilities, on patient education, on patient advocates who provide counseling. These are all expenditures that clinics could reduce."**
- **"If it was a choice between having a patient advocate and giving somebody the wrong knee, you should definitely give them the correct knee, because that's medically necessary, and reduce the amount of overhead spent on these other, these other things. So the fixed costs are not fixed in the medium run and clinics would be expected to respond by adjusting the services they provide."**
- **"Now, that's of course a harm to the patients, reducing those services, and that's the kind of harm that we expect from a merger that causes a higher price. So I'm not saying it's good, but it's a strategy that would be preferable I think to the clinics compared to putting amputees into the wrong product."**

(CCFF ¶ 1445). Accordingly, Complaint Counsel's proposed finding should be ignored.

E. THE MERGER HAS ALREADY CAUSED HARM

1. Product Delays

a) Quattro Launch Delay from the Merger

1446. [redacted] (*See* CCFF ¶¶ 1207-1209, above).

Response to Finding No. 1446:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1447. [redacted]

Response to Finding No. 1447:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1448. [redacted] (PX01117 (Freedom) at 014).

Response to Finding No. 1448:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

1449. [redacted] (PX05006 (Robertson (Freedom) IHT at 39 (*in camera*))).

Response to Finding No. 1449:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

[redacted]

1450. (*See* CCFF ¶¶ 1290, 1294 above).

Response to Finding No. 1450:

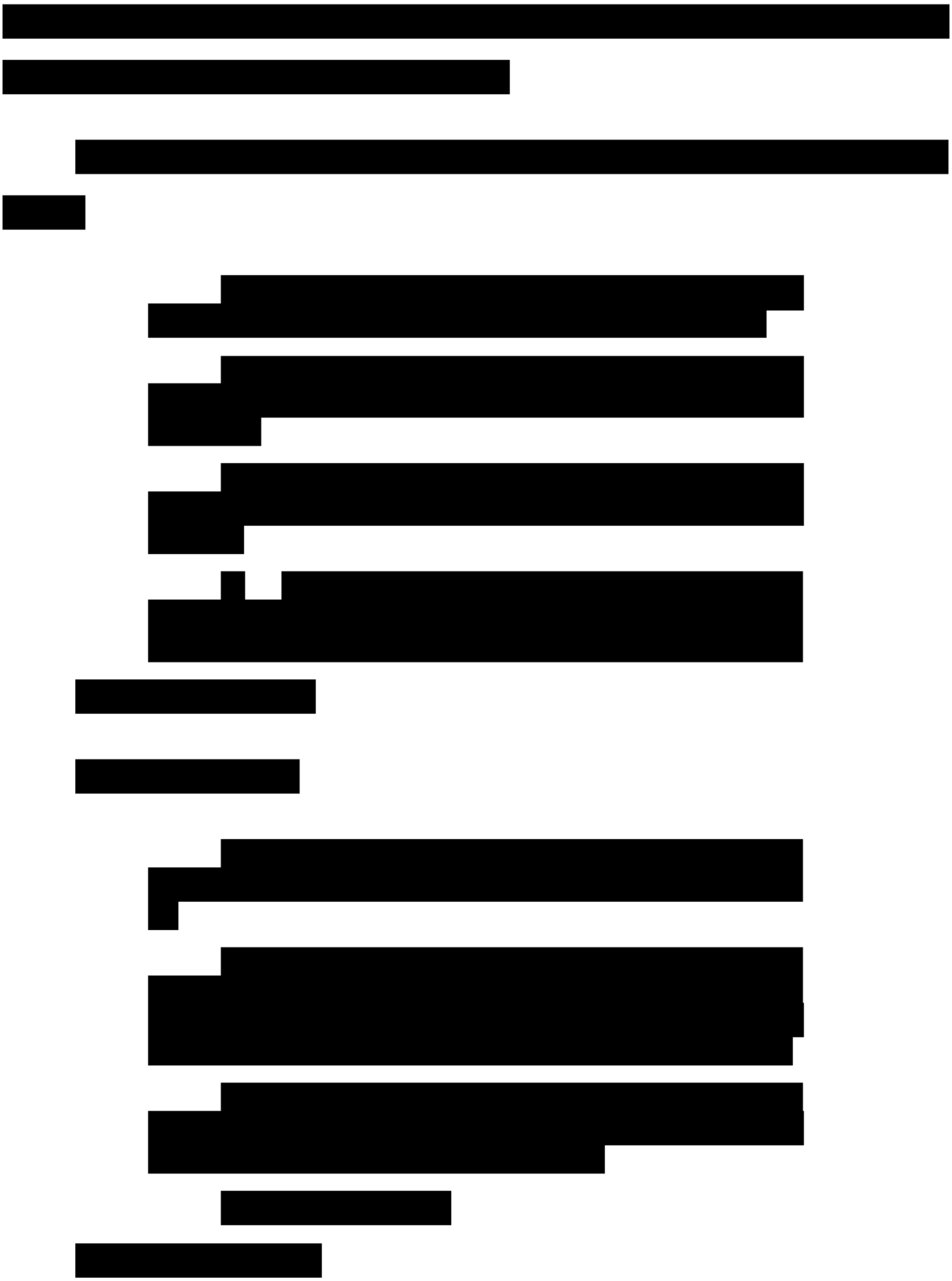
Respondent has no specific response, other than that

1451. (PX05111 (Prince (Freedom) , Dep. at 75 (*in camera*)).

Response to Finding No. 1451:

Complaint Counsel's proposed finding of fact is misleading and incomplete.

[redacted]



[redacted]

1452. According to Dr. Prince, the Quattro Project Manager and Technical Leader, while Quattro development has continued post-Merger, the Merger has "definitely slowed down the entire [Quattro] project." (PX05111 (Prince (Freedom) , Dep. at 148)).

Response to Finding No. 1452:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it is inaccurate. [redacted]

1453. [redacted]

[redacted] (PX05115 (Robertson (Freedom) , Dep. at 53) (*in camera*)).

Response to Finding No. 1453:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it is inaccurate. [redacted]

1454. [redacted] (Carkhuff (Freedom) Tr. 731 (*in camera*); Prince (Freedom) Tr. 2796-97 (*in camera*)).

Response to Finding No. 1454:

Respondent has no specific response other than to state this is speculative testimony.

1455. [redacted] (*See* CCFF ¶¶ 1228, 1229, above).

Response to Finding No. 1455:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

b) Plié 4 (Fast Fit) Delay

1456. [redacted] (Carkhuff (Freedom) Tr. 396-397 (*in camera*)).

Response to Finding No. 1456:

Complaint Counsel's proposed finding of fact is vague and misleading. [redacted]

[redacted]

1457. [redacted] (PX05006 (Robertson (Freedom) IHT at 90) (*in camera*)). Specifically, the Plié 4 would have improved the "Ease of programming to speed up the programming of the product." (PX05005 (Smith) IHT at 66). [redacted] (Smith (HEP) Tr. 6548 (*in camera*)).

Response to Finding No. 1457:

Complaint Counsel's proposed finding of fact is vague and misleading. [redacted]

[redacted]

[redacted]

[redacted]

1458. [redacted] (Smith (HEP) Tr. 6531 (*in camera*)).

Response to Finding No. 1458:

Complaint Counsel's proposed finding of fact is vague and misleading. At trial, Carkhuff stated that Plié is at the very end of its product life cycle. (Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

[redacted]

[redacted]

1459. [redacted]

Response to Finding No. 1459:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it relies on unreliable testimony. [redacted]

[redacted]

1460. [redacted] (PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1460:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

1461. [redacted] (PX02032 (HEP) at 013 (*in camera*)). [redacted] (Carkhuff (Freedom) Tr. 555, 567 (*in camera*); *see also* PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1461:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

1462. [redacted] (PX02032 (HEP) at 013 (*in camera*); PX05007 (Carkhuff (Freedom) IHT at 247-48 (explaining that the Plié 4 revenue "was projected to decline as we introduced the Quattro into the market that offset the revenue").

Response to Finding No. 1462:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

1463. [redacted] Mr. Smith testified that the "Plie 3 FastFit" referenced in PX02033 is the same thing as the Plié 4. (Smith Tr. 6548 (*in camera*).

Response to Finding No. 1463:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it relies on unreliable testimony. [redacted]

[redacted]

[redacted]

[redacted]

1464. [redacted]
(PX02033 (HEP) at 011) (*in camera*); *see also* (PX05005 (Smith) IHT at 194 ("AOPA, which is an industry conference. And I think we did talk about it at the industry conference.")).

Response to Finding No. 1464:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it relies on unreliable testimony. [redacted]

[redacted]

1465. [redacted] (Carkhuff (Freedom) Tr. 567 (*in camera*); PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1465:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

1466. [redacted] (Smith (HEP) Tr. 6531 (*in camera*)).

Response to Finding No. 1466:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it relies on unreliable testimony. [redacted]

[redacted]

1467. (Carkhuff (Freedom) Tr. 555 (*in camera*)).

Response to Finding No. 1467:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it is grossly inaccurate.

[redacted]

1468. [redacted] *see also* (PX05006 (Robertson (Freedom) IHT at 90) (*in camera*)). [redacted] (PX05006 (Robertson (Freedom) IHT at 91) (*in camera*)).

Response to Finding No. 1468:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

2. Merger Reduced Otto Bock's and Freedom's Incentives to Compete and Provided Respondent an Ability to Raise MPK Prices

1469. Dr. Helmut Pfuhl, Otto Bock's Head of Strategic Business Unit Prosthetics, explained that Freedom had previously marketed the Plié 3 "[i]n a very concentrated way" against Otto Bock's C-Leg 4. (PX05157 (Pfuhl (Otto Bock) , Dep. at 168)).

Response to Finding No. 1469:

Complaint Counsel's proposed finding of fact is misleading. 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.")). [redacted]

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). 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]; Carkhuff, 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.").

1470. For example, just weeks before the Merger in September 2017, Otto Bock continued to compete aggressively against Freedom. [redacted] (PX01602 (Otto Bock) at 001 (*in camera*)).

Response to Finding No. 1470:

Complaint Counsel's proposed finding of fact is misleading. 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.")). 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). 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]; Carkhuff, 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."). Further, Respondent notes that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus not subject to cross-examination before the Court.

1471. Immediately prior to the Merger, Otto Bock Executive Medical Director of North America, Andreas Kannenberg, recognized that acquiring Freedom would affect how Otto Bock competed. Dr. Kannenberg wrote to Milana Mileusnic on September 7, 2017 that, "There is something going on that I cannot yet talk about but that may force us to stop attacking the Plié." (PX01547 (Otto Bock) at 002).

Response to Finding No. 1471:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1472. [redacted] (PX01061 (Otto Bock) at 030 (*in camera*)).

Response to Finding No. 1472:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted] Further, Respondent notes that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus not subject to cross-examination before the Court.

1473. [redacted] (PX05148 (Swiggum (Otto Bock) , Dep. at 193 (*in camera*)).

Response to Finding No. 1473:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

[redacted]

1474. [redacted] (PX05123 (Solorio (Otto Bock) , Dep. at 141-42 (*in camera*)); PX01265 (Otto Bock) at 001 (*in camera*)). [redacted] (PX01265 (Otto Bock) at 001) (*in camera*)).

Response to Finding No. 1474:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

1475. On October 5, 2017, Matt Swiggum, Otto Bock's CEO at the time, 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. (PX01425 (Freedom) at 001-003). In response to this complaint, Mr. Swiggum wrote, "We are absolutely one company today and the target is not each other!" (PX05137 (Matthews (Freedom) , Dep. at 234); PX01425

(Freedom) at 001). Mr. Mathews responds with, "as long as we are aligned in our messaging, we will get through this." (PX01425 (Freedom) at 001).

Response to Finding No. 1475:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

1476. [redacted] (PX05109 (Carkhuff (Freedom) , Dep. at 148 (*in camera*)); PX01156 (Freedom) at 003-05 (*in camera*)). [redacted] (PX01156 (Otto Bock) at 003 (*in camera*)).

Response to Finding No. 1476:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

1477. David Reissfelder, the Freedom CEO put in place by Otto Bock after the Merger, testified that Matthew Swiggum (Otto Bock's CEO at the time of the Merger) 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. 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." (PX05138 (Reissfelder (Freedom) , Dep. at 89-90)).

Response to Finding No. 1477:

Complaint Counsel's proposed finding of fact is incomplete and misleading, and only presents a portion of Reissfelder's testimony. Here is the complete excerpt from Reissfelder's Deposition:

> Q. Who did you have conversations with?
>
> A. I had a conversation with Matt [Swiggum] and [Andreas] Schultz regarding this.
>
> Q. What did you discuss with them?

A. They had indicated that we were giving away a number of items with a Plié sale that I didn't believe was the case.

Q. What did they believe?

MS. KULIK: Objection. Lacks foundation.

BY MS. WOHL:

Q. What did they tell you they believed about the --

A. What they told me that they had believed or heard was that we were giving away a foot, a GoPro and a Yeti, I think cooler or tumbler or something.

Q. Did they express concerns about that?

A. They just felt that -- they felt like it was a lot of discounting, I guess, for lack of a better term, 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.

Q. Did Freedom stopping doing it as a result?

A. Well, we were never doing it. The only thing we did was agree to SPS's promotion for that quarter to provide a GoPro with every Plié order that they got. So that's what I was referring to when I said, "There is a lot of misinformation in this thread." Because what OttoBock personnel had heard or believed was just not the case, and I think Jeremy was clarifying that here.

(PX05138 (Reissfelder, Dep. at 88-91)).

[redacted]

[redacted]

1478. Customers experienced negative consequences from the changed incenctives created by the Merger. For example, Mr. Endrikat of Empire Medical explained that his Freedom sales representative used to sell the Plié 3 by "selling against the C-Leg 4 mostly," but post-Merger, the sales representative informed Mr. Endrikat that "I'm now competing against my partner . . . it's a mental shift." According to Mr. Endrikat, his sales representative no longer "talk[ed] bad about" Otto Bock. (PX05116 (Endrikat (Empire) , Dep. at 127-28)).

Response to Finding No. 1478:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it is misleading and inaccurate. Endrikat testified at a deposition that he "was curious as to [the Freedom sales representative's] opinion on what it feels like to kind of create this identity for yourself and then now work for that company." (PX05116 (Endrikat , Dep. at 127)). Moreover, in discussing his opinion with Endrikat, the Freedom sales representative specifically told him that "*the nice thing about what was happening was that they were still operating separately and so he's still mandated to do so. So that was good.*" (PX05116 (Endrikat , Dep. at 127-128)) (emphasis added). [redacted]

1479. Mark Ford, President and Managing Partner of Prosthetic and Orthotic Associates (POA), testified that Freedom previously offered a cooperative marketing arrangement to POA "[l]ast summer." (Ford (POA) Tr. 1014). The cooperative marketing arrangement would have benefited POA by leveraging manufacturers' "marketing dollars in our individual markets to benefit them as well as us." (Ford (POA) Tr. 1013). After the Merger, "everything got put on hold," and Mr. Ford has not heard anything from Freedom about the status of the cooperative marketing agreement. Ford (POA) Tr. 1014).

Response to Finding No. 1479:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because it is unreliable.

X. REMAINING COMPETITORS WILL NOT CONSTRAIN MERGER'S LIKELY ANTICOMPETITIVE EFFECTS

A. ÖSSUR

1. Össur's MPKs Rely On Functionally Different Technology Than Otto Bock's C-Leg 4 and Freedom's Plié

1480. Össur's Executive Vice President of R&D, Kim DeRoy, testified that the company's MPKs use a unique and proprietary "magnetorheologic technology," which creates a magnetic field that builds a level of resistance to allow the knee to function. (De Roy (Össur) Tr. 3576-77); *see also* Blatchford (Endolite) Tr. 2148-49).

Response to Finding No. 1480:

Complaint Counsel's proposed finding of fact is incomplete. Magnetorheologic technology in the Össur Rheo and Rheo XC offers variable resistance control in both the swing and stance phases of the knee. (DeRoy, Tr. 3639; Responses to CCFF ¶¶ 901-905). 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. (DeRoy, Tr. 3639; Responses to CCFF ¶¶ 901-905). 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; Responses to CCFF ¶¶ 901-905). 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. (DeRoy, Tr. 3579; Responses to CCFF ¶¶ 901-905).

1481. The Össur Rheo MPK operates on 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. (De Roy (Össur) Tr. 3591-93). Mr. De Roy of Össur testified that "patients will report that they feel . . . somewhat more stable when they're walking on a hydraulic unit because it is stiffer versus on a Rheo knee …." (De Roy (Össur) Tr. 3592).

Response to Finding No. 1481:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. There is substantial evidence in the record that the first sentence is inaccurate and misleading because the Plié 3's technology is more similar to a Sophisticated Non-MPK than it is to the Ottobock C-Leg 4, the Össur Rheo, the Endolite Orion 3, or the Nabtesco Allux. (DeRoy, Tr. 3649-3650 (referring to PXD0001 and testifying that the swing phase of the Plié 3, unlike the Rheo and C-Leg 4, is set with an air pump); Schneider, Tr. 4322-4323)). The second sentence is misleading to the extent that Complaint Counsel is attempting to create an inference that the Rheo is functionally inferior to the Freedom Plié 3. The record evidence establishes that, [redacted]

[redacted]

Ottobock's 3R80 and Össur's Mauch knee use hydraulic technology and provide functionality very similar the Plié 3. (Schneider, Tr. 4326-4327; DeRoy, Tr. 3593, 3649-3652 (testifying specifically that the Plié 3 functions similarly to Össur's Mauch, Sophisticated Non-MPK)).

1482. Össur's Executive Vice President of R&D, Kim DeRoy, testified that the Freedom Plié 3 is "more similar to the C-Leg 4" than the Össur Rheo because the Plié 3 and C-Leg 4 use hydraulic technology to provide resistance, while Össur's Rheo does not. (De Roy (Össur) Tr. 3592-93)

Response to Finding No. 1482:

Complaint Counsel's proposed finding of fact is misleading. De Roy testified at trial that he was not familiar with any knees on the market that require an air pump. (DeRoy, Tr. 3552-3553). The record is overwhelmingly clear that, from a functionality perspective, Össur's Rheo and Rheo XC utilize a microprocessor and sensors to provide variable resistance control in both the swing and stance phases of the user's gait cycle, (DeRoy, Tr. 3638-3639) similar to the Ottobock C-Leg 4, Endolite Orion 3, and Nabtesco Allux, (DeRoy, Tr. 3646-3648; Blatchford, Tr. 2213-2216; Sanders, Tr. 5426; RX-0894 at 004, 016; RX-0345 at 002; Schneider, Tr. 4322). The swing phase of the Össur Rheo is not set with an air pump like it is with the Freedom Plié 3. (DeRoy, Tr. 3649-3650; Schneider, Tr. 4322-4323). The Össur Rheo and Ottobock C-Leg 4 are also PDAC verified for L5856, the L-code associated with microprocessor swing and stance control, but the Freedom Plié 3 is not PDAC verified for L5856. (DeRoy, Tr. 3646-3648; Sanders, Tr. 5426). Health economic studies support the benefits of the Össur Rheo and Ottobock C-Leg relative to Sophisticated Non-MPKs, but Össur's Executive VP of R&D is not familiar with any studies showing any benefits of the Freedom Plié 3 relative to Sophisticated Non-MPKs. (DeRoy, Tr. 3645).

1483. [redacted] (*See, e.g.*, Ford (POA) Tr. 950-51; Senn (COPC) Tr. 223-24 (*in camera*); PX05001 (Endrikat (Empire Medical), IHT at 21-23)).

Response to Finding No. 1483:

Complaint Counsel's proposed finding of fact is misleading. Certified prosthetists that testified at trial consider the Össur Rheo to be the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; [redacted] The only witnesses relied upon by Complaint Counsel—Ford, Senn, and Endrikat—are not and never have been prosthetists, certified or otherwise. (Ford, Tr. 918; Senn, Tr. 152-154; PX05116 (Endrikat , Dep. at 16-17)).

Moreover, Ford testified that the prosthetists that work at POA for Ford all believe that "the C-Leg is a better product than the Plié." (Ford, Tr. 1044). Ford also testified that, despite the fact that POA clinics fit Ottobock C-Legs "almost exclusively," that POA's prosthetists consider Össur's Rheo and Endolite's Orion 3 to be in the same category as the C-Leg as a microprocessor knee. (Ford, Tr. 1050). Endrikat testified that the Rheo is more nimble and agile than the C-Leg. (PX05001 (Endrikat IHT at 21)).

1484. Mark Ford, President and CEO of POA, testified that the Össur 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." (Ford (POA) Tr. 1016).

Response to Finding No. 1484:

Complaint Counsel's proposed finding of fact is misleading and not supported by the record. The proposed finding relies exclusively on the testimony of Mark Ford, who is not and never has been a prosthetist. (Ford, Tr. 918). Ford also has no foundation to opine on the technological or functional differences between the Plié, C-Leg, and Rheo because the clinic where Ford works, POA, has only purchased one Plié 3 during Ford's time at POA (2016-2018), and that was a special circumstance for a patient with no insurance. (Ford, Tr. 1066).

Moreover, Ford testified that the prosthetists that work at POA all believe that "the C-Leg is a better product than the Plié." (Ford, Tr. 1044). Ford also testified that, despite the fact that POA clinics fit Ottobock C-Legs "almost exclusively," that POA's prosthetists consider Össur's Rheo and Endolite's Orion 3 to be in the same category as the C-Leg as a microprocessor knee. (Ford, Tr. 1050). Finally, actual certified prosthetists testified at trial that the Össur Rheo is the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; [redacted]

1485. Mark Ford, President and CEO of POA, testified that compared to the Otto Bock C-Leg 4, the Össur Rheo MPK is "built on a different technology with magnetic fluids versus a hydraulic fluid system, and that changes the way the knee operates." (Ford (POA) Tr. 950). Moreover, Mr. Ford testified 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." (Ford (POA) Tr. 951).

Response to Finding No. 1485:

Complaint Counsel's proposed finding of fact is inaccurate, misleading, and unsupported by the record. (*See* Response to CCFF ¶¶ 905, 1484, above).

1486. Jonathan Endrikat, the CEO of Empire Medical, testified that the population base that uses Össur's Rheo "isn't as broad" and it "takes a specific type of walker" to use the Össur's Rheo MPK. (PX05001 (Endrikat (Empire Medical) IHT at 21-22)).

Response to Finding No. 1486:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the record evidence. Endrikat is a former tennis instructor, is not a prosthetist, and does not fit patients. (PX05001 (Endrikat IHT at 4, 7; PX05116 (Endrikat , Dep. at 15-17)). Endrikat is the Chief Executive Officer of Empire Medical, and testified at his deposition that his titles at the company "changed based on kind of what I wanted to call myself." (PX05001 (Endrikat IHT at 7-8)). Endrikat also works part-time at the Rogue Valley Swim and Tennis Club. (PX05001 (Endrikat IHT at 4, 7)). His responsibilities do not include patient care or trialing prosthetics products.

(PX05116 (Endrikat , Dep. at 15-17)). Complaint Counsel did not call Endrikat to testify at trial. (Tr. 147-6887). Actual certified prosthetists that are involved in patient care and product testing testified at trial that the Össur Rheo is the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; [redacted]

1487. [redacted] (Senn (COPC) Tr. 223 (*in camera*)).

Response to Finding No. 1487:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the record evidence. Senn is not and never has been a prosthetist. (Senn, Tr. 152-154).) Senn does not work directly with prosthetists and does not provide any medical-related care to COPC's patients. (Senn, Tr. 152-154). Actual certified prosthetists that are involved in patient care and product testing testified at trial that the Össur Rheo is the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; [redacted]

1488. Some clinics do not like the Össur Rheo in comparison to the Otto Bock and Freedom MPKs. (PX05128 (Senn (COPC) , Dep. at 44) (testifying that "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.")); PX05141 (Bright (North Bay) , Dep. at 40-41)).

Response to Finding No. 1488:

Complaint Counsel's proposed finding of fact is misleading and not supported by the record evidence. Complaint Counsel's proposed finding of fact relies on deposition testimony of two witnesses, Senn and Bright. As discussed above, Senn did not credibly testify at trial regarding the functionality of different prosthetic knees and has no foundation to do so. (Senn, Tr. 152-154; Response to CCFF ¶ 1487). At his deposition, Bright did not testify that his clinic, North Bay, did

not like the Össur Rheo. (PX05141 (Bright , Dep. at 40-41)). He testified only that three patients had tried an older version of the Össur Rheo, and those patients chose either a C-Leg or a Plié. (PX05141 (Bright , Dep. at 37-38). Bright further stated that North Bay has not fit any patients with the Össur Rheo and that North Bay has never tried the current version of the Rheo released in 2017. (PX05141 (Bright , Dep. at 37, 40-41)). Certified prosthetists that have trialed more recent versions of the Össur Rheo testified at trial that the Össur Rheo is the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; [redacted]

1489. 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." (PX05128 (Senn (COPC) , Dep. at 44).

Response to Finding No. 1489:

Complaint Counsel's proposed finding of fact is misleading and not supported by the record evidence. Complaint Counsel's proposed finding of fact relies only on the deposition testimony of Senn. As discussed above, Senn did not credibly testify at trial regarding the functionality of different prosthetic knees and had no training, education, experience or other foundation to do so. (Senn, Tr. 152-154; Response to CCFF ¶ 1487). Actual certified prosthetists that are involved in patient care and product testing testified at trial that the Össur Rheo is the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; [redacted]

1490. Michael Bright, owner of North Bay Prosthetics and Orthotics, testified that North Bay has not trialed patients with the latest-version of the Rheo because "North Bay has not heard from anybody else in the industry a reason to, and after trialing a few times if something isn't working we're not willing to subject our patients to being guinea pigs of a manufacturer's product." (PX05141 (Bright (North Bay) , Dep. at 41)).

Response to Finding No. 1490:

Respondent has no specific response other than that Complaint Counsel's proposed finding of fact supports Bright's lack of foundation to provide reliable testimony on the functional differences between the current version of the Össur Rheo and other Sophisticated Non-MPKs and MPKs. (Response to CCFF ¶ 1488).

1491. Michael Bright, owner of North Bay Prosthetics and Orthotics, testified in April 2018 that most patients who chose a different MPK after a trial fitting of the Rheo did so because "most just preferred the feel and function of either the Freedom Plié or the Otto Bock C-Leg." (PX05141 (Bright (North Bay) , Dep. at 38)).

Response to Finding No. 1491:

Complaint Counsel's proposed finding of fact is misleading. North Bay has only trialed the Rheo on three patients, and none of those patients trialed the most recent version of the Össur Rheo that was launched in 2017. (PX05141 (Bright , Dep. at 37-38, 40-41)). At his deposition, Bright did not testify that his clinic, North Bay, did not like the Össur Rheo. (PX05141 (Bright , Dep. at 40-41)). Certified prosthetists that have trialed more recent versions of the Össur Rheo testified at trial that the Össur Rheo is the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; [redacted]

1492. [redacted] (PX03103 (Ossur) at 007 (*in camera*)). [redacted] (PX03103 (Ossur) at 007 (*in camera*)).

Response to Finding No. 1492:

[redacted] (PX03103 at 006). [redacted]

[redacted] (PX03103 at 006).

[redacted] (PX03103 at 006 (*in camera*)). [redacted] (PX03103 at 006 (*in camera*)). [redacted] (PX03103 at 006). [redacted] (PX03103 at 006 (*in camera*)). [redacted] (PX03103 at 006 (*in camera*)).

2. Össur's MPK Technology Is Associated with Safety and Reliability Concerns Among Clinic Customers

1493. [redacted] (PX01004 (Otto Bock) at 056) (*in camera*)). [redacted] (PX01004 (Otto Bock) at 056) (*in camera*)).

Response to Finding No. 1493:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the record. The first sentence is misleading to the extent that Complaint Counsel is attempting to create an inference that the Plié is not inferior to the Össur Rheo and Ottobock C-Leg. [redacted] (PX01004 at 056). [redacted] (PX01004 at 057). [redacted] (PX01004 at 057).

[redacted] (PX01004 at 057).

[redacted] (PX01004 at 058). [redacted]

[redacted]

1494. 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. (PX05010 (Schneider (Otto Bock) IHT at 108-109)).

Response to Finding No. 1494:

Complaint Counsel's proposed finding of fact is misleading. At his Investigational Hearing in this matter, Schneider also testified that Rheo's magnetorheological fluid has benefits over the hydraulic fluid used in Ottobock's Sophisticated Non-MPKs and MPKs. (PX05010 (Schneider IHT at 110-111)). Schneider testified that he did not believe there to be a significant difference between Össur's Rheo and Ottobock's C-Leg stating that "I believe that Össur, when they came out with theirs, felt that that was a superior product and fluid type and therefore used it for the benefits that I stated." (PX05010 (Schneider IHT at 111)).

At trial Schneider testified that Össur's Rheo is the C-Leg 4's closest competitor and one of only two products (the other being the Rheo XC) that Ottobock considers when setting the price of the C-Leg 4. (Schneider, Tr. 4344, 4351-4352).

> Q. What competitor knee does Otto Bock consider to be the C-Leg 4's closest competitor in the United States?
> A. Both the Rheo and the Rheo XC is our closest competitor to the C-Leg 4.
> JUDGE CHAPPELL: Do you base that on price or function?
> THE WITNESS: I base that on function first, and price is also close to it.

(Schneider, Tr. 4351-4352).

After Plié3's launch in the United States, Ottobock's former Executive Vice President of Sales, Matt Swiggum, warned his National Sales Director that "Plie is NOT the competition. Rheo Is. Plié is a fly and Rheo is a vulture." (RX-0047 at 002; Swiggum, Tr. 3437).

1495. 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." (PX05112 (Ammouri (Freedom) , Dep. at 197-198)).

Response to Finding No. 1495:

Complaint Counsel's proposed finding of fact is misleading. There is no evidence in the record that the Össur Rheo's free swing mode qualifies it as an inferior product to the Plié 3, and Ammouri testified at her deposition that "I'm not sure how [Rheo 3] functions" and "I'm not certain how [Rheo 3] functions in dead battery." (PX05112 (Ammouri , Dep. at 123)). Moreover, the Rheo's free swing mode would only ever be activated if the Rheo lost power, but it has a 72 hour average battery life (3 times as long as the Plié 3's 24-hour average battery life) and alerts the user if there is a risk of losing power. (PX01172 at 004; PX01175 at 003 (noting addition of

new manual extension lock on the Rheo in 2017); DeRoy, Tr. 3581 (noting that Rheo provides warning signals to the user before the battery runs out and Össur trains its users on how to use the Rheo in case the battery does run out)).

1496. Manar Ammouri, Freedom's Senior Product Manager, testified that "even when there is a dead battery, the Plié goes into stance for stability and safety." This feature is different from Össur Rheo, which advertises "a manual lock feature for when the battery dies," because a Plié user does not require "engag[ing] a manual lock." (PX05112 (Ammouri (Freedom) , Dep. at 122)).

Response to Finding No. 1496:

Complaint Counsel's proposed finding of fact is misleading. There is no evidence in the record that the functionality of various MPKs when the battery is dead makes a material difference to users of MPKs. Moreover, the Rheo's batter lasts on average for 72 hours (three times as long as the Plié 3) and provides warning signals to the user before going dead. (PX01172 at 004; PX01175 at 003; DeRoy, Tr. 3581).

1497. Manar Ammouri, Freedom's Senior Product Manager, testified that the Rheo's lack of water resistance is a weakness for some patients. She explained, "[i]f their environment requires them to be near water, then I would say yes, it's a weakness." (PX05112 (Ammouri (Freedom) , Dep. at 196-97)).

Response to Finding No. 1497:

Respondent has no specific response other than to point out that the Plié 3, despite Freedom's misleading claims to the contrary, is not waterproof either. (Kannenberg, Tr. 1958-1959, 1986-1987; PX01499 at 031).

1498. Manar Ammouri, Freedom's Senior Product Manager, testified that the "Rheo 3 has a reputation of being boxy." (PX05112 (Ammouri (Freedom) , Dep. at 198).

Response to Finding No. 1498:

Respondent has no specific response other than to highlight the fact that there is no evidence in the record that being "boxy" makes the Rheo inferior to the Freedom Plié 3, which is not a microprocessor-controlled swing and stance knee. (RFOF ¶¶ 646-660 (establishing that C-Leg's closest competitor in terms of functionality and quality is the Össur Rheo)).

1499. In an email that Stephen Prince, Freedom's Quattro Project Leader, sent to Freedom Engineers Rob Glidden and Jonathan Byars on March 16, 2016, a set of notes under a header for "Marketing (Eric, Manar) – Input on size limitations" includes "I have read online forum posts saying the Rheo looks 'clunky and robotic', want to avoid this scenario…" (PX01123 (Freedom) at 001 (ellipsis in the original)).

Response to Finding No. 1499:

Respondent has no specific response other than to highlight the fact that there is no evidence in the record that alleged online forum posts about the Rheo's appearance are reliable or valid or make the Rheo inferior to the Freedom Plié 3, which is not a microprocessor-controlled swing and stance knee. (RFOF ¶¶ 646-660 (establishing that C-Leg's closest competitor in terms of functionality and quality is the Össur Rheo)).

1500. Freedom's Senior Product Manager, Manar Ammouri, testified in March 2018 that customers have told her that the weight of the Rheo is a weakness for the MPK. She elaborated that the customers told her "it's heavy or heavier" and testified that "[t]he heavier the product, the harder it is to – decreases the number of patients you can put it on. Imagine a 90-pound female carrying around a five-pound device, that kind of eliminates her from using that product. You want to make sure you've got a light product that is usable on several patients or a spectrum of patients." (PX05112 (Ammouri (Freedom) , Dep. at 197)).

Response to Finding No. 1500:

Complaint Counsel's proposed finding of fact is misleading. Sophisticated Non-MPKs are lighter than MPKs. (Kannenberg, Tr. 1985; Schneider, Tr. 4331; Ell, Tr. 1784). [redacted]

[redacted]

[redacted]

1501. Third-party witnesses have testified about safety concerns with respect to the Össur Rheo knee. (PX05001 (Endrikat (Empire Medical) IHT at 21-22; PX05128 (Senn (COPC) , Dep. at 82-83); PX05129 (Ell (Mid-Missouri) , Dep. at 74).

Response to Finding No. 1501:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the record. Endrikat is a former tennis instructor, is not a prosthetist, and does not fit patients. (PX05001 (Endrikat IHT at 4, 7; PX05116 (Endrikat , Dep. at 15-17)). Endrikat is the Chief Executive Officer of Empire Medical, and testified at his deposition that his titles at the company "changed based on kind of what I wanted to call myself." (PX05001 (Endrikat IHT at 7-8)). Endrikat also works part-time at the Rogue Valley Swim and Tennis Club. (PX05001 (Endrikat IHT at 4, 7)). His responsibilities do not include patient care or trialing prosthetics products. (PX05116

(Endrikat , Dep. at 15-17)). Complaint Counsel did not call Endrikat to testify at trial. (Tr. 147-6887). Senn is not a prosthetist. (Senn, Tr. 152-154).) Senn does not work directly with prosthetists and does not provide any medical-related care to COPC's patients. (Senn, Tr. 152-154). Ell testified that "I do not have an extensive history or knowledge in fitting the other knees besides the Ottobock line of knees and the Plié line of knees." (PX05129 (Ell , Dep. at 73)). Moreover, the only "safety concerns" cited by Complaint Counsel **all** relate only to the Rheo's functionality **if** it loses power. (PX05001 (Endrikat (Empire Medical) IHT at 21-22); PX05128 (Senn , Dep. at 82-83)); (PX05129 (Ell , Dep. at 74)).

1502. 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." (Sabolich (Scott Sabolich Prosthetics and Research) Tr. 5889-90). After the incident, he explained that Össur "didn't want to pay the guy's $1800 visit to the hospital and new glasses . . . ." (Sabolich (Scott Sabolich Prosthetics and Research) Tr. 5889-90).

Response to Finding No. 1502:

Complaint Counsel's proposed finding of fact is misleading. Sabolich testified at trial that he considers the Endolite Orion and Össur Rheo to be the next best performing MPKs to the Ottobock C-Leg 4. (Sabolich, Tr. 5948-5949). Specifically, Mr. Sabolich testified:

> Q. What microprocessor knee that is not manufactured by Otto Bock and is available in the United States is the closest substitute for a C-Leg 4, in your view?
> A. A Rheo Knee. The Rheo 3.

(Sabolich, Tr. 5858). Mr. Sabolich's testimony about one instance of a fall in 2015 related specifically to the Rheo 2. (Sabolich, Tr. 5889-5890). Össur has developed the Rheo 3, the waterproof Rheo 3, and the fourth-generation Rheo since the Rheo 2 in 2015. (Cross-Reference citation).

1503. Jonathan Endrikat, CEO of Empire Medical, testified that the safety profile for the Freedom Plié is "more similar to the Ottobock C-Leg" than the Össur Rheo. (PX05001 (Endrikat (Empire Medical) IHT at 22-23)).

Response to Finding No. 1503:

Complaint Counsel's proposed finding of fact is misleading, unreliable, and vague. Endrikat is a former tennis instructor, is not a prosthetist, and does not fit patients. (PX05001 (Endrikat IHT at 4, 7; PX05116 (Endrikat , Dep. at 15-17)). Endrikat is the Chief Executive Officer of Empire Medical, and testified at his deposition that his titles at the company "changed based on kind of what I wanted to call myself." (PX05001 (Endrikat IHT at 7-8)). Endrikat also works part-time at the Rogue Valley Swim and Tennis Club. (PX05001 (Endrikat IHT at 4, 7)). His responsibilities do not include patient care or trialing prosthetics products. (PX05116 (Endrikat , Dep. at 15-17)). Complaint Counsel did not call Endrikat to testify at trial. (Tr. 147-6887). Moreover, the phrase "safety profile" is vague. Actual certified prosthetists that are involved in patient care and product testing testified at trial that the Össur Rheo is the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; [redacted]

1504. 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." (PX05001 (Endrikat (Empire Medical), IHT at 21-22)).

Response to Finding No. 1504:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the record. Endrikat is a former tennis instructor, is not a prosthetist, and does not fit patients. (PX05001 (Endrikat IHT at 4, 7; PX05116 (Endrikat , Dep. at 15-17)). Endrikat is the Chief Executive Officer of Empire Medical, and testified at his deposition that his titles at the company "changed based on kind of what I wanted to call myself." (PX05001 (Endrikat IHT at 7-8)). Endrikat also

works part-time at the Rogue Valley Swim and Tennis Club. (PX05001 (Endrikat IHT at 4, 7)). His responsibilities do not include patient care or trialing prosthetics products. (PX05116 (Endrikat , Dep. at 15-17)). Complaint Counsel did not call Endrikat to testify at trial. (Tr. 147-6887). Moreover, the only "safety concern" cited by Complaint Counsel relates only to the Rheo's functionality **if** it loses power. (PX05001 (Endrikat (Empire Medical) IHT at 21-22).

1505. Likewise, 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." (PX05128 (Senn (COPC) , Dep. at 82-83)).

Response to Finding No. 1505:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the record evidence. Senn is not a prosthetist. (Senn, Tr. 152-154).) Senn does not work directly with prosthetists and does not provide any medical-related care to COPC's patients. (Senn, Tr. 152-154). Moreover, the only "safety concern" cited by Complaint Counsel relates only to the Rheo's functionality **if** it loses power. (PX05128 (Senn , Dep. at 82-83)).

1506. [redacted] (Senn (COPC) Tr. 224 (*in camera*)).

Response to Finding No. 1506:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the record evidence. Senn is not a prosthetist. (Senn, Tr. 152-154).) Senn does not work directly with prosthetists and does not provide any medical-related care to COPC's patients. (Senn, Tr. 152-154). To the extent Complaint Counsel is attempting to create an inference that the Rheo is inferior to the Plié 3, the Plié 3 is not a microprocessor-controlled swing-and-stance knee and does not

provide clinically proven stumble recovery. (Schneider, Tr. 4389-4390). The record is overwhelmingly clear that the Plié 3 is inferior to both the Össur Rheo and the Ottobock C-Leg 4. (RFOF ¶¶ 577-602, RFOF ¶¶ 646-660).

1507. Jeffrey Brandt, the CEO of Ability Prosthetics and Orthotics, testified in April 2018 that "I personally don't feel like – you know, I feel like Össur has been a little absent on the microprocessor knee stage. Now, whether the Rheo XC is, you know, bringing a new – a whole other game to the town here – game to town. But their Rheo came out a long time ago and I feel like it was marginally adopted and just sort of – I didn't really hear about it after that for a long time." (PX05149 (Brandt (Ability Prosthetics and Orthotics) , Dep. at 234)).

Response to Finding No. 1507:

Complaint Counsel's proposed finding of fact is unreliable and unsupported by the record evidence. Brandt is not a licensed prosthetist, (Brand, Tr. 3749-3750, 3790-3791) and he testified at trial that he has not fit a patient with a prosthetic knee (or any other prosthetic device) since 2012). (Brandt, Tr. 3791). Despite Brandt's lack of familiarity with prosthetic devices since 2012, Ability Prosthetics and Orthotics purchased 11 Össur Rheos in 2016 and in 2017. (Brandt, Tr. 3793-3794; PX03282). Brandt also testified at trial that Ability Prosthetics and Orthotics considers the Össur Rheo to be a preferred MPK option with respect to quality, durability, service, and performance. (Brandt, Tr. 3834).

1508. In April 2018, Keith Watson, the President of Fourroux Prosthetics, testified, "[w]hen you go down a ramp [in Össur Rheos], they tend to click click click click click click. Because I think the signal, the electric pulse that is going to make the fluid a solid and then release and then make it a solid, from secondary feedback from patients, they can feel that. And it just feels unstable. Anytime – anytime it brakes and release, brake, release, brake, release, it tends – it has – in my experience, it tends to make the patient not trust it." (PX05166 (Watson (Fourroux Prosthetics) , Dep. at 142-143)).

Response to Finding No. 1508:

Complaint Counsel's proposed finding of fact is unreliable and misleading. It is unreliable because Complaint Counsel did not call Watson to testify at trial, and because Watson testified

that he and his clinic, Fourroux Prosthetics, "really don't have a lot of experience at all with the Rheo." (PX05166 (Watson , Dep. at 46)). Watson stated further that if Fourroux Prosthetics ever fit a Rheo, it would have only been one. (PX05166 (Watson , Dep. at 72)). Complaint Counsel's proposed finding of fact is misleading because Watson testified that he makes sure all MPKs are available to his patients, and he would fit a patient with an Össur Rheo (or a C-Leg 4 or Orion 3) knee if it were the most appropriate device for that patient. (PX05166 (Watson , Dep. at 72-73; 143-144 ("I think all microprocessor knee solutions are presented, all possible gamut.")).

1509. In April 2018, Michael Bright, owner of North Bay Prosthetics and Orthotics, testified his clinic does not purchase Össur's Rheo because they "[j]ust did not have good clinical outcomes when we last used it." (PX05141 (Bright (North Bay) , Dep. at 201-202)).

Response to Finding No. 1509:

Complaint Counsel's proposed finding of fact is misleading and unreliable.. The deposition testimony of Bright is unreliable to support Complaint Counsel's proposed finding of fact because Complaint Counsel did not call Bright to testify at trial and because Bright stated at his deposition that North Bay has only trialed the Rheo on three patients, and none of those patients trialed the most recent version of the Össur Rheo that was launched in 2017. (PX05141 (Bright , Dep. at 37-38, 40-41)). Complaint Counsel's proposed finding of fact is misleading because at his deposition, Bright did not testify that his clinic, North Bay, did not like the Össur Rheo. (PX05141 (Bright , Dep. at 40-41)) (testifying that North Bay Prosthetics and Orthotics has not yet even trialed the current model of the Össur Rheo)). Certified prosthetists that have trialed more recent versions of the Össur Rheo testified at trial that the Össur Rheo is the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; [redacted]

1510. Mark Ford, President of Prosthetic and Orthotics Associates, testified that his clinic has only bought Freedom's Plié and Otto Bock's C-Leg in the last two years because of

["[p]atient preference and clinician preference in terms of what they think the patient is going to get out of the device." (Ford (POA) Tr. 954).

Response to Finding No. 1510:

Complaint Counsel's proposed finding of fact is misleading and unreliable. Complaint Counsel's proposed finding of fact is unreliable because it relies exclusively on the testimony of Mark Ford, who testified that he is not and never has been a prosthetist, (Ford, Tr. 918), and because POA has only purchased **1** Freedom Plié 3 since 2016 (and that was post-Acquisition for a patient without insurance). (Ford, Tr. 1029-1030; PX03170 at 001). Complaint Counsel's proposed finding of fact is also misleading because Ford also testified that the prosthetists that work at POA for Ford all believe that "the C-Leg is a better product than the Plié." (Ford, Tr. 1044). Ford also testified that, despite the fact that POA clinics fit Ottobock C-Legs "almost exclusively," that POA's prosthetists consider Össur's Rheo and Endolite's Orion 3 to be in the same category as the C-Leg as a microprocessor knee. (Ford, Tr. 1050). Certified prosthetists that testified at trial consider the Össur Rheo to be the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; [redacted]

1511. Keith Senn of COPC testified that [redacted] (Senn (COPC) Tr. 224 (*in camera*)).

Response to Finding No. 1511:

Complaint Counsel's proposed finding of fact is misleading, unsupported by the record evidence, a repeat of CCFF ¶ 1506. Complaint Counsel's proposed finding of fact is not reliable because Senn is not a prosthetist. (Senn, Tr. 152-154).) Senn does not work directly with prosthetists and does not provide any medical-related care to COPC's patients. (Senn, Tr. 152-154). Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel

is attempting to create an inference that the Rheo is inferior to the Plié 3 because direct evidence shows that the Plié 3 is not a microprocessor-controlled swing-and-stance knee and does not provide clinically proven stumble recovery. (Schneider, Tr. 4389-4390). The record is overwhelmingly clear that the Plié 3 is inferior to both the Össur Rheo and the Ottobock C-Leg 4. (RFOF ¶¶ 577-602, RFOF ¶¶ 646-660).

1512. Jeffrey Brandt, the CEO of Ability Prosthetics and Orthotics, testified in April 2018 that "I personally don't feel like – you know, I feel like Össur has been a little absent on the microprocessor knee stage. Now, whether the Rheo XC is, you know, bringing a new – a whole other game to the town here – game to town. But their Rheo came out a long time ago and I feel like it was marginally adopted and just sort of – I didn't' really hear about it after that for a long time." (PX05149 (Brandt (Ability Prosthetics and Orthotics) , Dep. at 234)).

Response to Finding No. 1512:

Complaint Counsel's proposed finding of fact is unreliable, unsupported by the record evidence, and a repeat of CCFF ¶ 1507. Complaint Counsel's proposed finding of fact is unreliable because Brandt is not a licensed prosthetist, (Brand, Tr. 3749-3750, 3790-3791) and he testified at trial that he has not fit a patient with a prosthetic knee (or any other prosthetic device) since 2012. (Brandt, Tr. 3791). Complaint Counsel's proposed finding of fact is misleading because, despite Brandt's lack of familiarity with prosthetic devices since 2012, Ability Prosthetics and Orthotics has purchased 11 Össur Rheos in 2016 and in 2017. (Brandt, Tr. 3793-3794; PX03282). Brandt also testified at trial that Ability Prosthetics and Orthotics considers the Össur Rheo to be a preferred MPK option with respect to quality, durability, service, and performance. (Brandt, Tr. 3834).

1513. Keith Watson, the President of Fourroux Prosthetics, testified in April 2018 that Össur's Rheo was "racheted" when his clinic fit the knee "several years" ago, which he attributes to its design and function. Mr. Watson explained, "When you go down a ramp, they tend to click click click click click click. Because I think the signal, the electric pulse that is

going to make the fluid a solid and then release and then make it a solid, from secondary feedback from patients, they can feel that. And it just feels unstable. Anytime – anytime it brakes and release, brake, release, brake, release, it tends – it has – in my experience, it tends to make the patient not trust it." (PX05166 (Watson (Fourroux Prosthetics) , Dep. at 142-143)).

Response to Finding No. 1513:

Complaint Counsel's proposed finding of fact is unreliable, misleading and a repeat of CCFF ¶ 1508. Complaint Counsel's proposed finding of fact is unreliable because Complaint Counsel did not call Watson to testify at trial, and because Watson testified that he and his clinic, Fourroux Prosthetics, "really don't have a lot of experience at all with the Rheo." (PX05166 (Watson , Dep. at 46)). Watson stated further that if Fourroux Prosthetics ever fit a Rheo, it would have only been one. (PX05166 (Watson , Dep. at 72). Complaint Counsel's proposed finding of fact is also misleading because Watson testified that he makes sure all MPKs are available to his patients, and he would fit a patient with an Össur Rheo (or a C-Leg 4 or Orion 3) if it were appropriate for that patient. (PX05166 (Watson , Dep. at 72-73; 143-144 ("I think all microprocessor knee solutions are presented, all possible gamut.")).

1514. [redacted]

Response to Finding No. 1514:

Complaint Counsel's proposed finding of fact is unreliable and misleading. Complaint Counsel's proposed finding of fact is unreliable because Complaint Counsel did not call Yates to testify at trial and because the deposition testimony cited by Complaint Counsel refers to the first iteration of the Össur Rheo launched in 2007. (PX05108 (Yates , Dep. at 59) (noting issues with

Össur Rheo "when the Rheo knee was developed"; PX05108 (Yates , Dep. at 105 (noting issues with the Rheo "in the past.")). Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that the Rheo is inferior to the Plié 3 because Yates stated at his deposition that the Rheo, C-Leg 4, Orion, and Plié are in the same class of knee. (PX05108 (Yates , Dep. at 51-52 (noting also that Ottobock's Genium and X3 and Össur's XC are in a different class of MPK)). Yates stated further that his clinic, Jonesboro P&O, has used Össur's Rheo before for its patients. (PX05108 (Yates , Dep. at 57-58)).

Most notably, Yates testified that he thinks Össur's Rheo is "absolutely" a "good product" and that he is "aware that [Össur's Rheo and Endolite's Orion], too, have improved their products over time, and so, yes, I believe today that the Orion and the Rheo are quality products, good products." (PX05108 (Yates , Dep. at 105)).

1515. Michael Bright, owner of North Bay Prosthetics and Orthotics, testified in April 2018 that his clinic "[j]ust did not have good clinical outcomes" when it "last used" the Rheo. (PX05141 (Bright (North Bay) , Dep. at 201-202)).

Response to Finding No. 1515:

Complaint Counsel's proposed finding of fact is misleading, unreliable, and a repeat of CCFF ¶ 1509. Complaint Counsel's proposed finding of fact is unreliable because Complaint Counsel did not call Bright to testify at trial and because Bright stated at his deposition that North Bay has only trialed the Rheo on three patients, and none of those patients trialed the most recent version of the Össur Rheo that was launched in 2017. (PX05141 (Bright , Dep. at 37-38, 40-41)). Complaint Counsel's proposed finding of fact is misleading because at his deposition, Bright did not testify that his clinic, North Bay, did not like the Össur Rheo. (PX05141 (Bright , Dep. at 40-41)) (testifying that North Bay Prosthetics and Orthotics has not yet even trialed the current model

of the Össur Rheo)). Certified prosthetists that have trialed more recent versions of the Össur Rheo testified at trial that the Össur Rheo is the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; [redacted]

1516. Mark Ford, President of Prosthetic and Orthotics Associates, testified that his clinic only fit Freedom's Plié and Otto Bock's C-Leg on patients because ["[p]atient preference and clinician preference in terms of what they think the patient is going to get out of the device." (Ford (POA) Tr. 954).

Response to Finding No. 1516:

Complaint Counsel's proposed finding of fact is misleading, unreliable, and a repeat of CCFF ¶ 1510. Complaint Counsel's proposed finding of fact is unreliable because it relies exclusively on the testimony of Mark Ford, who testified that he is not and never has been a prosthetist, (Ford, Tr. 918), and because POA has only purchased ***one*** Freedom Plié 3 since 2016 (and that was post-Acquisition, for a discounted price, for a patient without insurance). (Ford, Tr. 1029-1030; PX03170 at 001). Complaint Counsel's proposed finding of fact is also misleading because Ford also testified that the prosthetists that work at POA for Ford all believe that "the C-Leg is a better product than the Plié." (Ford, Tr. 1044). Ford also testified that, despite the fact that POA clinics fit Ottobock C-Legs "almost exclusively," that POA's prosthetists consider Össur's Rheo and Endolite's Orion 3 to be in the same category as the C-Leg as a microprocessor knee. (Ford, Tr. 1050). Certified prosthetists that testified at trial who have experience with all MPKs on the market consider the Össur Rheo to be the closest competitor to the Ottobock C-Leg 4. (Sabolich, Tr. 5858-5859; [redacted]

3. Freedom's Quattro Will Be Functionally Superior to, and Lower-Priced than, Össur's Rheo

1517. During its due diligence of the acquisition of Freedom on or around September 19, 2017, after Otto Bock executives tested the Quattro in-person for several hours, they identified

> as "RISKS IF WE DO NOT CONTROL QUATTRO" that "Össur 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." (PX01471 (Otto Bock) at 002).

Response to Finding No. 1517:

Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel's proposed finding of fact is misleading for two reasons. First, Schneider testified that the first setup of the Quattro Alpha prototype tested failed and a large portion of the four-hour test consisted of sitting in a car in California traffic unable to test the prototype. (Schneider, Tr. 4635). Schneider also testified at trial that based on the assessment reflected in PX01471, Ottobock assigned no value to the Quattro project because it was just in Alpha prototype form, and Ottobock was concerned that Quattro would never be commercialized. (Schneider, Tr. 4638-4641). Schneider testified, "please caution that this is a prototype that they have not put their battery into. They had not made it into its formal size, so the – you could slap a battery on the outside of this and get good range of motion. So these refer to **goals** as well, **not the actuals**." (Schneider, Tr. 4641). Specifically, Schneider, who was present at the testing and prepared PX01471, testified at trial that the remarks regarding Össur were based solely on the "goals" of the Quattro and not the actual prototype tested. (Schneider, Tr. 4642).

Most notably, Schneider led Ottobock's North American commercial due diligence team that analyzed the Quattro project in depth. (Schneider, Tr. ; PX01004). According to Schneider's team analysis the Quattro project had serious issues. (Schneider, Tr. 4477-4478; PX01004 at 062). Specifically, Schneider testified as follows:

> Q. If you could please turn, Mr. Schneider, to page 62. This is regarding the development project, the Quattro. The last paragraph on this page that begins with "It also seems," there's a sentence in

> the middle that reads, "The most likely scenario is that the developers at Roosevelt are underestimating the project's development risks; among others there could be hydraulic leakage, excessive noise, damage due to environmental conditions (e.g. sand and stones), electrostatic discharge, electromagnetic interference, software compatibility, structural stability, energy consumption, sensor drift, delivery chain issues, et cetera." Do you see that?
> A. I do.
> Q. What does that mean?
> A. So this part is from our R&D evaluation, so this is our engineers that had looked at this and listened to the sales pitch and the interface and had these concerns about the Quattro project.
> JUDGE CHAPPELL: So other than that, it's a great product?
> Q. Specifically, what is meant by "hydraulic leakage"?
> A. So at this point we also -- because it shared this hydraulic unit with the Kinnex product which was on the market -- the Quattro is just a project – but the engineers, the Freedom engineers, had told us that the same type of hydraulic unit was going to be used in both the same -- some of the same technologies, so what we knew about one we were fearful of going into the Quattro project.
> Q. And do you know whether hydraulic leakage has been a critical issue with the Kinnex?
> A. Yes.

(Schneider, Tr. 4477-4479; PX01004 at 062).

1518. [redacted] (De Roy (Ossur) Tr. 3604 (*in camera*)). [redacted] (PX01117 (Freedom) at 030 (*in camera*)).

Response to Finding No. 1518:

Complaint Counsel's proposed finding of fact is unreliable and misleading. The first sentence of Complaint Counsel's proposed finding of fact accurately reflects De Roy's testimony. (DeRoy, Tr. 3604). The second sentence is unreliable and misleading because Ferris, Freedom's Vice President of Marketing, Customer Service, and Product Development, (Ferris, Tr. 2299) and Executive Sponsor of the Quattro project, (Ferris, Tr. 2412-2413), testified at trial that Freedom has never made any decisions about how to price the Quattro if it is ever commercialized because

of the technical problems with its development. (Ferris, Tr. 2432-2433 (noting that testing results will be "critical in how we set our pricing".). [redacted]

1519. [redacted] (Prince (Freedom) Tr. 2762-63 (*in camera*)).

Response to Finding No. 1519:

Complaint Counsel's proposed finding of fact is misleading. It is misleading to the extent Complaint Counsel is attempting to establish that [redacted]

[redacted]

Össur's findings during diligence confirm Ottobock's finding during diligence that [redacted]

Complaint Counsel's proposed finding of fact is also misleading to the extent it focuses only on Össur's Rheo and ignores new MPK products in development at Össur. [redacted]

1520. [redacted] (PX01004 (Otto Bock) at 064 (*in camera*)).

Response to Finding No. 1520:

Complaint Counsel's proposed finding of fact is not supported by the record evidence.

[redacted]

poorly written statement and one that should not have made it into [redacted]

[redacted]

1521. [redacted] (Prince (Freedom) Tr. 2762 (*in camera*); PX01117 (Freedom) at 016 (*in camera*)).

Response to Finding No. 1521:

Complaint Counsel's proposed finding of fact is misleading. It is misleading to the extent Complaint Counsel is attempting to establish that [redacted]

[redacted]

[redacted]

1522. Mr. DeRoy, Össur's Executive Vice President of R&D, testified that the Rheo XC "includes a couple of features and functions that are not available in the Rheo Knee, such as the smooth transition from level ground walking to biking, it supports running, and it also supports up stairs walking as well as hindrance avoidance, so your obstacle avoidance. You're able to take a step over an obstacle with more stability and more safety." (PX05124 (De Roy (Össur) , Dep. at 157-58). Össur prices the Rheo XC "approximately 9-10 thousand dollars more expansive" than the Rheo. Mr. De Roy testified that the Rheo XC's "two main competitors" are Otto Bock's Genium and X3. (De Roy (Össur) Tr. 3584).

Response to Finding No. 1522:

Respondent has no specific response.

1523. [redacted] (PX01117 (Freedom) at 016 (*in camera*); Prince (Freedom) Tr. 2758 (*in camera*)). [redacted]

Response to Finding No. 1523:

Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel's proposed finding of fact is misleading in two respects. First, it is misleading to the extent that Complaint Counsel is attempting to create the inference that Freedom did not benchmark the Quattro against the Orion and Allux MPKs as well, because there is direct evidence that Freedom did so. Dr. Prince, who has been involved with the development of the Quattro, testified at trial that the Quattro's development team has benchmarked the Quattro against the C-Leg 4, the Rheo 3, the Orion from Endolite, and the Allux from Nabtesco. (Prince, Tr. 2816-2817 (noting that Orion and Allux have "been added to the benchmarking specifications that we have").

Second, Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel is attempting to create an inference that the Quattro's "design specs" actually reflect features that will be incorporated into a commercialized version of the Quattro, if that ever happens. Dr. Prince testified at trial that Freedom is already missing design specifications rendering the chart in Complaint Counsel's proposed finding of fact unreliable. (Prince, Tr. 2818-2819). Schneider confirmed Dr. Prince's concern at trial testifying that Freedom has been unable to achieve the designed height and weight for the Quattro, which are the critical features upon which Freedom was selling the Quattro. (Schneider, Tr. 4467-4468; PX01068 at 033-036 (presentation by Carkhuff to Näder highlighting the designed small weight and build height of the Quattro).

1524. [redacted] (PX01117 (Freedom) at 016 (*in camera*)).

Response to Finding No. 1524:

Complaint Counsel's proposed finding of fact is misleading. It is misleading to the extent Complaint Counsel is attempting to establish that Quattro's design will ever be achieved by Freedom or anyone else or that any future commercialized version of the Quattro will actually have greater functionality than the Rheo. Dr. Prince, who has been developing the Quattro for years, testified at trial that the project team has already missed the designed product weight specification and the Quattro's weight will be similar to the Össur Rheo. (Prince, Tr. 2818-2819). Scott Schneider testified at trial that the Alpha prototype of the Quattro, which was the only

prototype that had been tested by the time of trial, did not have the "shorter build height" reflected in the design of the Quattro. (Schneider, Tr. 4467-4468).

[redacted]

Össur's findings during diligence confirm Ottobock's finding during diligence that the Freedom's oversold the Quattro and that it had fundamental functionality issues. (Response to CCFF ¶ 1517).

1525. [redacted]

Response to Finding No. 1525:

Complaint Counsel's proposed finding of fact is misleading. It is misleading to the extent Complaint Counsel is attempting to establish that Quattro's design will ever be achieved by Freedom or anyone else or that any future commercialized version of the Quattro will actually have greater functionality than the Rheo. The Quattro does not yet have a weight limit for high-activity use—it has a design that may never be achieved. (Prince, Tr. 2837-2838, 2841-2842). Indeed, Dr. Prince, who has been developing the Quattro for years, testified at trial that the project team has already missed the designed product weight specification and the Quattro's weight will be similar to the Össur Rheo. (Prince, Tr. 2818-2819). Scott Schneider testified at trial that the Alpha prototype of the Quattro, which was the only prototype that had been tested by the time of trial, did not have the "shorter build height" reflected in the design of the Quattro. (Schneider, Tr. 4467-4468).

1526. [redacted] (Prince (Freedom) Tr. 2758-59 (*in camera*). [redacted] (Prince (Freedom) Tr. 2758-59 (*in camera*); *see also* PX01117 (Freedom) at 016) (*in camera*)).

Response to Finding No. 1526:

Respondent has no specific response other than to highlight the phrase "Freedom plans" in Complaint Counsel's proposed finding of fact and to note that there is no evidence in the record that Freedom will ever be able to achieve those "plans."

1527. [redacted] (PX01408 (Otto Bock) at 008 (*in camera*); Arbogast (Ohio Willow Wood) Tr. 5094 (*in camera*), 5115-16 (*in camera*)). [redacted]

[redacted] (PX01408 (Otto Bock) at 008 (*in camera*)).

Response to Finding No. 1527:

Complaint Counsel's proposed finding of fact is misleading. It is misleading to the extent Complaint Counsel is attempting to establish that [redacted]

[redacted]

B. ENDOLITE

1528. Endolite sells prosthetic components, including MPKs, in the United States. (JX-001 at 004 (¶ 39)).

Response to Finding No. 1528:

Respondent has no specific response.

1529. [redacted] (Blatchford (Endolite) Tr. 2180-182 (*in camera*)).

Response to Finding No. 1529:

Complaint Counsel's proposed finding of fact is misleading. [redacted] On November 20, 2018, CBPE Capital Investments announced that it "has invested to acquire a majority ownership position in Blatchford, a world leading provider of advanced prosthetic and orthotic devices." (Press Release, CBPE Capital Investments, CBPE Capital Investments Invests In Blatchford (Nov.

20, 2018 (available at http://www.cbpecapital.com/news/cbpe-capital-invests-in-blatchford/) (CBPE Press Release). According to the CBPE Press Release, "CBPE will be investing alongside fourth generation family member Stephen Blatchford and the management team led by Adrian Stenson, CEO." The Release confirmed [redacted] that "CBPE will support management's plans to bring a range of innovative new products to market and to expand the business geographically, both organically and through acquisitions." (CBPE Press Release).

1530. [redacted] (PX06001A at 84 (Table 7) (Scott Morton Report) (*in camera*)). [redacted] (PX06001A at 84 (Table 7) (Scott Morton Report) (*in camera*)).

Response to Finding No. 1530:

Complaint Counsel's proposed finding of fact is misleading. Freedom does not sell a swing-and-stance controlled MPK. [redacted] Schneider, Tr. 4311-3213 (noting that the Plié 3 offers set resistance in the swing and stance phases set by an air pump and a wrench, respectively)). [redacted]

1531. [redacted] (Solorio (Otto Bock) Tr. 1603-06 (*in camera*); PX00867 (Otto Bock) at 021 (2018 North America Marketing & Sales Plan) (*in camera*)).

Response to Finding No. 1531:

Complaint Counsel's proposed finding of fact is misleading. The market share data in PX00867 is derived from "Estimates based upon 2015 CMS usage data/BU Assumption." (PX00867 at 21). The 2015 CMS usage data reflects data from 2015, well before the launch of the Orion 3 in September 2016, which had a significant impact on the market and before significant growth in 2017. (Blatchford, Tr. 2109-2110; [redacted]).[1]

1532. [redacted] (Blatchford (Endolite) Tr. 2170) (*in camera*).

Response to Finding No. 1532:

Complaint Counsel's proposed finding of fact is misleading. Mr. Blatchford testified that Endolite had ranked number four in the past but that that the company plans to become a strong

[1] PX00867 also recognizes a separate market for K-3 and K-4 feet. (PX00867 at 15).

number three with revenues similar to Össur and Ottobock. [redacted] On November 20, 2018, CBPE Capital Investments announced that it "has invested to acquire a majority ownership position in Blatchford, a world leading provider of advanced prosthetic and orthotic devices." (CBPE Press Release; Response to CCFF ¶ 1529). According to the CBPE Press Release, Blatchford "will continue its dedication to and focus on developing innovative products that lead to improved clinical outcomes and enhanced quality of life for patients. The ongoing investment in R&D, under the stewardship of Professor Sir Saeed Zaheedi, has resulted in pioneering prosthetics such as Linx, the world's first and only truly integrated microprocessor-controlled limb system" The Release confirmed [redacted] that "CBPE will support management's plans to bring a range of innovative new products to market and to expand the business geographically, both organically and through acquisitions." (CBPE Press Release).

1533. [redacted] (PX01075 (Freedom) at 109 (*in camera*) (Freedom presentation detailing issues with Endolite's Orion); (Blatchford (Endolite) Tr. 2170-71 (*in camera*); Senn (COPC) Tr. 194; PX05128 (Senn (COPC) , Dep. at 44)).

Response to Finding No. 1533:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the record evidence. Complaint Counsel's proposed finding of fact is misleading to the extent it is attempting to create an inference that Endolite's Orion 3 has had technical or service issues recently. The evidence cited by Complaint Counsel refers to predecessor products. (PX01075 at 109 (dated

January 2016, months before Orion 3 was even launched); [redacted]

[redacted]

Orion 3's quality improvement has been recognized by the industry. After the Acquisition in 2017, Ottobock noted that Endolite was "[q]uietly building a following through positive experience with performance, customers are commenting on improved functionality with latest version [Orion 3]." (PX00867 at 022).

Complaint Counsel's proposed finding of fact is unsupported by the record evidence to the extent it relies on the testimony of Senn. Senn is not and never has been a prosthetist. (Senn, Tr. 152-154).) Senn does not work directly with prosthetists and does not provide any medical-related care to COPC's patients. (Senn, Tr. 152-154). [redacted]

[redacted]

[redacted]

Most notably, Senn testified at his deposition and at trial as follows: "***The Orion I think is becoming more interchangeable as they improve that product***." (Senn, Tr. 256; PX05128 (Senn , Dep. at 107)) (emphasis added).

1534. [redacted] (PX01075 (Freedom) at 109 (*in camera*)).

Response to Finding No. 1534:

Complaint Counsel's proposed finding of fact is misleading, unsupported by the record, and a repeat of CCFF ¶ 1533. Complaint Counsel's proposed finding of fact is misleading to the extent it is attempting to create an inference that Endolite's Orion 3 has had technical or service issues recently. The evidence cited by Complaint Counsel refers to a predecessor product. (PX01075 at 109 (dated January 2016, months before Orion 3 was even launched).

Orion 3's quality improvement has been recognized by the industry. After the Acquisition in 2017, Ottobock noted that Endolite was "[q]uietly building a following through positive experience with performance, customers are commenting on improved functionality with latest version [Orion 3]." (PX00867 at 022). Complaint Counsel called Senn, who testified at his deposition and at trial as follows: "The Orion I think is becoming more interchangeable as they improve that product." (Senn, Tr. 256; PX05128 (Senn , Dep. at 107)) (emphasis added).

1535. [redacted] (Blatchford (Endolite) Tr. 2170-71 (*in camera*)).

Response to Finding No. 1535:

Complaint Counsel's proposed finding of fact is misleading, unsupported by the record evidence, and a repeat of CCFF ¶ 1533. Complaint Counsel's proposed finding of fact is misleading to the extent it is attempting to create an inference that Endolite's Orion 3 has had technical or service issues recently. The evidence cited by Complaint Counsel refers to predecessor products. [redacted]

Orion 3's quality improvement has been recognized by the industry. After the Acquisition in 2017, Ottobock noted that Endolite was "[q]uietly building a following through positive experience with performance, customers are commenting on improved functionality with latest version [Orion 3]." (PX00867 at 022). Complaint Counsel called Senn, who testified at his deposition and at trial as follows: "The Orion I think is becoming more interchangeable as they improve that product." (Senn, Tr. 256; PX05128 (Senn , Dep. at 107)) (emphasis added).

1536. [redacted] (PX05144 (Blatchford (Endolite) , Dep. at 237) (*in camera*).

Response to Finding No. 1536:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the record. Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

Blatchford further testified as follows:

> Q. And you believe, don't you, that the Orion3 is the closest competitor to the C-Leg 4?
> A. I do.
> Q. And you believe, don't you, sir, that the Orion3 is functionally as good as the C-Leg 4?
> A. I do.
> Q. And although there may have been some problems with earlier versions of the Orion, you've now worked through those, and the Orion3, in your view, is as good as the C-Leg 4.
> A. Yes.

(Blatchford, Tr. 2213-2214).

[redacted] Ottobock's head of mechatronic marketing in the United States testified at trial that "Endolite has improved a lot on their Orion product with that latest iteration of it, the Orion 3." (Solorio, Tr. 1647). Quality improvements to the Orion 3 and Endolite's increased trialing of the product have allowed Endolite to grow its market share and become a stronger competitor according to Ottobock's head of U.S. MPK marketing. (Solorio, Tr. 1647).

[redacted]

1537. At trial, Mr. Blatchford also explained that "if you want to use the Orion3 knee, then there's a particular way you have to start the process of going down the stairs so that the Orion3 will know that's what it's doing." (Blatchford (Endolite) Tr. 2250).

Response to Finding No. 1537:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that the Orion 3 is an inferior product. The context of the testimony cited by Complaint Counsel related to the features and benefits of Sophisticated Non-MPKs to MPKs, including being more robust and being able to go down steps more easily than MPKs. (Blatchford, Tr. 2249-2252). Direct evidence at trial supports the proposition that the functionality of the Orion 3 is far superior to the Freedom Plié 3 and much more similar to the functionality of the Ottobock C-Leg 4. (Blatchford, Tr. 2213-2214). Blatchford testified as follows:

> Q. And you believe, don't you, that the Orion3 is the closest competitor to the C-Leg 4?
> A. I do.
> Q. And you believe, don't you, sir, that the Orion3 is functionally as good as the C-Leg 4?
> A. I do.
> Q. And although there may have been some problems with earlier versions of the Orion, you've now worked through those, and the Orion3, in your view, is as good as the C-Leg 4.
> A. Yes.
> Q. And you believe, don't you, sir, that the Orion3 is functionally superior to the Plié?
> A. I do, yes.
> Q. Can you tell us why you believe that?
> A. 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 Orion3 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 Orion3, there is greater control in the way it works than on the Plié.
> Q. And what difference would that make to a transfemoral amputee?

> A. Well, in my view, it would mean that the transfemoral amputee would find the Orion3 is an easier knee to work with, it adapts better to the terrain, and it is just generally overall nicer.

(Blatchford, Tr. 2213-2215). Endolite's Orion 3 Sale Guide highlights several of the features and benefits of the Orion 3 as follows:

Feature	Orion3	Rheo	C4	Plie 3
Activity Level	3	3	3 - 4	3 - 4
Microprocessor Swing and Stance Control	Yes	Yes	Yes	Not automatic for swing
Stance Control	Hydraulic	EMF on Magnetic fluid	Hydraulic	Hydraulic
Swing Control Mechanism	Pneumatic	EMF on Magnetic fluid	Hydraulic	Pneumatic
Staneflex Feature	Optional	Optional	Optional	No
Terminal Swing Dampening	Yes	Yes	Yes	Yes
Extension Initiation	Pneumatic	Spring	Spring	Pneumatic
Standing Support Mode	Yes	Yes	Yes	No
Stumble Recovery	Instantaneous after flexion + dynamic	Weight activated	Instantaneous after flexion	Instantaneous after flexion?
Dynamic Stair and Slope Descent	Yes – customisable	Yes	Yes	Yes
Supported Sitting	Yes – customisable	Yes	Yes	Yes
Proximal options	4	2	2	2
Battery Life (Days)	3	3	1.5	24 hours
Weight (kg)	1.5	1.61	1.13	1.24
Weight Limit (kg)	125	136	136 (dependent on foot size)	125 (moderate) 100 (high)
Service Interval (Months)	20	40	Not required	12
Mode Changes	On board	No user modes	Remote change or cockpit app	No (user adjustable swing)
Cycling Mode	Yes	No	Yes	No
Flexion Lock	Yes (up to 45°)	Yes	Yes (up to 64°)	No
Build Height (mm)	244	236	294-352	223-235
Power Source	Lithium Ion	Lithium Ion	Lithium Ion	Lithium Ion
Low Power Mode	Yes (default stance flexion - no release to swing)	Yes (manually operated lock)	Yes (knee locked stiff)	Yes (default stance flexion - no release to swing)
Low Power warning	Yes	Yes	Yes	Yes
Power Indicator	Yes (on board)	Yes (via App, or charger if connected)	Yes (via cockpit App, orcharger if connected)	Yes (on board)
Clinician Software	Yes	Yes	Yes	Yes
Auto Calibrate Option	Yes	Yes	Yes	Yes
Foot Options	All manufacturers' feet	Limited Ossur Feet	Limited Otto Bock feet	All manufacturers' feet
Waterproof	Weatherproof	Weatherproof/IP34	Splashproof/IP67	IP67 (submersible up to 1m for 30 mins)
Max Knee Flexion Angle	130°	120°	130° (122° with flexion stop)	117-125°
Standard warranty	36 months	36 months	36 months	36 months

Data taken from manufacturers' websites April 2017.

(RX-0419 at 004). Orion 3 is microprocessor swing and stance controlled like the Rheo and C-Leg 4 (but **not** the Plié 3), Plié 3 does not offer a Staneflex feature like Orion 3 and other MPKs, Plié 3 does not offer a standing support mode like Orion 3 (and Rheo and C-Leg 4), the battery life

of the Plié 3 is just 24 hours (compared to 3 days for Orion 3 and Rheo), Plié 3 offers no mode changes, no cycling mode, and a lesser max knee flexion. (RX-0419 at 004).

1538. [redacted] (RX-0607 (Endolite) at 009 (*in camera*)).

Response to Finding No. 1538:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that the Orion 3 was not performing exceedingly well in 2017 and 2018, which it was. [redacted]

1539. 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." (Senn (COPC) Tr. 194). 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." (PX05128 (Senn (COPC) , Dep. at 44).

Response to Finding No. 1539:

Complaint Counsel's proposed finding of fact is unsupported by the record evidence to the extent it relies on the testimony of Senn. Senn is not and never has been a prosthetist. (Senn, Tr. 152-154).) Senn does not work directly with prosthetists and does not provide any medical-related care to COPC's patients. (Senn, Tr. 152-154). [redacted]

[redacted]

Senn also testified that the Orion is on COPC's recommended list. (Senn, Tr. [redacted] 255).

[redacted]

[redacted]

Most notably, Senn testified at his deposition and at trial as follows: "***The Orion I think is becoming more interchangeable as they improve that product***." (Senn, Tr. 256; PX05128 (Senn, Dep. at 107)) (emphasis added).

1540. Mr. Ford, President and Managing Partner of POA, testified that Endolite "to a lesser degree" is trying to get their company's business due to less service and support compared to the Otto Bock, Freedom, and Össur. (Ford (POA) Tr. 946, 956-957) (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]."

Response to Finding No. 1540:

Complaint Counsel's proposed finding of fact is misleading and unreliable. Complaint Counsel's proposed finding of fact is unreliable because it relies exclusively on the testimony of Mark Ford, who testified that he is not and never has been a prosthetist, (Ford, Tr. 918), and because POA has only purchased ***one*** Freedom Plié 3 since 2016 (and that was post-Acquisition,

for a discounted price, for a patient without insurance). (Ford, Tr. 1029-1030; PX03170 at 001). Complaint Counsel's proposed finding of fact is misleading because Ford also testified that the prosthetists that work at POA for Ford all believe that "the C-Leg is a better product than the Plié." (Ford, Tr. 1044). Ford also testified that, despite the fact that POA clinics fit Ottobock C-Legs "almost exclusively," that POA's prosthetists consider Össur's Rheo and Endolite's Orion 3 to be in the same category as the C-Leg as a microprocessor knee. (Ford, Tr. 1050).

1541. [redacted] (Blatchford (Endolite) Tr. 2170-171 (*in camera*)).

Response to Finding No. 1541:

It is misleading to suggest that Endolite has not been aggressive in the past year or that Endolite does not have definitive plans to get significantly more aggressive in the near future with respect to its MPK sales and R&D efforts. (*See* Response to CCFF ¶¶ 912, 920-923, 1536).

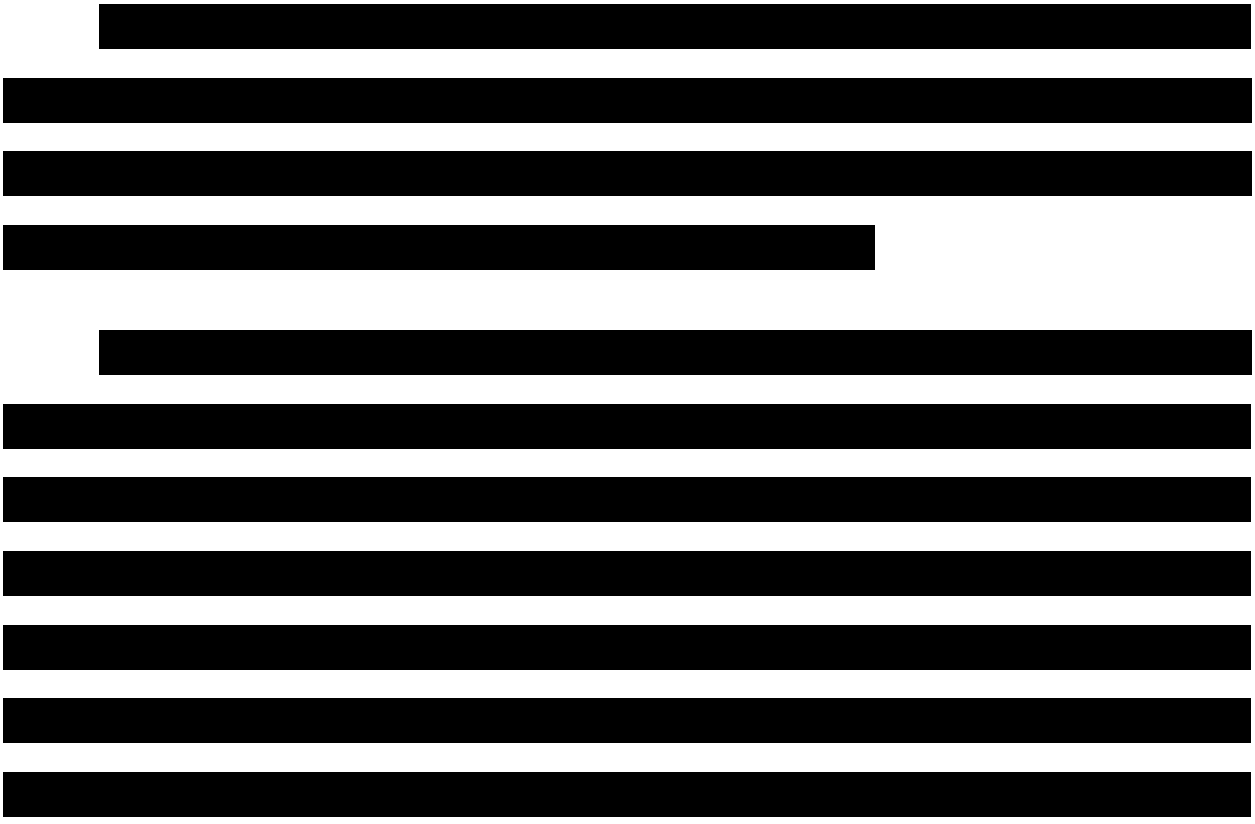
1542. Freedom's internal documents indicate that Endolite's Orion was not a major competitor. In particular, a Freedom regional sales manager noted that, despite Endolite's promotions, "the Orion is not a huge threat in my territory." (PX01700 (Freedom) at 001 (updating Freedom's Director of Field Sales and Clinical Training on Endolite promotion)).

Response to Finding No. 1542:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the record evidence. Complaint Counsel's proposed finding of fact is misleading because it relies only on a document from 2015, months before Endolite launched the Orion 3. (PX01700 at 001). Complaint Counsel's proposed finding of fact is unsupported by the record because direct evidence presented at trial overwhelming showed that [redacted]

Ottobock's head of mechatronic marketing in the United States testified at trial that "Endolite has improved a lot on their Orion product with that latest iteration of it, the Orion 3." (Solorio, Tr. 1647). Quality improvements to the Orion 3 and Endolite's increased trialing of the product have allowed Endolite to grow its market share and become a stronger competitor according to Ottobock's head of U.S. MPK marketing. (Solorio, Tr. 1647).

Endolite employs 900 people throughout the world, including approximately 80 people in the United States. (Blatchford, Tr. 2208, 2212-2213). Endolite's U.S. sales force consists of two regional sales managers, fifteen sales representatives and five clinical support specialists located across the country. (2212-2213, 2100-2101). Endolite's U.S. sales force is larger than Freedom Innovations' sales force prior to the Acquisition. (Testerman, Tr. 1077, 1114 (noting that Freedom had just 14 sales representatives at the time of Acquisition)).



[redacted]

1543. Mr. Senn of COPC testified that the company purchased only a few Endolite MPKs in 2017 because "the quality of the Plié or back up to the C-Leg 4 is greater than the Endolite knee." (Senn (COPC) Tr. 193-94).

Response to Finding No. 1543:

Complaint Counsel's proposed finding of fact is unsupported by the record evidence to the extent it relies on the testimony of Senn. Senn is not and never has been a prosthetist. (Senn, Tr. 152-154).) Senn does not work directly with prosthetists and does not provide any medical-related care to COPC's patients. (Senn, Tr. 152-154). When asked by Complaint Counsel at trial "Is there any specific feedback you've received regarding the Endolite Orion that's caused you not to try to shift more purchasing volume to it," Senn testified, "Not to my knowledge." (Senn, Tr. 225-226). Senn also testified that the Orion is on COPC's recommended list. (Senn, Tr. [redacted] 255; [redacted] Senn, Tr. 245-246). Most notably, Senn testified at his deposition and at trial as follows: "***The Orion I think is becoming more interchangeable as they improve that product***." (Senn, Tr. 256; PX05128 (Senn , Dep. at 107) (emphasis added).

Certified prosthetists with experience fitting many different types of MPKs consider the Orion 3 to be in the "sweet spot" for patients that would like an MPK, along with the Ottobock C-Leg 4, Össur Rheo, and Nabtesco Allux, but **not** the Plié 3 which is inferior. (Oros, Tr. 4876-4877; Sabolich, Tr. 5858-5859 (noting that the Orion 3 is the third-best option for an MPK after the Ottobock C-Leg 4 and Össur Rheo and qualifying that the Plié 3 is **not** a substitute for the Ottobock C-Leg 4, Össur Rheo, or Endolite Orion 3).

1544. 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." 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." (PX05168 (Sprinkle (Sprinkle Prosthetics) , Dep. at 60-61)).

Response to Finding No. 1544:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the record evidence. Complaint Counsel's proposed finding of fact is misleading the extent that Complaint Counsel is attempting to create an inference that the Orion 3 has issues similar to whatever products Sprinkle was using "seven to eight years" ago because, as Sprinkle testified, Endolite's MPKs "may have changed," and the overwhelming direct evidence in the case proves that it has changed. (*See* Responses to CCFF ¶¶ 1533-1537, above). Complaint Counsel's proposed finding of fact is unsupported by the record evidence because Sprinkle testified at his deposition that if Ottobock raised the price of the C-Leg by $1,000, he would switch patients to Endolite's Orion 3 or Össur's Rheo 3. (PX05168 (Sprinkle , Dep. at 140-141)).

1545. In an internal Freedom document entitled "Competitor Info: Plié 3 vs. Orion3," Freedom identifies several advantages of the Plié over the Orion, including the weight, height, batteries, and water exposure. Freedom indicates the Plié 3 as weighing "2.7 lbs/1.2 kg" compared to "3.3 lbs/1.5 kg" for the Orion 3. The document also lists the height of the Plié 3 as 235 mm compared to "244 mm (plus 7-14 mm for proximal attachment)" for the Orion 3. (PX01973 (Freedom) at 001).

Response to Finding No. 1545:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that the Plié 3 is superior to the Orion 3. PX01973 is a document for Freedom's sales team to use in the marketplace, so it is understandably biased relative to the Plié 3. (PX01973 at 001; Ferris, Tr. 2347-2349 (testifying that Freedom prepares battle cards to compare the Plié to the Orion and Rheo); Testerman, Tr. 1193 (testifying that Freedom uses battle cards to sell the Plié against the Orion 3, Rheo and C-Leg 4).

[redacted]

The impact of the Orion was also noted by Testerman in September 2016 when he notified his supervisor, Vice President of Sales, Jeremy Mathews, that "continued aggressive pricing from Endolite with the ORION (11k/knee)" was causing a "Plie decline." (RX-0277 at 01; Testerman, Tr. 1298 (testifying that "Endolite was taking a very aggressive approach in the pricing of their knee). Testerman, Freedom's Vice President of National and Key Accounts, testified further at trial that "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 [Orion]. And that was costing us business." (Testerman, Tr. 1298).

Further, Complaint Counsel's proposed finding of fact relies solely upon a single document, which was not used at trial and thus was not subject to cross-examination before the Court

1546. [redacted]

Response to Finding No. 1546:

Complaint Counsel's proposed finding of fact is totally unsupported by record evidence.

[redacted]

[redacted]

1547. [redacted]
(Blatchford (Endolite) Tr. 2178–79) (*in camera*)).

Response to Finding No. 1547:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

[redacted]

[redacted]

C. NABTESCO

1. Background on Nabtesco and Proteor Inc.

1548. Nabtesco does not sell its MPKs directly to prosthetic clinics in the United States. (PX03004 (Nabtesco) at 001) (explaining that Nabtesco has four distributors in the U.S.)).

Response to Finding No. 1548:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that Nabtesco's Allux MPK is not sold directly to prosthetic clinics in the United States. Before September 2018, Nabtesco's sales in the United States were made through four distributors, but those four distributors sold Nabtesco products directly to prosthetic clinics in the United States. (PX03004 at 001). In September 2018, Proteor, Inc., based in Arizona, entered into an exclusive distribution agreement with Nabtesco. (Mattear, Tr. 5510, 5521-5522, 5525-5526, 5546-5547). Pursuant to the new arrangement with Nabtesco, Proteor, Inc. exclusively sells Nabtesco's products, including the Allux MPK, directly to prosthetic clinics in the United States. (Mattear, Tr. 5521-5522, 5525-5526; RX-0896 at 002). Proteor, Inc. also acquired Ability Dynamics in June 2018, and through that acquisition, Proteor, Inc. now utilizes a sales force of eight people to sell Nabtesco products, including the Allux, directly to prosthetic clinics in the United States. (Mattear, Tr. 5527-5528). On September 20, 2018, Brad Mattear, Managing Director of Proteor, Inc., testified that in the days since entering into the exclusivity agreement with Nabtesco on September 1, 2018, Proteor, Inc. had already sold 8 Allux MPKs. (Mattear, Tr. 5518-5519, 5689). Further, Complaint Counsel's proposed finding of fact

relies solely upon a single document, which was not used at trial and thus was not subject to cross-examination before the Court.

1549. Previously, until September 2018, all of Nabtesco's sales in the United States were made through four distributors—Cascade Orthopedic Supply, Inc., Southern Prosthetic Supply, Inc. ("SPS"), PEL LLC, and Proteor, Inc. (PX03004 (Nabtesco) at 001; Mattear (Proteor Inc.) Tr. 5538-40, 5544-45).

Response to Finding No. 1549:

Complaint Counsel's proposed finding of fact is misleading, for the reasons Respondent sets forth in its Responses to CCFF ¶¶ 926 and 1548, above, and Respondent incorporates these responses by reference here.

1550. No one from Nabtesco testified at the trial or testified in a deposition. (Tr. 143-6895; JX002).

Response to Finding No. 1550:

Respondent has no specific response, but states it is misleading to attempt to create the inference that Nabtesco does not have a presence in the United States, which it does through its exclusive distribution agreement with Proteor, Inc. based in Arizona. (Mattear, Tr. 5510, 5521-5522, 5525-5526, 5546-5547; RX-0896 at 002).

1551. Proteor Inc. (d/b/a Nabtesco & Proteor in USA) ("Proteor Inc.") is a distributor of prosthetic and orthotic products manufactured by Proteor France and prosthetic knees manufactured by Nabtesco Corporation. (Mattear (Proteor Inc.) Tr. 5520-22).

Response to Finding No. 1551:

Respondent has no specific response.

1552. Proteor Inc. was formed in 2016. (Mattear (Proteor Inc.) Tr. 5538).

Response to Finding No. 1552:

Respondent has no specific response.

1553. Proteor Inc. is "owned a hundred percent by Proteor France." (Mattear (Proteor Inc.) Tr. 5712). Nabtesco Corporation does not own Proteor Inc. (Mattear (Proteor Inc.) Tr. 5714). Proteor Inc. does not own Nabtesco Corporation. (Mattear (Proteor Inc.) Tr. 5714).

Response to Finding No. 1553:

Respondent has no specific response.

1554. Starting September 1, 2018, Proteor, Inc. became the exclusive distributor of Nabtesco's prosthetic knees in the United States. (Mattear (Proteor Inc.) Tr. 5521, 5525, 5546-547). As of September 1, 2018, all sales of Nabtesco's prosthetic knees in the United States go through Proteor Inc. (Mattear (Proteor Inc.) Tr. 5526).

Response to Finding No. 1554:

Respondent has no specific response.

1555. Proteor France "manufacture[s] prosthetic knees, prosthetic feet, orthotic joints, materials for prosthetics." (Mattear (Proteor Inc.) Tr. at 5519-520). Proteor France does not manufacture an MPK. (Mattear (Proteor Inc.) Tr. 5541).

Response to Finding No. 1555:

Complaint Counsel's proposed finding of fact is misleading. Respondent has no specific response to Complaint Counsel's first sentence. Complaint Counsel's second sentence is misleading because it ignores the fact that [redacted]

1556. Proteor France is located in Dijon, France. Proteor France is a private, "family-owned company." (Mattear (Proteor Inc.) Tr. 5531-532).

Response to Finding No. 1556:

Respondent has no specific response except to the extent that Complaint Counsel is attempting to create an inference that Proteor France is not one of the largest prosthetics companies in the world. (Mattear, Tr. 5521, 5531-5533 (testifying that Proteor France is a global company, is the number one fitter of prosthetic and orthotic devices in France, is the manufacturer of thousands of prosthetics products, and has over 800 employees);- [redacted]; Blatchford, Tr. 2227-2228 (testifying that Proteor is a global prosthetics company)).

1557. Proteor Inc. sells prosthetic products to prosthetic clinics and distributors including Southern Prosthetic Supply, Cascade Orthopedic Supply, and PEL Supply. (Mattear (Proteor Inc.) Tr. 5522-523, 5716).

Response to Finding No. 1557:

Respondent has no specific response.

1558. Proteor Inc. makes less money when it sells to a distributor than when it sells directly to a clinic. (Mattear (Proteor Inc.) Tr. 5716).

Response to Finding No. 1558:

Respondent has no specific response.

1559. As of September 19, 2018, Proteor Inc. employed seven sales team members and a business development manager. (Mattear (Proteor Inc.) Tr. 5527, 5563).

Response to Finding No. 1559:

Complaint Counsel's proposed finding of fact is incomplete. As of April 6, 2018, Proteor, Inc. had only two salespeople selling prosthetic products, including the Allux, in the United States. (Mattear, Tr. 5563). As of September 19, 2018, Proteor, Inc. employs one salesperson that has remained with Proteor, Inc. and seven additional salespersons from Ability Dynamics, which

Proteor, Inc. acquired in June 2018. (Mattear, Tr. 5563; Testerman, Tr. 1278-1279). Four or five of Proteor, Inc.'s new salespeople have prior experience working for Freedom Innovations. (Mattear, Tr. 5566-5567; Testerman, Tr. 1277). According to Freedom Innovations' Vice President of Key and National Accounts, those four or five former Freedom salespeople have "extensive knowledge of microprocessor knees and the Plie" and have significant experience and relationships with large MPK customers. (Testerman, Tr. 1277). One of the new Proteor, Inc. sales people is Freedom's former National Sales Director. (Testerman, Tr. 1277).

Proteor, Inc. also employs a certified prosthetist, Craig Armstrong, who helps Proteor, Inc.'s sales force sell directly to prosthetic clinics in the United States. (Mattear, Tr. 5564-5566; Prince, Tr. 2831). Armstrong presented the Nabtesco Allux at the Hanger Education Fair in 2018, an opportunity to educate prosthetists from around the country on the features and benefits of the Allux. (Mattear, Tr. 5608; RX-0894). In addition to being a certified prosthetist, Armstrong is an above-the-knee amputee. (Prince, Tr. 2831). Before joining Proteor, Armstrong was a very experienced clinician and core Quattro development team member that was critical to the Quattro's development. (Prince, Tr. 2830-2831).

1560. No one at Proteor has any responsibility related to the research and development of MPKs at Nabtesco. (Mattear (Proteor Inc.) Tr. at 5717-718).

Response to Finding No. 1560:

Complaint Counsel's proposed finding of fact is misleading. Nabtesco Corporation in Japan has its own well-established research and development group that has a long, innovative history with respect to the development of MPKs. (Mattear, Tr. 5783-5784). 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).

Proteor France also has its own research and development group that is developing, among other products, the 1008 Complete Leg, which includes an MPK, for sale to prosthetic clinics in the United States. (Mattear, 5671-5672). Mattear expects the 1008 Complete Leg to be a "game changer" in the United States. (Mattear, Tr. 5682-5683).

Proteor, Inc. has its own research and development group that it acquired from Ability Dynamics, which developed and manufactures the RUSH foot, a very popular line of fiberglass feet. (PX05158 (Swain , Dep. at 9, 14; Mattear, Tr. 5518-5520; 5527-5528, 5555-5561; Testerman, Tr. 1278).

1561. [redacted] (Mattear (Proteor Inc.) Tr. 5646-647 (*in camera*)).

Response to Finding No. 1561:

Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel is attempting to create an inference that Proteor, Inc.'s Allux MPK sales [redacted]

[redacted]

[redacted]

2. Limited Sales of Nabtesco's MPKs

1562. [redacted] (PX06001A at 84 (Scott Morton Report) Table 7 (*in camera*)). [redacted] (PX06001A at 84 (Scott Morton Report) Table 7 (*in camera*)).

Response to Finding No. 1562:

Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel is attempting to create the inference that the number of Allux sales in 2016 and 2017 are indicative of the number of Alluxes sold in 2018 and in the future. Complaint Counsel's proposed finding ignores three significant market developments since 2017. [redacted]

1563. Nabtesco currently manufactures and sells three MPK products—the Intelligent Knee, the Hybrid Knee, and the Allux. (Mattear (Proteor Inc.) Tr. 5534).

Response to Finding No. 1563:

Complaint Counsel's proposed finding of fact is incomplete. Nabtesco currently manufactures three microprocessor knee products—the Intelligent Knee, the Hybrid Knee, and the Allux—as well as Sophisticated Non-MPKs, such as the Symphony knee, and Proteor, Inc. exclusively sells those products directly to prosthetics clinics in the United States. (PX05161 (Mattear , Dep. at 35)); Mattear 5521-5522, 5525-5526, 5534, 5543; RX-0896 at 002).

1564. [redacted] (PX03004 (Nabtesco) at 005).

Response to Finding No. 1564:

Respondent has no specific response except that those sales were made prior to Proteor, Inc.'s acquisition of Ability Dynamics and its experienced sales force and prior to Proteor, Inc. entering into an exclusivity agreement to sell Nabtesco products, including the Intelligent knee, in the United States. (Responses to CCFF ¶¶ 926-928). Further, Complaint Counsel's proposed finding of fact relies solely upon a single document, which was not used at trial and thus was not subject to cross-examination before the Court.

1565. [redacted] (Mattear (Proteor Inc.) Tr. 5721 (discussing PX03229) (Proteor Inc. Sales by Item Detail) (*in camera*)).

Response to Finding No. 1565:

Respondent has no specific response except that those sales of Nabtesco's Hybrid knee were made prior to Proteor, Inc.'s acquisition of Ability Dynamics and its experienced sales force

and prior to Proteor, Inc. entering into an exclusivity agreement to sell Nabtesco products, including the Intelligent knee, in the United States. (Responses to CCFF ¶¶ 926-928).

1566. [redacted] (PX03004 (Nabtesco) at 005).

Response to Finding No. 1566:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Between 2015 and June 2017, Nabtesco sold a beta version of the Allux in the United States via four different distributor partners. (Response to CCFF ¶ 926; RFOF ¶¶ 209, 871). In June 2017, Nabtesco released a full-launch model of the Allux in the United States, and in September 2018, Nabtesco and Proteor, Inc. entered into an exclusivity arrangement wherein Proteor, Inc. only sells Nabtesco products, including the Allux, directly to prosthetic clinics in the United States. (RFOF ¶¶ 209, 871; Response to CCFF ¶ 926). Sales of the Allux have been grown significantly as a result of these changes. (RFOF ¶ 914). [redacted] (RFOF ¶ 895).

1567. [redacted] (Mattear (Proteor Inc.) Tr. 5721 (discussing PX03229) (*in camera*)). [redacted] (Mattear (Proteor Inc.) Tr. 5722 (discussing PX03229) (*in camera*)).

Response to Finding No. 1567:

Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel's proposed finding ignores three significant market developments since 2017. [redacted]

[redacted]

1568. [redacted] (Mattear (Proteor Inc.) Tr. 5723 (discussing PX03229) (*in camera*)).

Response to Finding No. 1568:

Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel's proposed finding ignores three significant market developments since 2017. [redacted]

[redacted]

1569. [redacted] (Mattear (Proteor) Tr. 5725 (*in camera*)).

Response to Finding No. 1569:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Complaint Counsel's proposed finding ignores three significant market developments since 2017. [redacted]

1570. [redacted]
(Collins (Cascade) Tr. 3288-289 (*in camera*)).

Response to Finding No. 1570:

Respondent has no specific response except to note the fact that Proteor, Inc. is the exclusive distributor of Allux MPKs in the United States effective September 2018. (Mattear, Tr. 5521; 5525-5526; RX-0896; RX-0167; Mattear, Tr. 5546-5547).

1571. Stephen Blatchford, the Executive Chairman of Endolite, testified at trial that the Allux has a "very limited presence" and Endolite doesn't "come across it very much at all." (Blatchford (Endolite) Tr. 2150-151). [redacted]
(Blatchford (Endolite) Tr. 2163-164 (*in camera*)).

Response to Finding No. 1571:

Complaint Counsel's proposed finding of fact is misleading. Blatchford testified at trial on August 9 and 10, 2018, shortly after Proteor, Inc. acquired Ability Dynamics and prior to Proteor, Inc. entering into an exclusive distributor arrangement with Nabtesco Corporation. (Tr. 1922, 2206; Blatchford, Tr. 2227 (testifying that he was unfamiliar with the Nabtesco/Proteor, Inc. distribution arrangement); Mattear, Tr. 5521; 5525-5526; RX-0896; RX-0167; Mattear, Tr. 5546-5547).

Moreover, Blatchford testified at trial that the C-Leg 4, Össur Rheo, Freedom Plié, and Nabtesco Allux compete with the Endolite Orion 3 in the United States. (Blatchford, Tr. 2144). Blatchford also testified that he considers the Allux to be "quite a nice functioning knee." (Blatchford, Tr. 2227).

1572. [redacted] (PX00867 (Otto Bock) at 021 (*in camera*); Solorio (Otto Bock) Tr. 1603-04 (*in camera*)).

Response to Finding No. 1572:

Complaint Counsel's proposed finding of fact is misleading. [redacted] The full-launch model of the Allux was not released in the United States until June 2017. (RX-0346; Mattear, Tr. 5598-5599, 5775). At trial, Scott Schneider testified that Nabtesco's Allux is a "newcomer" on the US market. (Schneider, Tr. 4322). Schneider further testified that, with respect to Nabtesco's Allux, "we're getting reports back from customers that are using it" and those customers are noting that it is microprocessor-controlled swing and stance knee. (Schneider, Tr. 4368). Specifically, Schneider testified as follows:

> Q. Are you familiar with the functionality of Nabtesco's Allux product?
> A. I am.
> Q. Has Nabtesco's Allux been able to make inroads in the United States market within the last year?
> A. It has. The Allux product is very intriguing. They had used a distributor in the United States that was pretty small, but dedicated, and they have recently purchased the company Ability, which has a prosthetic foot which is called the RUSH, that has done a tremendous job marketing and has taken a lot of -- earned a lot of sales of their foot product. And now they have -- the Allux product will have a truly dedicated sales staff and aggressive marketing staff and many more feet on the street and people in the United States that will be marketing and selling the Allux product.
> Q. How is Otto Bock addressing Proteor Nabtesco's recent acquisition of Ability Dynamics?
> A. We're monitoring it.

(Schneider, Tr. 4400-4401).

1573. [redacted] (PX01025 (Freedom) at 008 (*in camera*)).

Response to Finding No. 1573:

Complaint Counsel's proposed finding of fact is misleading because, like CCFF ¶ 1572, Complaint Counsel relies on a [redacted] At trial, Freedom's Vice President of National and Key Accounts, Mark Testerman, testified that the "Introduction of the Allux by Nabtesco" was leading to a decline in Plié 3 sales in September 2016, and even this was before the full-launch of the Allux. (RX-0277 at 01; Testerman, Tr. 1297). Testerman further testified that the in-roads being made by the Allux "was a concern" at Freedom, and it was causing Freedom "some heartbreak," in particular because Freedom's former certified prosthetist Craig Armstrong was selling the Allux. (Testerman, Tr. 1297). Freedom's Vice President of Marketing and Product Development also testified at trial that the Nabtesco Allux was "making progress in the market." (Ferris, Tr. 2467; 2468 (noting that the introduction of the Nabtesco Allux was discussed at the highest levels at Freedom).

Dr. Prince of Freedom testified that Quattro's development team was benchmarking the Quattro's design specifications against the Nabtesco Allux, including its new battery extender and greater range of motion of 135 degrees. (Prince, Tr. 2696 (testifying that the Nabtesco Allux was the first MPK to introduce a battery extender), 2817 (testifying that the Quattro team benchmarked against the Nabtesco Allux), 2856 (testifying that Nabtesco's Allux offers greater flexion angle

than all other MPKs; RX-0266 at 01 (noting that Quattro's development team was incorporating innovative features of the Nabtesco Allux into the Quattro's design specifications).

3. Function and Design of Nabtesco's MPKs Prevent Them from Successfully Competing

1574. The microprocessor in Nabtesco's Hybrid MPK only controls the swing phase of a user's gait. (Mattear (Proteor Inc.) Tr. 5542). Nabtesco's Hybrid microprocessor knee manufactured by Nabtesco does not qualify for the MPK base L-Code, 5856. (PX05161 (Mattear (Proteor Inc.) , Dep. at 49-50).

Response to Finding No. 1574:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that L-Code L5856 is the base code for all MPKs. L5856 is the base code for microprocessor-controlled swing and stance phase knees. (JX001, ¶ 24; Schneider, Tr. 4350). Proteor, Inc. recommends that the Hybrid knee be reimbursed with code L5857 for swing-only microprocessor control, not L5856 for swing and stance microprocessor control. (Mattear, Tr. 5595).

1575. [redacted] (Mattear (Proteor Inc.) Tr. 5607; Mattear (Proteor Inc.) 5738-739 (*in camera*)). [redacted] (Mattear (Proteor Inc.) 5739-740 (*in camera*)).

Response to Finding No. 1575:

Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that Nabtesco and/or Proteor, Inc. determines what L-Codes its products "qualify" for. Nabtesco and Proteor, Inc. both recommend that prosthetics clinics not seek reimbursement for L5828 when they are seeking reimbursement for the Nabtesco Allux. (Mattear, Tr. 5738-5739).

Complaint Counsel's proposed finding of fact is also misleading to the extent Complaint Counsel is attempting to create an inference that the Nabtesco Allux cannot be reimbursed for additional L-codes that other MPKs cannot because of its revolutionary, four-bar technology. The Nabtesco Allux is the only four-bar MPK on the U.S. market, which gives the Allux a competitive advantage over all other MPKs. (Mattear, Tr. 5601). Nabtesco and Proteor, Inc. recommend the reimbursement for the Allux for the following L-Codes: L5856, L5613, L5845, and L5848. (Mattear, Tr. 5607; RX-0345 at 03). L-Code 5613 is recommended for the Allux's four-bar technology. (Mattear, Tr. 5629-5630). The difference between reimbursement for L-Code 5613 and reimbursement for L-Code 5828, on average, appears to be only a few hundred dollars. (RX-0898 at 001).

1576. Marketing material produced by Nabtesco Corporation lists a weight limit of 275 pounds. (Mattear (Proteor Inc.) Tr. 5607 (discussing RX-0345)).

Response to Finding No. 1576:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that the Allux's weight limit is materially different from other MPKs on the market in the United States. The weight limit for the Allux (275 pounds / 125 kilograms) is the same as the weight limit for the Endolite Orion 3 and the Freedom Innovations Plié 3, but less than the weight limit for the Össur Rheo and Ottobock C-Leg 4 (300 pounds / 136 kilograms). (RX-0898 at 01; RX-0345 at 03).

1577. [redacted] (Mattear (Proteor Inc.) Tr. 5731-32 (*in camera*)). [redacted] (Mattear (Proteor Inc.) Tr. 5733 (*in camera*)).

Response to Finding No. 1577:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the record evidence. Complaint Counsel's proposed finding of fact is misleading because the [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1578. [redacted] (Mattear (Proteor Inc.) Tr. 5738 (*in camera*)).

Response to Finding No. 1578:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that Brad Mattear has done any independent assessment of [redacted]

1579. Brad Mattear also testified that "[t]he most unique portion [of the Allux] being it's a four-bar MPK." (Mattear (Proteor Inc.) Tr. 5629). [redacted] (Mattear (Proteor Inc.) Tr. 5731 (*in camera*)).

Response to Finding No. 1579:

Respondent has no specific response except to add that the benefits of the Allux's four-bar technology include greater knee flexion for bending down and greater toe clearance which lowers the tendency that a user will stumble or fall. (Mattear, Tr. 5616-5617; RX-0894 at 008).

1580. According to Michael Oros, the President and CEO of Scheck & Siress, the Allux knee was designed for somebody with a very long residual" or more technically "a short floor to knee center height." Mr. Oros testified that the only time he's attempted to order an Allux was for a patient with a long residual limb characteristic. (Oros (Scheck & Siress) Tr. 4868-869).

Response to Finding No. 1580:

Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel is attempting to create an inference that the Nabtesco Allux is not also suitable for all K-3 and K-4 patients in the United States, because it is. [redacted]). Oros testified at trial that his clinic, Scheck & Siress has fit one or two patients with a Nabtesco Allux so far. (Oros, Tr. 4813). Oros testified that between 85 and 90 percent of Scheck & Siress's 57 MPK purchases last year were either Ottobock or Össur. (Oros, Tr. 4906-4907).

About 10 percent were either the Nabtesco Allux, Endolite Orion 3, or Freedom Plié 3. (Oros, Tr. 4906-4907). 10 percent of 57 total MPKs is 5.7 MPKs between Allux, Orion 3, and Plié 3, and Oros testified that one or two of those MPKs were the Nabtesco Allux. (Oros, Tr. 4906-4907).

1581. In the one instance he attempted to fit an Allux on a patient, Mr. Oros testified that he never received the MPK he ordered. (Oros (Scheck & Siress) Tr. 4868-869).

Response to Finding No. 1581:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that the "instance" described by Complaint Counsel happened since the full-launch of the Allux in June 2017, because it did not. Oros testified that he ordered an Allux back when he was still treating patients, which ended around September 2016, and he was unable to get the Allux to fit on his patient back at that time. (Oros, Tr. 4868-4869). Scheck & Siress has fit one or two patients with a Nabtesco Allux within the last year. (Oros, Tr. 4906-4907).

1582. [redacted] (Mattear (Proteor Inc.) Tr. 5728 (*in camera*)). [redacted] (Mattear (Proteor Inc.) Tr. 5732 (*in camera*)).

Response to Finding No. 1582:

Complaint Counsel's proposed finding of fact is misleading, unsupported by the record evidence, and a repeat of CCFF ¶ 1577. Complaint Counsel's proposed finding of fact is misleading because the [redacted]

[redacted]

1583. [redacted] (Mattear (Proteor Inc.) Tr. 5753 (*in camera*)).

Response to Finding No. 1583:

Complaint Counsel's proposed finding of fact is misleading for two reasons. First, Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is seeking to create an inference that 300 Allux unit sales would not have a meaningful impact on the U.S. market, which it would. Second, Complaint Counsel's proposed finding of fact is misleading because it ignores Mattear's qualifying testimony that the 300 Allux-per-year capacity testimony was accurate only "at the time" that Proteor, Inc. met with the FTC in 2018. (Mattear, Tr. 5753).

1584. [redacted] (Mattear (Proteor Inc.) Tr. 5753 (*in camera*)).

Response to Finding No. 1584:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1585. On June 21, 2017, Eric Ferris, the Vice President of Marketing and Product Development at Freedom, asked Lloyd Presswood, the Director of Field Sales and Clinical Training at Freedom, if there is "a clinical reason as to why a CP would choose a product like Allux versus P3? Other than price?" Mr. Presswood later responded that the Nabtesco Allux is a "piece of crap knee." (PX00811 (Freedom) at 001; *see also* Ferris (Freedom) Tr. 2356-358). [redacted] (PX05114 (Ferris (Freedom) , Dep. at 91-92) (*in camera*)).

Response to Finding No. 1585:

Complaint Counsel's proposed finding of fact is misleading and contrary to the record evidence. The email cited by Complaint Counsel reflects a June 2017 comment by Lloyd Presswood, who is not a prosthetist and is not involved in product development. (Ferris, Tr. 2356-2358; 2475-2476 (testifying that Presswood is a typical sales person and is "always making jokes")). Ferris testified that he and others at Freedom did not agree with Presswood's joking remark. (Ferris, Tr. 2475-2476).

At this same time, in June 2017, Ferris asked Tom Nomura about the competitive significance of the Nabtesco Allux. (PX00810 at 001). Tom Nomura is a certified prosthetist and the Director of Clinical Services at Freedom Innovations. (PX00810 at 001). Ferris testified at trial that he sent an email about the Allux to Nomura because "Allux was continuing to make noise in the market." (Ferris, Tr. 2474). Ferris' concern in the summer of 2017 is consistent with the full-launch of the Allux and with Testerman's concerns from the fall of 2016 that Allux was causing a decline in Plié 3 sales. (RX-0277). [redacted]

Direct evidence from Freedom shows that many of Freedom's top executives were seriously concerned by the inroads being made by the Allux. (RX-0277). 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).

[redacted]

4. Reputational Barriers for Nabtesco

1586. Brad Mattear, General Manager of O&P at Proteor Inc., testified that he does not know why a patient or prosthetist might want to buy a knee like the Hybrid knee. (Mattear (Proteor Inc.) Tr. 5596).

Response to Finding No. 1586:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that the reputation of the Hybrid knee is related to the reputation of the Nabtesco Allux. Mattear testified that the Hybrid knee is reimbursed with L-Code L5857 for swing-only microprocessor control. (Mattear, Tr. 5595). Complaint Counsel's proposed finding of fact is also misleading because it ignores Mattear's testimony that the Hybrid knee's battery charge lasts for a full year, which is "one reason that somebody could choose this knee." (Mattear, Tr. 5596-5597).

1587. [redacted] (Mattear (Proteor Inc.) Tr. 5744 (*in camera*)).

Response to Finding No. 1587:

Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel cites Mattear's trial testimony wherein Complaint Counsel was asking what Mattear testified about at his deposition back in the April of 2018. (Mattear, Tr. 5744). Mattear went on to testify that "Nabtesco has a wonderful reputation of a long history of producing quality prosthetic components," which included "microprocessor knees." (Mattear, Tr. 5783). Mattear also testified that Proteor, Inc. is improving Nabtesco's reputation in the industry through its exclusive distribution agreement, which was not entered into until well after Mattear was deposed. (Mattear, Tr. 5784).

1588. [redacted] (Mattear (Proteor) Tr. 5744-745 (*in camera*)).

Response to Finding No. 1588:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that reputation of the Nabtesco Allux has not grown significantly in the last year, because it has. Complaint Counsel's proposed finding of fact cites Mattear's testimony from his deposition in April 2018, before Proteor, Inc. acquired Ability Dynamics and before Proteor, Inc. entered into an exclusive agreement with Nabtesco. (Mattear Tr. 5744-5745 (repeating deposition testimony at trial). [redacted]

1589. Ms. Wise, the Sales and Marketing Director of Ohio Willow Wood, is not concerned about Cascade distributing both the Plié and Nabtesco's MPK because "Nabtesco is a very, very tiny fraction of what the Plié sells. They're a small company." (PX05152 (Wise (Willow Wood) , Dep. at 72)).

Response to Finding No. 1589:

Complaint Counsel's proposed finding of fact is misleading and unreliable. Complaint Counsel's proposed finding of fact is unreliable because Wise is the Chief Marketing Officer at the Ohio Willow Wood Company. (PX05152 (Wise , Dep. at 4)). Wise is not a prosthetist and does not purchase MPKs for prosthetics clinics. (PX05152 (Wise , Dep. at 4)).

Complaint Counsel's proposed finding of fact is misleading because Wise provided testimony on April 4, 2018, well before Proteor, Inc. purchased Ability Dynamics and entered into

an exclusive arrangement with Nabtesco to sell its products in the United States. (PX05152 (Wise , Dep. at 1)). Complaint Counsel did not call Wise to testify at trial.

1590. [redacted] (Carkhuff (Freedom) Tr. 447 (*in camera*)).

Response to Finding No. 1590:

Complaint Counsel's proposed finding of fact is vague, misleading, and contrary to direct evidence. Complaint Counsel's proposed finding of fact is vague because it is unclear from the testimony what [redacted] (Carkhuff, Tr. 447). Complaint Counsel's proposed finding of fact is misleading because Carkhuff was replaced as CEO in April 2016, before the full-launch of the Nabtesco Allux in June 2017. (Carkhuff, Tr. 292).

Complaint Counsel's proposed finding of fact is contrary to direct evidence because Ferris testified that Freedom did analyze the degree to which the Allux was competing in the U.S. market. (Ferris, Tr. 2468 (testifying that Freedom saw the Allux "gaining momentum" and "starting to get more trials" and "starting to get more I think really share of voice when you look at them from a marketing perspective, so we were looking at them"). Ferris also testified that in 2017, the Allux was "continuing to make noise in the [U.S.] market." (Ferris, Tr. 2474; PX00810). Freedom's Vice President of National and Key Accounts also testified that the introduction of the Allux in the U.S. market was causing a decline in Plié 3 sales. (RX-0272 at 01; Testerman, Tr. 1296-1298 (noting that the Allux was causing Freedom "heartbreak"). Testerman also testified:

> Q. During your time in sales at Freedom Innovations, has Freedom created sales strategies targeting the Nabtesco Allux?
> A. We have discussed that. It's relatively new to the market coming up, so yes, we have.

(Testerman, Tr. 1267-1268).

1591. [redacted] (Asar (Hanger) Tr. 1490 (*in camera*)).

Response to Finding No. 1591:

Complaint Counsel's proposed finding of fact is unreliable and misleading. Complaint Counsel's proposed finding of fact is unreliable because Vinit Asar is the President and CEO of Hanger, the third-party that complained to the FTC about the Acquisition. (CCFF ¶ 115). Complaint Counsel's proposed finding of fact is also unreliable because Asar testified that he is not a prosthetist and is not involved in patient care. (Asar, Tr. 1392).

Complaint Counsel's proposed finding of fact is misleading because Asar also testified at trial that Hanger invited Proteor, Inc. to do a presentation on the Nabtesco Allux at the Hanger Education Fair in 2018. (Asar, Tr. 1491-1492; RX-0894). Mattear testified that Proteor, Inc.'s Craig Armstrong, a certified prosthetist and above-the-knee amputee, was one of the presenters at the Hanger Education Fair. (Mattear, Tr. 5608; RX-0894). The other presenter for Proteor, Inc. was Akio Sakata, also a certified prosthetist. (Mattear, Tr. 5608).

1592. Mr. Sabolich, the owner and Clinical Director of Scott Sabolich Prosthetics and Research, testified that his clinic hasn't fit an Allux MPK and characterized it as a "very janky knee." He explained, "We were introduced to [the Allux]. We had a practitioner who was very interested in using one, but it seemed – I hate to overuse the word 'janky,' but it was a very janky knee." (Sabolich (Scott Sabolich Prosthetic and Research) Tr. 5861, 5889).

Response to Finding No. 1592:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel's proposed finding of fact attempts to create an inference that Sabolich's clinic has actually fit a Nabtesco Allux or that any of Sabolich's patients have ever worn an Allux and provided feedback to Sabolich about the Allux. (Sabolich, Tr. 5861, 5889, 6050-6051).

5. Customers and Other Industry Participants Testified that Nabtesco Is Unable to Compete Successfully Against Freedom and Otto Bock

1593. Several clinic customers testified that they are not familiar with MPKs manufactured by Nabtesco. (*See, e.g.*, PX05168 (Sprinkle (Sprinkle Prosthetics) , Dep. at 61); PX05151 (Patton (Prosthetic Solutions) , Dep. at 32); PX05149 (Brandt (Ability Prosthetics & Orthotics) , Dep. at 241-42); PX05167 (Filippis (Wright & Filippis) , Dep. at 115:12-17)).

Response to Finding No. 1593:

Complaint Counsel's proposed finding of fact is misleading. Each of the clinic customers' depositions cited by Sprinkle occurred before Proteor, Inc. acquired Ability Dynamic and before Proteor, Inc. entered into an exclusive distribution agreement with Nabtesco. (PX05168 (Sprinkle , Dep. at 1) (dated April 18, 2018); PX05151 (Patton , Dep. at 1) (dated April 4, 2018); PX05149 (Brandt , Dep. at 1) (dated April 4, 2018); PX05167 (Filippis , Dep. at 1) (dated April 1, 2018). Brandt is the only customer that Complaint Counsel called to testify at trial, and he was clear that he has not treated a patient since 2012; therefore his testimony regarding the competitive significance of Nabtesco's Allux is particularly unreliable. (Brandt, Tr. 3791).

Several clinic customers testified at trial that they are more familiar with the Allux in 2018 than they had been previously. (Oros, Tr. 4811, 4813 (testifying that Scheck & Siress has recently fit 1 or 2 Allux knees), 4815-4816; Sabolich, Tr. 5889 (testifying that his clinic has been introduced to the Allux), 5890-5891; PX03287 at 01). The President and CEO of Scheck & Siress, a prosthetic clinic with 15 locations in the Midwest, testified at trial that he was not familiar with the Allux at his deposition on March 29, 2018, (PX05134 (Oros , Dep. at 134-135)) but that Scheck & Siress has fit 1 or 2 patients with the Allux since that time. (Oros, Tr. 4813, 4866-4867). Vinit Asar, the CEO of Hanger, the largest prosthetics clinic in the United States, testified at trial that Hanger invited Proteor, Inc. to do a presentation on the Nabtesco Allux at the Hanger Education Fair in 2018. (Asar, Tr. 1491-1492; RX-0894).

1594. Jeff Sprinkle, the owner of Sprinkle Prosthetics, testified in April 2018 that he had never heard of Nabtesco as a manufacturer. (PX05168 (Sprinkle (Sprinkle Prosthetics) , Dep. at 61)).

Response to Finding No. 1594:

Complaint Counsel's proposed finding of fact is misleading and repetitive of CCFF ¶ 15

(*See* Response to CCFF ¶ 1593).

1595. 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. (PX05151 (Patton (Prosthetic Solutions) , Dep. at 32)).

Response to Finding No. 1595:

Complaint Counsel's proposed finding of fact is misleading and repetitive of CCFF ¶ 15

(*See* Response to CCFF ¶ 1593).

1596. 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." (PX05149 (Brandt (Ability) , Dep. at 241-242)).

Response to Finding No. 1596:

Complaint Counsel's proposed finding of fact is misleading and repetitive of CCFF ¶ 15

(*See* Response to CCFF ¶ 1593).

1597. Anthony Filippis, the CEO of Wright & Filippis, testified in April 2018 that he had never heard of the company Nabtesco or the Allux MPK. (PX05167 (Filippis (Wright & Filippis) , Dep. at 115)).

Response to Finding No. 1597:

Complaint Counsel's proposed finding of fact is misleading and repetitive of CCFF ¶ 15

(*See* Response to CCFF ¶ 1593).

1598. 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. He further elaborated that COPC did not have any plans to shift purchases of MPKs from Freedom to Nabtesco. (Senn (COPC) Tr. 194).

Response to Finding No. 1598:

Complaint Counsel's proposed finding of fact is unreliable and misleading. Complaint Counsel's proposed finding of fact is unreliable because Senn is not and never has been a prosthetist. (Senn, Tr. 152-154).) Senn does not work directly with prosthetists and does not provide any medical-related care to COPC's patients. (Senn, Tr. 152-154).

Senn testified only that COPC does not have plans to shift purchases of MPKs from Freedom to Nabtesco "at this time"; Senn did not testify that COPC would be unwilling or precluded from doing so in the future (Senn, Tr. 194).

1599. 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, e.g.*, Ford (POA) Tr. 959; PX05141 (Bright (North Bay) , Dep. at 87-88)).

Response to Finding No. 1599:

Complaint Counsel's proposed finding of fact is misleading. Complaint Counsel's proposed finding of fact is based only on the testimony of two third-parties. The first third-party, Ford, is not a prosthetist, has never been a prosthetist, and is not personally involved in providing patient care. (Ford, Tr. 918-919). The second third-party, Bright, provided deposition testimony in April 2018, well before Proteor, Inc. acquired Ability Dynamics and before Proteor, Inc. entered into an exclusive arrangement with Nabtesco, and Bright did not testify at trial. (PX05141 (Bright , Dep. at 1)). At his deposition, Bright stated that his clinic had only tried one Nabtesco Allux that did not work properly. (PX05141 (Bright , Dep. at 87-88)).

1600. 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." (PX05141 (Bright (North Bay) , Dep. at 87-88)).

Response to Finding No. 1600:

Complaint Counsel's proposed finding of fact is misleading and duplicative of CCFF ¶ 1599. Complaint Counsel's proposed finding of fact is misleading to the extent that Complaint Counsel relies on a single trial fitting to suggest that the full-launch version of the Nabtesco Allux has reliability concerns. (PX05141 (Bright, Dep. at 87-88) (testifying that North Bay Prosthetics trialed the Allux "one time")).

1601. 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." (Ford (POA) Tr. 959).

Response to Finding No. 1601:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the evidence. It is misleading because it relies exclusively on the testimony of Ford, who is not a prosthetist, has never been a prosthetist, and is not personally involved in providing patient care. (Ford, Tr. 918-919). This proposed finding is also misleading to the extent Complaint Counsel is attempting to create an inference that POA's lack of Allux purchases shows that the Allux is less competitive than the Freedom Plié 3. [redacted]

1602. 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." (Ford (POA) Tr. 958).

Response to Finding No. 1602:

Complaint Counsel's proposed finding of fact is misleading and unsupported by the evidence. It is misleading because it relies exclusively on the testimony of Ford, who is not a prosthetist, has never been a prosthetist, and is not personally involved in providing patient care. (Ford, Tr. 918-919). This proposed finding is also misleading to the extent Complaint Counsel is attempting to create an inference that Freedom's "level of service and technical support" have led to POA purchasing the Freedom Plié 3. [redacted]

1603. [redacted] (PX04002 at 002 (Marquette (DAW) Decl. ¶ 7)(*in camera*)).

Response to Finding No. 1603:

Complaint Counsel's proposed finding of fact is misleading, vague, and unsupported by the record evidence. It is misleading because Marquette is not a prosthetist or a clinic customer and his declaration was executed in December 2017 before Proteor, Inc. acquired Ability Dynamics and entered into an exclusive arrangement with Nabtesco Corporation. (PX04002 at 001-002 (Marquette Decl. ¶ 1)). The references to "technology" and "Nabtesco microprocessor knees" are vague because Nabtesco makes several types of MPKs, but Marquette does not specify whether he is referring to the Hybrid Knee, Intelligent Knee, or Allux knee. (PX04002 at 002 (Marquette Decl. ¶ 7)).

Complaint Counsel's proposed finding of fact is also unsupported by the record. Complaint Counsel's proposed finding of fact relies solely upon a single document, which was not used at trial and thus was not subject to cross-examination before the Court. Indeed, executives from Freedom Innovations, Ottobock, Össur, and Endolite who testified at trial all consider Nabtesco's Allux to be a sophisticated product that competes with the C-Leg 4, Rheo, Orion 3, and Plié 3. (Testerman, Tr. 1267-1268; Schneider, Tr. 4323, 4368; Blatchford, Tr. 2144, 2227 (testifying that he considers the Allux to be "quite a nice functioning knee"); DeRoy, Tr. 3582, 3595).

1604. [redacted] (PX01762 (Otto Bock) at 049 (*in camera*); *see also* Schneider (Otto Bock) Tr. 4687) (*in camera*)).

Response to Finding No. 1604:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is trying to create an inference that Ottobock did not recognize the competitive significance of the launch of the Allux because it did not appear on a PowerPoint slide. [redacted]

[redacted]

D. DAW INDUSTRIES

1. Background on DAW Industries

1605. DAW Industries sells prosthetic components, including MPKs, in the United States. (JX001 at ¶ 40).

Response to Finding No. 1605:

Respondent has no specific response.

1606. DAW serves as a distributor of the MPKs it sells. A company named Teh Lin located in Taipei, Taiwan manufactures the MPKs that DAW distributes. (PX05146 (Marquette (DAW) , Dep. at 15-17)).

Response to Finding No. 1606:

Respondent has no specific response.

1607. No one from DAW testified at the trial. (Tr. 143-6895).

Response to Finding No. 1607:

Respondent has no specific response.

1608. No one from The Lin testified at the trial or testified in a deposition. (Tr. 143-6895; JX002).

Response to Finding No. 1608:

Respondent has no specific response.

2. DAW Has Minimal Sales in the United States

1609. [redacted] (PX04002 at 002 (Marquette (DAW) Decl. ¶ 7)(*in camera*)).

Response to Finding No. 1609:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a single document, which was not used at trial and thus was not subject to cross-examination before the Court.

1610. [redacted] (PX04002 at 001-02 (Marquette (DAW) Decl.) (*in camera*)).

Response to Finding No. 1610:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a single document, which was not used at trial and thus was not subject to cross-examination before the Court.

1611. Stephen Blatchford, the Executive Chairman of Endolite, testified at trial in August 2018 that he only had familiarity with DAW "[t]o a limited extent." Mr. Blatchford could not remember the name of any DAW MPKs, and testified that DAW's MPKs have "[v]ery little" presence in the United States. (Blatchford (Endolite) Tr. 2151).

Response to Finding No. 1611:

Respondent has no specific response.

1612. Stephen Blatchford testified in August 2018 that the price of the DAW MPKs has no impact on Endolite's pricing of the Orion 3 in the United States. Mr. Blatchford also testified that customers do not raise DAW's MPK in pricing negotiations with Endolite. (Blatchford (Endolite) Tr. 2164 (*in camera*)).

Response to Finding No. 1612:

Respondent has no specific response.

1613. [redacted] (PX00867 (Otto Bock) at 021 (2018 Prosthetics Roadmap to Success: North America Marketing & Sales Plan) (*in camera*); Solorio (Otto Bock) Tr. 1605 (*in camera*)).

Response to Finding No. 1613:

Respondent has no specific response.

3. Clinic Customers Are Unfamiliar or Unwilling to Fit DAW MPKs

1614. [redacted] (Senn (COPC) Tr. 191; Ell (Mid-Missouri) Tr. 1730-731; Sabolich (Scott Sabolich Prosthetic and Research) Tr. 5889; Oros (Scheck & Siress) Tr. 4811 (*in camera*); Ford (POA) Tr. 955; Brandt (Ability) Tr. 3763-764; Asar (Hanger) Tr. 1380-381 (*in camera*)).

Response to Finding No. 1614:

Complaint Counsel's proposed finding of fact is misleading to the extent Complaint Counsel is attempting to create an inference that clinic customers in the United States do not play DAW's MPKs off of other prosthetic knee suppliers. [redacted]

1615. [redacted] (*See, e.g.*, Ford (POA) Tr. 958; Ell (Mid-Missouri) Tr. 1736; Oros (Scheck & Siress) Tr. 4811 (*in camera*); Sabolich (Scott Sabolich Prosthetics and Research) Tr. 5891; PX05108 (Yates (Jonesboro) , Dep. at 57-58, 64) (*in camera*); PX05149 (Brandt (Ability) , Dep. at 243-44)).

Response to Finding No. 1615:

Respondent has no specific response.

1616. [redacted] (PX05108 (Yates (Jonesboro) , Dep. at 57-58, 64) (*in camera*); PX05135 (Weber (Prosthetic & Orthotic Care) , Dep. at 64-65); PX05140 (Weott (Orthotic Prosthetic Center) , Dep. at 35-36)); PX05141 (Bright (North Bay) , Dep. at 203); PX05151 (Patton (Prosthetic Solutions) , Dep. at 116); PX05166 (Watson (Fourroux) , Dep. at 173) (*in camera*); PX05167 (Filippis (Wright & Filippis) , Dep. at 115-16); PX05168 (Sprinkle (Sprinkle Prosthetics) , Dep. at 58-59)).

Response to Finding No. 1616:

Respondent has no specific response.

1617. Only one witness, who was deposed but did not appear at the trial, Curt Patton from Prosthetic Solutions, testified that his clinic had ever fit a DAW MPK. Prosthetic Solutions fit the DAW MPK "more than 10 years ago." (PX05151 (Patton (Prosthetic Solutions) , Dep. at 116)).

Response to Finding No. 1617:

Respondent has no specific response.

1618. [redacted] (PX05108 (Yates (Jonesboro) , Dep. at 64) (*in camera*)).

Response to Finding No. 1618:

Respondent has no specific response.

1619. [redacted] (Asar (Hanger) Tr. 1395 (*in camera*)).

Response to Finding No. 1619:

Respondent has no specific response.

1620. 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. (*See, e.g.*, Ford (POA) Tr. 957-958; Ell (Mid-Missouri) Tr. 1736; PX05129 (Ell (Mid-Missouri) , Dep. at 78); PX05140 (Weott (Orthotic Prosthetic Center) , Dep. at 35-36)).

Response to Finding No. 1620:

Respondent has no specific response.

1621. Mark Ford, President of Prosthetic and Orthotic Associates, testified that his "experience with DAW is very negative." Specifically, POA has "had struggles with them standing up with their warranties of their products. We've bought a limited number of products from them, and we struggle with timely shipping and we struggle with support of their warranties." (Ford (POA) Tr. 957-958).

Response to Finding No. 1621:

Respondent has no specific response.

1622. Mr. Ford added, DAW is "very aggressive with their telemarketing" and will make a call claiming "it's an emergency and get our clinicians to come out of the room with a patient and it's really a sales call. So our clinicians are not big fans of interacting with DAW." (Ford (POA) Tr. 958).

Response to Finding No. 1622:

Respondent has no specific response.

1623. Tracy Ell of Mid-Missouri O&P testified that DAW "has extremely rude and aggressive marketing principles." (Ell (Mid-Missouri) Tr. 1736).

Response to Finding No. 1623:

Respondent has no specific response.

1624. Mark Testerman, the Vice President of National and Key Accounts at Freedom, testified in August 2018 that he did not know the name of DAW's MPK. (Testerman (Freedom) Tr. 1264).

Response to Finding No. 1624:

Respondent has no specific response.

1625. Jeffrey Brandt, the CEO of Ability Prosthetics and Orthotics, testified in April 2018 that he was "not really" familiar with DAW's MPKs and no one at Ability well-versed in MPKs had mentioned them to him. Mr. Brandt explained that individuals at Ability would have brought DAW MPKs to his attention if they were on the caliber of the C-Leg, Plié, or the Rheo because "that's what they're supposed to do is just make sure they're aware of clinical options out there for the patients." (PX05149 (Brandt (Ability) , Dep. at 243-244)).

Response to Finding No. 1625:

Respondent has no specific response.

1626. Paul Weott, the owner of Orthotic Prosthetic Center, Inc., testified in March 2018 that he was "100 percent sure" his clinic had never fit a DAW MPK. He explained, "I don't know if I've ever seen one, and that's a – it's a personal thing. DAH (sic) is an odd company that markets very aggressively, and it tends to turn everybody off." Mr. Weott also testified that he "just never liked their products, and most of our practitioners – and I don't know if it's the area or what, but we just never have bought a lot of DAH (sic) products. They just never seemed to fit into our model." (PX05140 (Weott (Orthotic Prosthetic Center) , Dep. at 35-36)).

Response to Finding No. 1626:

Respondent has no specific response.

XI. NEW ENTRY WOULD NOT BE TIMELY, LIKELY, OR SUFFICIENT TO CONSTRAIN THE MERGER'S ANTICOMPETITIVE EFFECTS

A. LAUNCH OF A NEW MPK WOULD NOT BE TIMELY

1. MPK Development Takes Several Years

a) Length of Time Required by Respondent to Develop its MPKs

(1) Otto Bock

1627. Otto Bock manufactures and markets the C-Leg 4, the fourth generation microprocessor knee for the C-Leg product line. [redacted]

[redacted]

Response to Finding No. 1627:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1628. Andreas Eichler, Otto Bock's Head of the Prosthetics Lower Limb Mechatronic Systems business unit, acknowledged that "alterations on a microprocessor-guided knee can take up to two years, sometimes even three to four" and that "[o]ne could even say that the C-Leg 4 has been developed since 1997 up to today" with the introduction of the first C-Leg in 1997. (PX05133 (Eichler (Otto Bock)) , Dep. at 114).

Response to Finding No. 1628:

Complaint Counsel's proposed finding of fact is based upon an individual who did not testify at trial. Indeed, Schneider, who did testify at trial, [redacted]

1629. [redacted]

Response to Finding No. 1629:

Respondent has no specific response.

1630. According to Otto Bock, in addition to the time it takes to develop a microprocessor knee, a manufacturer of microprocessor knees would be required to develop a sales force, qualify for reimbursement, and undergo multiple phases of product testing, among other requirements, in order to successfully launch an MPK. (PX05133 (Eichler (Otto Bock) , Dep. at 115-116).

Response to Finding No. 1630:

Complaint Counsel's proposed finding of fact is incorrect and misleading. First, this proposed finding of fact attempts to attribute testimony from a single individual to Ottobock as a whole. Second, Eichler was testifying regarding microprocessor-guided knees as a whole, based upon his experience. (PX05133 (Eichler, Dep. at 115)). Eichler admits that he is "not an expert in the field." (PX05133 (Eichler, Dep. at 115)). Eichler also testified that he does not believe that a minimum or maximum number of salespeople are required. (PX05133 (Eichler, Dep. at 115)).

(2) Freedom

1631. Freedom manufactures and markets the Plié 3, the third generation microprocessor knee for the Plié product line. It took approximately three years for Freedom to develop the original Plié and a further three years to develop the second generation Plié 2. (Carkhuff (Freedom) Tr. 361-362; PX05007 (Carkhuff (Freedom) IHT at 155-56, 297-300)).

Response to Finding No. 1631:

Complaint Counsel's proposed finding of fact misstates witness testimony. While Carkhuff testified that it took Freedom three years to develop the Plié 1 before its launch in 2007, he did not testify that it took a further three years to develop the second generation Plié 2, as Complaint Counsel suggests. (Carkhuff, Tr. 361). Carkhuff testified that the original Plié was launched in 2007, the Plié 2 was launched in 2010, and the Plié 3 was launched in 2014. (Carkhuff, Tr. 361). He does not state the development time required for the Plié 2.

1632. Freedom's Chairman, Maynard Carkhuff, testified that it took approximately six years, from the development of the Plié 1 to the launch of the Plié 2, before Freedom had a product that could compete effectively in the MPK market, and a reputation to support it. (PX05007 (Carkhuff (Freedom) IHT at 299-300)).

Response to Finding No. 1632:

Complaint Counsel's proposed finding of fact mischaracterizes witness testimony. Carkhuff also noted that "I would say, just for clarity, that we launched the Plié 1 and marketed it

for three years, '07, '08, and '09, and during the late stages of that time, we realized that there were product shortcomings in the design and that we had a full-court press, and in approximately a year, we redesigned and launched the product in 2010." (PX05007 (Carkhuff, IHT at 299)). Carkhuff further refuted the notion that Freedom did not have a product that could compete effectively when he testified at trial that "[t]he engineers were developing a product that was a microprocessor-controlled stance as opposed to swing and stance," and that "it was designed intentionally as a different product." (Carkhuff, Tr. 362).

1633. Freedom began the development of its fourth microprocessor knee, the Quattro, in the third quarter of 2015. (PX05007 (Carkhuff (Freedom) IHT at 245)). [redacted]

Response to Finding No. 1633:

Respondent has no specific response.

1634. [redacted]

Response to Finding No. 1634:

Complaint Counsel's proposed finding of fact is misleading [redacted]

b) Length of Time Required by Other Manufacturers to Develop MPKs

1635. [redacted] (Blatchford (Endolite) Tr. 2172-73 (*in camera*); De Roy (Ossur) Tr. 3613-14 (*in camera*)).

Response to Finding No. 1635:

Complaint Counsel's proposed finding of fact is inaccurate because it misstates the testimony. [redacted] The Linx is an Integrated Leg System. (Blatchford, Tr. 2110). [redacted]

(1) Össur

1636. [redacted]

Response to Finding No. 1636:

Respondent has no specific response.

1637. [redacted] (De Roy (Ossur) Tr. 3617-18 (*in camera*)).

Response to Finding No. 1637:

Complaint Counsel's proposed finding of fact is misleading because Complaint Counsel fails to mention that it is based entirely on DeRoy's own experience. Further, DeRoy was not testifying regarding all MPKs; his testimony was that [redacted]

1638. [redacted] (De Roy (Ossur) Tr. 3624-25 (*in camera*)).

Response to Finding No. 1638:

Complaint Counsel's proposed finding of fact is misleading. DeRoy testified that [redacted]

(2) Endolite

1639. [redacted] (Blatchford (Endolite) Tr. 2172).

Response to Finding No. 1639:

Respondent has no specific response.

1640. [redacted] (Blatchford (Endolite) Tr. 2173 (*in camera*)).

Response to Finding No. 1640:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1641. [redacted] (Blatchford (Endolite) Tr. 2174 (*in camera*)).

Response to Finding No. 1641:

Complaint Counsel's proposed finding of fact misstates the testimony [redacted]

[redacted]

1642. [redacted] (PX04001 (Blatchford (Endolite) Decl. at ¶ 9) (*in camera*)).

Response to Finding No. 1642:

Complaint Counsel's proposed finding of fact is inaccurate because it misstates the testimony. [redacted] The Linx is an Integrated Leg System. (Blatchford, Tr. 2110). [redacted]

2. MPKs in Development Are Not on Track to Launch for Many Years

1643. Other prosthetic manufacturers and third parties interested in developing an MPK predict entry into the United States market will take at least another five years. (*See* PX04003 at 001 (Sun (BionicM), Decl.); PX05117 (Choi (ST&G) , Dep. at 95)).

Response to Finding No. 1643:

Complaint Counsel's proposed finding of fact relies on a document that was never presented at trial and thus was not subject to cross examination before the Court. Complaint Counsel's proposed finding of fact is also misleading because it refers to BionicM as an "other prosthetic manufacturer[] and third part[y]." BionicM has never sold a prosthetic knee, or any

other product. (PX04003 at 001 (Sun, Decl. ¶ 1)). It is a student team consisting of three graduate students and a faculty member at the University of Tokyo. (PX04003 at 001 (Sun, Decl. ¶ 1)).

a) BionicM's SuKnee

1644. BionicM is a student-research team at the University of Tokyo that began a research project to develop an MPK, named the SuKnee, in approximately 2016. (PX04003 (Sun (BionicM) Decl. at ¶¶ 1-2)).

Response to Finding No. 1644:

Complaint Counsel's proposed finding of fact relies on a document that was never presented at trial and thus was not subject to cross examination before the Court. Complaint Counsel's proposed finding of fact is also misleading and misstates the record. BionicM has never sold a prosthetic knee, or any other product. (PX04003 at 001 (Sun, Decl. ¶ 1)). It is a student team consisting of three graduate students and a faculty member at the University of Tokyo. (PX04003 at 001 (Sun, Decl. ¶ 1)). Further, the affidavit of Xiajun Sun, PhD candidate at the University of Tokyo, states that his research has included "the design of a mechanically powered microprocessor knee, named the 'Suknee.'" (PX04003 at 001 (Sun, Decl. ¶ 2)). The affidavit does not state whether other members of the team are assisting Sun in this research. (See PX04003 at 001 (Sun, Decl.)). While Complaint Counsel's proposed finding of fact states that BionicM's research project is to "develop an MPK," this goal is not stated anywhere within Sun's affidavit. (See PX04003 at 001 (Sun, Decl.)). Further, the affidavit does not state the goal of this research project, including whether Sun has any plans to actually develop, manufacture, or otherwise create an MPK. (See PX04003 at 001 (Sun, Decl.)).

1645. As of March 2018, BionicM had not finished developing a prototype for the SuKnee. (PX04003 (Sun (BionicM) Decl. at ¶ 2)).

Response to Finding No. 1645:

Complaint Counsel's proposed finding of fact relies on a document that was never presented at trial and thus was not subject to cross examination before the Court. Complaint Counsel's proposed finding of fact is also misleading. BionicM has never sold a prosthetic knee or any other product. (PX04003 at 001 (Sun, Decl. ¶ 1)). It is a student team consisting of three graduate students and a faculty member at the University of Tokyo. (PX04003 at 001 (Sun, Decl. ¶ 1)). Further, the affidavit of Xiajun Sun, PhD candidate at the University of Tokyo, states that his research has included "the design of a mechanically powered microprocessor knee, named the 'Suknee.'" (PX04003 at 001 (Sun, Decl. ¶ 2)). The affidavit does not state whether other members of the team are assisting Sun in this research. (*See* PX04003 at 001 (Sun, Decl.)). While Complaint Counsel's proposed finding of fact states that BionicM's research project is to "develop an MPK," this goal is not stated anywhere within Sun's affidavit. (*See* PX04003 at 001 (Sun, Decl.)). Further, the affidavit does not state the goal of this research project, including whether Sun has any plans at all to actually develop, manufacture, or otherwise create an MPK. (*See* PX04003 at 001 (Sun, Decl.)).

1646. The project leader for BionicM, Xiaojun Sun, does not expect to have a SuKnee ready for commercial use for several years. (PX04003 (Sun (BionicM) Decl. at ¶ 3)). Xiaojun Sun believes the "process required to begin selling the SuKnee in the United States would take a long time, maybe even more than a decade." (PX04003 (Sun (BionicM) Decl. at ¶ 3)).

Response to Finding No. 1646:

Complaint Counsel's proposed finding of fact relies on a document that was never presented at trial and thus was not subject to cross examination before the Court. Complaint Counsel's proposed finding of fact is also misleading. BionicM has never sold a prosthetic knee, or any other product. (PX04003 at 001 (Sun, Decl. ¶ 1)). It is a student team consisting of three

graduate students and a faculty member at the University of Tokyo. (PX04003 at 001 (Sun, Decl. ¶ 1)). Further, the affidavit of Xiajun Sun, PhD candidate at the University of Tokyo, states that he has not researched how to manufacture the Suknee, and does not have plans to sell the Suknee in the United States as of now. (PX04003 at 001 (Sun, Decl. ¶ 2)). Further, the affidavit does not state why Sun believes that the "process required to begin selling the SuKnee in the United States would take a long time, maybe even more than a decade," or even what basis he holds that belief. (See PX04003 at 001 (Sun, Decl. ¶ 3)).

b) ST&G

1647. ST&G is a seller of lower limb prosthetics, including mechanical knees, prosthetic feet, and prosthetic liners, and orthotics. (PX05117 (Choi (ST&G) , Dep. at 15-17)). ST&G does not currently sell an MPK. (PX05117 (Choi (ST&G) , Dep. at 27)).

Response to Finding No. 1647:

Complaint Counsel's proposed finding of fact misstates the testimony to the extent it suggests that ST&G only sells lower limb prosthetics. Not only is ST&G a seller of lower limb prosthetics and orthotics, but it also manufactures and sells ankle joints for ankle-foot orthosis. (PX05117 (Choi, Dep. at 15)).

1648. The president of ST&G, Glenn Choi, testified that the company began a development project for an MPK in approximately 2016. (PX05117 (Choi (ST&G) , Dep. at 84)). The company's goal for the MPK development project is to provide an MPK with similar functions and benefits as other MPKs on the market at a more affordable price. (PX05117 (Choi (ST&G) , Dep. at 92)).

Response to Finding No. 1648:

Respondent has no specific response.

1649. After starting the project in 2016, ST&G had not created a functioning prototype of an MPK as of March 2018. (PX05117 (Choi (ST&G) , Dep. at 84)).

Response to Finding No. 1649:

Complaint Counsel's proposed finding of fact is misleading because it omits necessary facts from the Court's consideration. ST&G has two individuals working on the MPK project, Choi and the technical director of ST&G. (PX05117 (Choi, Dep. at 83)). ST&G is working in collaboration with KORAC, an entity affiliated with the South Korean Government. (PX05117 (Choi, Dep. at 83)). During this timeframe, ST&G sold a 5-Bar Stance Flexion Knee to Freedom so that Freedom could re-sell the knee. (PX05117 (Choi, Dep. at 81)). Sales of this mechanical knee generated roughly $250,000 in revenue for ST&G in 2017. (PX05117 (Choi, Dep. at 81)).

1650. Mr. Choi estimated, in March 2018, the company would finish building and testing a prototype within one or two years. (PX05117 (Choi (ST&G) , Dep. at 86)). Once finished testing the prototype, Mr. Choi estimated the process for developing a commercial-scale production would take at least an additional six months. (PX05117 (Choi (ST&G) , Dep. at 88)). ST&G would plan to perform field tests on the product after developing a commercial-scale production, which would require an additional six months. (PX05117 (Choi (ST&G) , Dep. at 94)).

Response to Finding No. 1650:

Respondent has no specific response.

1651. ST&G would then plan to perform a "soft launch" outside of the country before beginning to sell the product in the United States. (PX05117 (Choi (ST&G) , Dep. at 95)).

Response to Finding No. 1651:

Complaint Counsel's proposed finding of fact is misleading because it omits necessary facts from the Court's consideration. ST&G "would launch this product probably outside of USA first to see how feasible or how applicable our product would be in countries outside the USA." (PX05117 (Choi, Dep. at 94)).

1652. Altogether, Mr. Choi believes the process would take "[a]t best, five years" as of March 2018 before ST&G could begin selling the MPK in the United States. (PX05117 (Choi (ST&G) , Dep. at 95)).

Response to Finding No. 1652:

Complaint Counsel's proposed finding of fact is misleading. Choi testified that it would take "at best, five years" for ST&G to have a product that would be sold commercially in the United States, but Choi did not testify regarding the earliest that the product could be sold in the United States. (PX05117 (Choi, Dep. at 95)). ST&G's considerations regarding its decisions of when to release its products are based on its own strategy and do not necessarily reflect the minimum time by which the company could begin selling its MPK in the United States.

1653. In order to compete as effectively as possible in the United States, Mr. Choi believes ST&G will need to spend an additional three years after the launch of the product to develop meaningful brand recognition in the United States. (PX05117 (Choi (ST&G) , Dep. at 95)).

Response to Finding No. 1653:

Complaint Counsel's proposed finding of fact is misleading. Choi testified that ST&G would need to spend "about three years" to build up brand recognition, but he did not state that ST&G would need to spend an additional three years after the launch of the product to do so. (PX05117 (Choi, Dep. at 95)). Indeed, as stated, Choi's testimony leaves open the possibility that this brand recognition could potentially be developed simultaneously with the product.

B. LAUNCH OF A NEW MPK IS NOT LIKELY

1654. [redacted] (Argue, Tr. 6265; PX05173 (Argue , Dep. at 29) (*in camera*)).

Response to Finding No. 1654:

Complaint Counsel's proposed finding of fact mischaracterizes the record testimony. [redacted]

[redacted]

1. Barriers to Entry

a) IP Poses a Significant Barrier to Entry

1655. [redacted] (PX05107 (Carver (College Park) , Dep. at 117) (*in camera*)).

Response to Finding No. 1655:

Complaint Counsel's proposed finding of fact is misleading because it is based solely upon one individual's experiences, and the declarant lacks the necessary foundation to provide information on this finding of fact. College Park currently sells only one prosthetic knee, the Guardian knee, a non-MPK that Carver describes as a "preparatory knee that would transition into a more functional K2 knee." (Carver, Tr. 2012; PX05107 (Carver, Dep. 14)).

1656. [redacted] (PX05107 (Carver (College Park) , Dep. at 117) (*in camera*)).

Response to Finding No. 1656:

Complaint Counsel's proposed finding of fact is misleading because it is based solely upon one individual's experiences, and the declarant lacks the necessary foundation to provide information on this finding of fact. College Park currently sells only one prosthetic knee, the Guardian knee, a non-MPK that Carver describes as a "preparatory knee that would transition into a more functional K2 knee." (Carver, Tr. 2012; PX04012 (Carver, Dep. 14)).

1657. [redacted]

Response to Finding No. 1657:

Complaint Counsel's proposed finding of fact is misleading to the extent it cites to [redacted] Further, Complaint Counsel's proposed finding of fact relies on a document, PX01410, which was never presented at trial and thus was not subject to cross examination before the Court. Complaint Counsel's proposed finding of fact is also incomplete because it fails to mention that the patented technology may be licensed. For example, [redacted]

1658. [redacted]

Response to Finding No. 1658:

Complaint Counsel's proposed finding of fact is misleading to the extent it cites to [redacted] Further, Complaint Counsel's proposed finding of fact relies on two documents, PX01410 and PX01122, which were never presented at trial and thus were not subject to cross examination before the Court.

1659. [redacted]

Response to Finding No. 1659:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies on a document, PX01410, which was never presented at trial and thus was not subject to cross examination before the Court.

1660. [redacted]

Response to Finding No. 1660:

Complaint Counsel's proposed finding of fact mischaracterizes witness testimony by omitting information necessary for the Court's consideration and [redacted]

[redacted]

1661. Complaint Counsel's expert, Dr. Fiona Scott Morton, concluded that "[p]otential entrants seeking to develop a microprocessor knee in the United States are likely to encounter intellectual property barriers." (PX06001A at 145 (¶ 190) (Morton Expert Report)).

Response to Finding No. 1661:

Complaint Counsel's proposed finding of fact is improper argument because it utilizes the opinion of Complaint Counsel's expert as a substitute for facts and record testimony.

b) Reputation and Brand are Critical

1662. [redacted] (*See, e.g.,* Blatchford (Endolite) Tr. 2176 (*in camera*); De Roy (Ossur) Tr. 3622-24 (*in camera*); PX05007 (Carkhuff (Freedom) IHT at 296)).

Response to Finding No. 1662:

Complaint Counsel's proposed finding of fact is misleading because it suggests that reputation is the only factor which manufacturers consider important for selling MPKs.

1663. According to Freedom's Chairman, Maynard Carkhuff, "due to the prosthetists high reliance on the manufacturers of microprocessor knees, and any product in the prosthetic industry, the company's reputation for servicing, standing behind their products, quick turnaround times, being easy to do business with in tough times as well as good times,

providing educational services, having high-quality products that can be relied on and that can service their patients well, and I think all of those and I'm sure many more are important." (PX05007 (Carkhuff (Freedom) IHT at 296).

Response to Finding No. 1663:

Complaint Counsel's proposed finding of fact is misleading because it suggests that reputation is the only factor which manufacturers consider important for selling MPKs.

1664. Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs, and Future Development, testified that "[b]rand and reputation is a very large consideration in the purchase of a prosthetic device") (PX05010 (Otto Bock) IHT at 58)).

Response to Finding No. 1664:

Complaint Counsel's proposed finding of fact is misleading because it is incomplete. Mr. Schneider went on to state that "for example, it's similar to an internal prosthesis. If you know of someone who may have an artificial knee from a total knee or a partial knee replacement, ask that person what brand of product, if it's a Smith & Nephew or DePuy, most people have no idea. They just know that Dr. Smith did the surgery. But Dr. Smith's reputation is based off of how well that manufacturer has created that implant. So it's similar in our industry where a prosthesis -- you have to remember the levels. There are several different components that are built into each prosthesis. And oftentimes it's not just from one company. It's very seldom that it's from one company. It can be from multiple companies. And therefore, the leg, the prosthesis, is not an Otto Bock. It is not an Össur. It is typically a prosthesis that CPO Jim has delivered. So CPO Jim is responsible for collecting to understanding what components to purchase that would provide the best outcome. And when there's more a critical part, maybe it's due to the patient's weight or their activity level or the environment in which they work or safety. All of these criteria, when evaluating a patient, the CPO makes a determination. (PX05010 (Schneider, Dep.) at 58-59)).

1665. Freedom "experienced some reputational barriers to success" with the launch of the original Plié. (PX05007 (Carkhuff (Freedom) IHT at 297-298)).

Response to Finding No. 1665:

Complaint Counsel's proposed finding of fact mischaracterizes witness testimony. Mr. Carkhuff refuted the notion that Freedom did not have a product which could compete effectively when he testified at trial that "[t]he engineers were developing a product that was a microprocessor-controlled stance as opposed to swing and stance, and that "it was designed intentionally as a different product." (Carkhuff, Tr. 362).

1666. [redacted] (De Roy (Ossur) Tr. 3622 (*in camera*)).

Response to Finding No. 1666:

Complaint Counsel's proposed finding of fact is misleading because it is incomplete. [redacted]

1667. [redacted] (De Roy (Ossur) Tr. 3622-23 (*in camera*)).

Response to Finding No. 1667:

Respondent has no specific response.

1668. [redacted] (De Roy (Ossur) Tr. 3623 (*in camera*)).

Response to Finding No. 1668:

Respondent has no specific response.

1669. [redacted]

[redacted]

Response to Finding No. 1669:

Complaint Counsel's proposed finding of fact is misleading because it is incomplete. [redacted]

1670. [redacted] (Blatchford (Endolite) Tr. 2176 (*in camera*)).

Response to Finding No. 1670:

Complaint Counsel's proposed finding of fact is misleading because it is incomplete. [redacted]

1671. Freedom's Chairman, Maynard Carkhuff, testified that when Freedom launched its first-generation MPK in 2007, the Plié 1, its success was hindered by reputational barriers. (Carkhuff (Freedom) Tr. 361-362; PX05007 (Carkhuff (Freedom) IHT at 298)). It took about three years after the launch of the Plié 1 in 2007 for the company "to really gain credibility" and compete effectively in the market. (PX05007 (Carkhuff (Freedom) IHT at 297-300)).

Response to Finding No. 1671:

Complaint Counsel's proposed finding of fact mischaracterizes witness testimony. Mr. Carkhuff also noted that "I would say, just for clarity, that we launched the Plié 1 and marketed it for three years, '07, '08, and '09, and during the late stages of that time, we realized that there

were product shortcomings in the design and that we had a full-court press, and in approximately a year, we redesigned and launched the product in 2010." (PX05007 (Carkhuff, IHT), at 299). Mr. Carkhuff further refuted the notion that Freedom did not have a product which could compete effectively when he testified at trial that "[t]he engineers were developing a product that was a microprocessor-controlled stance as opposed to swing and stance, and that "it was designed intentionally as a different product." (Carkhuff, Tr. 362).

1672. According to clinic customer testimony, reputation is also important to prosthetists when choosing an MPK to fit on a patient. (*See, e.g.,* PX05167 (Filippis (Wright & Filippis) , Dep. at 112-13); PX05151 (Patton (Prosthetic Solutions) , Dep. at 113-14); PX05141 (Bright (North Bay) , Dep. at 211)).

Response to Finding No. 1672:

Complaint Counsel's proposed finding of fact is misleading because it suggests that reputation is the only factor which prosthetists consider important for selling MPKs.

1673. Michael Bright, a certified prosthetist and co-owner of North Bay Prosthetics and Orthotics, testified that he would like to see an MPK "on the market for a period of time . . . without having problems" before he would recommend it to patients. (PX05141 (Bright (North Bay) , Dep. at 211)). Mr. Bright also testified that he would not purchase an MPK "right away" from a manufacturer who had never sold one. (PX05141 (Bright (North Bay) , Dep. at 226).

Response to Finding No. 1673:

Complaint Counsel's proposed finding of fact is misleading because it represents the opinion of a single prosthetist. Further, Mr. Bright did not testify regarding why he would not purchase an MPK "right away" from a manufacturer who had never sold one. (PX05141 (Bright, Dep. at 226)).

1674. Glenn Choi, President of ST&G, testified that his company will need to spend an additional three years after the launch of its in-development MPK to establish meaningful brand recognition in the United States. (PX05117 (Choi (ST&G) , Dep. at 95)).

Response to Finding No. 1674:

Complaint Counsel's proposed finding of fact is misleading. Choi testified that ST&G would need to spend "about three years" to build up brand recognition, but he did not state that ST&G would need to spend an additional three years after the launch of the product to do so. (PX05117 (Choi, Dep. at 95)). Indeed, as stated, Choi's testimony leaves open the possibility that this brand recognition could potentially be developed simultaneously with the product.

1675. [redacted]
(Collins (Cascade) Tr. 3291-92 (*in camera*)).

Response to Finding No. 1675:

Complaint Counsel's proposed finding of fact mischaracterizes testimony. [redacted]

c) Development of an Extensive Sales and Clinical Force is Necessary

1676. A direct sales model is important to the effective sale of MPKs in the United States. (De Roy (Össur) Tr. 3573 (a direct sales force is "absolutely necessary" to sell MPKs to U.S. clinics); PX05007 (Carkhuff (Freedom) IHT at 136 (agreeing 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)); PX05148 (Swiggum (Otto Bock) , Dep. at 32-33); PX05009 (De Roy (Össur) IHT at 18)).

Response to Finding No. 1676:

Complaint Counsel's finding of fact is misleading because direct sales are just one of several methods for sales of MPKs in the United States.

1677. [redacted] (PX05144 (Blatchford (Endolite) , Dep. at 215) (*in camera*)).

Response to Finding No. 1677:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1678. As Freedom's Vice President of National and Key Accounts, Mark Testerman, testified, "[t]here's no doubt that a direct sales force is important in driving Plié 3 sales for Freedom Innovations". (Testerman (Freedom) Tr. 1125-26).

Response to Finding No. 1678:

Complaint Counsel's proposed finding of fact is misleading. Testerman further testified that a direct sales force was important for selling Freedom Innovations' ankles, feet, and entire product line. (Testerman, Tr. 1125). Testerman further testified that the clinical team is also an important part of Freedom's sales. (Testerman, Tr. 1125-1126).

1679. As of the trial, Freedom had 14 regional sales managers. (Testerman (Freedom) Tr. 1114-15).

Response to Finding No. 1679:

Complaint Counsel's proposed finding of fact is incomplete. While Freedom does have 14 regional sales managers, they support Freedom's entire product line, not just Freedom's Plié. (Testerman, Tr. 1114-1115).

1680. Aside from SPS, a distributor owned by Hanger, Freedom sells its MPKs direct to customers in the United States. (PX05118 (Testerman (Freedom) , Dep. at 41); PX05005 (Smith (HEP) IHT at 159)).

Response to Finding No. 1680:

Respondent has no specific response.

1681. This is similar to other MPK manufacturers. For example, Otto Bock sells 100 percent of its MPKs directly. (PX05148 (Swiggum (Otto Bock) , Dep. at 38)).

Response to Finding No. 1681:

Complaint Counsel's proposed finding of fact is misleading, as other MPK manufacturers utilize distributors as well as direct sales to sell products. For example, [redacted]

[redacted]

[redacted]

1682. Otto Bock has four sales regions in the United States, with six to eight sales representatives per region that report to a regional sales manager. Otto Bock's sales representatives sell the entire suite of Otto Bock's prosthetic products. (Solorio (Otto Bock) Tr. 1638-39).

Response to Finding No. 1682:

Respondent has no specific response.

1683. Endolite has 15 sales representatives located across the United States. Like Otto Bock, Endolite's "sales representatives sell the whole product range." (Blatchford (Endolite) Tr. 2127-29).

Response to Finding No. 1683:

Respondent has no specific response.

1684. Össur has approximately 50 sales representatives "spread around the U.S." (De Roy (Össur) Tr. 3568). Össur only sells its MPKs directly "because they are more complicated to fit. They require more education. There's programming to those knees. And to ensure proper outcomes we decided to do that ourselves." (De Roy (Össur) Tr. 3570).

Response to Finding No. 1684:

Complaint Counsel's proposed finding of fact is misleading, as other MPK manufacturers utilize distributors as well as direct sales to sell products. For example, [redacted]

[redacted]

1685. Selling MPKs directly has contributed to Otto Bock and Freedom's success in the MPK market. (PX05163 (Stuch (Otto Bock) , Dep. at 45-48); PX05007 (Carkhuff (Freedom) , Dep. at 132-134)).

Response to Finding No. 1685:

Complaint Counsel's proposed finding of fact is misleading because Otto Bock and Freedom's direct sales are not their only basis for success in the prosthetic knee industry. For example, Freedom also sells its Plié via SPS, a distributor owned by Hanger. (PX05118 (Testerman, Dep. at 41); PX05005 (Smith, IHT at 159)).

1686. As Vinit Asar, President and CEO of Hanger, testified, "[i]t would be very difficult to work with" an MPK manufacturer who does not have a direct sales force. (PX05153B (Asar (Hanger) , Dep. at 65)). [redacted]

Response to Finding No. 1686:

Complaint Counsel's proposed finding of fact is misleading because Asar's response encompassed more than just direct sales. Mr. Asar was asked how it would affect Hanger's willingness "to work with an MPK supplier that didn't offer the training and services and the other things that you have just discussed." (Asar, Tr. 1459). Asar had previously discussed the important factors Hanger considered when deciding on MPK suppliers, which included providing quality products, providing adequate service, providing training, providing a good warranty program, and providing an economically viable price for Hanger. (Asar, Tr. 1459). Asar's testimony was that it would be "very difficult to work with" a manufacturer who did not offer *all* of these factors. (Asar, Tr. 1459). Asar did not single out a direct sales force in his response.

1687. In-person meetings between sales representatives and customers help facilitate sales. (Blatchford (Endolite) Tr. 2129-30; PX05137 (Matthews (Freedom) , Dep. at 113-115); PX05151 (Patton (Prosthetic Solutions) , Dep. at 109-10, 115); PX05168 (Sprinkle (Sprinkle Prosthetics) , Dep. at 68)). [redacted]

Response to Finding No. 1687:

Complaint Counsel's proposed finding of fact is misleading because in-person meetings are not the only method for sales. For example, [redacted]

1688. Otto Bock's National Sales Director Walter Governor explained in an e-mail on Freedom's "Keys to Success," "if we are not in front of our customers asking for their business, our competition is." (PX01326 (Otto Bock) at 001).

Response to Finding No. 1688:

Complaint Counsel's proposed finding of fact is based upon a document for which Respondent did not have an opportunity to cross-examine the declarant.

1689. Otto Bock's sales representatives visit Hanger's clinics more than 2,000 times per year. (PX05148 (Swiggum (Otto Bock) , Dep. at 58-59)).

Response to Finding No. 1689:

Complaint Counsel's proposed finding of fact is misleading because it is based upon the experiences of the declarant while he was employed by Otto Bock. Swiggum was terminated as regional president and CEO of Ottobock and thus is not apprised of how often Otto Bock's sales representatives presently visit Hanger's clinics. (Swiggum, Tr. 3313, 3316).

1690. For Freedom, building relationships with customers "help[s] sell Freedom products, drive revenue, drive profitability, short and long term." (Testerman (Freedom) Tr. 1101-02). In

particular, building relationships with customers is "a component of trying to protect Plié 3 sales." (Testerman (Freedom) Tr. 1102).

Response to Finding No. 1690:

Complaint Counsel's proposed finding of fact is incomplete, and thus inaccurate and misleading. While Testerman did testify that building relationships with customers is a component, he further testified that "[t]here's so much more that goes into it [...] the relationships, driving value, bringing creative programming on pricing, clinical programs" are also components. (Testerman, Tr. 1102).

1691. Freedom's sales managers visit clinic customers multiple times to build relationships and make sales. According to Mark Testerman, Freedom's Vice President of National and Key Accounts, "[i]f a Freedom Innovations RSM [Regional Sales Manager] spends more time in a given location, whether it's a key account or across any channel, they have a greater likelihood of building a relationship, as we discussed earlier, gaining access to a trial, and getting that prosthetist and the patient to trial a Freedom product." (Testerman (Freedom) Tr. 1121-23).

Response to Finding No. 1691:

Complaint Counsel's proposed finding of fact is misleading. While Testerman did testify that building relationships with customers is a component of Freedom's sales strategy, he further testified that "[t]here's so much more that goes into it [...] the relationships, driving value, bringing creative programming on pricing, clinical programs" are also components. (Testerman, Tr. 1102).

1692. [redacted]

Response to Finding No. 1692:

Complaint Counsel's proposed finding of fact is misleading. While Testerman did testify that building relationships with customers is a component of Freedom's sales strategy, he further

testified that "[t]here's so much more that goes into it [...] the relationships, driving value, bringing creative programming on pricing, clinical programs" are also components. (Testerman, Tr. 1102).

1693. [redacted] (Blatchford (Endolite) Tr. 2174-75) (*in camera*).

Response to Finding No. 1693:

Respondent has no specific response.

1694. MPKs are highly technical products. (*See, e.g.,* PX05109 (Carkhuff (Freedom) , Dep. at 111); PX05163 (Stuch (Otto Bock) , Dep. at 45-48); PX05159 (Arbogast (Willow Wood) , Dep. at 137-38); PX05141 (Bright (North Bay) , Dep. at 223)).

Response to Finding No. 1694:

Complaint Counsel's proposed finding of fact is misleading because all prosthetic knee devices are technical products.

1695. A direct sales force must be knowledgeable about MPK products. (PX05010 (Schneider (Otto Bock) IHT at 40)).

Response to Finding No. 1695:

Complaint Counsel's proposed finding of fact misstates the testimony and is misleading because a direct sales force must be knowledgeable about all products. Indeed, Mr. Schneider testified that a direct sales force requires specialized knowledge in prosthetics, but did not specifically state that it requires knowledge regarding MPK products. (PX05010 (Schneider, IHT) at 40). Further, it is important to note that 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).

1696. Direct sales representatives typically have better knowledge of MPKs than distributors, which has led some manufacturers to rely more on their direct sales representatives than distributors. (De Roy (Össur) Tr. 35702-3573; PX05141 (Bright (North Bay) , Dep. at 190-91223); PX05162 (Ruhl (Otto Bock) , Dep. at 183-84); see also (Blatchford (Endolite) Tr. 2132-2133)) (Endolite's Executive Chairman, Stephen Blatchford, testifying at trial that Endolite switched to using its own sales force about ten years ago and how, as a result, Endolite's sales tripled and its customer relationships improved)). Otto Bock, for example, sells 100 percent of its MPKs directly. (PX05148 (Swiggum (Otto Bock) Dep. at38-39)).

Response to Finding No. 1696:

Complaint Counsel's proposed finding of fact is misleading because many manufacturers utilize distributors to sell its products. For example, [redacted]

1697. Sales representatives educate customers on MPKs. (PX05167 (Filippis (Wright & Filippis) , Dep. at 99-100); PX05009 (De Roy (Össur) , Dep. at 17); PX05130 (Governor (Otto Bock) , Dep. at 61-62); PX05004 (Senn (COPC) IHT at 22-23)). [redacted]

Response to Finding No. 1697:

Respondent has no specific response.

1698. Freedom's Vice President of National and Key Accounts, Mark Testerman, testified about the importance of educating customers on your products. According to Mr. Testerman, "if you can educate a practitioner on the functionality of our product, they can see it, it only

makes sense that they perhaps would might want to try that product. And if they try the product, it may be something that they'd want to purchase for that particular -- their next patient". (Testerman (Freedom) Tr. 1110-11).

Response to Finding No. 1698:

Respondent has no specific response.

1699. Mr. Testerman testified that Freedom offers continuing education classes for prosthetists, which provide Continuing Education Unit ("CEU") credits to the practitioners and, "at the same time they can learn about Freedom products . . . [I]t's definitely a good, solid, aggressive strategy to try to differentiate ourselves from the competition." (Testerman (Freedom) Tr. 1107-08).

Response to Finding No. 1699:

Complaint Counsel's proposed finding of fact is misleading because it is based upon a single individual's experiences and opinions on strategy.

1700. Sales representatives keep customers informed of the latest technological developments of MPKs. (Testerman (Freedom) Tr. 1117-19; PX05148 (Swiggum (Otto Bock) , Dep. at 32-33); PX05135 (Weber (Prosthetic & Orthotic Care) , Dep. at 68-69); Blatchford (Endolite) Tr. 2130-31; PX05145 (Ford (POA) , Dep. at 34-36); PX05007 (Carkhuff (Freedom) IHT at 132-133); *see also* [redacted] Customers appreciate learning about improvements to the MPK products. (PX05141 (Bright (North Bay) , Dep. at 223); PX05007 (Carkhuff (Freedom) , Dep. at 132-133)).

Response to Finding No. 1700:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that sales representatives do not educate customers about Sophisticated Non-MPKs and other prosthetic products.

1701. According to Mark Ford, President of Prosthetic and Orthotic Associates, information on product updates and software changes comes from a manufacturer's sales representatives and clinical educators. He testified that such information "is very helpful because it's going to optimize the performance of those components for that specific patient". (Ford (POA) Tr. 960-61).

Response to Finding No. 1701:

Complaint Counsel's proposed finding of fact is misleading because it omits important background information regarding Ford's experience. POA sells a little less than seven MPKs per year on average. (Ford, Tr. 945-946).

1702. According to Mr. Ford, oftentimes "the local sales rep becomes the first point of contact" when his clinic has a technical question about a product. (Ford (POA) Tr. 962-63).

Response to Finding No. 1702:

Complaint Counsel's proposed finding of fact is misleading because it omits important background information regarding Ford's experience. POA sells a little less than seven MPKs per year on average. (Ford, Tr. 945-946).

1703. The assistance provided by direct sales representatives includes providing a demo knee to customers so that their patients can trial the MPK. (Testerman (Freedom) Tr. 1121). "[I]f a Freedom rep can get that trial and it's a successful trial, because the prosthetist sees the joy in the patient in their functionality from that particular trial, it will definitely help in the sale." (Testerman (Freedom) Tr. 1122-23).

Response to Finding No. 1703:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that Freedom's direct sales representatives sell only the Plié 3. None of Freedom's regional sales managers sell only the Plié 3 in the United States. (Testerman, Tr. 1258). They sell all of Freedom's products. (Testerman, Tr. 1258). Further, it is also important to note that prior to joining Freedom, Testerman had no experience selling MPKs. (Testerman, Tr. 1248). Testerman was able to start effectively selling Plié 3 within a month or two. (Testerman, Tr. 1248-1249).

1704. Sales representatives and clinical staff also assist prosthetists with fittings of MPKs. (Testerman (Freedom) Tr. 1118-19; Blatchford (Endolite) Tr. 2131; De Roy (Össur) Tr. 3539; PX05148 (Swiggum (Otto Bock) , Dep. at 33-34); PX05114 (Ferris (Freedom) , Dep. at 138); PX05130 (Governor (Otto Bock) , Dep. at 60-61); PX05009 (De Roy (Össur) IHT at 17); PX05151 (Patton (Prosthetic Solutions) , Dep. at 92-93)).

Response to Finding No. 1704:

Respondent has no specific response.

1705. MPK manufacturers, including Otto Bock, Freedom, and Össur assist customers in obtaining reimbursement for MPKs. (Testerman (Freedom) Tr. 1113-14; De Roy (Össur) Tr. 3538; PX05148 (Swiggum (Otto Bock) , Dep. at 34-36); (Ford (POA) Tr. 970-72).

Response to Finding No. 1705:

Complaint Counsel's proposed finding of fact is misleading, as manufacturers generally utilize reimbursement specialists rather than sales representatives to assist customers in obtaining reimbursement for prosthetic devices. (Schneider, Tr. 4285 (noting that Ottobock employs between 75 and 100 people in the field that work as sales representatives, clinical specialists, or reimbursement specialists)).

1706. If MPK manufacturers did not have a direct sales force, it would lead to fewer MPK sales. (De Roy (Össur) Tr. 3573; Testerman (Freedom) Tr. 1125-26; PX05163 (Stuch (Otto Bock) , Dep. at 45-48); PX05148 (Swiggum (Otto Bock) , Dep. at 38-39); PX05137 (Matthews (Freedom) , Dep. at 124-125)).

Response to Finding No. 1706:

Complaint Counsel's proposed finding of fact is misleading because many manufacturers also utilize distributors to sell their products. For example, [redacted]

1707. Complaint Counsel's expert, Fiona Scott Morton, concluded that "to compete effectively in the United States, prosthetic manufacturers must have established sales and support presences in the United States, as clinics require assistance with fitting, service, and repair of microprocessor prosthetic knees." (PX06001A at 70 (¶90) (Morton Expert Report)).

Response to Finding No. 1707:

Complaint Counsel's proposed finding of fact is an expert opinion proffered to support factual propositions that should be established by fact witnesses in violation of the Order on Post-Trial Briefs (Oct. 10, 2018). Complaint Counsel's proposed finding of fact is misleading because many manufacturers also utilize distributors to sell its products. For example, [redacted]

1708. Freedom employs a clinical team of prosthetists that "conduct educational courses on how to adjust Plié to each individual patient's needs," as well as meet directly with prosthetists, provide training to sales staff, and going out into the field to help prosthetists and amputees use the Plié effectively. (PX05109 (Carkhuff (Freedom) , Dep. at 19-20)).

Response to Finding No. 1708:

Complaint Counsel's proposed finding of fact is misleading because Freedom's clinical team does not conduct educational courses only about the Plié, but conducts courses about all of Freedom's products. (Testerman, Tr. 1112). Similarly, Endolite utilizes a clinical team to promote its line of products in the United States. (Blatchford, Tr. 2130-2131).

1709. One of the responsibilities of Freedom's clinical team is "to take phone calls from clinicians who are fitting Plié" to try to diagnose issues and, at times, to visit the customer directly to help resolve issues. (PX05109 (Carkhuff (Freedom) , Dep. at 22-23)).

Response to Finding No. 1709:

Respondent has no specific response.

1710. Clinical education by Freedom's clinical prosthetists is "an important method of promoting and educating customers on the benefits [of the Plié 3]. And if they believe those benefits,

then it can be converted to trial and hopefully usage of the product." (PX05109 (Carkhuff (Freedom) , Dep. at 23-24)).

Response to Finding No. 1710:

Complaint Counsel's proposed finding of fact is incomplete, as Freedom individuals believe that clinical education is important for all of Freedom's product line, including its graphite feet, carbon feet, and ankles. (Testerman, Tr. 1111).

1711. Freedom's Vice President of National and Key Accounts, Mark Testerman, testified that he believed Freedom's MPK sales would be negatively impacted if the company did not provide sales representatives and clinical prosthetists to provide troubleshooting services to their customers. (PX05118 (Testerman (Freedom) , Dep. at 51-53)).

Response to Finding No. 1711:

Complaint Counsel's proposed finding of fact is misleading to the extent that it is based solely upon the testimony of a single individual. Further, Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that Freedom's direct sales representatives sell only the Plié 3. 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).

1712. Mr. Testerman testified that if Freedom did not provide troubleshooting and fitting services, "it could affect Plié 3 sales." (Testerman (Freedom) Tr. 1118-1120).

Response to Finding No. 1712:

Complaint Counsel's proposed finding of fact is misleading because it omits the fact that Freedom also discusses other products besides the Plié 3 when providing troubleshooting and fitting services. (Testerman, Tr. 1118).

1713. [redacted]

[redacted]

Response to Finding No. 1713:

Complaint Counsel's proposed finding of fact is incomplete because it does not acknowledge that [redacted]

1714. Mark Ford, the President and CEO of Prosthetic & Orthotic Associates, testified that the MPK manufacturers' clinical teams are "very important" because when POA clinicians "need help, they need it quickly, and they're looking for experience, so that's where being able to get that is very helpful for our clinicians." (Ford (POA) Tr. 964)).

Response to Finding No. 1714:

Complaint Counsel's proposed finding of fact is incomplete. Ford also 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).

2. Failed Attempts by Other Prosthetic Companies Highlight the Difficulty of Developing an MPK

1715. [redacted]

Response to Finding No. 1715:

Complaint Counsel's proposed finding of fact is misleading and incomplete. It is misleading to [redacted]

1716. [redacted]

Response to Finding No. 1716:

Complaint Counsel's proposed finding of fact is misleading and incomplete. It is misleading to [redacted]

[redacted]

1717. [redacted]

Response to Finding No. 1717:

Complaint Counsel's proposed finding of fact is misleading and incomplete. It is misleading to [redacted]

1718. [redacted]

Response to Finding No. 1718:

Complaint Counsel's proposed finding of fact is misleading and incomplete. It is misleading to [redacted]

[redacted]

1719. [redacted]

Response to Finding No. 1719:

Complaint Counsel's proposed finding of fact is misleading and incomplete. It is misleading to [redacted]

1720. [redacted]

Response to Finding No. 1720:

Respondent has no specific response.

1721. [redacted]

Response to Finding No. 1721:

Complaint Counsel's proposed finding of fact is misleading because it is incomplete. [redacted]

1722. [redacted]

Response to Finding No. 1722:

Complaint Counsel's proposed finding of fact is misleading because it is incomplete. [redacted]

1723. [redacted]

Response to Finding No. 1723:

Respondent has no specific response.

1724. [redacted]

[redacted]

Response to Finding No. 1724:

Complaint Counsel's proposed finding of fact is misleading because it fails to mention that Fillauer's resources are currently focused on Motion Control. Further, Complaint Counsel's proposed finding of fact is misleading because it is incomplete. [redacted]

1725. [redacted]

Response to Finding No. 1725:

Respondent has no specific response.

1726. [redacted]

Response to Finding No. 1726:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1727. [redacted]

Response to Finding No. 1727:

Respondent has no specific response.

3. Best Positioned Theoretical Entrants in Prosthetic Industry Have No Plans to Enter

1728. Companies in the industry operating in adjacent markets such as mechanical knee manufacturers, foot manufacturers, and clinic operators testified that they have no current plans to develop and sell an MPK. For example, TruLife, a manufacturer of mechanical knees, does not currently have plans to develop or distribute an MPK. (PX05136 (Knudsen (TruLife) , Dep. at 60, 115-16).

Response to Finding No. 1728:

Complaint Counsel's proposed finding of fact is misleading because it relies on testimony from only one manufacturer to support a statement about the industry as a whole.

1729. [redacted]

Response to Finding No. 1729:

Respondent has no specific response.

1730. [redacted]

Response to Finding No. 1730:

Complaint Counsel's proposed finding of fact is misleading and incomplete. It is misleading to [redacted]

[redacted]

1731. [redacted]

Response to Finding No. 1731:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1732. [redacted]

Response to Finding No. 1732:

Complaint Counsel's proposed finding of fact is misleading. [redacted] Hanger provides healthcare services 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).

XII. RESPONDENT'S ASSERTED EFFICIENCIES DO NOT REBUT PRESUMPTION OF COMPETITIVE HARM

1733. Complaint Counsel's expert witness, Ms. Christine Hammer, concluded that Respondent has not demonstrated that the Merger would produce any cognizable efficiencies. Even assuming that Respondent's claimed efficiencies are cognizable, Ms. Hammer concludes that Respondent has failed to establish that MPK customers would benefit from the claimed efficiencies or that the Respondent's claimed cognizable efficiencies would outweigh the

anticompetitive harm resulting from the Merger. (Hammer Tr. 2880, 2898-99; PX06002 at 056, 062 (¶¶ 144, 163) (Hammer Expert Report)).

Response to Finding No. 1733:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

1734. The Merger Guidelines outline the framework within which to assess Respondent's claimed efficiencies. (PX08040 at 032-34 (§ 10) (Merger Guidelines)). Efficiencies are deemed "cognizable" if they are "merger-specific," "have been verified[,] and do not arise from anticompetitive reductions in output or service." (PX08040 at 033 (§ 10) (Merger Guidelines)). Respondent has the burden to "substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific." (PX08040 at 033 (§ 10) (Merger Guidelines)).

Response to Finding No. 1734:

Complaint Counsel's proposed finding of fact is not a fact, but an inaccurate summary of the legal framework for an efficiencies analysis. "[C]ourts and the [FTC] typically consider 'efficiencies, including quality improvements, after the government has shown that the transaction is likely to reduce competition.'" *In re Polypore, Inc.*, 149 F.T.C. 486, 801 (F.T.C. March 1, 2010) (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."); *United States v. Country Lake Foods*, 754 F. Supp. 669, 674, 680 (D. Minn. 1990) (efficiencies involving "lower plant and transportation costs and other savings" found as "further evidence that the proposed acquisition will enhance competition."). (*See also* COL ¶ 1679 (providing legal framework for efficiencies analysis)).

A. RESPONDENT'S CLAIMED EFFICIENCIES

1735. Respondent relies on James R. Peterson, its efficiencies expert, to quantify its claimed cost-savings efficiencies. (RX1048 at 3 (¶¶ 1, 14) (Peterson Expert Report)).

Response to Finding No. 1735:

Complaint Counsel's proposed finding of fact is incomplete, because Peterson quantified more than just cost-savings efficiencies. (RFOF ¶ 1562 (citing RX-1048 at 051-052)). He also quantified, for example, quality improvements. (RFOF ¶ 1562 (citing RX-1048 at 051-052)).

1736. [redacted] (Peterson, Tr. 6668–672 (*in camera*); PX03185 (AT Kearney) at 004-079 (*in camera*)).

Response to Finding No. 1736:

Respondent has no specific response.

1737. The Integration Team, made up of personnel from Otto Bock, Freedom, and A.T. Kearney, conducted work on potential cost-savings synergies from the Merger. (PX05127 (Röessing (Otto Bock) , Dep. at 50–51); PX05154 (Baggenstoss (A.T. Kearney) , Dep. at 27, 33)).

Response to Finding No. 1737:

Complaint Counsel's proposed finding of fact is incomplete, because the Integration Team conducted work on more than just cost-savings efficiencies. It also conducted work, for example, on quality improvements. (RFOF ¶ 1562 (citing RX-1048 at 051-052)).

1738. [redacted]

Response to Finding No. 1738:

Respondent has no specific response.

1739. [redacted] (Peterson, Tr. 6670–71 (*in camera*); PX05174 (Peterson , Dep. at 43–44; RX-1048 at 49-51 (¶ 131, Table 8) (Peterson Expert Report) (*in camera*)).

Response to Finding No. 1739:

Respondent has no specific response.

1740. [redacted] (RX-1048 at 51–52 (¶ 132) (Peterson Expert Report) (*in camera*); Peterson, Tr. 6672–673 (*in camera*)).

Response to Finding No. 1740:

Respondent has no specific response.

1741. [redacted] (Peterson, Tr. 6671–672 (*in camera*); PX05174 (Peterson , Dep. at 49–50, 53) (*in camera*)).

Response to Finding No. 1741:

Respondent has no specific response.

1742. [redacted] (RX-1048 at 53 (Table 9) (Peterson Expert Report) (*in camera*); Peterson, Tr. 6728 (*in camera*); PX05174 (Peterson , Dep. at 53) (*in camera*)).

Response to Finding No. 1742:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1743. [redacted] (RX-1048 at 53 (Table 9) (Peterson Expert Report) (*in camera*); Peterson, Tr. 6673–676 (*in camera*)).

Response to Finding No. 1743:

Respondent has no specific response.

1744. [redacted] (RX-1048 at 53 (Table 9) (Peterson Expert Report) (*in camera*); Peterson, Tr. 6673–676 (*in camera*)).

Response to Finding No. 1744:

Respondent has no specific response.

1745. [redacted] (Peterson, Tr. 6729–730 (*in camera*); RX-1048 at 53 (Table 9) (Peterson Expert Report) (*in camera*)).

Response to Finding No. 1745:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1746. [redacted] (Peterson, Tr. 6673–676, 6722 (*in camera*); RX-1048 at 51–52 (¶ 132) (Peterson Expert Report) (*in camera*)).

Response to Finding No. 1746:

Respondent has no specific response.

B. RESPONDENT'S CLAIMED EFFICIENCIES ARE NOT COGNIZABLE

1. Respondent's Claimed Efficiencies are Not Verifiable

1747. The Merger Guidelines state "[e]fficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means." (PX08040 at 033 (§ 10) (Merger Guidelines)).

Response to Finding No. 1747:

Complaint Counsel's proposed finding of fact is not a fact, but an incomplete summary of the legal framework for an efficiencies analysis. (*See also* COL ¶ 1679 (providing legal framework for efficiencies analysis)).

a) Respondent's Claimed Efficiencies Are Speculative

1748. In mid- December 2017, the Integration Team stopped all work to evaluate any potential efficiencies or cost savings from the Merger. (PX05127 (Röessing (Otto Bock) , Dep. at 36–37; PX05154 (Baggenstoss (A.T. Kearney), Dep. at 26) (testifying that A.T. Kearney stopped performing all work relating to Otto Bock's acquisition of Freedom in "mid-December"); PX05170 (Schneider (Otto Bock) , Dep. at 22-23)). At that point, work relating to identifying synergies opportunities was "all early stage" and "incomplete." (PX05154 (Baggenstoss (A.T. Kearney), Dep. at 27, 33)).

Response to Finding No. 1748:

Complaint Counsel's proposed finding of fact is misleading. Expert witness James Peterson, concluded that, based upon his experience with many mergers and acquisitions, Ottobock and AT Kearney performed "significant work" to quantify the efficiencies of the Transaction. (RFOF ¶ 1556 (citing RX-1048 at 048)).

1749. [redacted]; PX05154 (Baggenstoss (A.T. Kearney) , Dep. at 33, 49)).

Response to Finding No. 1749:

Respondent has no specific response.

1750. 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. (PX05154 (Baggenstoss (A.T. Kearney) , Dep. at 53–54)).

Response to Finding No. 1750:

Respondent has no specific response.

1751. When asked which of the identified synergy opportunities progressed to the second Hardness Level—setting a synergy target—Dr. Baggenstoss responded, "None of them. They were initial estimates on the opportunity, but a proper target setting was not done by mid-December." (PX05154 (Baggenstoss (A.T. Kearney) , Dep. at 54)).

Response to Finding No. 1751:

Complaint Counsel's proposed finding is misleading because it relies solely on a witness who was not called to testify at trial and thus was not subject to cross examination before this

Court. Further, expert witness Peterson, who testified at trial, concluded that Ottobock and AT Kearney performed "significant work" to quantify the efficiencies of the Transaction. (RFOF ¶ 1556 (citing RX-1048 at 048)).

1752. 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." (PX05154 (Baggenstoss (A.T. Kearney) , Dep. at 54-55)).

Response to Finding No. 1752:

Complaint Counsel's proposed finding is misleading because it relies solely on a witness who was not called to testify at trial and thus was not subject to cross examination before this Court. Further, expert witness Peterson, who testified at trial, concluded that Ottobock and AT Kearney performed "significant work" to quantify the efficiencies of the Transaction. (RFOF ¶ 1556 (citing RX-1048 at 048)).

1753. The second Hardness Level—setting a synergy target—involves typically the CFO offering a "top down" cost savings target, followed by a "bottom-up assessment" by the integration team, which can lead to readjusting the target. (PX05154 (Baggenstoss (A.T. Kearney) , Dep. at 54–55)).

Response to Finding No. 1753:

Complaint Counsel's proposed finding is misleading because it relies solely on a witness who was not called to testify at trial and thus was not subject to cross-examination before this Court. Further, expert witness Peterson, who testified at trial, concluded that Ottobock and AT Kearney performed "significant work" to quantify the efficiencies of the Transaction. (RFOF ¶ 1556 (citing RX-1048 at 048)).

1754. 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. (Hammer Tr. 2898; PX06002 at 062 (¶ 163) (Hammer Expert Report)).

Response to Finding No. 1754:

Complaint Counsel's proposed finding of fact is misleading because Hammer failed to perform any efficiencies calculation of her own. (PX06002). On the other hand, Respondent's expert witness, Peterson, did perform his own efficiencies calculation and sensitivity analysis, and concluded that the Transaction offered "enormous" material and achievable efficiencies. (RFOF ¶¶ 1563-1564, 1569-1570 (citing RX-1048 at 050-054; Peterson, Tr. 6672-6673)). Further, expert witness Peterson, who testified at trial, concluded that Ottobock and AT Kearney performed "significant work" to quantify the efficiencies of the Transaction. (RFOF ¶ 1556 (citing RX-1048 at 0048)).

1755. [redacted] (Peterson, Tr. 6720 (*in camera*); PX05154 (Baggenstoss (A.T. Kearney) , Dep. at 54)). Mr. Peterson's conclusion is not credible given Dr. Baggenstoss's testimony, as the integration project lead. (PX05127 (Röessing (Otto Bock) , Dep. at 34, 50–51)).

Response to Finding No. 1755:

Complaint Counsel's proposed finding is misleading because it relies solely on a witness who was not called to testify at trial and thus was not subject to cross examination before this Court. Complaint Counsel inappropriately attempts to discredit Respondent's expert witness, Peterson, based upon a deposition witness whom Complaint Counsel never called to testify at trial. Expert witness Peterson, who did testify at trial and who was subject to cross examination before this Court, concluded that Ottobock and AT Kearney performed "significant work" to quantify the efficiencies of the Transaction. (RFOF ¶ 1556 (citing RX-1048 at 048)).

1756. Furthermore, when the Integration Team stopped all work to evaluate any potential efficiencies or cost savings from the Merger in mid-December 2017, it also stopped all

other work related to integration planning for the Merger. (PX05154 (Baggenstoss (A.T. Kearney) , Dep. at 26–29)).

Response to Finding No. 1756:

Complaint Counsel's use of "Furthermore" is inappropriate to begin a new proposed finding and creates a compound proposed finding.

1757. When integration work stopped, "integration plans were either not started or in [a] very early stage." (PX05154 (Baggenstoss (A.T. Kearney) , Dep. at 27)).

Response to Finding No. 1757:

Complaint Counsel's proposed finding is misleading because it relies solely on a witness who was not called to testify at trial and thus was not subject to cross examination before this Court. Further, expert witness Peterson, who testified at trial, concluded that Ottobock and AT Kearney performed "significant work" to quantify the efficiencies of the Transaction. (RFOF ¶ 1556 (citing RX-1048 at 048)).

1758. Mr. David Reissfelder, Freedom's CEO, stated, "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." (PX05138 (Reissfelder (Freedom) , Dep. at 125)).

Response to Finding No. 1758:

Complaint Counsel's proposed finding is misleading because it relies on deposition testimony that was contradicted by testimony elicited at trial. [redacted]

1759. Due to the lack of decisions with respect to integration, Otto Bock had not yet determined integration plans related to the synergy opportunities it had identified, including manufacturing footprint, logistics, back-office in the United States, and the R&D organization. PX05154 (Baggenstoss (A.T. Kearney) , Dep. at 29-30, 55-57)). As a result,

Dr. Baggenstoss testified that cost savings estimates from identified synergy opportunities in manufacturing footprint, logistics, back office, and R&D could be affected. (PX05154 (Baggenstoss (A.T. Kearney) , Dep. at 54–57)).

Response to Finding No. 1759:

Complaint Counsel's proposed finding is misleading because it relies solely on testimony from a witness who was not called to testify at trial and thus was not subject to cross-examination before this Court. Expert witness Peterson, who testified at trial, concluded that Ottobock and AT Kearney performed "significant work" to quantify the efficiencies of the Transaction. (RFOF ¶ 1556 (citing RX-1048 at 0048)). [redacted]

1760. In December 2017, with respect to the cost savings that Otto Bock expects to realize from the Merger, Scott Schneider, Otto Bock's Vice President of Medical Affairs, Government Affairs, and Business Development, testified, "I don't believe we have a set number that we'd be able to tell you." (PX05010 (Schneider (Otto Bock) IHT at 152)).

Response to Finding No. 1760:

Complaint Counsel's proposed finding of fact is misleading and incomplete because the cited testimony provided in an investigational hearing is contradicted by evidence and documents presented at trial, including the Financial Model that estimated with precision the dollar amounts of cost-savings that Ottobock expected to realize from the Acquisition. (PX05138 (Reissfelder, Dep. at 147-159); see also RFOF ¶ 1546 (citing Peterson, Tr. 6675)).

1761. Furthermore, Dr. Röessing, Otto Bock's Chief Strategy and Human Resources Officer, the Otto Bock executive responsible for designing the Freedom integration plan, could not identify any document indicating potential cost savings generated by Otto Bock's acquisition of Freedom. (PX05127 (Röessing (Otto Bock) , Dep. at 37–38)).

Response to Finding No. 1761:

Complaint Counsel's proposed finding of fact is misleading because the cited testimony provided in a deposition is contradicted by evidence and documents presented at trial, including the Financial Model that estimated with precision the dollar amounts of cost-savings that Ottobock expected to realize from the Acquisition. (PX05138 (Reissfelder, Dep. at 147-159); see also RFOF ¶ 1546 (citing Peterson, Tr. 6675)).

1762. [redacted]

Response to Finding No. 1762:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

1763. [redacted] (Peterson, Tr. 6728 (*in camera*)).

Response to Finding No. 1763:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

1764. Apart from relying on Mr. James Peterson's expert report, Dr. Argue did not conduct any separate analysis of cost savings that might result from the Merger. (Argue, Tr. 6259; PX05173 (Argue , Dep. at 30)).

Response to Finding No. 1764:

Respondent has no specific response.

1765. Dr. Argue did not perform any independent assessment to verify the cost savings estimate that Mr. Peterson included in his report. (Argue, Tr. 6259; PX05173 (Argue , Dep. at 30)).

Response to Finding No. 1765:

Respondent has no specific response.

b) Respondent's Methodology and Inputs for Its Efficiency Claims Cannot Be Verified

1766. [redacted]

Response to Finding No. 1766:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it ignores [redacted]

[redacted]

1767. [redacted]

Response to Finding No. 1767:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

1768. [redacted]

Response to Finding No. 1768:

Complaint Counsel's proposed finding of fact is incomplete and inaccurate. [redacted]

1769. Mr. Peterson failed to test the assumptions contained within the [redacted] (PX05174 (Peterson , Dep. at 270–75 (*in camera*))).

Response to Finding No. 1769:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

[redacted]

1770. [redacted]

Response to Finding No. 1770:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

[redacted]

1771. [redacted]

[redacted] (PX05174 (Peterson , Dep. at 274 (*in camera*)); Peterson, Tr. 6735 (*in camera*)).

Response to Finding No. 1771:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

1772. [redacted] (PX05174 (Peterson , Dep. at 277 (*in camera*)).

Response to Finding No. 1772:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

[redacted]

1773. [redacted] (PX05174 (Peterson , Dep. at 276) (*in camera*)).

Response to Finding No. 1773:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

1774. [redacted] (RX-1048 at 52-53 (¶ 133, Table 9) (*in camera*) (Peterson Expert Report); Peterson, Tr. 6727-728 (*in camera*)).

Response to Finding No. 1774:

Respondent has no specific response.

1775. Regarding Mr. Peterson's range of claimed efficiencies, Ms. Hammer concluded that using a "haircut" to estimate efficiencies does not meet the requirements of the Merger Guidelines because one does not "know what a reasonably derived estimate of the future efficiency would be." (Hammer Tr. 2900–901).

Response to Finding No. 1775:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1776. [redacted] (Hammer Tr. 2913 (*in camera*)).

Response to Finding No. 1776:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1777. [redacted] (PX05174 (Peterson , Dep. at 280) (*in camera*)).

Response to Finding No. 1777:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

1778. [redacted] (RX-1048 at 45–53 (¶¶ 120–135) (*in camera*) (Peterson Expert Report); PX05174 (Peterson , Dep. at 71)).

Response to Finding No. 1778:

Complaint Counsel's proposed finding is misleading. [redacted]

1779. Mr. Peterson testified that his expert report did not include the calculation he used to determine the claimed cost-savings efficiencies from gross margin improvements, as derived from the [redacted] (PX05174 (Peterson , Dep. at 71) (*in camera*)).

Response to Finding No. 1779:

Complaint Counsel's proposed finding is misleading. [redacted]

1780. [redacted] (PX06004 at 035 (¶ 76) (Hammer Rebuttal Report) (*in camera*).

Response to Finding No. 1780:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1781. Ms. Hammer concluded that Mr. Peterson had not provided sufficient documentation to substantiate his claimed efficiencies, as "there is no information explaining [Mr. Peterson's] methodology, and it was not clear from the [redacted] how that methodology might have been derived." (Hammer Tr. 2899; PX06004 at 034 (¶ 72) (*in camera*) (Hammer Rebuttal Report)).

Response to Finding No. 1781:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1782. Dr. Argue did not do any independent assessment to verify the cost savings estimate that Mr. Peterson included in his expert report. (Argue, Tr. 6259; PX05173 (Argue , Dep. at 30)).

Response to Finding No. 1782:

Respondent has no specific response.

2. Respondent's Claimed Efficiencies are Not Merger Specific

1783. Merger-specific efficiencies are those "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger and or another means having comparable anticompetitive effects." (PX08040 at 033 (§ 10) (Merger Guidelines)). Moreover, efficiencies are not merger-specific if they "could be attained by practical alternatives that mitigate competitive concerns, such as divestiture or licensing." (PX08040 at 033 n.13 (§ 10) (Merger Guidelines)).

Response to Finding No. 1783:

Complaint Counsel's proposed finding of fact is an improper and incomplete summary of a legal conclusion.

a) Respondent's Claimed Efficiencies Could Be Achieved through Independent Cost-Saving Initiatives

1784. [redacted] (RX-1048 at 51–52 (¶ 132) (Peterson Expert Report) (*in camera*)).

Response to Finding No. 1784:

[redacted]

1785. [redacted] (RX-1048 at 51–52 (¶ 132) (Peterson Expert Report) (*in camera*)).

Response to Finding No. 1785:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1786. [redacted] (RX-1048 at 51–52 (¶ 132) (Peterson Expert Report) (*in camera*)).

Response to Finding No. 1786:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

1787. [redacted] (RX-1048 at 51–52 (¶ 132) (Peterson Expert Report) (*in camera*)).

Response to Finding No. 1787:

Complaint Counsel's proposed finding of fact is misleading [redacted]

[redacted]

1788. [redacted] (Hammer Tr. 2901–902; PX06004 at 037-38 (¶ 82) (Hammer Rebuttal Report) (*in camera*)).

Response to Finding No. 1788:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1789. Ms. Hammer concluded that Mr. Peterson did not demonstrate that the claimed efficiencies are merger-specific because Mr. Peterson did not provide "any ordinary-course documents or really anything that would help one obtain some certainty that indeed [a claimed efficiency] is likely to be merger-specific." (Hammer Tr. 2901; *see also* PX06004 at 036 (¶ 78) (Hammer Rebuttal Report)).

Response to Finding No. 1789:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1790. Dr. Argue did not do any independent assessment to determine whether the cost savings Mr. Peterson cites in his report are merger specific. (Argue, Tr. 6259; PX05173 (Argue , Dep. at 30)).

Response to Finding No. 1790:

Respondent has no specific response.

b) Respondent's Claimed Efficiencies Could Be Achieved through Other, Less Anticompetitive Transactions

1791. [redacted]

Response to Finding No. 1791:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies on a document, PX01585, which was never presented at trial and thus was not subject to cross examination before the Court.

1792. [redacted] (PX02090 (HEP) at 001 (Freedom Board Call (5/27): Sale/Refi Process Update) (*in camera*)).

Response to Finding No. 1792:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1793. [redacted] (PX05122 (Smith (HEP) , Dep. at 53–54 (*in camera*)).

Response to Finding No. 1793:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1794. [redacted] (PX06004 at 037 (¶ 82) (Hammer Rebuttal Report) (*in camera*)).

Response to Finding No. 1794:

Complaint Counsel's proposed finding of fact is inaccurate [redacted]

1795. [redacted] (Peterson, Tr. 6739 (*in camera*); PX05174 (Peterson , Dep. at 278) (*in camera*)). [redacted] (Peterson, Tr. 6739 (*in camera*)).

Response to Finding No. 1795:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

1796. [redacted] (RX-1048 at 51–52 (¶ 132) (Peterson Expert Report) (*in camera*)). [redacted] (RX-1048 at 51–52 (¶ 132) (Peterson Expert Report) (*in camera*)).

Response to Finding No. 1796:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1797. Mr. Peterson failed to consider alternative ways that the claimed efficiencies could be accomplished absent the Merger. (Hammer Tr. 2902; PX06004 at 036 (¶ 78) (Hammer Rebuttal Report)).

Response to Finding No. 1797:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

C. THERE IS NO EVIDENCE SHOWING RESPONDENT'S CLAIMED EFFICIENCIES WILL BE PASSED ON TO CUSTOMERS

1. There is No Evidence Showing Respondent's Claimed Cost Savings Will Be Passed on to Customers

1798. [redacted] (Peterson, Tr. 6749 (*in camera*)).

Response to Finding No. 1798:

Respondent has no specific response.

1799. [redacted] (PX05174 (Peterson , Dep. at 284 (*in camera*)); Peterson, Tr. 6746–749 (*in camera*)).

Response to Finding No. 1799:

Respondent has no specific response.

1800. [redacted] ((Peterson, Tr. 6746-749 (*in camera*)); PX05174 (Peterson , Dep. at 281–283 (*in camera*)); PX06004 at 038 (¶ 84) (Hammer Rebuttal Report)).

Response to Finding No. 1800:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

1801. 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. (Argue, Tr. 6259; PX05173 (Argue , Dep. at 35–36)).

Response to Finding No. 1801:

Respondent has no specific response.

1802. Dr. Argue did not perform any assessment to determine whether the efficiencies Mr. Peterson calculates in his report would result in lower prices for MPK customers. (Argue, Tr. 6259-260; PX05173 (Argue , Dep. at 35–36).

Response to Finding No. 1802:

Respondent has no specific response.

1803. [redacted] (RX-1048 at 45–53 (¶ 120–135) (Peterson Expert Report) (*in camera*)).

Response to Finding No. 1803:

Respondent has no specific response.

1804. Because Mr. Peterson did not specify what portion of any claimed efficiencies are fixed versus marginal costs, Mr. Peterson failed to show what portion of the claimed efficiencies would be more likely to be passed on to consumers. (Hammer Tr. 2904; PX06004 at 039 (¶ 87) (Hammer Rebuttal Report)).

Response to Finding No. 1804:

Complaint Counsel's proposed finding of fact is not a fact; rather, it is an improper and inaccurate legal conclusion.

1805. [redacted] (PX01302 (Otto Bock) at 081 (*in camera*)).

Response to Finding No. 1805:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

2. There is No Evidence Showing Respondent's Claimed Efficiencies regarding Repositioning the Plié Will Benefit Customers

1806. [redacted] (RX-1049 at 83–84 (¶ 179)) (Argue Expert Report) (*in camera*). [redacted] (RX-1049 at 83-84 (¶ 179) (Argue Expert Report) (*in camera*)).

Response to Finding No. 1806:

Complaint Counsel's proposed finding of fact is incomplete, inaccurate and misleading. Complaint Counsel's proposed finding improperly cites to an expert witness for a factual proposition. [redacted]

1807. [redacted]

Response to Finding No. 1807:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

Further, Complaint Counsel's proposed finding of fact relies on a document, PX01061, which was never presented at trial and thus was not subject to cross examination before the Court.

1808. [redacted] (PX01302 (Otto Bock) at 081 (*in camera*) (emphasis in original)).

Response to Finding No. 1808:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1809. [redacted] (PX01302 (Otto Bock) at 081 (*in camera*)).

Response to Finding No. 1809:

[redacted]

1810. [redacted] (Morton Tr. 4170–171 (*in camera*)). [redacted]

[redacted] (Morton Tr. 4172 (*in camera*)).

Response to Finding No. 1810:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1811. [redacted] (Morton Tr. 4172–173 (*in camera*)).

Response to Finding No. 1811:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

1812. [redacted] (Argue, Tr. 6349–350 (*in camera*)).

Response to Finding No. 1812:

Complaint Counsel's proposed finding of fact is misleading and improperly cites to expert testimony for a factual proposition. [redacted]

1813. There is no evidence in the record regarding any benefit to consumers of the 3E80. (Tr. 143-6895; JX002).

Response to Finding No. 1813:

Complaint Counsel's proposed finding of fact is factually inaccurate and is misleading. [redacted]

1814. Dr. Argue testified that he did not perform any assessment to determine whether the efficiencies Mr. Peterson estimated in Peterson's expert report would be passed on as lower prices for MPK customers. (Argue, Tr. 6259-60; PX05173 (Argue , Dep. at 35-36)).

Response to Finding No. 1814:

Respondent has no specific response.

1815. [redacted] (Argue, Tr. 6359 (*in camera*); PX05173 (Argue , Dep. at 43 (*in camera*)).

Response to Finding No. 1815:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

XIII. RESPONDENT HAS FAILED TO MEET ITS BURDEN TO SHOW FREEDOM WAS A FAILING FIRM AT THE TIME OF THE MERGER

1816. Ms. Christine Hammer, Complaint Counsel's expert, concluded that Freedom was not a failing firm because it did not meet any of the three requirements for a "failing firm" under the Merger Guidelines when the Merger occurred, in September 2017. (PX06002 at 006 (¶ 9) (Hammer Expert Report)).

Response to Finding No. 1816:

Complaint Counsel's proposed finding of fact is irrelevant because Hammer is not qualified to offer any opinions regarding the second and third requirements for a "failing firm" defense under the Merger Guidelines, and because her opinions regarding the first requirement of the defense are unreliable. Hammer is an accountant who spends 90 to 100 percent of her recent time preparing opinions for litigation. (Hammer, Tr. 3018, 3022-3023). Hammer expressly stated that she is "not an M&A person" and that the sale bidding process for a company seeking acquirers has never been her focus. (Hammer, Tr. 3018-3020).). [redacted]

[redacted] Hammer is therefore not qualified to offer opinions regarding Freedom's efforts to elicit reasonable alternatives to the Acquisition.

[redacted] Her opinions regarding good faith efforts to elicit reasonable alternative offers is thus unreliable for this reason as well.

Hammer is also not qualified to offer any opinions regarding the second prong of the failing firm defense as set forth in the Merger Guidelines regarding Chapter 11 reorganization. Hammer is an accountant and does not have relevant expertise in Chapter 11 reorganization efforts. (Hammer, Tr. 3018, 3022-3023). [redacted]

[redacted]

Complaint Counsel's proposed finding of fact is also irrelevant because Hammer's opinions regarding the first requirement of the failing firm defense – whether Freedom had the ability to meet its financial obligations in the near future – are inconsistent with the record evidence and therefore unreliable. Most notably, Hammer attempts to completely sweep under the rug the undisputed testimony from Freedom's former CEO, Smith, that [redacted] Hammer admitted during trial that, on the one hand, she did not disagree with any of the testimony in the case, including Smith's testimony, but on the hand, Hammer also admitted that Smith's testimony is inconsistent with her opinions and she cited no countervailing record evidence supporting her opinions. (Hammer, Tr. 3012, [redacted]). Hammer's "say-so," which is directly contradicted by the record, is not a sufficient basis for expert testimony and should thus be disregarded.

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1817. In order to assert successfully a failing firm defense, according to the Merger Guidelines Respondent must demonstrate 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. (PX08040 at 035 (§ 11) (Merger Guidelines)).

Response to Finding No. 1817:

Complaint Counsel's proposed finding of fact is not a fact, but, rather, it is an improper summary of a legal conclusion.

1818. The Merger Guidelines state that, "Any offer to purchase the assets of the failing firm for a price above liquidation value of those assets will be regarded as a reasonable alternative offer. Liquidation value is the highest value the assets could command for use outside the relevant market." (PX08040 at 035 n.16 (§ 11) (Merger Guidelines)).

Response to Finding No. 1818:

Complaint Counsel's proposed finding of fact is not a fact, but, rather, it is an improper summary of a legal conclusion.

A. FREEDOM'S FINANCIAL CONDITION PRIOR TO THE MERGER

1. Financial Condition Prior to April 2016

1819. [redacted] (PX03008 (Madison Capital) at 005 (*in camera*)). [redacted] (PX03008 (Madison Capital) at 006 (*in camera*)).

Response to Finding No. 1819:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies on a document, PX03008, which was never presented at trial and thus was not subject to cross examination before the Court.

1820. Later that year, in the fourth quarter of 2015, Otto Bock released its C-Leg 4 MPK, which negatively impacted Freedom's MPK sales. (*See* CCFF ¶¶ 1056-1073, above). For example, [redacted]

[redacted] (PX03008 (Madison Capital) at 005 (*in camera*)).

Response to Finding No. 1820:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

1821. Freedom also delayed the launch of its Kinnex microprocessor ankle, from the end of 2015 to the third quarter of 2016. [redacted] (PX03008 (Madison Capital) at 005 (*in camera*)).

Response to Finding No. 1821:

Complaint Counsel's proposed finding of fact is misleading [redacted] Further, Freedom has since stopped production of the Kinnex because of significant quality problems. The Kinnex was never a profitable product. (Carkhuff, Tr. 613). Further, Complaint Counsel's proposed finding of fact relies on a document, PX03008, which was never presented at trial and thus was not subject to cross examination before the Court.

1822. [redacted]

[redacted]

Response to Finding No. 1822:

Respondent has no specific response.

1823. [redacted] (PX03008 (Madison Capital) at 001, 004-06 (*in camera*)).

Response to Finding No. 1823:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies on a document, PX03008, which was never presented at trial and thus was not subject to cross examination before the Court.

1824. [redacted] (PX03008 (Madison Capital) at 006 (*in camera*)).

Response to Finding No. 1824:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Freedom replaced Carkhuff with Smith, an HEP operating partner with zero experience in the prosthetics industry. (Smith, Tr. 6411). Further, Complaint Counsel's proposed finding of fact relies on a document, PX03008, which was never presented at trial and thus was not subject to cross examination before the Court.

1825. David Smith became Freedom's Chairman and CEO on April 1, 2016. (Smith (HEP) Tr. 6408).

Response to Finding No. 1825:

Respondent has no specific response.

2. Changes Implemented by CEO David Smith

a) Changes in Personnel

1826. [redacted] (PX02034 (HEP) at 049 (*in camera*)).

Response to Finding No. 1826:

Complaint Counsel's proposed finding of fact is incomplete. David Smith testified that, although he attempted to implement a turnaround play, he identified significant obstacles that prevented him from doing so. (RFOF ¶¶ 1330-1358). For example, Freedom's products did not match the company's warranty and marketing claims. (RFOF ¶ 1338 (citing Smith, Tr. 6423)). In addition, Freedom's "team wasn't as competent as they needed to be to execute the strategy to be successful." (RFOF ¶ 1339 (citing Smith, Tr. 6423)).

1827. [redacted] (Smith (HEP) Tr. 6511 (*in camera*)).

Response to Finding No. 1827:

Respondent has no specific response.

1828. In June 2016, David Smith hired Jeremy Matthews (Freedom's current senior VP of sales and marketing) as VP of domestic sales, to "lead the sales team for the U.S. and to help marketing." (PX05137 (Matthews (Freedom) , Dep. at 13)).

Response to Finding No. 1828:

Respondent has no specific response.

1829. [redacted]

Response to Finding No. 1829:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1830. Maynard Carkhuff's role also changed from CEO to Chief Innovation Officer. (Carkhuff (Freedom) Tr. 291–292).

Response to Finding No. 1830:

Respondent has no specific response.

1831. [redacted] (PX02034 (HEP) at 049 (*in camera*)).

Response to Finding No. 1831:

Respondent has no specific response.

b) Plié 3 Improvements

1832. [redacted] (Smith (HEP) Tr. 6537, 6543 (*in camera*)).

Response to Finding No. 1832:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Complaint Counsel does not include the full sentence of David Smith's quote: [redacted]

1833. Specifically, in 2016, Freedom put initiatives in place to improve the quality of the Plié 3. (Kim (Freedom) Tr. 2515; *see also* (PX02034 (HEP) at 049 (*in camera*) [redacted].

Response to Finding No. 1833:

Respondent has no specific response.

1834. [redacted] (PX05137 (Mathews (Freedom) , Dep. at 205-06) (*in camera*)).

Response to Finding No. 1834:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1835. [redacted] (PX05115 (Robertson (Freedom) , Dep. at 101-02 (*in camera*)). [redacted] (PX05115 (Robertson (Freedom) , Dep. at 104 (*in camera*)).

Response to Finding No. 1835:

Respondent has no specific response.

1836. [redacted] (PX05137 (Mathews (Freedom) , Dep. at 196) (*in camera*)).

Response to Finding No. 1836:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1837. [redacted]

Response to Finding No. 1837:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

1838. [redacted] (PX05137 (Mathews (Freedom) , Dep. at 196) (*in camera*)).

Response to Finding No. 1838:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

c) David Smith's Strategic Plan

1839. [redacted] (PX01014 (Freedom) (*in camera*)).

Response to Finding No. 1839:

Respondent has no specific response.

1840. [redacted] (PX03009 (Madison Capital) at 002 (*in camera*)).

Response to Finding No. 1840:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

1841. [redacted] (PX03009 (Madison Capital) at 002 (*in camera*)).

Response to Finding No. 1841:

Complaint Counsel's proposed finding of fact is incomplete because it does not specify that [redacted]

1842. Christine Hammer, Complaint Counsel's expert witness, stated, "In my opinion, the 2017 Strategic Plan provided a sound roadmap for Freedom to address its declining revenues and profits, which had caused the liquidity constraints that it faced." (PX06002 at 014 (¶ 28) (Hammer Expert Report)). Furthermore, Christine Hammer stated, "Freedom appears to be a company that had temporarily experienced financial difficulties but had successfully implemented the changes required for it to succeed in the future." (PX06002 at 028 (¶ 70) (Hammer Expert Report)).

Response to Finding No. 1842:

Complaint Counsel's proposed finding of fact is misleading. Hammer ignores the fact that [redacted] Finally,

Hammer's opinions regarding Respondent's failing firm defense should be disregarded because they are unreliable and Hammer lacks the qualifications to provide them. (Response to CCFF ¶ 1816).

1843. [redacted] (Smith (HEP) Tr. 6487–88 (*in camera*)).

Response to Finding No. 1843:

Respondent has no specific response.

1844. [redacted] (Smith (HEP) Tr. 6489 (*in camera*)).

Response to Finding No. 1844:

Respondent has no specific response.

1845. [redacted] (Smith (HEP) Tr. 6489 (*in camera*)).

Response to Finding No. 1845:

Respondent has no specific response.

1846. [redacted] (Smith (HEP) Tr. 6489 (*in camera*)).

Response to Finding No. 1846:

Respondent has no specific response.

3. Freedom's Financial Turnaround

a) Late 2016 Inflection Point

1847. [redacted] (PX01109 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1847:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Complaint Counsel's proposed finding of fact relies solely on a document which was not used at trial and thus not subject to cross-examination before the Court. In addition to relying on this document which was not used at trial, [redacted]

1848. Further, Mr. Kim testified that in December 2016, Freedom's revenues and profit exceeded its annual financial plan. (Kim (Freedom) Tr. 2530

Response to Finding No. 1848:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Complaint Counsel ignores that [redacted]

1849. [redacted] (PX02034 (HEP) at 050 (*in camera*)).

Response to Finding No. 1849:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

[redacted]

1850. [redacted] (PX01087 (Freedom) at 003 (Going Concern Memo) (*in camera*)).

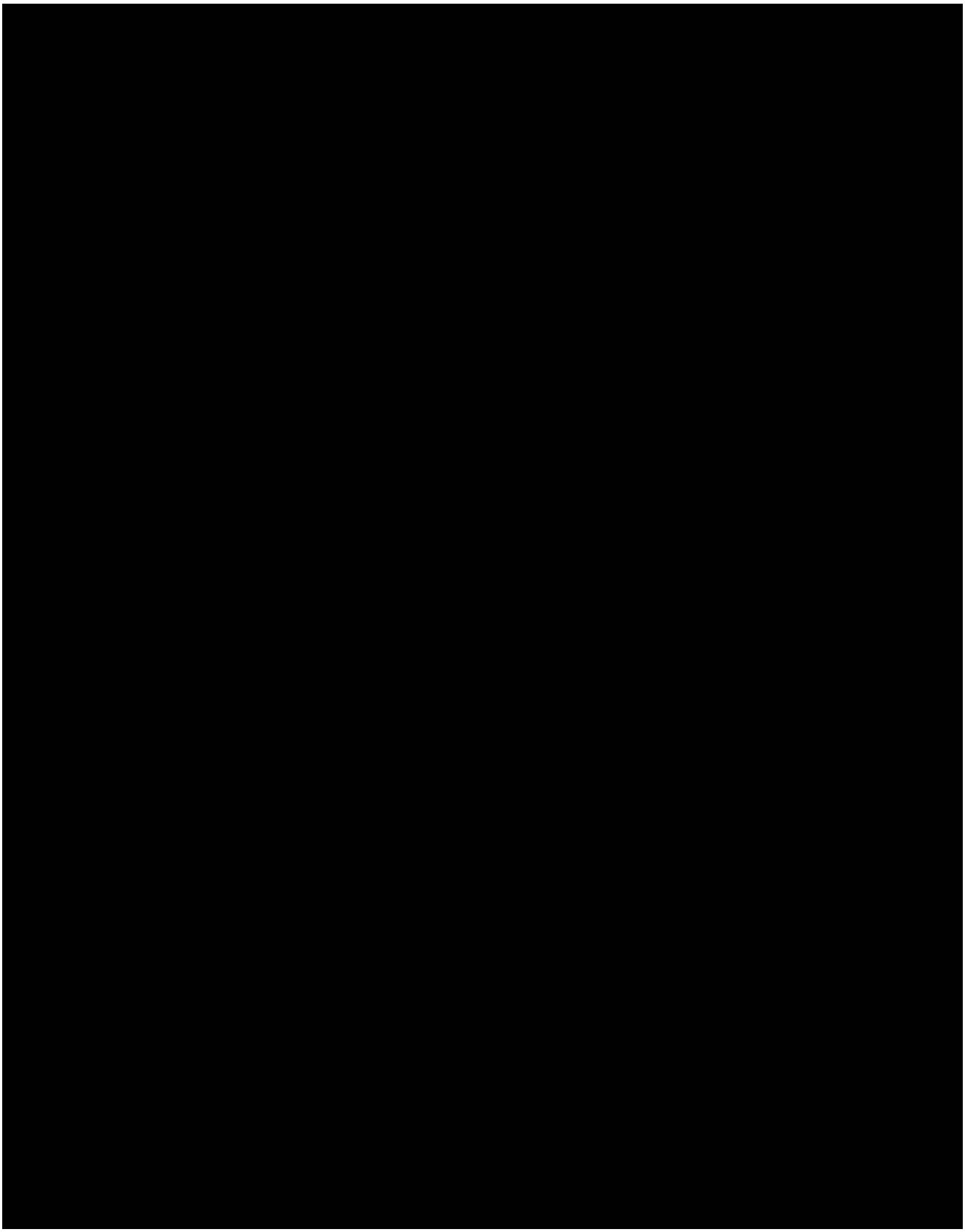
Response to Finding No. 1850:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted] For example, the Kim Memo represented to Squire that, as of March 2017, the Seventh Amendment "has been finalized to extend the due date of the debt to September 16, 2017." (RFOF ¶ 1430 (citing PX01087 at 004)). [redacted]

[redacted]

[redacted]

[redacted]



[redacted]

b) Freedom Financial Performance in 2017

1851. [redacted] (PX01108 (Freedom) at 001, 008 (*in camera*)).

Response to Finding No. 1851:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1852. [redacted] (PX01108 (Freedom) at 008 (*in camera*)).

Response to Finding No. 1852:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Complaint Counsel ignores that, [redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1853. At trial, Mr. Kim testified that Freedom's revenue and profits exceeded its annual plan for the month of January 2017. (Kim (Freedom) Tr. 2531–32).

Response to Finding No. 1853:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1854. [redacted] (PX01107 (Freedom) at 001–003 (*in camera*)).

Response to Finding No. 1854:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1855. [redacted] (PX01107 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1855:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1856. [redacted] (PX01107 (Freedom) at 002 (*in camera*)).

Response to Finding No. 1856:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

[redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1857. At trial, Mr. Kim testified that Freedom's revenue and profits exceeded its annual plan for the month of February 2017. (Kim (Freedom) Tr. 2531–32).

Response to Finding No. 1857:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

[redacted]

1858. [redacted] (PX01087 (Freedom) at 003 (Going Concern Memo) (*in camera*)). At trial, Mr. Kim testified that means that Plié 3 sales were above the forecasted sales. (Kim (Freedom) Tr. 2523-24).

Response to Finding No. 1858:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted] Complaint Counsel's proposed finding of fact is also incomplete and misleading for the reasons stated in Respondent's Response to CCFF ¶ 1850.

1859. [redacted] (Smith (HEP) Tr. 6491-92 (*in camera*)).

Response to Finding No. 1859:

Respondent has no specific response.

1860. [redacted] (PX02034 (HEP) at 001 (*in camera*)).

Response to Finding No. 1860:

Respondent has no specific response.

1861. [redacted] (PX02034 (HEP) at 024 (*in camera*)). [redacted] (Smith (HEP) Tr. 6494–95 (*in camera*)).

Response to Finding No. 1861:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1862. [redacted] (PX02034 (HEP) at 024 (*in camera*)). [redacted] (Smith (HEP) Tr. 6496-97 (*in camera*).

Response to Finding No. 1862:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1863. [redacted] (PX01105 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1863:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1864. [redacted] (PX01105 (Freedom) at 005 (*in camera*)).

Response to Finding No. 1864:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

[redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1865. At trial, Mr. Kim testified, "[s]ales performance had improved significantly" by March 2017. (Kim (Freedom) Tr. 2532).

Response to Finding No. 1865:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. Kim also testified at trial that Freedom's cash flow was still negative for March 2017. (Kim, Tr. 2532). [redacted]

1866. [redacted] (PX02032 (Freedom) at 005 (*in camera*)).

Response to Finding No. 1866:

Respondent has no specific response.

1867. [redacted] (Smith (HEP) Tr. 6514 (*in camera*)).

Response to Finding No. 1867:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

[redacted]

1868. [redacted] (Smith (HEP) Tr. 6514 (*in camera*)).

Response to Finding No. 1868:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1869. [redacted] (PX02032 (Freedom) at 006 (*in camera*)).

Response to Finding No. 1869:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1870. [redacted] (Smith (HEP) Tr. 6521 (*in camera*)). [redacted] (Smith (HEP) Tr. 6521 (*in camera*)).

Response to Finding No. 1870:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1871. [redacted] (PX02032 (Freedom) at 038 (*in camera*) [redacted]

Response to Finding No. 1871:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1872. [redacted] (Carkhuff (Freedom) Tr. 570-71 (*in camera*)).

Response to Finding No. 1872:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Complaint Counsel ignores that, [redacted]

[redacted]

1873. [redacted] (Carkhuff (Freedom) Tr. 571 (*in camera*)).

Response to Finding No. 1873:

Complaint Counsel's proposed finding of fact is incomplete. At trial, Carkhuff stated that Plié is at the very end of its product life cycle. (Carkhuff, Tr. 616). Carkhuff also 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). [redacted]

1874. [redacted] (PX01104 (Freedom) at 011 (*in camera*)).

Response to Finding No. 1874:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1875. [redacted] (PX01104 (Freedom) at 001-02 (*in camera*)).

Response to Finding No. 1875:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Complaint Counsel ignores that, [redacted] Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1876. [redacted] (PX01104 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1876:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1877. [redacted] (PX01293 (Freedom) (*in camera*)). [redacted] (PX01293 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1877:

Complaint Counsel's proposed finding of fact is misleading [redacted]

[redacted]

1878. [redacted] (Kim (Freedom) Tr. 2554 (*in camera*)).

Response to Finding No. 1878:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1879. [redacted] (PX01293 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1879:

Respondent has no specific response.

1880. [redacted] (Kim (Freedom) Tr. 2553–54 (*in camera*)).

Response to Finding No. 1880:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1881. [redacted]

(PX01293 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1881:

Respondent has no specific response.

1882.

(Kim (Freedom) Tr. 2557–58 (*in camera*)).

Response to Finding No. 1882:

Complaint Counsel's proposed finding of fact is incomplete and misleading.

1883.

(PX01103 (Freedom) (*in camera*)).

(PX01103 (Freedom) at 001 (*in camera*)).

(PX01103 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1883:

Complaint Counsel's proposed finding of fact is incomplete and misleading.

1884. [redacted] (PX02036 (Freedom) (*in camera*)). [redacted] (PX02036 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1884:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1885. [redacted] (PX01292 (Freedom) (*in camera*)). [redacted] (PX01292 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1885:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1886. [redacted] (Kim (Freedom) Tr. 2566 (*in camera*)).

Response to Finding No. 1886:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1887. [redacted] (PX01292 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1887:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1888. [redacted] (Kim (Freedom) Tr. 2566–67 (*in camera*)).

Response to Finding No. 1888:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1889. [redacted] (PX01292 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1889:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1890. [redacted] (Kim (Freedom) Tr. 2567 (*in camera*)).

Response to Finding No. 1890:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

[redacted]

1891. [redacted] (Carkhuff (Freedom) Tr. 571 (*in camera*)).

Response to Finding No. 1891:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1892. [redacted] (PX01312 (Freedom) (*in camera*)). [redacted] (PX01312 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1892:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1893. [redacted] (Kim (Freedom) Tr. 2568 (*in camera*)).

Response to Finding No. 1893:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1894. [redacted] (PX01312 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1894:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1895. [redacted] (Kim (Freedom) Tr. 2569 (*in camera*)).

Response to Finding No. 1895:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1896. [redacted] (PX01313 (Freedom)(*in camera*)). [redacted] (PX01313 (Freedom) at 002 (*in camera*)).

Response to Finding No. 1896:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1897. [redacted] (Kim (Freedom) Tr. 2570 (*in camera*)).

Response to Finding No. 1897:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

[redacted]

1898. [redacted] (PX01313 (Freedom) at 002 (*in camera*)).

Response to Finding No. 1898:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1899. [redacted] (Kim (Freedom) Tr. 2571 (*in camera*)).

Response to Finding No. 1899:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

[redacted]

1900. [redacted] (PX02028 (HEP)(*in camera*)). [redacted] (PX02028 (HEP) at 001 (*in camera*)). [redacted] (PX02028 (HEP) at 001 (*in camera*)).

Response to Finding No. 1900:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1901. [redacted] PX02028 (HEP) at 003 (*in camera*)).

Response to Finding No. 1901:

Complaint Counsel's proposed finding of fact is factually inaccurate. [redacted]

1902. [redacted] (PX02028 (HEP) at 003 (*in camera*)).

Response to Finding No. 1902:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

1903. [redacted] (PX01315 (Freedom)(*in camera*)). [redacted] (PX01315 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1903:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

1904. [redacted] (Kim (Freedom) Tr. 2574 (*in camera*)).

Response to Finding No. 1904:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

[redacted]

1905. [redacted] (Kim (Freedom) Tr. 2573-74 (*in camera*); PX01315 (Freedom) at 001 (*in camera*)).

Response to Finding No. 1905:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

[redacted]

1906. [redacted] (PX01457 (Freedom)(*in camera*)). [redacted] (PX01457 (Freedom) at 002 (*in camera*)).

Response to Finding No. 1906:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

[redacted]

1907. [redacted] (PX05137 (Matthews (Freedom) , Dep. at 196 (*in camera*)). The improvements were due to "a combination of

efforts, not just one thing [Freedom] did. It was production, sales, customer service, everybody doing their part." (PX05137 (Matthews (Freedom) , Dep. at 206)).

Response to Finding No. 1907:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

1908. Complaint Counsel's expert witness, Christine Hammer, concluded that "Freedom's financial position had significantly improved by the time Otto Bock acquired it in September 2017." (PX06002 at 017-018 (¶ 40) (Hammer Expert Report)).

Response to Finding No. 1908:

Complaint Counsel's proposed finding of fact is not a fact, but an improper expert opinion, as well as incomplete and misleading [redacted]

4. Financial Forecasts

1909. [redacted] (Smith (HEP) Tr. 6509–10 (*in camera*) ([redacted]

[redacted]

Response to Finding No. 1909:

Respondent has no specific response.

1910. [redacted] (Smith (HEP) Tr. 6505 (*in camera*)) [redacted].

Response to Finding No. 1910:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

[redacted]

1911. [redacted] (Smith (HEP) Tr. 6491 (*in camera*)).

Response to Finding No. 1911:

Respondent has no specific response.

1912. [redacted] (PX02034 (HEP) at 001 (*in camera*)).

Response to Finding No. 1912:

Respondent has no specific response.

1913. [redacted] (PX02034 (HEP) at 028 (*in camera*)).

Response to Finding No. 1913:

Respondent has no specific response.

1914. [redacted] (PX02034 (HEP) at 028 (*in camera*)). (Smith (HEP) Tr. 6499 (*in camera*)).

Response to Finding No. 1914:

Respondent has no specific response.

1915. [redacted] (PX02034 (HEP) at 028 (*in camera*)).

Response to Finding No. 1915:

Respondent has no specific response.

1916. [redacted] (PX02034 (HEP) at 028 (*in camera*)).

Response to Finding No. 1916:

Respondent has no specific response.

1917. [redacted] (Smith (HEP) Tr. 6499–6500 (*in camera*)).

Response to Finding No. 1917:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

[redacted]

1918. [redacted] (Carkhuff (Freedom) Tr. 543 (*in camera*)).

Response to Finding No. 1918:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

1919. [redacted] (PX02034 (HEP) at 021 (*in camera*); (Carkhuff (Freedom) Tr. 542-43 (*in camera*)).

Response to Finding No. 1919:

Respondent has no specific response.

1920. [redacted] (PX02034 (HEP) at 021 (*in camera*)).

Response to Finding No. 1920:

Respondent has no specific response.

1921. [redacted] (PX02034 (HEP) at 021 (*in camera*)).

Response to Finding No. 1921:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

1922. [redacted] (Carkhuff (Freedom) Tr. 544 (*in camera*)).

Response to Finding No. 1922:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1923. [redacted] (Carkhuff (Freedom) Tr. 544 (*in camera*)).

Response to Finding No. 1923:

Complaint Counsel's proposed finding of fact is misleading [redacted]

[redacted]

1924. [redacted] (Carkhuff (Freedom) Tr. 544 (*in camera*)).

Response to Finding No. 1924:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1925. [redacted] (PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1925:

Respondent has no specific response.

1926. [redacted] (PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1926:

Respondent has no specific response.

1927. [redacted] (PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1927:

Respondent has no specific response.

1928. [redacted] (PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1928:

Respondent has no specific response.

1929. [redacted] (PX02032 (HEP) at 013 (*in camera*); *see also* Smith (HEP) Tr. 6527 (*in camera*)).

Response to Finding No. 1929:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

1930. [redacted] (PX02032 (HEP) at 013 (*in camera*); *see also* Smith (HEP) Tr. 6527 (*in camera*)).

Response to Finding No. 1930:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

1931. [redacted] (PX02032 (HEP) at 013 (*in camera*); *see also* (Smith (HEP) Tr. 6527–28 (*in camera*)).

Response to Finding No. 1931:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

1932. [redacted]
(PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1932:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

1933. [redacted] (PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1933:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

1934. [redacted]

[redacted]
(PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1934:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

1935. [redacted] (PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1935:

Respondent has no specific response.

1936. [redacted]
(PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1936:

Respondent has no specific response.

1937. [redacted]

[redacted] (PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1937:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

1938. [redacted] (PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1938:

Respondent has no specific response.

1939. [redacted] (PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1939:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1940. [redacted] (PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 1940:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1941. On July 15, 2017, David Smith, Freedom's former Chairman and CEO, sent an email to Jon Hammack, Managing Director of Moelis, which included business points for Rolf Classon, a Freedom board member, to deliver to Professor Hans George Näder, of Otto Bock. (PX02010 (HEP) at 001). One of the business points David Smith instructed to be delivered to Professor Näder was that "our pipeline is the best it's ever been in the history of [the] company. That investment will be harvested over the next several years. Quattro MPK is a crown jewel. . . ." (PX02010 (HEP) at 001).

Response to Finding No. 1941:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

1942. On August 17, 2017, Jon Hammack, managing director of Moelis, emailed Rolf Classon, a Freedom board member about Freedom's negotiations with Otto Bock, which stated,

"They've now seen how attractive our pipeline is. They know Quattro is a game changer. They know what it means if Össur ends up with this." (PX01851 (Freedom) at 001).

Response to Finding No. 1942:

Complaint Counsel's proposed finding of fact is misleading and incomplete [redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

1943. [redacted] (PX03012 (Ossur) at 023 (*in camera*)).

Response to Finding No. 1943:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1944. [redacted] (PX01003 (Otto Bock) at 003 (*in camera*)).

Response to Finding No. 1944:

Respondent has no specific response.

B. RESPONDENT HAS NOT DEMONSTRATED THAT FREEDOM WOULD HAVE BEEN UNABLE TO MEET ITS FINANCIAL OBLIGATIONS IN THE NEAR FUTURE

1945. Christine Hammer, Complaint Counsel's expert witness, concluded, "at the time of its acquisition by Otto Bock, in September 2017, Freedom would have been able to meet its financial obligations in the near future." (PX06002 at 008 (¶ 17) (Hammer Expert Report)).

Response to Finding No. 1945:

Complaint Counsel's proposed finding of fact is factually inaccurate and misleading because it ignores testimony from various Freedom executives stating the exact opposite of Hammer's "conclusion." [redacted] Further, Respondent's corporate finance expert, Peterson, has substantial experience with hundreds of transactions in which he performed analyses of whether companies would be able to meet their financial obligations in the near future. (RFOF ¶ 82). Peterson concluded: "Due to the

historical trend of declining financial performance and the pending maturity of the [Freedom's] Credit Facility, Freedom was unable to meet its financial obligations in the near future."[2] (RX-1048 at 006).

1. The Clean Independent Audit of Freedom's 2016 Financial Statements is Inconsistent with an Inability to Meet Near-Term Financial Obligations

1946. Prior to Freedom's acquisition by Otto Bock, it was Freedom's regular practice to retain independent auditors to conduct an annual audit of Freedom's financial statements. (Kim (Freedom) Tr. 2494–95).

Response to Finding No. 1946:

Respondent has no specific response.

1947. Independent auditors typically would audit Freedom's financial statements in mid-February or mid-March of each year. (Kim (Freedom) Tr. 2497).

Response to Finding No. 1947:

Respondent has no specific response.

1948. At the end of the audit process, Freedom's independent auditor would provide a report on Freedom's financial statements. (Kim (Freedom) Tr. 2500–01).

Response to Finding No. 1948:

Respondent has no specific response.

1949. The independent auditors report would include an opinion on whether the financial statements present fairly the financial position of Freedom, in accordance with Generally Accepted Accounting Principles ("GAAP"). (Kim (Freedom) Tr. 2501).

[2] Peterson has substantial experience with hundreds of transactions in which he performed analyses of whether companies would be able to meet their financial obligations in the near future. (RFOF ¶ 82).

Response to Finding No. 1949:

Complaint Counsel's proposed finding of fact is misleading because it lacks foundation and cites to testimony from a deponent who has no first-hand knowledge as to whether the independent auditors issue opinions in accordance with Generally Accepted Accounting Principles.

1950. According to Complaint Counsel's expert witness, Christine Hammer, "[u]nder Generally Accepted Accounting Principles ('GAAP'), "continuation of an entity as a going concern is presumed as the basis for financial reporting unless and until the entity's liquidation becomes imminent." (PX06002 at 024 (¶ 59) (Hammer Expert Report)).

Response to Finding No. 1950:

Complaint Counsel's proposed finding of fact is not a fact and is incomplete. [redacted]

[redacted]

[redacted]

1951. According to Ms. Hammer, under GAAP, "[i]n connection with preparing financial statements for each annual and interim reporting period, an entity's management shall evaluate whether there are conditions and events, considered in the aggregate, that raise substantial doubt about an entity's ability to continue as a going concern within one year after the date that the financial statements are issued (or within one year after the date that the financial statements are available to be issued when applicable)." (PX06002 at 024 (¶ 60) (Hammer Expert Report)).

Response to Finding No. 1951:

Respondent has no specific response.

1952. According to Ms. Hammer, under GAAP, "[o]rdinarily, conditions or events that raise substantial doubt about an entity's ability to continue as a going concern relate to the entity's ability to meet its obligations as they become due. Accordingly, management's evaluation of an entity's ability to continue as a going concern ordinarily is based on conditions and events that are relevant to an entity's ability to meet its obligations as they become due within one year after the date that the financial statements are issued." (PX06002 at 024-025 (¶ 61) (Hammer Expert Report)).

Response to Finding No. 1952:

Respondent has no specific response.

1953. Lee Kim, Freedom's CFO, is a certified public accountant, licensed in California. (Kim (Freedom) Tr. 2495–96).

Response to Finding No. 1953:

Respondent has no specific response.

1954. Lee Kim, Freedom's CFO testified that the term "going concern" refers to an entity that "has the financial capability to operate for the long term." (Kim (Freedom) Tr. 2502).

Response to Finding No. 1954:

Respondent has no specific response.

1955. Lee Kim, Freedom's CFO, was responsible for managing the independent audit process while it was ongoing each year. (Kim (Freedom) Tr. 2497).

Response to Finding No. 1955:

Complaint Counsel's proposed finding of fact is misleading and inaccurate because Smith, Freedom's CEO at the time, [redacted]

1956. Lee Kim, Freedom's CFO, was responsible for interacting with the financial auditors that were retained by Freedom for its annual audits. (Kim (Freedom) Tr. 2495).

Response to Finding No. 1956:

Complaint Counsel's proposed finding of fact is misleading and inaccurate because Smith, Freedom's CEO at the time, [redacted]

[redacted]

1957. Lee Kim, Freedom's CFO, would try to be truthful in his communications with Freedom's financial auditors. (Kim (Freedom) Tr. 2495).

Response to Finding No. 1957:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1958. Lee Kim, Freedom's CFO, would provide financial information to the independent auditors they would request for the audit. (Kim (Freedom) Tr. 2497).

Response to Finding No. 1958:

Complaint Counsel's proposed finding of fact is misleading and inaccurate because Smith, Freedom's CEO at the time, [redacted]

1959. Lee Kim, Freedom's CFO, testified that he has an obligation to provide outside auditors with information that is free from material misstatements. (Kim (Freedom) Tr. 2500).

Response to Finding No. 1959:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1960. Prior to Otto Bock's acquisition of Freedom, the last independent audit of Freedom's financial statements was completed in March 2017. (Kim (Freedom) Tr. 2501).

Response to Finding No. 1960:

Respondent has no specific response.

1961. The March 2017 independent audit was of Freedom's 2016 financial statements. (Kim (Freedom) Tr. 2501).

Response to Finding No. 1961:

Respondent has no specific response.

1962. Squire & Company ("Squire") conducted the March 2017 independent audit of Freedom's 2016 financial statements. (Kim (Freedom) Tr. 2501).

Response to Finding No. 1962:

Respondent has no specific response.

1963. During the course of the audit Squire conducted in March 2017, Lee Kim, Freedom's CFO, provided Squire with information regarding the financial state of Freedom. (Kim (Freedom) Tr. 2502).

Response to Finding No. 1963:

Respondent has no specific response.

1964. During the course of the audit Squire conducted in March 2017, Lee Kim, Freedom's CFO, strived to be truthful in his communications with Squire. (Kim (Freedom) Tr. 2502).

Response to Finding No. 1964:

Complaint Counsel's proposed finding of fact is misleading [redacted]

a) Going Concern Memo

1965. During the audit Squire conducted in March 2017, Squire informed Lee Kim, Freedom's CFO, that it was considering including a paragraph in its audit opinion expressing doubt about Freedom's ability to continue as a going concern. (Kim (Freedom) Tr. 2502-03).

Response to Finding No. 1965:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1966. At trial, Lee Kim, Freedom's CFO, testified that during the March 2017 audit, Squire requested that Mr. Kim draft "a memorandum addressing the various accounting requirements in the guidance with respect to financial reporting regarding going concern." (Kim (Freedom) Tr. 2503).

Response to Finding No. 1966:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1967. Lee Kim, Freedom's CFO, had an understanding of the potential impact that the information conveyed in the memo could have on Squire's audit opinion. (Kim (Freedom) Tr. 2504).

Response to Finding No. 1967:

Complaint Counsel's proposed finding of fact is inaccurate [redacted]

1968. Lee Kim, Freedom's CFO, drafted and provided Squire with the memorandum that it requested. (Kim (Freedom) Tr. 2504).

Response to Finding No. 1968:

Complaint Counsel's proposed finding of fact is incomplete and inaccurate [redacted]

1969. [redacted]

Response to Finding No. 1969:

Respondent has no specific response.

1970. At trial, Lee Kim, Freedom's CFO, confirmed that the attachment, "Going concern memo, 2016.doc," was the memo he wrote regarding the factors that could affect the evaluation of Freedom as a going concern within the context of the March 2017 audit. (Kim (Freedom) Tr. 2505–06).

Response to Finding No. 1970:

Respondent has no specific response.

1971. At trial, Lee Kim, Freedom's CFO, confirmed that he provided the Going Concern Memo to Squire during the March 2017 audit. (Kim (Freedom) Tr. 2510).

Response to Finding No. 1971:

Respondent has no specific response.

1972. At trial, Lee Kim, Freedom's CFO, testified that he drafted the Going Concern Memo in March 2017. (Kim (Freedom) Tr. 2510).

Response to Finding No. 1972:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

1973. [redacted] (PX01087 (Freedom) at 001 (email with Going Concern Memo) (*in camera*)). [redacted] At trial, Lee Kim, Freedom's CFO, confirmed that the "opinion" he referenced was the opinion of Squire & Company with respect to its audit of Freedom's 2016 financial statements. (Kim (Freedom) Tr. 2507).

Response to Finding No. 1973:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

1974. At trial, Lee Kim, Freedom's CFO, testified that Squire ultimately removed the going concern modification it had been considering including in its opinion, meaning that Squire's report did not include information about issues relating to Freedom's ability to

continue as a going concern. (Kim (Freedom) Tr. 2508). Mr. Kim testified that Squire's "opinion did not include that information." (Kim (Freedom) Tr. 2508).

Response to Finding No. 1974:

Complaint Counsel's proposed finding of fact is factually inaccurate. [redacted]

1975. [redacted]

Response to Finding No. 1975:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

1976. [redacted]

(PX01087 (Freedom) at 002–003 (Going Concern Memo) (*in camera*)).

Response to Finding No. 1976:

Respondent has no specific response.

1977. [redacted]

Response to Finding No. 1977:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

1978. [redacted]

Response to Finding No. 1978:

Complaint Counsel's proposed finding of fact is incomplete and inaccurate [redacted]

[redacted]

1979. [redacted]

Response to Finding No. 1979:

Respondent has no specific response.

1980. [redacted]

Response to Finding No. 1980:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1981. [redacted]

Response to Finding No. 1981:

Respondent has no specific response.

1982. [redacted]

Response to Finding No. 1982:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1983. [redacted] At trial, Lee Kim, Freedom's CFO, testified that he made this representation to Freedom's auditors in March 2017. (Kim (Freedom) Tr. 2539).

Response to Finding No. 1983:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1984. At trial, Lee Kim, Freedom's CFO, testified that when he drafted the Going Concern Memo in March 2017 for Freedom's financial auditors, he believed that the plan that Freedom management had in place could alleviate the conditions raising substantial doubt about the company's ability to continue as a going concern. (Kim (Freedom) Tr. 2540).

Response to Finding No. 1984:

Complaint Counsel's proposed finding of fact is misleading [redacted]

[redacted]

1985. [redacted]

Response to Finding No. 1985:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1986. [redacted] At trial, Lee Kim, Freedom's CFO, testified that he made this representation to Freedom's financial auditors in March 2017. (Kim (Freedom) Tr. 2541–42).

Response to Finding No. 1986:

Complaint Counsel's proposed finding of fact is misleading [redacted]

[redacted]

1987. [redacted]

Response to Finding No. 1987:

Respondent has no specific response.

1988. [redacted]
(PX01294 (Freedom) at 001 (email chain with draft consolidated financial statements) (*in camera*)). [redacted]

Response to Finding No. 1988:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

[redacted]

[redacted]

b) Freedom's Consolidated Financial Statements Issued in April 2017

1989. [redacted]

Response to Finding No. 1989:

Respondent has no specific response.

1990. [redacted]

Response to Finding No. 1990:

Respondent has no specific response.

1991. [redacted]

Response to Finding No. 1991:

Respondent has no specific response.

1992. David Smith, who was Freedom's CEO on April 20, 2017, practiced as a CPA for approximately five years. (Smith (HEP) Tr. 6409).

Response to Finding No. 1992:

Respondent has no specific response.

1993. [redacted] (Kim (Freedom) Tr. 2590 (*in camera*)).

Response to Finding No. 1993:

Respondent has no specific response.

1994. [redacted]

Response to Finding No. 1994:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1995. [redacted] (Kim (Freedom) Tr. 2591 (*in camera*)).

Response to Finding No. 1995:

Respondent has no specific response.

1996. [redacted] (Kim (Freedom) Tr. 2591 (*in camera*)).

Response to Finding No. 1996:

Complaint Counsel's proposed finding of fact is misleading [redacted]

1997. [redacted]

Response to Finding No. 1997:

Respondent has no specific response.

1998. [redacted] (Kim (Freedom) Tr. 2592 (*in camera*)).

Response to Finding No. 1998:

Respondent has no specific response.

1999. [redacted] (Kim (Freedom) Tr. 2592 (*in camera*)).

Response to Finding No. 1999:

Respondent has no specific response.

2000. [redacted]

[redacted]

Response to Finding No. 2000:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

2001. [redacted]

Response to Finding No. 2001:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

2002. [redacted]

Response to Finding No. 2002:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

2003. [redacted]

Response to Finding No. 2003:

Respondent has no specific response.

2004. [redacted]

Response to Finding No. 2004:

Respondent has no specific response.

2005. [redacted]

Response to Finding No. 2005:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2006. [redacted] (PX02023 (HEP) at 015–016 (*in camera*)).

Response to Finding No. 2006:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2007. No one from Squire & Company, which, on April 6, 2017, submitted its Independent Auditor's Report of Freedom's Consolidated Financial Statements for Years Ended December 31, 2016 and 2015, testified at trial. (Hearing Tr. 143-6895).

Response to Finding No. 2007:

Respondent has no specific response.

2008. No one from Squire & Company, which, on April 6, 2017, submitted its Independent Auditor's Report of Freedom's Consolidated Financial Statements for Years Ended December 31, 2016 and 2015, testified at a deposition. (JX002).

Response to Finding No. 2008:

Respondent has no specific response.

2009. There is no testimony in the record from Squire & Company that Freedom's audited Consolidated Financial Statements for Years Ended December 31, 2016 and 2015 are not accurate. (Tr. 143-6895; JX002).

Response to Finding No. 2009:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that

[redacted]

2010. Squire & Company, which, on April 6, 2017, submitted its Independent Auditor's Report of Freedom's Consolidated Financial Statements for Years Ended December 31, 2016 and 2015, did not produce any documents in In the Matter of Otto Bock HealthCare North America, Inc., Docket No. 9378, before the Federal Trade Commission. (JX002).

Response to Finding No. 2010:

Respondent has no specific response.

2011. There are no documents in the record from Squire & Company stating that Freedom's audited Consolidated Financial Statements for Years Ended December 31, 2016 and 2015 are not accurate. (JX002).

Response to Finding No. 2011:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that [redacted]

2012. Christine Hammer, Complaint Counsel's expert witness, concluded, [redacted] (PX06002 at 028 (¶ 69) (Hammer Expert Report) (*in camera*)).

Response to Finding No. 2012:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

2. Freedom's Actions were Inconsistent with an Inability to Meet Near Term Financial Obligations

2013. In preparing Freedom's audited Consolidated Financial Statements for Years Ended December 31, 2016 and 2015, Freedom never employed a liquidation method of accounting. (Kim (Freedom) Tr. 2548).

Response to Finding No. 2013:

Complaint Counsel's proposed finding of fact is misleading [redacted]

2014. At trial, Lee Kim, Freedom's CFO, testified that Freedom never employed a liquidation method of accounting because Freedom was not going to be liquidated. (Kim (Freedom) Tr. 2548).

Response to Finding No. 2014:

Complaint Counsel's proposed finding of fact is misleading because it misrepresents Kim's testimony. [redacted]

2015. At trial, Lee Kim, Freedom's CFO, testified that Freedom never undertook any efforts to value what its various assets could be sold for through liquidation. (Kim (Freedom) Tr. 2548).

Response to Finding No. 2015:

Respondent has no specific response.

2016. [redacted] (Carkhuff (Freedom) Tr. 552 (*in camera*); Smith (HEP) Tr. 6551 (*in camera*)).

Response to Finding No. 2016:

Respondent has no specific response.

2017. [redacted] (Carkhuff (Freedom) Tr. 552 (*in camera*)).

Response to Finding No. 2017:

Respondent has no specific response.

2018. [redacted] (PX01014 (Freedom) at 040 (*in camera*) (P&L Projection for 2016 to 2018, contained in Freedom's Board of Directors Meeting Presentation, dated September 22, 2016)).

Response to Finding No. 2018:

Respondent has no specific response.

2019. [redacted] (PX02032 (HEP) at 016 (*in camera*)).

Response to Finding No. 2019:

Complaint Counsel's proposed finding of fact is misleading because it mischaracterizes the document. [redacted]

2020. [redacted]

Response to Finding No. 2020:

Respondent has no specific response.

2021. At trial, Lee Kim, Freedom's CFO, testified that [redacted] (Kim (Freedom) Tr. 2588 (*in camera*)). For example, [redacted] (PX02028 (HEP) at 003 (*in camera*) [redacted]

Response to Finding No. 2021:

Respondent has no specific response.

2022. On December 1, 2017, David Smith, Freedom's CEO at the time, testified that Freedom had fairly recently extended the leases for its Irvine, California and Gunnison, Utah facilities for three years each. (PX05005 (Smith (HEP) IHT at 001, 214-15)).

Response to Finding No. 2022:

Respondent has no specific response.

2023. At trial, Lee Kim, Freedom's CFO, testified [redacted] (Kim (Freedom) Tr. 2588 (*in camera*)).

Response to Finding No. 2023:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it ignores that [redacted]

2024. At trial, Lee Kim, Freedom's CFO, testified that [redacted] (Kim (Freedom) Tr. 2588 (*in camera*)). [redacted] (PX05126 (Kim (Freedom) , Dep. at 160). [redacted] (PX05126 (Kim (Freedom) , Dep. at 160).

Response to Finding No. 2024:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it ignores that [redacted]

2025. [redacted] (PX02032 (HEP) at 013 (*in camera*)).

Response to Finding No. 2025:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that many of these pipeline products [redacted]

[redacted]

2026. Christine Hammer, Complaint Counsel's expert witness, stated, "In my experience, Freedom's continued investment in its product development pipeline and plans for business expansion are not consistent with a company that is close to imminent failure or in decline." (PX06002 at 018–019 (¶ 43) (Hammer Expert Report)).

Response to Finding No. 2026:

Complaint Counsel's proposed finding of fact is misleading because it ignores that, [redacted]

[redacted]

3. Freedom Has Not Demonstrated that Absent the Merger, Its Creditors Likely Would Have Forced It into Bankruptcy or Liquidation

a) Freedom's Lenders Previously Extended the Repayment Date Instead of Foreclosing

2027. [redacted] (RX-0826 (Freedom) (*in camera*)(Credit Agreement)).

Response to Finding No. 2027:

Respondent has no specific response.

2028. [redacted] (RX-0826 (Freedom) at 28 (*in camera*) (Credit Agreement)).

Response to Finding No. 2028:

Respondent has no specific response.

2029. [redacted] (PX03009 (Madison Capital) at 001 (*in camera*) (Seventh Amendment Memo)).

Response to Finding No. 2029:

Respondent has no specific response.

2030. [redacted] (Kim (Freedom) Tr. 2602-04 (*in camera*)).

Response to Finding No. 2030:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

2031. [redacted]

Response to Finding No. 2031:

Respondent has no specific response.

2032. [redacted]

Response to Finding No. 2032:

Respondent has no specific response.

2033. [redacted]

Response to Finding No. 2033:

Respondent has no specific response.

2034. [redacted]

Response to Finding No. 2034:

Respondent has no specific response.

2035. [redacted]

Response to Finding No. 2035:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2036. At trial, Lee Kim, Freedom's CFO testified that there were eight amendments to Freedom's Credit Agreement with Madison Capital and BMO. (Kim (Freedom) Tr. 2528).

Response to Finding No. 2036:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

[redacted]

b) Respondent Submitted No Testimony or Documents from Freedom's Lenders Showing that They Would Have Foreclosed

2037. No one from Madison Capital Financial, one of Freedom's lenders, testified at trial. (Tr. 143-6895).

Response to Finding No. 2037:

Respondent has no specific response.

2038. No one from Madison Capital Financial, one of Freedom's lenders, testified at a deposition. (JX002).

Response to Finding No. 2038:

Respondent has no specific response.

2039. No one from Madison Capital Financial, one of Freedom's lenders, testified [redacted] (Tr. 143-6895; JX002) (*in camera*).

Response to Finding No. 2039:

Complaint Counsel's proposed finding of fact is misleading, because it ignores that

[redacted]

[redacted]

2040. [redacted] (PX03009 (Madison Capital) at 004 (*in camera*)).

Response to Finding No. 2040:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2041. No one from Bank of Montreal ("BMO"), one of Freedom's lenders, testified at trial. (Tr. 143-6895).

Response to Finding No. 2041:

Respondent has no specific response.

2042. No one from BMO, one of Freedom's lenders, testified at a deposition. (JX002).

Response to Finding No. 2042:

Respondent has no specific response.

2043. No one from BMO, one of Freedom's lenders, testified [redacted] (Tr. 143-6895; JX002) (*in camera*).

Response to Finding No. 2043:

Complaint Counsel's proposed finding of fact is misleading, because it ignores that [redacted]

c) Madison Capital and BMO Had the Financial Incentive to Extend the Credit Agreement Maturity Date Instead of Foreclosing

2044. [redacted]

Response to Finding No. 2044:

Respondent has no specific response.

2045. At trial, Freedom's CEO at the time, David Smith, testified that [redacted] (Smith (HEP) Tr. 6556 (*in camera*)).

Response to Finding No. 2045:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it ignores [redacted]

[redacted]

Complaint Counsel chose to cite Smith's testimony on this subject despite his admonition against doing so.

2046. Christine Hammer, Complaint Counsel expert witness, stated that "even if Freedom had not been able to refinance or complete an acquisition by September 2017, my opinion is that Freedom's creditors likely would not have forced it into bankruptcy or liquidation for several reasons." (PX06002 at 024 (¶ 58) (Hammer Expert Report)).

Response to Finding No. 2046:

Complaint Counsel's proposed finding of fact is misleading, because it is based on pure speculation and it ignores the fact that [redacted]

2047. The basis for Ms. Hammer's conclusion that Freedom's creditors likely would not have forced it into bankruptcy or liquidation was based on her opinions that "It is unlikely that liquidating Freedom's assets would cover the debt owed to its creditors," (PX06002 at 024 (¶ 58) (Hammer Expert Report)), [redacted] and [redacted] (PX06002 at 024 (¶ 58) (*in camera*)

(Hammer Expert Report) [redacted]

Response to Finding No. 2047:

Complaint Counsel's proposed finding of fact is improper, inaccurate, incomplete, and misleading. [redacted]

d) Refinancing Option

2048. [redacted] (PX02023 (HEP) at 022 (*in camera*)).

Response to Finding No. 2048:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that [redacted]

2049. [redacted] (PX02023 (HEP) at 022 (*in camera*)).

Response to Finding No. 2049:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2050. [redacted] (PX02023 (HEP) at 022 (*in camera*)).

Response to Finding No. 2050:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

[redacted]

2051. [redacted] (PX02093 (HEP) (*in camera*)). [redacted] (PX02093 (HEP) (*in camera*)).

Response to Finding No. 2051:

Respondent has no specific response.

2052. [redacted] (PX02093 (HEP) (*in camera*)).

Response to Finding No. 2052:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2053. [redacted] (PX03049 (Moelis) (*in camera*)).

Response to Finding No. 2053:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2054. [redacted] (PX03087 (Parker Hannifin) at 001) (*in camera*)).

Response to Finding No. 2054:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2055. [redacted] (PX03087 (Parker Hannifin) at 001) (*in camera*)).

Response to Finding No. 2055:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

[redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2056. [redacted] (PX05125 (Dorotheou (Parker Hannifin), Dep. at 112-113 (*in camera*)).

Response to Finding No. 2056:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

2057. [redacted] (PX03087 (Parker Hannifin) at 001) (*in camera*)).

Response to Finding No. 2057:

Complaint Counsel's proposed finding of fact is incomplete. [redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2058. [redacted] (PX02100 (HEP) at 002 (*in camera*)).

Response to Finding No. 2058:

Respondent has no specific response.

2059. [redacted] (PX05125 (Dorotheou (Parker Hannifin) , Dep. at 111) (*in camera*)).

Response to Finding No. 2059:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it ignores the fact that [redacted]

[redacted]

2060. Complaint Counsel's expert, Christine Hammer, concluded that "if Freedom had made good faith efforts to explore extending its existing credit agreement with Madison Capital and refinancing BMO's share of the maturing credit facility with either new equity or debt sources, Freedom could have been successful in obtaining additional financing." (PX06002 at 22 (¶ 51) (Hammer Expert Report)).Complaint Counsel's expert, Christine Hammer, concluded that although refinancing arrangements may not have been as favorable to Freedom's equity investors as the sale to Otto Bock, they "would likely have been pursued" in lieu of bankruptcy or liquidation. (PX06002 at 023 (¶ 57) (Hammer Expert Report)).

Response to Finding No. 2060:

Complaint Counsel's proposed finding relies on the opinions of a purported expert witness, Hammer, who is not qualified to offer expert testimony regarding good faith efforts to pursue M&A alternatives. Hammer expressly stated that she is "not an M&A person" and that the sale bidding process for a company seeking acquirers has never been her focus. (Hammer, Tr. 3018-3020). During her trial testimony, Hammer made very clear how unqualified she is to render opinions regarding good faith efforts to elicit offers in a sale process. [redacted]

Hammer is therefore not qualified to offer opinions regarding Freedom's efforts to elicit reasonable alternatives to the Acquisition. (*See also* Response to CCFF ¶ 1816).

Counsel's proposed finding is also incomplete and contradicted by the record evidence. [redacted]

[redacted]

[redacted]

C. REORGANIZATION UNDER CHAPTER 11 WAS NOT SERIOUSLY CONSIDERED

2061. [redacted] (PX05113 (Chung (HEP) , Dep. at 99-100) (*in camera*)).

Response to Finding No. 2061:

Respondent has no specific response.

2062. [redacted] (PX05113 (Chung (HEP) , Dep. at 100) (*in camera*)).

Response to Finding No. 2062:

Complaint Counsel's proposed finding of fact is misleading and inaccurate because it ignores the fact that [redacted]

2063. [redacted] (PX05122 (Smith (HEP) , Dep. at 47–48 (*in camera*)).

Response to Finding No. 2063:

Complaint Counsel's proposed finding of fact is misleading and inaccurate because it ignores the fact that [redacted]

2064. Christine Hammer, Complaint Counsel's expert witness, concluded, "Given that Freedom's reorganization efforts were proving to be successful outside of Chapter 11, there is no reason to believe, barring new evidence produced to the record, that Freedom could not have reorganized successfully in Chapter 11 or implemented a successful reorganization plan." (PX06002 at 031 (¶ 75) (Hammer Expert Report)).

Response to Finding No. 2064:

Complaint Counsel's proposed finding of fact is misleading and inaccurate because it ignores the fact that [redacted]

[redacted] Complaint Counsel's proposed finding of fact is also based on the testimony of a purported expert who lacks the qualifications necessary to offer opinions regarding Chapter 11 reorganization. Unlike Smith, Hammer has no relevant experience with Chapter 11 reorganization efforts. (Hammer, Tr. 3018, 3022-3023). Further, the information she relied upon in reaching her opinions regarding Chapter 11 reorganization consists of (1) information Hammer collected from the internet that purports to summarize the requirements for reorganization and (2) a Ph.D. dissertation from a student at the University of Munich that was originally published in German. (Hammer, Tr. 3231-3232). [redacted]

2065. Ms. Hammer identified multiple factors related to a company's ability to reorganize successfully under Chapter 11 bankruptcy, including an increase in sales, reduction of costs, reduction of personnel, and change in top management. (PX06002 at 031 (¶ 75) (Hammer Expert Report)). Ms. Hammer concluded that "Despite not having entered into Chapter 11 bankruptcy, many of the actions taken by Freedom to reorganize its business prior to the Otto Bock acquisition echo the reorganization variables examined within the Chapter 11 literature." (PX06002 at 031 (¶ 75) (Hammer Expert Report)).

Response to Finding No. 2065:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores testimony from [redacted]

2066. [redacted] (PX02034 (HEP) at 049 (*in camera*); [redacted]

Response to Finding No. 2066:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2067. [redacted] (PX01457 (Freedom) at 002 (*in camera*)).

Response to Finding No. 2067:

Respondent has no specific response.

2068. Freedom executed a restructuring plan to reduce its "expense run rate" which is Freedom's "total monthly expenses." (Kim (Freedom) Tr. 2515-16; PX01087 (Freedom) at 003 (Going Concern Memo) (*in camera*)). Mr. Kim testified, this restructuring "reduced the expense run rate." (Kim (Freedom) Tr. 2516).

Response to Finding No. 2068:

Respondent has no specific response.

2069. Christine Hammer, Complaint Counsel's expert witness, concluded, [redacted] (PX06002 at 031 (¶ 74) (*in camera*) (Hammer Expert Report)).

Response to Finding No. 2069:

Complaint Counsel's proposed finding should be disregarded because [redacted] Complaint Counsel's proposed finding of fact is also misleading and incomplete because it ignores testimony from [redacted]

2070. In her Rebuttal Report, Christine Hammer, Complaint Counsel's expert, stated, [redacted] (PX06004 at 024 (¶ 50) (*in camera*) (Hammer Rebuttal Report)).

Response to Finding No. 2070:

Complaint Counsel's proposed finding should be disregarded because [redacted] Peterson, on the other hand, has substantial experience working with dozens of companies that have considered whether to reorganize under Chapter 11 as well as companies that are already in the Chapter 11 reorganization process. RFOF ¶ 82. Complaint Counsel's proposed finding of fact is also misleading and inaccurate because it ignores the fact that [redacted]

2071. In her Rebuttal Report, Christine Hammer, Complaint Counsel's expert, stated, "Further Freedom's cash situation would not appear unusual in a Chapter 11 context. Often cash is made available through DIP financing, which provides the reorganizing company with the cash it needs to successfully reorganize." (PX06004 at 024 (¶ 51) (Hammer Rebuttal Report)).

Response to Finding No. 2071:

Complaint Counsel's proposed finding should be disregarded because [redacted]

D. FREEDOM DID NOT MAKE GOOD-FAITH EFFORTS TO ELICIT REASONABLE ALTERNATIVE OFFERS

2072. The Merger Guidelines state that, in order to qualify as a failing firm, the company must have 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 sever danger to competition" than the Merger at issue. (PX08040 at 035 (§ 11) (Merger Guidelines)).

Response to Finding No. 2072:

Complaint Counsel's proposed finding of fact is not a fact, but an improper summary of a legal conclusion.

2073. The Merger Guidelines state, "[a]ny offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer. Liquidation value is the highest value the assets could command for use outside the relevant market." (PX08040 at 035 n.16 (§ 11) (Merger Guidelines)).

Response to Finding No. 2073:

Complaint Counsel's proposed finding of fact is not a fact, but an improper summary of a legal conclusion.

2074. Christine Hammer, Complaint Counsel's expert witness, concluded, "Freedom's sales process did not amount to a good-faith effort to elicit reasonable alternative offers." (PX06002 at 032 (¶ 78) (Hammer Expert Report)).

Response to Finding No. 2074:

Complaint Counsel's proposed finding should be disregarded because [redacted]

[redacted]

Complaint Counsel's proposed finding of fact is also misleading and inaccurate because it ignores the fact that [redacted]

[redacted]

1. Freedom's Sales Process Focused on Otto Bock to the Exclusion of Other Less Anticompetitive Options

a) Freedom's Sales Process Focused on Otto Bock to the Exclusion Other Less Anticompetitive Strategic Buyers

2075. [redacted] (Carkhuff (Freedom) Tr. 649 (*in camera*)).

Response to Finding No. 2075:

Respondent has no specific response.

2076. [redacted]

[redacted] (PX03096 (Parker Hannifin) at 001–002 (*in camera*)). [redacted] (PX03096 (Parker Hannifin) at 001 (*in camera*)). [redacted] (PX03096 (Parker Hannifin) at 001 (*in camera*)).

Response to Finding No. 2076:

Complaint Counsel's proposed finding lacks foundation, because there is no evidence cited in support of the proposed finding that Dorotheou was at the meeting between Smith, Carkhuff and Professor Näder. Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2077. [redacted] (Carkhuff (Freedom) Tr. 519, 649 (*in camera*)) [redacted] (PX05109 (Carkhuff (Freedom) , Dep. at 46) (*in camera*)).

Response to Finding No. 2077:

Respondent has no specific response.

2078. [redacted] (Carkhuff (Freedom) Tr. 522, 525-26, 649 (*in camera*)). [redacted] (Carkhuff (Freedom) Tr. 520-21 (*in camera*); PX01068 (Freedom) (*in camera*)).

Response to Finding No. 2078:

Respondent has no specific response.

2079. [redacted] (PX05122 (Smith (HEP) , Dep. at 24-27) (*in camera*)).

Response to Finding No. 2079:

Respondent has no specific response.

2080. Jon Hammack, Managing Director at Moelis, testified that Moelis knew about the discussions with Otto Bock in the fall of 2016, but did not play a role in them. (PX05110 (Hammack (Moelis) , Dep. at 14)).

Response to Finding No. 2080:

Respondent has no specific response.

2081. Jon Hammack, Managing Director at Moelis, testified that in the October 2016 timeframe, Moelis was not asked to provide any assistance with selling the Freedom business. (PX05110 (Hammack (Moelis) , Dep. at 19-20)).

Response to Finding No. 2081:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted] Complaint Counsel's proposed finding also omits that Hammack clarified that Moelis provided advisory services to Freedom prior to being formally engaged in May 2017. (Hammack, Tr. 6064).

2082. Jon Hammack, Managing Director at Moelis, testified that in the October 2016 timeframe, Moelis had not been asked to conduct any outreach to potential acquirers. (PX05110 (Hammack (Moelis) , Dep. at 19-20)).

Response to Finding No. 2082:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted] Complaint Counsel's proposed finding also omits that Hammack clarified that Moelis provided advisory services to Freedom prior to being formally engaged in May 2017. (Hammack, Tr. 6064).

2083. Jon Hammack, Managing Director at Moelis, testified that in the October 2016 timeframe, Moelis had not been asked to reach out to any possible refinance partners. (PX05110 (Hammack (Moelis) , Dep. at 19-20)).

Response to Finding No. 2083:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted] Complaint Counsel's proposed finding also omits that Hammack clarified that Moelis provided advisory services to Freedom prior to being formally engaged in May 2017. (Hammack, Tr. 6064).

2084. [redacted] (PX03092 (Parker Hannifin) at 001 (*in camera*)). [redacted] (PX03092 (Parker Hannifin) at 001 (*in camera*)).

Response to Finding No. 2084:

Respondent has no specific response.

2085. On November 27, 2016 Professor Has Georg Näder, primary owner of Ottobock HealthCare GmbH, emailed David Smith, the CEO of Freedom at the time, stating, "we are too busy with M&A and year end rally to start any work before January-I tried to squeeze our project in but my team is overloaded-I am still very much positive-that we may find a winwin sweet spot-lets catch up [in] January." (PX02059 (HEP) at 001, 002).

Response to Finding No. 2085:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2086. On November 28, 2016, Maynard Carkhuff, Freedom's Chairman, emailed Achilleas Dorotheou, a Freedom board member, stating, "[o]n a confidential basis, yesterday I

received a note from Hans Georg Näder advising that Freedom continues as a top priority, however, they are focusing on wrapping up two prosthetic acquisitions before year-end." (PX01111 (Freedom) at 001).

Response to Finding No. 2086:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2087. Jon Hammack, Managing Director at Moelis, testified that at no time in 2016 was Moelis asked by Freedom to identify potential acquirers for the business. (Hammack (Moelis) Tr. 6081).

Response to Finding No. 2087:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted] Complaint Counsel's proposed finding also omits that Hammack clarified that Moelis provided advisory services to Freedom prior to being formally engaged in May 2017. (Hammack, Tr. 6064).

2088. Jon Hammack, Managing Director at Moelis, testified that at no time in 2016 was Moelis asked by Freedom to conduct any outreach to potential acquirers for the business. (Hammack (Moelis) Tr. 6081).

Response to Finding No. 2088:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted] Complaint Counsel's proposed finding also omits that Hammack clarified that Moelis provided advisory services to Freedom prior to being formally engaged in May 2017. (Hammack, Tr. 6064).

2089. Jon Hammack, Managing Director at Moelis, testified that at no time in 2016 was Moelis asked by Freedom to reach out to any possible refinancing partners. (Hammack (Moelis) Tr. 6082).

Response to Finding No. 2089:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted] Complaint Counsel's proposed finding also omits that Hammack clarified that Moelis provided advisory services to Freedom prior to being formally engaged in May 2017. (Hammack, Tr. 6064).

2090. [redacted] (PX03009 (Madison Capital Funding) at 002 (*in camera*)).

Response to Finding No. 2090:

Respondent has no specific response.

2091. [redacted] (PX03002 (Moelis) at 002 (*in camera*)).

Response to Finding No. 2091:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2092. [redacted] (PX03002 (Moelis) at 002 (*in camera*)).

Response to Finding No. 2092:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2093. [redacted] (Carkhuff (Freedom) Tr. 541-42 (*in camera*); Smith (HEP) Tr. 6491-92 (*in camera*); PX02034 (HEP) at 001 (*in camera*)).

Response to Finding No. 2093:

Respondent has no specific response.

2094. [redacted] (Carkhuff (Freedom) Tr. 542-43 (*in camera*)).

Response to Finding No. 2094:

Respondent has no specific response.

2095. [redacted]

[redacted] (PX02034 (HEP) at 001 (*in camera*)).

Response to Finding No. 2095:

Respondent has no specific response.

2096. [redacted] (PX02088 (HEP) at 001; PX03084 (Parker Hannifin) at 001 (*in camera*)).

Response to Finding No. 2096:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon two documents which were not used at trial and thus were not subject to cross-examination before the Court.

2097. In an April 6, 2017 email, Thomas Chung, of HEP, summarized the Freedom board of directors meeting on April 6, 2017. (PX02088 (HEP) at 001–002.) Freedom's board of directors authorized Moelis to tell Otto Bock that, "there is no need to submit an offer at $60M." (PX02088 (HEP) at 001).

Response to Finding No. 2097:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2098. [redacted] (PX05110 (Hammack (Moelis) , Dep. at 47); PX02089 (HEP) at 001 (*in camera*); PX05125 (Dorotheou (Parker Hannifin) at 67) (*in camera*)).

Response to Finding No. 2098:

Complaint Counsel's proposed finding of fact is factually inaccurate. [redacted]

[redacted]

[redacted]

2099. Christine Hammer, Complaint Counsel's expert witness, concluded that nothing in the record shows "that Freedom pursued similar discussions with any potential acquirer other than Otto Bock before April 2017." (PX06002 at 34-35 (¶ 92) (Hammer Expert Report)).

Response to Finding No. 2099:

Complaint Counsel's proposed finding should be disregarded because [redacted]

b) Freedom's Sales Process Focused on a Sale of the Company Rather than Refinancing

2100. [redacted] (PX03136 (Moelis) at 002 (*in camera*)).

Response to Finding No. 2100:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2101. Össur and Permobil, a wheelchair company, were contacted as potential acquirers of the Freedom business in late April to early May of 2017. (PX03264 (Moelis) at 001-03 (*in camera*); PX05110 (Hammack (Moelis) Dep. at41)).

Response to Finding No. 2101:

Complaint Counsel's proposed finding of fact is factually inaccurate. [redacted]

2102. [redacted] (PX05110 (Hammack (Moelis) , Dep. at 41-42); PX03264 (Moelis) at 001 (*in camera*)).

Response to Finding No. 2102:

Complaint Counsel's proposed finding that the companies cited are not lower-limb prosthetic companies is not supported by the evidence cited.

2103. [redacted] (PX05110 (Hammack (Moelis) , Dep. at 61-63) (*in camera*)).

Response to Finding No. 2103:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it omits that several of these companies knew that Freedom was for sale and chose not to take part in the sale process and/or had no interest in purchasing Freedom's entire business. (RFOF ¶ 1479; Response to CCFF ¶¶ 2155, 2144).

2104. Thomas Chung, of HEP, testified that he is not aware whether anyone related to Freedom reached out to ST&G, Hanger, Fillauer, Ability Dynamics, College Park, or Ohio Willow

Wood to see if they would be interested in purchasing Freedom. (PX05113 (Chung (HEP) , Dep. at 197-98)).

Response to Finding No. 2104:

Respondent has no specific response.

2105. [redacted] (PX01370 (Otto Bock) at 001 (*in camera*)). [redacted] (PX01370 (Otto Bock) at 001 (*in camera*)).

Response to Finding No. 2105:

Complaint Counsel's proposed finding of fact is misleading. [redacted] Further, Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2106. [redacted] (PX03056 (Moelis) at 003 (*in camera*); PX05110 (Hammack (Moelis) , Dep. at 79)). No other companies received a process letter to submit an indication of interest. (PX05110 (Hammack (Moelis) , Dep. at 79)).

Response to Finding No. 2106:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

2107. Jon Hammack, Managing Director at Moelis, testified that Össur and Otto Bock were the only companies that received a letter to submit an indication of interest in acquiring Freedom. (PX05110 (Hammack (Moelis) , Dep. at 79) (Q Which companies received a process letter to submit an indication of interest? A Össur and Ottobock. Q Anyone else? A No.).

Response to Finding No. 2107:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

2108. [redacted] (Carkhuff (Freedom) Tr. 660-61 (*in camera*)). [redacted]

Response to Finding No. 2108:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2109. In August 2017, Moelis requested that Otto Bock and Össur submit their second-round bids. (PX03239 (Moelis) at 007-10; PX03238 (Moelis) at 008-11).

Response to Finding No. 2109:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2110. [redacted] (RX-0531 (Ossur) at 001–003 (*in camera*)).

Response to Finding No. 2110:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it ignores the fact that [redacted]

2111. [redacted] (PX02115 (HEP) at 001–006 (*in camera*)).

Response to Finding No. 2111:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2112. [redacted] (PX02115 (HEP) at 001 (*in camera*)). [redacted] (PX02115 (HEP) at 001 (*in camera*)). [redacted] (PX02115 (HEP) at 002 (*in camera*)).

Response to Finding No. 2112:

Respondent has no specific response, except to note that Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2113. [redacted] (PX02115 (HEP) at 005 (*in camera*)). [redacted] (PX02115 (HEP) at 005 (*in camera*)).

Response to Finding No. 2113:

Respondent has no specific response, except to note that Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2114. [redacted] (PX02054 (HEP) at 002-003; (PX05005 (Smith (HEP) IHT at 207) (*in camera*)).

Response to Finding No. 2114:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

2115. [redacted] (PX07049 at 003 (¶ 1) (Otto Bock Amended Answer); JX001 at 001 (¶ 4)).

Response to Finding No. 2115:

Respondent has no specific response.

2116. Christine Hammer, Complaint Counsel's expert witness, stated, "It is my assessment that by focusing primarily on a strategic sale, Freedom precluded the opportunity to refinance its existing credit facility with debt and/or equity." (PX06002 at 044 (¶ 109) (Hammer Expert Report)).

Response to Finding No. 2116:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. Ms. Hammer ignores evidence that [redacted] **Further, Ms. Hammer is not qualified to offer opinions regarding Freedom's efforts to elicit reasonable alternatives to the Acquisition, and her opinions on that subject should be disregarded by the Court. (Response to CCFF ¶ 1816).**

2117. Christine Hammer, Complaint Counsel's expert witness, stated, "Freedom still had potential financing options available when it was acquired by Otto Bock in September 2017, but it did not fully explore them because it prioritized a sale of its business to Otto Bock instead." (PX06002 at 046 (¶ 113) (Hammer Expert Report)).

Response to Finding No. 2117:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. Ms. Hammer ignores evidence that [redacted]

[redacted] **Further, Ms. Hammer is not qualified to offer opinions regarding Freedom's efforts to elicit reasonable alternatives to the Acquisition, and her opinions on that subject should be disregarded by the Court. (Response to CCFF ¶ 1816).**

2118. Christine Hammer, Complaint Counsel's expert witness, concluded, "Freedom's shareholders' financial incentives led them to prefer a strategic sale to Otto Bock instead of pursuing possible refinancing options." (PX06002 at 046 (¶ 114) (Hammer Expert Report)).

Response to Finding No. 2118:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. Ms. Hammer ignores evidence that [redacted] **Further, Ms. Hammer is not qualified to offer opinions regarding Freedom's efforts to elicit reasonable alternatives to the Acquisition, and her opinions on that subject should be disregarded by the Court. (Response to CCFF ¶ 1816) In addition, Ms. Hammer's "conclusion" concerns the state of mind of Freedom's shareholders and is thus not an appropriate subject for expert testimony.**

2. Freedom's Sales Process Precluded Likely Additional Reasonable Alternative Offers

a) Freedom Limited its Sales Process Limited to Bidders Able to Pay More than $75M

2119. [redacted] (Hammack (Moelis) Tr. 6091) (*in camera*).

Response to Finding No. 2119:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

2120. [redacted] (PX05005 (Smith (HEP) IHT at 189) (*in camera*)).

Response to Finding No. 2120:

Complaint Counsel's proposed finding of fact is misleading. Whereas Complaint Counsel cites testimony from an investigational hearing, with no opportunity for cross examination, [redacted]

b) Freedom Failed to Contact Interested Bidders

2121. Christine Hammer, Complaint Counsel's expert witness, concluded that, "Freedom's sale process excluded numerous companies operating within the prosthetics industry that may have made reasonable alternative offers and that Freedom certainly did not make

unsuccessful good-faith efforts to elicit such offers." (PX06002 at 043 (¶ 105) (Hammer Expert Report)).

Response to Finding No. 2121:

Complaint Counsel's proposed finding of fact is an expert opinion proffered to support factual propositions that should be established by fact witnesses in violation of the Order on Post-Trial Briefs (Oct. 10, 2018). Complaint Counsel's proposed finding of fact is also incomplete and misleading. [redacted] **Further, Ms. Hammer is not qualified to offer opinions regarding Freedom's efforts to elicit reasonable alternatives to the Acquisition, and her opinions on that subject should be disregarded by the Court. (Response to CCFF ¶ 1816).**

(1) Nabtesco

2122. [redacted] (PX02033 (HEP) at 001–021 (*in camera*)). [redacted]

[redacted] (PX02033 (HEP) at 021 (*in camera*)).

Response to Finding No. 2122:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2123. [redacted] (Smith (HEP) Tr. 6551 (*in camera*); PX02033 (HEP) at 001–021 (*in camera*)).

Response to Finding No. 2123:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2124. On September 7, 2017, Maynard Carkhuff, Freedom's Chairman, sent David Smith, then Freedom's CEO, an email that stated "Do you have time for a brief call. I was just

approached by Nabtesco regarding their interest in acquiring Freedom." (PX01288 (Freedom) at 002).

Response to Finding No. 2124:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2125. [redacted] (Smith (HEP) Tr. 6561–62 (*in camera*)). Mr. Smith informed Mr. Carkhuff that Freedom already had "several good offers in hand." (PX01288 (Freedom) at 001-02). Mr. Smith informed a Freedom board member that Freedom could validate Nabtesco's interest if the current "process falls apart." (PX01288 (Freedom) at 001).

Response to Finding No. 2125:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2126. [redacted] (PX03264 (Moelis) at 001 (*in camera*)).

Response to Finding No. 2126:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2127. [redacted] (Smith (HEP) Tr. 6559 (*in camera*)).

Response to Finding No. 2127:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2128. [redacted] (Carkhuff (Freedom) Tr. 450-51 (*in camera*)).

Response to Finding No. 2128:

Respondent has no specific response.

2129. Respondent admitted that no person working on behalf of Freedom formally reached out to solicit a bid from Nabtesco to purchase the Freedom Business in September 2017. (PX07040 at 006 (Respondent's Responses to Complaint Counsel's Third Set of Requests for Admissions); *see also* (PX07051 (Otto Bock) at 003 (¶ 2) (Respondent's Answers to Complaint Counsel's First Set of Interrogatories) [redacted]

Response to Finding No. 2129:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2130. [redacted] (Carkhuff (Freedom) Tr. 727-728 (*in camera*)).

Response to Finding No. 2130:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2131. [redacted] (Carkhuff (Freedom) Tr. 450-51 (*in camera*)).

Response to Finding No. 2131:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2132. [redacted] (Carkhuff (Freedom) Tr. 450-51 (*in camera*)).

Response to Finding No. 2132:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2133. [redacted] (Carkhuff (Freedom) Tr. 451 (*in camera*)).

Response to Finding No. 2133:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2134. At trial, Jon Hammack, Managing Director at Moelis, Freedom's investment bank, testified that Moelis did not contact Nabtesco regarding a potential transaction with Freedom. (Hammack (Moelis) Tr. 6093).

Response to Finding No. 2134:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

(2) Proteor

2135. [redacted] (PX02033 (HEP) at 001–002 (*in camera*)). [redacted] (PX02033 (HEP) at 021 (*in camera*)).

Response to Finding No. 2135:

Complaint Counsel's proposed finding of fact is misleading and redundant. [redacted]

2136. [redacted] (Smith (HEP) Tr. 6551; PX02033 (HEP) at 021 (*in camera*)).

Response to Finding No. 2136:

Complaint Counsel's proposed finding of fact is misleading and redundant. [redacted]

2137. [redacted] (PX03264 (Moelis) at 001 (*in camera*)).

Response to Finding No. 2137:

Complaint Counsel's proposed finding of fact is misleading and redundant. [redacted]

2138. [redacted] (Smith (HEP) Tr. 6557 (*in camera*)).

Response to Finding No. 2138:

Complaint Counsel's proposed finding of fact is misleading and redundant. [redacted]

2139. At trial, Jon Hammack, Managing Director at Moelis, Freedom's investment bank, testified that Moelis did not contact Proteor Inc. regarding a potential transaction with Freedom. (Hammack (Moelis) Tr. 6093–94; *see also* (PX07051 (Otto Bock) at 003 (¶ 2) (Respondent's Answers to Complaint Counsel's First Set of Interrogatories) [redacted]

Response to Finding No. 2139:

Complaint Counsel's proposed finding of fact is misleading and redundant. [redacted]

[redacted]

2140. [redacted]
(Mattear (Proteor) Tr. 5761-62 (*in camera*))

Response to Finding No. 2140:

Complaint Counsel's proposed finding of fact is misleading and redundant. [redacted]

(3) College Park

2141. [redacted] (PX02033 (HEP) at 001–021 (*in camera*)). [redacted] (PX02033 (HEP) at 021 (*in camera*)).

Response to Finding No. 2141:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

[redacted]

2142. [redacted] (PX03264 (Moelis) at 001 (*in camera*)).

Response to Finding No. 2142:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

[redacted]

2143. At trial, Jon Hammack, Managing Director at Moelis, Freedom's investment bank, testified that Moelis did not contact College Park regarding a potential transaction with Freedom. (Hammack (Moelis) Tr. 6093; *see also* (PX07051 (Otto Bock) at 003 (¶ 2) (Respondent's Answers to Complaint Counsel's First Set of Interrogatories) [redacted]

Response to Finding No. 2143:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

[redacted]

2144. [redacted] (PX05107 (Carver (College Park), Dep. at 118) (*in camera*)).

Response to Finding No. 2144:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

2145. [redacted] (PX05107 (Carver (College Park) , Dep. at 118–19) (*in camera*)).

Response to Finding No. 2145:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

2146. [redacted] (PX05107 (Carver (College Park) , Dep. at 119) (*in camera*)).

Response to Finding No. 2146:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

[redacted]

2147. Freedom's CEO at the time, David Smith, testified that reaching out to College Park, or another small competitor, would be "the worst thing to do" because it "would have alerted a small competitor that [Freedom] was being sold" and would waste time with "a partner that couldn't buy us." (PX05122 (Smith (HEP) , Dep. at 174-75)).

Response to Finding No. 2147:

Respondent has no specific response.

(4) Fillauer

2148. [redacted] (PX02033 (HEP) at 001–021 (*in camera*)). [redacted] (PX02033 (HEP) at 021 (*in camera*)).

Response to Finding No. 2148:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

2149. [redacted] (Smith (HEP) Tr. 6551; PX02033 (HEP) at 021 (*in camera*)).

Response to Finding No. 2149:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

2150. [redacted] (Smith (HEP) Tr. 6556 (*in camera*)).

Response to Finding No. 2150:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

2151. At the deposition of David Smith, Freedom's CEO at the time, on March 22, 2018, when asked if he reached out to Fillauer as part of the Freedom sales process, Smith responded, "Philaur? [sic] No. I don't even know who they are." (PX05122 (Smith (HEP) , Dep. at 86)).

Response to Finding No. 2151:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

2152. At trial, Jon Hammack, Managing Director at Moelis, Freedom's investment bank, testified that Moelis did not contact Fillauer regarding a potential transaction with Freedom. (Hammack (Moelis) Tr. 6094; *see also* (PX07051 (Otto Bock) at 003 (¶ 2) (Respondent's

Answers to Complaint Counsel's First Set of Interrogatories) (not identifying Nabtesco, Proteor, College Park, Fillauer, or Ohio Willow Wood in response to interrogatory requesting identification of every firm contacted in connection with the sale of Freedom in 2017)).

Response to Finding No. 2152:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

2153. [redacted] (PX03264 (Moelis) at 001 (*in camera*)).

Response to Finding No. 2153:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

2154. [redacted] (PX05105 (Fillauer (Fillauer) , Dep. at 45) (*in camera*)). [redacted] (PX05105 (Fillauer (Fillauer) , Dep. at 45) (*in camera*)).

Response to Finding No. 2154:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

(5) Ohio Willow Wood

2155. [redacted] (PX02033 (HEP) at 001–021 (*in camera*)). [redacted] (PX02033 (HEP) at 021 (*in camera*)).

Response to Finding No. 2155:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

[redacted]

2156. [redacted] (Smith (HEP) Tr. 6551; PX02033 (HEP) at 021 (*in camera*)).

Response to Finding No. 2156:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

2157. [redacted] (PX03264 (Moelis) at 001 (*in camera*)).

Response to Finding No. 2157:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

[redacted]

2158. [redacted] (Smith (HEP) Tr. 6557 (*in camera*)).

Response to Finding No. 2158:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

2159. At trial, Jon Hammack, Managing Director at Moelis, Freedom's investment bank, testified that Moelis did not contact Ohio Willow Wood regarding a potential transaction with Freedom. (Hammack (Moelis) Tr. 6094; *see also* (PX07051 (Otto Bock) at 003 (¶ 2) (Respondent's Answers to Complaint Counsel's First Set of Interrogatories) (not identifying Nabtesco, Proteor, College Park, Fillauer, or Ohio Willow Wood in response to interrogatory requesting identification of every firm contacted in connection with the sale of Freedom in 2017)).

Response to Finding No. 2159:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

2160. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5080 (*in camera*)). [redacted] (Arbogast (Ohio Willow Wood) Tr. 5080-81 (*in camera*)).

Response to Finding No. 2160:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that [redacted]

2161. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5087 (*in camera*)).

Response to Finding No. 2161:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that [redacted]

[redacted]

2162. [redacted] (Carkhuff (Freedom) Tr. 728 (*in camera*)).

Response to Finding No. 2162:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that, [redacted]

2163. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5081 (*in camera*)).

Response to Finding No. 2163:

Complaint Counsel's proposed finding of fact is misleading and incomplete because it ignores the fact that [redacted]

E. FREEDOM HAD A REASONABLE ALTERNATIVE OFFER FROM ÖSSUR

2164. The Merger Guidelines explain, "[a]ny offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer. Liquidation value is the highest value the assets could command for use outside the relevant market." (PX08040 at 035 n.16 (§ 11) (Merger Guidelines)).

Response to Finding No. 2164:

Complaint Counsel's proposed finding of fact is an improper and incomplete summary of a legal conclusion.

2165. Christine Hammer, Complaint Counsel's expert, concluded, "Further, despite its flawed sales process, I have seen no evidence to show that a [redacted] bid Össur submitted to acquire Freedom would not qualify as a reasonable alternative offer." (PX06002 at 32 (¶ 79) (*in camera*) (Hammer Expert Report)).

Response to Finding No. 2165:

Complaint Counsel's proposed finding of fact is inaccurate and misleading because Hammer ignores that [redacted] Further, Ms. Hammer is not qualified to offer opinions regarding Freedom's efforts to elicit reasonable alternatives to the Acquisition, and her opinions on that subject should be disregarded by the Court. (Response to CCFF ¶ 1816).

1. Össur's Bids

a) Össur's Initial Bid for Freedom

2166. [redacted] PX03102 (Ossur) (Project Roosevelt – Non-Binding Proposal) (*in camera*); (De Roy (Össur) Tr. 3606-07 (*in camera*)).

Response to Finding No. 2166:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2167. [redacted] (De Roy (Ossur) Tr. 3606 (*in camera*)).

Response to Finding No. 2167:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2168. [redacted] (PX05005 (Smith (HEP) IHT at 183-84)); (De Roy (Ossur) Tr. 3709-10 (*in camera*)).

Response to Finding No. 2168:

Respondent has no specific response.

2169. [redacted] (PX05005 (Smith (HEP) IHT at 184-86) (*in camera*)). [redacted] (PX05005 (Smith (HEP) IHT at 185) (*in camera*)).

Response to Finding No. 2169:

Complaint Counsel's proposed finding of fact is misleading as it [redacted]

[redacted]

b) Össur's Due Diligence on Freedom

2170. [redacted] (De Roy (Össur) Tr. 3712 (*in camera*)). [redacted] (De Roy (Ossur) Tr. 3608-09 (*in camera*)).

Response to Finding No. 2170:

Complaint Counsel's proposed finding of fact is incomplete. Complaint Counsel ignores the testimony from [redacted]

2171. [redacted] (De Roy (Ossur) Tr. 3608-09 (*in camera*)).

[redacted] (De Roy (Ossur) Tr. 3610-11 (*in camera*)).

Response to Finding No. 2171:

Complaint Counsel's proposed finding of fact is incomplete. Complaint Counsel ignores the testimony from [redacted]

2172. [redacted] (De Roy (Ossur) Tr. 3731 (*in camera*)).

Response to Finding No. 2172:

Complaint Counsel's proposed finding of fact is incomplete. Complaint Counsel ignores the fact that [redacted]

2173. [redacted] (PX05009 (De Roy (Ossur) IHT at 56) (*in camera*)).

Response to Finding No. 2173:

[redacted]

c) Össur's Second-Round Bid for Freedom

2174. On August 1, 2017, Moelis sent identical letters to Otto Bock and Össur, seeking their final offers to acquire Freedom. (PX03239 (Moelis) at 007–10; PX03238 (Moelis) at 008–11).

Response to Finding No. 2174:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon two documents which were not used at trial and thus were not subject to cross-examination before the Court.

2175. Moelis's August 1, 2017 letter stated that the finals offers for the Freedom business should include the following terms: contact, valuation, financing, management, due diligence, approvals and conditions, and agreement. (PX03239 (Moelis) at 007–10; PX03238 (Moelis) at 008–11).

Response to Finding No. 2175:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon two documents which were not used at trial and thus were not subject to cross-examination before the Court.

2176. [redacted] (RX-0531 (Ossur) at 001–002 (*in camera*)).

Response to Finding No. 2176:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2177. [redacted] (RX-0531 (Ossur) at 001–003 (*in camera*)).

Response to Finding No. 2177:

Respondent has no specific response.

2178. [redacted] (RX-0531 (Ossur) at 002 (*in camera*)).

Response to Finding No. 2178:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

2179. [redacted] (RX-0531 (Ossur) at 002 (*in camera*)).

Response to Finding No. 2179:

Complaint Counsel's proposed finding of fact is misleading as it ignores certain testimony at trial regarding [redacted]

[redacted]

2180. [redacted] (RX-0531 (Ossur) at 002–003 (*in camera*)).

Response to Finding No. 2180:

Respondent does not have a specific response.

2181. [redacted] (RX-0531 (Ossur) at 001, 003 (*in camera*)).

Response to Finding No. 2181:

Complaint Counsel's proposed finding of fact is misleading as ignores certain testimony at trial regarding [redacted]

2182. [redacted] (RX-0531 (Ossur) at 002 (*in camera*)).

Response to Finding No. 2182:

Complaint Counsel's proposed finding of fact is misleading as ignores certain testimony at trial regarding [redacted]

2183. [redacted] (PX02115 (HEP) at 001–006 (*in camera*)). [redacted] (PX02115 (HEP) at 001 (*in camera*)). [redacted] (PX02115 (HEP) at 005 (*in camera*)).

Response to Finding No. 2183:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2184. [redacted] (PX02054 (HEP) at 001) (*in camera*)).

Response to Finding No. 2184:

Respondent has no specific response, except to note that Complaint Counsel's proposed finding of fact relies solely upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

2185. [redacted] (De Roy (Ossur) Tr. 3612 (*in camera*)).

Response to Finding No. 2185:

Complaint Counsel's proposed finding of fact is misleading as it ignores certain testimony at trial regarding [redacted]

2186. [redacted] (De Roy (Ossur) Tr. 3610-11 (*in camera*)).

Response to Finding No. 2186:

Complaint Counsel's proposed finding of fact is incomplete. Complaint Counsel ignores an [redacted]

2187. [redacted] (PX05124 (De Roy (Ossur) , Dep. at 215-16) (*in camera*)). *See also* (De Roy (Ossur) Tr. 3714-15 (*in camera*)) [redacted]

Response to Finding No. 2187:

Complaint Counsel's proposed finding of fact is incomplete. Complaint Counsel ignores that [redacted]

2188. [redacted] (De Roy (Ossur) Tr. 3612 (*in camera*)).

Response to Finding No. 2188:

Respondent has no specific response.

2189. In a September 8, 2017 email sent to Maynard Carkhuff, Freedom's Chairman, David Smith, Freedom's CEO at the time, described Freedom as having "several good offers in hand." (PX01288 (Freedom) at 001).

Response to Finding No. 2189:

Respondent has no specific response.

2190. [redacted] (RX-0536 (Ossur) at 001 (*in camera*)).

Response to Finding No. 2190:

Complaint Counsel's proposed finding of fact is misleading as ignores that [redacted]

2191. With respect to his opinion on whether Össur's offer to acquire Freedom was a "reasonable alternative offer," James Peterson, Respondent's Expert Witness, testified, "I did not make an opinion or report within the context of the Merger Guidelines if [Össur's offer] met the liquidation threshold and the noncompetition threshold." (PX05174 (Peterson , Dep. at 126–27)). Further, with respect to whether Mr. Peterson had offered an opinion that Össur's offer to acquire Freedom was not a reasonable alternative offer, Mr. Peterson testified, "I did not offer that specific statement in my report." (PX05174 (Peterson (Respondent) , Dep. at 127)).

Response to Finding No. 2191:

Complaint Counsel's proposed finding of fact is incomplete. It ignores the fact that [redacted]

2192. [redacted] (PX05122 (Smith (HEP) , Dep. at 181 (*in camera*))).

Response to Finding No. 2192:

Complaint Counsel's proposed finding of fact is incomplete because it ignores the fact that [redacted]

2193. Respondent's expert witness, James Peterson, testified that he is not aware of testimony or documents in the record that indicate that Össur intended to discontinue selling Freedom's microprocessor knee products in the United States. (PX05174 (Peterson , Dep. at 133))

Response to Finding No. 2193:

Respondent has no specific response.

2. Liquidation Value of Freedom

a) No Ordinary Course Estimate of Liquidation Value Was Performed

2194. [redacted] (Carkhuff (Freedom) Tr. 552 (*in camera*)).

Response to Finding No. 2194:

Respondent has no specific response.

2195. Lee Kim, Freedom's CFO, testified that in preparing its own financial statements, Freedom never employed a liquidation method of accounting. (Kim (Freedom) Tr. 2548).

Response to Finding No. 2195:

Respondent has no specific response.

2196. [redacted] (Smith (HEP) Tr. 6551 (*in camera*)).

Response to Finding No. 2196:

Respondent has no specific response.

2197. [redacted] (PX07028 (HEP) at 002 (Response to Specification No. 1) (*in camera*)).

Response to Finding No. 2197:

Respondent has no specific response.

2198. Jon Hammack, Managing Director of Moelis, Freedom's investment bank, testified that Freedom never asked Moelis to assist in calculating a liquidation value of Freedom. (PX05110 (Hammack (Moelis) , Dep. at 200)).

Response to Finding No. 2198:

Respondent has no specific response.

2199. Jon Hammack, Managing Director of Moelis, Freedom's investment bank, testified that HEP never asked Moelis to assist in calculating a liquidation value of Freedom. (PX05110 (Hammack (Moelis) , Dep. at 200).

Response to Finding No. 2199:

Respondent has no specific response.

b) Respondent's Experts Did Not Estimate Liquidation Value

2200. Respondent's expert witness, James Peterson, did not perform a liquidation analysis of Freedom's business. (RX-1048 at 0044 (Peterson Expert Report) ("While I did not perform a liquidation analysis . . . .)).

Response to Finding No. 2200:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

2201. At trial, Respondent's expert witness, James Peterson, testified, "I did not calculate a point estimate of the liquidation value of Freedom." (Peterson, Tr. 6691).

Response to Finding No. 2201:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2202. [redacted] (Argue, Tr. 6373 (*in camera*)).

Response to Finding No. 2202:

Respondent has no specific response.

c) Evidence Indicates Freedom's Liquidation Value Is Substantially below Össur's Bid

(1) CEO David Smith's Estimate of Liquidation Value

2203. [redacted] (PX05005 (Smith (HEP) IHT at 13–14 (*in camera*)). *See also* PX02028 (HEP) at 007 (*in camera*) [redacted]

Response to Finding No. 2203:

Complaint Counsel's proposed finding of fact is misleading because it ignores David Smith's testimony that "I realize I'm not a liquidation specialist." (Smith, Tr. 6578).

2204. [redacted] (Smith (HEP) Tr. 6556 (*in camera*)).

Response to Finding No. 2204:

Complaint Counsel's proposed finding of fact is misleading because it ignores David Smith's testimony that "I realize I'm not a liquidation specialist." (Smith, Tr. 6578).

2205. In response to whether Chapter 7 bankruptcy was discussed, David Smith, Freedom's CEO at the time, testified "[W]hen you look at those economics of what you're going to pull in, you're not going to pay the debtors back. Could you sell your IP for something? You're not going to pay your banks back." (PX05122 (Smith (HEP) , Dep. at 50)).

Response to Finding No. 2205:

Complaint Counsel's proposed finding of fact is misleading because it ignores David Smith's testimony that "I realize I'm not a liquidation specialist." (Smith, Tr. 6578).

2206. David Smith, Freedom's CEO at the time, testified that if Freedom would have entered bankruptcy under Chapter 7 (liquidation bankruptcy), "work in process is worthless." (PX05122 (Smith (HEP) , Dep. at 50)).

Response to Finding No. 2206:

Complaint Counsel's proposed finding of fact is misleading because it ignores David Smith's testimony that "I realize I'm not a liquidation specialist." (Smith, Tr. 6578).

2207. David Smith, Freedom's CEO at the time, testified that if Freedom would have entered bankruptcy under Chapter 7 (liquidation bankruptcy), "raw materials, you could probably sell 60 cents on the dollar back to your original vendor." (PX05122 (Smith (HEP) , Dep. at 50)).

Response to Finding No. 2207:

Complaint Counsel's proposed finding of fact is misleading because it ignores David Smith's testimony that "I realize I'm not a liquidation specialist." (Smith, Tr. 6578).

2208. David Smith, Freedom's CEO at the time, testified that if Freedom would have entered bankruptcy under Chapter 7 (liquidation bankruptcy), "finished goods, you could probably auction, but the problem is a lot of your finished goods are, you know, you got 9,000 size, you know, 11s, when you need, you know, 9,000 size 8s kind of thing. So, are you going to get 40, 50, 60 percent on the dollar?" (PX05122 (Smith (HEP) , Dep. at 50)).

Response to Finding No. 2208:

Complaint Counsel's proposed finding of fact is misleading because it ignores David Smith's testimony that "I realize I'm not a liquidation specialist." (Smith, Tr. 6578).

2209. [redacted] (PX02028 (Freedom) at 006 (*in camera*)).

Response to Finding No. 2209:

Complaint Counsel's proposed finding of fact is misleading because it ignores David Smith's testimony that "I realize I'm not a liquidation specialist." (Smith, Tr. 6578).

2210. [redacted] (PX05122 (Smith (HEP) , Dep. at 190 (*in camera*))).

Response to Finding No. 2210:

Complaint Counsel's proposed finding of fact is misleading because it ignores David Smith's testimony that "I realize I'm not a liquidation specialist." (Smith, Tr. 6578).

2211. David Smith, Freedom's CEO at the time, testified that if Freedom would have entered bankruptcy under Chapter 7 (liquidation bankruptcy), "[t]he receivables, you could factor the receivables and collect those." (PX05122 (Smith (HEP) , Dep. at 50)).

Response to Finding No. 2211:

Complaint Counsel's proposed finding of fact is misleading because it ignores David Smith's testimony that "I realize I'm not a liquidation specialist." (Smith, Tr. 6578).

(2) Complaint Counsel's Expert's Estimate of Upper Bound of Freedom's Liquidation Value

2212. Christine Hammer, Complaint Counsel's expert witness, did not offer an opinion on Freedom's exact liquidation value. (PX06002 at 046 (¶ 124) (Hammer Expert Report)). *See also* Hammer Tr. 2979–80 (*in camera*) [redacted]

Response to Finding No. 2212:

Respondent has no specific response.

2213. Christine Hammer, Complaint Counsel's expert witness, used the book value of Freedom's tangible assets and fair value of Freedom's intangible assets to establish an upper boundary for the liquidation value. (PX06002 at 053 (¶ 142) (Hammer Expert Report)). *See also* Hammer Tr. 2980 (*in camera*) [redacted]

Response to Finding No. 2213:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

2214. [redacted] (PX06002 at 053 (¶ 142) (Hammer Expert Report) (*in camera*)).

Response to Finding No. 2214:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2215. [redacted] (PX06002 at 053 (¶ 142) (Hammer Expert Report) (*in camera*)).

Response to Finding No. 2215:

Complaint Counsel's proposed finding of fact is an expert opinion proffered to support factual propositions that should be established by fact witnesses in violation of the Order on Post-Trial Briefs (Oct. 10, 2018). Complaint Counsel's proposed finding of fact is misleading because [redacted]

2216. [redacted] (Hammer Tr. 2981 (*in camera*)).

Response to Finding No. 2216:

Complaint Counsel's proposed finding of fact is an expert opinion proffered to support factual propositions that should be established by fact witnesses in violation of the Order on Post-Trial Briefs (Oct. 10, 2018). Complaint Counsel's proposed finding of fact is misleading because [redacted]

2217. [redacted] (Hammer Tr. 2981 (*in camera*)).

Response to Finding No. 2217:

Complaint Counsel's proposed finding of fact is an expert opinion proffered to support factual propositions that should be established by fact witnesses in violation of the Order on Post-Trial Briefs (Oct. 10, 2018). Complaint Counsel's proposed finding of fact is misleading because [redacted]

2218. Christine Hammer, Complaint Counsel's expert witness, stated, "nothing suggests that Össur's bid does not qualify as a reasonable alternative offer, as defined by the Merger Guidelines." (PX06002 at 045 (¶ 119) (Hammer Expert Report)).

Response to Finding No. 2218:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2219. Ms. Hammer opined, "Because Össur submitted its bid as part of the sale process of Freedom as a going concern, instead of an asset liquidation sale, I find it unlikely that the liquidation value of the Freedom assets would be greater than Össur's bid." (PX06002 at 046 (¶ 122) (Hammer Expert Report)).

Response to Finding No. 2219:

Complaint Counsel's proposed finding of fact is an expert opinion proffered to support factual propositions that should be established by fact witnesses in violation of the Order on Post-Trial Briefs (Oct. 10, 2018). Complaint Counsel's proposed finding of fact is misleading because

it ignores the fact that [redacted]

[redacted]

3. Respondent Did Not Establish the Competitive Impact of an Össur Acquisition of Freedom

a) Respondent's Expert Did Not Perform Critical Aspects of a Competitive Analysis of an Össur-Freedom Transaction

2220. [redacted] (Argue, Tr. 6374 (*in camera*)).

Response to Finding No. 2220:

Respondent has no specific response.

2221. [redacted] (Argue, Tr. 6374 (*in camera*)). [redacted] (Argue, Tr. 6374 (*in camera*)).

Response to Finding No. 2221:

Respondent has no specific response.

2222. [redacted] (Argue, Tr. 6379 (*in camera*)).

Response to Finding No. 2222:

Respondent has no specific response.

2223. [redacted] (Argue, Tr. 6379 (*in camera*)).

Response to Finding No. 2223:

Respondent has no specific response.

2224. [redacted] (Argue, Tr. 6380 (*in camera*)).

Response to Finding No. 2224:

Complaint Counsel's proposed finding of fact is incomplete because it does not state that the [redacted]

2225. [redacted] (Argue, Tr. 6381 (*in camera*)).

Response to Finding No. 2225:

Complaint Counsel's proposed finding of fact is misleading because it ignores that [redacted]

[redacted]

2226. [redacted] (Argue, Tr. 6381 (*in camera*)).

Response to Finding No. 2226:

Respondent has no specific response.

b) Respondent's Expert's Market Shares and Concentration Estimates for a K3 Foot Market Are Unreliable and Ignore Evidence in the Record

2227. [redacted] (Argue, Tr. 6375 (*in camera*)).

Response to Finding No. 2227:

Respondent has no specific response.

2228. [redacted] (Argue, Tr. 6375 (*in camera*)).

Response to Finding No. 2228:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it ignores the fact that [redacted]

2229. [redacted] (Argue, Tr. 6376 (*in camera*)).

Response to Finding No. 2229:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

2230. [redacted] (Argue, Tr. 6376 (*in camera*)).

Response to Finding No. 2230:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

2231. [redacted] (Argue, Tr. 6376 (*in camera*)).

Response to Finding No. 2231:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

[redacted]

2232. [redacted] (Argue, Tr. 6376 (*in camera*)).

Response to Finding No. 2232:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

2233. [redacted] (Argue, Tr. 6377 (*in camera*)).

Response to Finding No. 2233:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

2234. [redacted] (Argue, Tr. 6377 (*in camera*)).

Response to Finding No. 2234:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

2235. In response to whether there are a number of prosthetic foot manufacturers from which you can choose to purchase the foot portion of the prosthesis, Tracy Duncan Ell, of Mid-Missouri Orthotics & Prosthetics, testified, "Yes, an extensive number." (PX05129 (Ell (Mid-Missouri) , Dep. at 86)).

Response to Finding No. 2235:

Complaint Counsel's proposed finding of fact is incomplete because it ignores testimony from prosthetists, such as [redacted]

2236. [redacted] (PX05153B (Asar (Hanger) , Dep. at 206-207)(*in camera*)).

Response to Finding No. 2236:

Complaint Counsel's proposed finding of fact is incomplete because it ignores testimony from prosthetists, such as [redacted]

2237. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5191-92 (*in camera*)). [redacted] (Arbogast (Ohio Willow Wood) Tr. 5192 (*in camera*)).

Response to Finding No. 2237:

Complaint Counsel's proposed finding of fact is incomplete because it ignores testimony from prosthetists, such as [redacted]

2238. Kim Peter Viviane DeRoy, Össur's executive vice president of R&D, testified "There's quite a few more" prosthetic foot manufacturers in the United States compared to MPK manufacturers, even when only considering manufacturers of K3 and K4 feet. (De Roy (Össur) Tr. 3587). De Roy estimated that there are between seven and nine foot producers. (De Roy (Össur) Tr. 3589).

Response to Finding No. 2238:

Complaint Counsel's proposed finding of fact is incomplete because it ignores testimony from prosthetists, such as [redacted]

2239. Keith Watson, of Fourroux Prosthetics, testified, "we see tons of different feet." (PX05166 (Watson (Fourroux) , Dep. at 124)).

Response to Finding No. 2239:

Complaint Counsel's proposed finding of fact is incomplete because it ignores testimony from prosthetists, such as [redacted]

2240. [redacted] (PX03074 (Cascade) at 002 (*in camera*)).

Response to Finding No. 2240:

Complaint Counsel's proposed finding of fact is incomplete because it ignores testimony from prosthetists, such as [redacted]

XIV. [redacted]

2241. [redacted]

Response to Finding No. 2241:

Respondent has no specific response.

2242. [redacted]

Response to Finding No. 2242:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

[redacted]

[redacted]

A. [redacted]

1. [redacted]

a) [redacted]

2243. [redacted]

Response to Finding No. 2243:

Respondent has no specific response.

2244. [redacted]

Response to Finding No. 2244:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

[redacted]

2245. [redacted]

[redacted]

Response to Finding No. 2245:

Respondent has no specific response.

2246. [redacted]

Response to Finding No. 2246:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that [redacted]

[redacted]

2247. [redacted]

Response to Finding No. 2247:

Complaint Counsel's proposed finding of fact is incorrect. [redacted]

2248. [redacted]

Response to Finding No. 2248:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2249. [redacted]

Response to Finding No. 2249:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

2250. [redacted]

Response to Finding No. 2250:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

2251. [redacted]

Response to Finding No. 2251:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

2252. [redacted]

Response to Finding No. 2252:

Respondent has no specific response, other than that this is consistent with the fact that [redacted]

2253. [redacted]

Response to Finding No. 2253:

Respondent has no specific response, other than that this is consistent with the fact that [redacted]

2254. [redacted]

Response to Finding No. 2254:

Respondent has no specific response, other than that this is consistent with the fact that [redacted]

2255. [redacted]

Response to Finding No. 2255:

Complaint Counsel's proposed finding of fact is incorrect, incomplete, and misleading, and does not cite to the pertinent testimony of the person responsible for [redacted]

[redacted]

2256. [redacted]

Response to Finding No. 2256:

Respondent has no specific response.

2257. [redacted]

Response to Finding No. 2257:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2258. [redacted]

Response to Finding No. 2258:

Respondent has no specific response.

2259. [redacted]

Response to Finding No. 2259:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that [redacted]

2260. [redacted]

Response to Finding No. 2260:

Respondent has no specific response.

2261. [redacted]

Response to Finding No. 2261:

Respondent has no specific response.

2262. [redacted]

Response to Finding No. 2262:

Complaint Counsel's proposed finding of fact is incomplete because the testimony does not support that [redacted]

2263. [redacted]

Response to Finding No. 2263:

Respondent has no specific response.

2264. [redacted]

Response to Finding No. 2264:

Complaint Counsel's proposed finding of fact is incomplete, because it ignores that [redacted]

[redacted]

2265. [redacted]

Response to Finding No. 2265:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2266. [redacted]

Response to Finding No. 2266:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

[redacted]

2267. [redacted]

Response to Finding No. 2267:

Complaint Counsel's proposed finding of fact is incomplete because it ignores [redacted]

2268. [redacted]

Response to Finding No. 2268:

Complaint Counsel's proposed finding of fact is incomplete because it ignores that [redacted]

2269. [redacted]

Response to Finding No. 2269:

Complaint Counsel's proposed finding of fact is false and misleading to the extent it suggests that [redacted]

[redacted]

2270. [redacted]

Response to Finding No. 2270:

Complaint Counsel's proposed finding of fact is inaccurate to the extent it suggests that [redacted]

2271. [redacted]

Response to Finding No. 2271:

Respondent has no specific response, other than to note that [redacted]

2272. [redacted]

Response to Finding No. 2272:

Respondent has no specific response.

2273. [redacted]

Response to Finding No. 2273:

Complaint Counsel's proposed finding of fact is false because it ignores that [redacted]

[redacted]

2274. [redacted]

Response to Finding No. 2274:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2275. [redacted]

Response to Finding No. 2275:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2276. [redacted]

Response to Finding No. 2276:

Complaint Counsel's proposed finding of fact is incomplete and irrelevant because [redacted]

2277. [redacted]

Response to Finding No. 2277:

Complaint Counsel's proposed finding of fact is false because it ignores that [redacted]

2278. [redacted]

Response to Finding No. 2278:

Complaint Counsel's proposed finding of fact is incomplete to the extent it does not acknowledge that [redacted]

[redacted]

2279. [redacted]

Response to Finding No. 2279:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

2280. [redacted]

Response to Finding No. 2280:

Complaint Counsel's proposed finding of fact is incorrect and [redacted]

2281. [redacted]

Response to Finding No. 2281:

Complaint Counsel's proposed finding of fact is incomplete and misleading in isolation. [redacted]

2282. [redacted]

Response to Finding No. 2282:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2283. [redacted]

Response to Finding No. 2283:

Complaint Counsel's proposed finding of fact is misleading to the extent that it suggests that [redacted]

2284. [redacted]

Response to Finding No. 2284:

Complaint Counsel's proposed finding of fact is irrelevant and misleading, as [redacted]

2285. [redacted]

Response to Finding No. 2285:

Complaint Counsel's proposed finding of fact is irrelevant and misleading because [redacted]

[redacted]

2286. [redacted]

Response to Finding No. 2286:

Complaint Counsel's proposed finding of fact is false and misleading. [redacted]

2287. [redacted]

Response to Finding No. 2287:

Respondent has no specific response.

2288. [redacted]

Response to Finding No. 2288:

Complaint Counsel's proposed finding of fact is grossly inaccurate. [redacted]

2289. [redacted]

Response to Finding No. 2289:

Respondent has no specific response.

2290. [redacted]

Response to Finding No. 2290:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

[redacted]

2291. [redacted]

Response to Finding No. 2291:

Complaint Counsel's proposed finding of fact is irrelevant. There is no dispute that [redacted]

2292. [redacted]

Response to Finding No. 2292:

Respondent has no specific response.

2293. [redacted]

Response to Finding No. 2293:

Respondent has no specific response.

2294. [redacted]

Response to Finding No. 2294:

Respondent has no response other than that, in context, [redacted]

2295. [redacted]

Response to Finding No. 2295:

Respondent has no specific response.

b) [redacted]

Response to Finding No. 2296:

Respondent has no specific response.

2297. [redacted]

Response to Finding No. 2297:

Respondent has no specific response.

2298. [redacted]

Response to Finding No. 2298:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2299. [redacted]

Response to Finding No. 2299:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2300. [redacted]

Response to Finding No. 2300:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2301. [redacted]

Response to Finding No. 2301:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2302. [redacted]

Response to Finding No. 2302:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2303. [redacted]

Response to Finding No. 2303:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

2304. [redacted]

Response to Finding No. 2304:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

2305. [redacted]

Response to Finding No. 2305:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2306. [redacted]

Response to Finding No. 2306:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

2307. [redacted]

Response to Finding No. 2307:

Complaint Counsel's proposed finding of fact is incorrect, incomplete, and misleading. [redacted]

[redacted]

2308. [redacted]

Response to Finding No. 2308:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2309. [redacted]

Response to Finding No. 2309:

Respondent has no specific response.

2310. [redacted]

Response to Finding No. 2310:

Respondent has no specific response.

2311. [redacted]

Response to Finding No. 2311:

Respondent has no specific response.

2312. [redacted]

Response to Finding No. 2312:

Respondent has no specific response.

2313. [redacted]

Response to Finding No. 2313:

Respondent has no specific response.

2314. [redacted]

Response to Finding No. 2314:

Respondent has no specific response.

2315. [redacted]

Response to Finding No. 2315:

Complaint Counsel's proposed finding of fact is irrelevant and incomplete. [redacted]

[redacted]

2316. [redacted]

Response to Finding No. 2316:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

c) [redacted]

2317. [redacted]

Response to Finding No. 2317:

Respondent has no specific response.

2318. [redacted]

Response to Finding No. 2318:

Respondent has no specific response.

2319. [redacted]

Response to Finding No. 2319:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2320. [redacted]

Response to Finding No. 2320:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2321. [redacted]

Response to Finding No. 2321:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2322. [redacted]

Response to Finding No. 2322:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2323. [redacted]

Response to Finding No. 2323:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2324. [redacted]

Response to Finding No. 2324:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2325. [redacted]

Response to Finding No. 2325:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

2326. [redacted]

Response to Finding No. 2326:

Complaint Counsel's proposed finding of fact is incorrect. [redacted]

[redacted]

[redacted]

2327. [redacted]

Response to Finding No. 2327:

Complaint Counsel's proposed finding of fact is incomplete. It ignores that [redacted]

2328. [redacted]

Response to Finding No. 2328:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

2329. [redacted]

Response to Finding No. 2329:

Respondent has no specific response.

2330. [redacted]

Response to Finding No. 2330:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

2331. [redacted]

Response to Finding No. 2331:

Respondent has no specific response.

2332. [redacted]

Response to Finding No. 2332:

Respondent has no specific response.

2333. [redacted]

Response to Finding No. 2333:

Respondent has no specific response.

2334. [redacted]

Response to Finding No. 2334:

Respondent has no specific response.

2335. [redacted]

Response to Finding No. 2335:

Respondent has no specific response.

2336. [redacted]

Response to Finding No. 2336:

Respondent has no specific response.

2337. [redacted]

Response to Finding No. 2337:

Respondent has no specific response.

d) [redacted]

2338. [redacted]

Response to Finding No. 2338:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2339. [redacted]

Response to Finding No. 2339:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2340. [redacted]

Response to Finding No. 2340:

Respondent has no specific response.

2341. [redacted]

Response to Finding No. 2341:

Respondent has no specific response.

2342. [redacted]

Response to Finding No. 2342:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

2343. [redacted]

Response to Finding No. 2343:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2344. [redacted]

Response to Finding No. 2344:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2345. [redacted]

Response to Finding No. 2345:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2346. [redacted]

Response to Finding No. 2346:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2347. [redacted]

Response to Finding No. 2347:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

2348. [redacted]

Response to Finding No. 2348:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2349. [redacted]

Response to Finding No. 2349:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2350. [redacted]

Response to Finding No. 2350:

Complaint Counsel's proposed finding of fact is incomplete and incorrectly suggests [redacted]

[redacted]

2351. [redacted]

Response to Finding No. 2351:

Respondent has no specific response, other than that [redacted]

2352. [redacted]

Response to Finding No. 2352:

Respondent has no specific response.

2353. [redacted]

Response to Finding No. 2353:

Complaint Counsel's proposed finding of fact is inaccurate because [redacted]

2354. [redacted]

Response to Finding No. 2354:

Respondent has no specific response.

2355. [redacted]

Response to Finding No. 2355:

Respondent has no specific response.

2356. [redacted]

Response to Finding No. 2356:

Respondent has no specific response.

2357. [redacted]

Response to Finding No. 2357:

Respondent has no specific response.

2. [redacted]

a) [redacted]

2358. [redacted]

Response to Finding No. 2358:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2359. [redacted]

Response to Finding No. 2359:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2360. [redacted]

Response to Finding No. 2360:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2361. [redacted]

Response to Finding No. 2361:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2362. [redacted]

Response to Finding No. 2362:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2363. [redacted]

Response to Finding No. 2363:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

[redacted]

2364. [redacted]

Response to Finding No. 2364:

Complaint Counsel's proposed finding of fact is incomplete and inaccurate as it [redacted]

2365. [redacted]

Response to Finding No. 2365:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2366. [redacted]

Response to Finding No. 2366:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

b) **Selling only part of Freedom's business used to develop, manufacture, and sell MPKs pre-Merger creates significant risk**

2367. [redacted]

Response to Finding No. 2367:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2368. [redacted]

Response to Finding No. 2368:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

2369. [redacted]

Response to Finding No. 2369:

Complaint Counsel's proposed finding of fact is incomplete, and has no relevance to [redacted]

2370. [redacted]

Response to Finding No. 2370:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

2371. [redacted]

Response to Finding No. 2371:

Complaint Counsel's proposed finding of fact is not relevant [redacted]

[redacted]

2372. [redacted]

Response to Finding No. 2372:

Complaint Counsel's proposed finding of fact is not relevant [redacted]

[redacted]

2373. [redacted]

Response to Finding No. 2373:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

[redacted]

2374. [redacted]

Response to Finding No. 2374:

Complaint Counsel's proposed finding of fact is [redacted]

2375. [redacted]

Response to Finding No. 2375:

Complaint Counsel's proposed finding of fact is not relevant [redacted]

2376. [redacted]

Response to Finding No. 2376:

Complaint Counsel's proposed finding of fact is **misleading** [redacted]

[redacted]

3. [redacted]

a) [redacted]

[redacted]

2377. [redacted]

Response to Finding No. 2377:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

[redacted]

2378. [redacted]

Response to Finding No. 2378:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2379. [redacted]

Response to Finding No. 2379:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

2380. [redacted]

Response to Finding No. 2380:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

2381. [redacted]

Response to Finding No. 2381:

Complaint Counsel's proposed finding of fact is misleading, out of context and incomplete because [redacted]

[redacted]

2382. [redacted]

Response to Finding No. 2382:

Complaint Counsel's proposed finding of fact duplicates No. 2270. [redacted]

2383. [redacted]

Response to Finding No. 2383:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2384. [redacted]

Response to Finding No. 2384:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2385. [redacted]

Response to Finding No. 2385:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

2386. [redacted]

Response to Finding No. 2386:

Complaint Counsel's proposed finding of fact is incorrect and incomplete because [redacted]

[redacted]

(2) [redacted]

2387. [redacted]

Response to Finding No. 2387:

Complaint Counsel's proposed finding of fact is false and incomplete. [redacted]

[redacted]

2388. [redacted]

Response to Finding No. 2388:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

2389. [redacted]

Response to Finding No. 2389:

Complaint Counsel's proposed finding of fact does not accurately state the testimony. [redacted]

2390. [redacted]

[redacted]

Response to Finding No. 2390:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2391. [redacted]

Response to Finding No. 2391:

Complaint Counsel's proposed finding of fact is false and incomplete. [redacted]

[redacted]

2392. [redacted]

Response to Finding No. 2392:

Complaint Counsel's proposed finding of fact is false and incomplete. [redacted]

2393. [redacted]

Response to Finding No. 2393:

Complaint Counsel's proposed finding of fact is false and incomplete. [redacted]

2394. [redacted]

Response to Finding No. 2394:

Complaint Counsel's proposed finding of fact is false and incomplete. [redacted]

[redacted]

2395. [redacted]

Response to Finding No. 2395:

Complaint Counsel's proposed finding of fact is false and incomplete. [redacted]

2396. [redacted]

Response to Finding No. 2396:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2397. [redacted]

Response to Finding No. 2397:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2398. [redacted]

Response to Finding No. 2398:

Complaint Counsel's proposed finding of fact is misleading and [redacted]

[redacted]

2399. [redacted]

Response to Finding No. 2399:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

(3) [redacted]

2400. [redacted]

Response to Finding No. 2400:

Respondent has no specific response.

2401. [redacted]

Response to Finding No. 2401:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2402. [redacted]

Response to Finding No. 2402:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2403. [redacted]

Response to Finding No. 2403:

Complaint Counsel's proposed finding of fact is incorrect and is contradicted by all of the pertinent testimony. [redacted]

2404. [redacted]

Response to Finding No. 2404:

Complaint Counsel's proposed finding of fact is incorrect and incomplete to the extent that [redacted]

[redacted]

2405. [redacted]

Response to Finding No. 2405:

Complaint Counsel's proposed finding of fact is incomplete to the extent that [redacted]

2406. [redacted]

Response to Finding No. 2406:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2407. [redacted]

Response to Finding No. 2407:

Respondent has no specific response.

2408. [redacted]

Response to Finding No. 2408:

Complaint Counsel's proposed finding of fact is incomplete and irrelevant because [redacted]

[redacted]

2409. [redacted]

Response to Finding No. 2409:

Respondent has no specific response, other than that [redacted]

2410. [redacted]

Response to Finding No. 2410:

Respondent has no specific response, other than that [redacted]

2411. [redacted]

Response to Finding No. 2411:

Respondent has no specific response, other than that [redacted]

2412. [redacted]

Response to Finding No. 2412:

Respondent has no specific response, other than that [redacted]

b) [redacted]

2413. [redacted]

Response to Finding No. 2413:

Respondent has no specific response.

2414. [redacted]

Response to Finding No. 2414:

Complaint Counsel's proposed finding of fact is incorrect to the extent that [redacted]

[redacted]

(1) [redacted]

2415. [redacted]

Response to Finding No. 2415:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

2416. [redacted]

Response to Finding No. 2416:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

2417. [redacted]

Response to Finding No. 2417:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

2418. [redacted]

Response to Finding No. 2418:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

2419. [redacted]

Response to Finding No. 2419:

Complaint Counsel's proposed finding of fact is false that there is [redacted]

[redacted]

2420. [redacted]

Response to Finding No. 2420:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2421. [redacted]

Response to Finding No. 2421:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2422. [redacted]

Response to Finding No. 2422:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

2423. [redacted]

Response to Finding No. 2423:

Complaint Counsel's proposed finding of fact is incorrect that [redacted]

2424. [redacted]

Response to Finding No. 2424:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

2425. [redacted]

Response to Finding No. 2425:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2426. [redacted]

Response to Finding No. 2426:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2427. [redacted]

Response to Finding No. 2427:

Complaint Counsel's proposed finding of fact is incorrect that [redacted]

(2) [redacted]

2428. [redacted]

Response to Finding No. 2428:

Respondent has no specific response.

2429. [redacted]

Response to Finding No. 2429:

Complaint Counsel's proposed finding of fact is false to the extent that [redacted]

2430. [redacted]

Response to Finding No. 2430:

Respondent has no specific response, other than that [redacted]

2431. [redacted]

Response to Finding No. 2431:

Complaint Counsel's proposed finding of fact is inaccurate to the extent that [redacted]

[redacted]

2432. [redacted]

Response to Finding No. 2432:

Complaint Counsel's proposed finding of fact is inaccurate to the extent [redacted]

2433. [redacted]

Response to Finding No. 2433:

Respondent has no specific response.

2434. [redacted]

Response to Finding No. 2434:

Respondent has no specific response.

(3) [redacted]

2435. [redacted]

Response to Finding No. 2435:

Respondent has no specific response.

2436. [redacted]

Response to Finding No. 2436:

Complaint Counsel's proposed finding of fact is incomplete to the extent that [redacted]

2437. [redacted]

Response to Finding No. 2437:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

B. [redacted]

1. [redacted]

2438. [redacted]

Response to Finding No. 2438:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2439. [redacted]

Response to Finding No. 2439:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

a) [redacted]

2440. [redacted]

Response to Finding No. 2440:

Respondent has no specific response.

2441. [redacted]

Response to Finding No. 2441:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

[redacted]

2442. [redacted]

Response to Finding No. 2442:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

[redacted]

2443. [redacted]

Response to Finding No. 2443:

As described above in Respondent's reply to Complaint Counsel's finding of fact no. 2441, Complaint Counsel's proposed finding of fact is irrelevant.

2444. [redacted]

Response to Finding No. 2444:

As described above in Respondent's reply to Complaint Counsel's finding of fact no. 2441, Complaint Counsel's proposed finding of fact is irrelevant.

2445. [redacted]

Response to Finding No. 2445:

As described above in Respondent's reply to Complaint Counsel's finding of fact no. 2441, Complaint Counsel's proposed finding of fact is irrelevant.

2446. [redacted]

Response to Finding No. 2446:

Complaint Counsel's proposed finding of fact is incomplete because [redacted] As described above in Respondent's reply to Complaint Counsel's finding of fact no. 2442, Complaint Counsel's proposed finding of fact is irrelevant.

2447. [redacted]

Response to Finding No. 2447:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons described above in Respondent's reply to Complaint Counsel's finding of fact no. 2442. In addition, Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2448. [redacted]

Response to Finding No. 2448:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

2449. [redacted]

Response to Finding No. 2449:

Complaint Counsel's proposed finding of fact mischaracterizes [redacted]

2450. [redacted]

Response to Finding No. 2450:

Respondent has no specific response.

2451. [redacted]

Response to Finding No. 2451:

Respondent has no specific response.

2452. [redacted]

Response to Finding No. 2452:

Complaint Counsel's proposed finding of fact is not credible because [redacted]

2453. [redacted]

Response to Finding No. 2453:

Complaint Counsel's proposed finding of fact is not credible because [redacted]

2454. [redacted]

Response to Finding No. 2454:

Complaint Counsel's proposed finding of fact is not credible because [redacted]

2455. [redacted]

Response to Finding No. 2455:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2456. [redacted]

Response to Finding No. 2456:

Respondent has no specific response, other than that [redacted]

2457. [redacted]

Response to Finding No. 2457:

Respondent has no specific response, other than that [redacted]

2458. [redacted]

Response to Finding No. 2458:

Respondent has no specific response, other than that [redacted]

2459. [redacted]

Response to Finding No. 2459:

Respondent has no specific response, other than that [redacted]

2460. [redacted]

Response to Finding No. 2460:

Respondent has no specific response, other than that [redacted]

2461. [redacted]

Response to Finding No. 2461:

Complaint Counsel's proposed finding of fact is not credible because [redacted]

[redacted]

2462. [redacted]

Response to Finding No. 2462:

Complaint Counsel's proposed finding of fact is irrelevant [redacted]

b) [redacted]

2463. [redacted]

Response to Finding No. 2463:

Respondent has no specific response.

2464. [redacted]

Response to Finding No. 2464:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2465. [redacted]

Response to Finding No. 2465:

Complaint Counsel's proposed finding of fact is misleading to the extent it [redacted]

[redacted]

2466. [redacted]

Response to Finding No. 2466:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2467. [redacted]

Response to Finding No. 2467:

Complaint Counsel's proposed finding of fact is misleading to the extent that it [redacted]

2468. [redacted]

Response to Finding No. 2468:

Complaint Counsel's proposed finding of fact does not properly characterize [redacted]

2469. [redacted]

Response to Finding No. 2469:

Respondent has no specific response, other than that [redacted]

2470. [redacted]

Response to Finding No. 2470:

Complaint Counsel's proposed finding of fact is misleading to the extent it [redacted]

2471. [redacted]

Response to Finding No. 2471:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2472. [redacted]

Response to Finding No. 2472:

Respondent has no specific response.

2473. [redacted]

Response to Finding No. 2473:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2474. [redacted]

Response to Finding No. 2474:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2475. [redacted]

Response to Finding No. 2475:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2476. [redacted]

Response to Finding No. 2476:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2477. [redacted]

Response to Finding No. 2477:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2478. [redacted]

Response to Finding No. 2478:

Complaint Counsel's proposed finding of fact is misleading first because [redacted]

[redacted]

2479. [redacted]

Response to Finding No. 2479:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2480. [redacted]

Response to Finding No. 2480:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

2481. [redacted]

Response to Finding No. 2481:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

2482. [redacted]

Response to Finding No. 2482:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2483. [redacted]

Response to Finding No. 2483:

Complaint Counsel's proposed finding of fact mischaracterizes [redacted]

[redacted]

2484. [redacted]

Response to Finding No. 2484:

Respondent has no specific response.

2485. [redacted]

Response to Finding No. 2485:

Complaint Counsel's proposed finding of fact mischaracterizes [redacted]

2486. [redacted]

Response to Finding No. 2486:

Complaint Counsel's proposed finding of fact is incomplete to the extent it [redacted]

[redacted]

2487. [redacted]

Response to Finding No. 2487:

Complaint Counsel's proposed finding of fact lacks credibility because [redacted]

2488. [redacted]

Response to Finding No. 2488:

Respondent has no specific response.

2489. [redacted]

Response to Finding No. 2489:

Respondent has no specific response.

2490. [redacted]

Response to Finding No. 2490:

Respondent has no specific response, other than that [redacted]

2491. [redacted]

Response to Finding No. 2491:

Respondent has no specific response, other than that [redacted]

2492. [redacted]

Response to Finding No. 2492:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2493. [redacted]

[redacted]

Response to Finding No. 2493:

Complaint Counsel's proposed finding of fact is irrelevant, [redacted]

c) [redacted]

2494. [redacted]

Response to Finding No. 2494:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2495. [redacted]

Response to Finding No. 2495:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

2496. [redacted]

Response to Finding No. 2496:

Respondent has no specific response.

2497. [redacted]

Response to Finding No. 2497:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

[redacted]

2498. [redacted]

Response to Finding No. 2498:

Respondent has no specific response.

2499. [redacted]

Response to Finding No. 2499:

Complaint Counsel's proposed finding of fact [redacted]

2500. [redacted]

Response to Finding No. 2500:

Respondent has no specific response

2. [redacted]

a) [redacted]

(1) [redacted]

2501. [redacted]

Response to Finding No. 2501:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

[redacted]

2502. [redacted]

Response to Finding No. 2502:

Complaint Counsel's proposed finding of fact **is irrelevant because** [redacted]

2503. [redacted]

Response to Finding No. 2503:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2504. [redacted]

Response to Finding No. 2504:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2505. [redacted]

Response to Finding No. 2505:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

[redacted]

2506. [redacted]

Response to Finding No. 2506:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2507. [redacted]

Response to Finding No. 2507:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2508. [redacted]

Response to Finding No. 2508:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

[redacted]

2509. [redacted]

Response to Finding No. 2509:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2510. [redacted]

Response to Finding No. 2510:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2511. [redacted]

Response to Finding No. 2511:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2512. [redacted]

Response to Finding No. 2512:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2513. [redacted]

Response to Finding No. 2513:

Complaint Counsel's proposed finding of fact lacks credibility because [redacted]

[redacted]

[redacted]

2514. [redacted]

Response to Finding No. 2514:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

2515. [redacted]

Response to Finding No. 2515:

Complaint Counsel's proposed finding of fact is incorrect because [redacted]

[redacted]

2516. [redacted]

Response to Finding No. 2516:

Complaint Counsel's proposed finding of fact is incorrect because [redacted]

[redacted]

[redacted]

2517. [redacted]

Response to Finding No. 2517:

Complaint Counsel's proposed finding of fact is incorrect for the reasons stated in Respondent's reply to Complaint Counsel's finding of fact no. 2516.

2518. [redacted]

[redacted]

Response to Finding No. 2518:

Complaint Counsel's proposed finding of fact is inaccurate to the extent it [redacted]

2519. [redacted]

[redacted]

Response to Finding No. 2519:

Respondent has no specific response, other than that [redacted]

2520. [redacted]

Response to Finding No. 2520:

Complaint Counsel's proposed finding of fact is irrelevant [redacted]

[redacted]

2521. [redacted]

Response to Finding No. 2521:

Respondent has no specific response, other than that [redacted]

2522. [redacted]

Response to Finding No. 2522:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2523. [redacted]

Response to Finding No. 2523:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

(2) [redacted]

2524. [redacted]

Response to Finding No. 2524:

Complaint Counsel's proposed finding of fact is irrelevant [redacted]

[redacted]

2525. [redacted]

Response to Finding No. 2525:

Respondent has no specific response.

2526. [redacted]

Response to Finding No. 2526:

Complaint Counsel's proposed finding of fact is incomplete and irrelevant because [redacted]

[redacted]

2527. [redacted]

Response to Finding No. 2527:

Respondent has no specific response.

2528. [redacted]

Response to Finding No. 2528:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2529. [redacted]

Response to Finding No. 2529:

Complaint Counsel's proposed finding of fact is misleading to the extent that it [redacted]

[redacted]

2530. [redacted]

Response to Finding No. 2530:

Complaint Counsel's proposed finding of fact is misleading to the extent that [redacted]

[redacted]

2531. [redacted]

Response to Finding No. 2531:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

2532. [redacted]

Response to Finding No. 2532:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

2533. [redacted]

Response to Finding No. 2533:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

(3) [redacted]

2534. [redacted]

Response to Finding No. 2534:

Respondent has no specific response.

2535. [redacted]

Response to Finding No. 2535:

Complaint Counsel's proposed finding of fact is irrelevant and incomplete because [redacted]

2536. [redacted]

Response to Finding No. 2536:

Respondent incorporates its replies to Complaint Counsel's proposed findings of fact nos. 2503-2505, above.

2537. [redacted]

Response to Finding No. 2537:

Complaint Counsel's proposed finding of fact is inaccurate to the extent that [redacted]

2538. [redacted]

Response to Finding No. 2538:

Respondent has no specific response.

2539. [redacted]

Response to Finding No. 2539:

Respondent has no specific response.

2540. [redacted]

Response to Finding No. 2540:

Complaint Counsel's proposed finding of fact is incomplete to the extent that [redacted]

[redacted]

2541. [redacted]

Response to Finding No. 2541:

Respondent incorporates its replies to Complaint Counsel's proposed findings of fact nos. 2503-2505 above.

2542. [redacted]

Response to Finding No. 2542:

Respondent has no specific response.

2543. [redacted]

Response to Finding No. 2543:

Respondent has no specific response

2544. [redacted]

Response to Finding No. 2544:

Complaint Counsel's proposed finding of fact is incomplete to the extent [redacted]

[redacted]

[redacted]

2545. [redacted]

Response to Finding No. 2545:

Respondent incorporates its replies to Complaint Counsel's proposed findings of fact nos. 2503-2505 above.

2546. [redacted]

Response to Finding No. 2546:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

b) [redacted]

(1) [redacted]

2547. [redacted]

Response to Finding No. 2547:

Complaint Counsel's proposed finding of fact is incorrect because [redacted]

[redacted]

2548. [redacted]

Response to Finding No. 2548:

Complaint Counsel's proposed finding of fact is incomplete to the extent [redacted]

2549. [redacted]

Response to Finding No. 2549:

Complaint Counsel's proposed finding of fact is not credible because [redacted]

2550. [redacted]

Response to Finding No. 2550:

Complaint Counsel's proposed finding of fact is inaccurate and incomplete because [redacted]

2551. [redacted]

Response to Finding No. 2551:

Complaint Counsel's proposed finding of fact is inaccurate and incomplete because [redacted]

2552. [redacted]

Response to Finding No. 2552:

Complaint Counsel's proposed finding of fact is inaccurate and incomplete because [redacted]

[redacted]

2553. [redacted]

Response to Finding No. 2553:

Respondent incorporates its replies to Complaint Counsel's proposed finding of fact nos. 1080 and 1084-86, above.

Complaint Counsel's proposed finding of fact is inaccurate and incomplete because [redacted]

2554. **One example of Freedom's promotion is from the fourth quarter of 2017, depicted below. (PX00787 (Freedom) at 001).**

(PX00787 (Freedom) at 001).

Response to Finding No. 2554:

Complaint Counsel's proposed finding of fact is of limited probative value because it is not based on any testimony regarding the promotional flyer. Indeed, there was no testimony at trial regarding the flyer.

2555. [redacted]

Response to Finding No. 2555:

Complaint Counsel's proposed finding of fact is inaccurate to the extent that [redacted]

[redacted]

2556. [redacted]

Response to Finding No. 2556:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons stated in response to Complaint Counsel's proposed finding of fact no. 2547.

2557. [redacted]

Response to Finding No. 2557:

Complaint Counsel's proposed finding of fact is inaccurate and incomplete because

[redacted]

[redacted]

2558. [redacted]

Response to Finding No. 2558:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons stated in response to Complaint Counsel's proposed finding of fact no. 2547.

2559. [redacted]

Response to Finding No. 2559:

Complaint Counsel's proposed finding of fact is inaccurate and incomplete because [redacted]

[redacted]

2560. [redacted]

Response to Finding No. 2560:

Respondent has no specific response.

2561. [redacted]

Response to Finding No. 2561:

Complaint Counsel's proposed finding of fact is inaccurate and incomplete because [redacted]

2562. [redacted]

Response to Finding No. 2562:

Complaint Counsel's proposed finding of fact is false and misleading because [redacted]

2563. [redacted]

Response to Finding No. 2563:

Complaint Counsel's proposed finding of fact is false and misleading because it mischaracterizes the cited testimony.

[redacted]

[redacted]

[redacted]

[redacted]

2564. [redacted]

Response to Finding No. 2564:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

[redacted]

2565. [redacted]

Response to Finding No. 2565:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2566. [redacted]

Response to Finding No. 2566:

Complaint Counsel's proposed finding of fact is of limited probative value because [redacted]

2567. [redacted]

Response to Finding No. 2567:

Complaint Counsel's proposed finding of fact is false and misleading because [redacted]

2568. [redacted]

Response to Finding No. 2568:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2569. [redacted]

[redacted]

Response to Finding No. 2569:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2570. [redacted]

Response to Finding No. 2570:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2571. [redacted]

Response to Finding No. 2571:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

[redacted]

2572. [redacted]

Response to Finding No. 2572:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2573. [redacted]

Response to Finding No. 2573:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

2574. [redacted]

Response to Finding No. 2574:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

2575. [redacted]

Response to Finding No. 2575:

Complaint Counsel's proposed finding of fact is irrelevant [redacted]

2576. [redacted]

Response to Finding No. 2576:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2577. [redacted]

Response to Finding No. 2577:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2578. [redacted]

Response to Finding No. 2578:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2579. [redacted]

Response to Finding No. 2579:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2580. [redacted]

Response to Finding No. 2580:

Complaint Counsel's proposed finding of fact is inaccurate because [redacted]

2581. [redacted]

Response to Finding No. 2581:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2582. [redacted]

Response to Finding No. 2582:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2583. [redacted]

Response to Finding No. 2583:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

2584. [redacted]

Response to Finding No. 2584:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

(2) [redacted]

2585. [redacted]

Response to Finding No. 2585:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2586. [redacted]

Response to Finding No. 2586:

Respondent has no specific response.

2587. [redacted]

Response to Finding No. 2587:

As described above in Response to CCFF ¶ 2441, Complaint Counsel's proposed finding of fact is irrelevant.

2588. [redacted]

Response to Finding No. 2588:

As described above in Response to CCFF ¶ 2441, Complaint Counsel's proposed finding of fact is irrelevant.

2589. [redacted]

Response to Finding No. 2589:

Complaint Counsel's proposed finding of fact is incomplete because [redacted] As described above in Response to CCFF ¶ 2441, Complaint Counsel's proposed finding of fact is irrelevant.

2590. [redacted]

Response to Finding No. 2590:

Complaint Counsel's proposed finding of fact is inaccurate and misleading because [redacted]

2591. [redacted]

Response to Finding No. 2591:

Complaint Counsel's proposed finding of fact is inaccurate and misleading because [redacted]

[redacted]

2592. [redacted]

Response to Finding No. 2592:

As described above in Response to CCFF ¶ 2441, Complaint Counsel's proposed finding of fact is irrelevant.

2593. [redacted]

Response to Finding No. 2593:

Complaint Counsel's proposed finding of fact is not credible [redacted]

2594. [redacted]

Response to Finding No. 2594:

Complaint Counsel's proposed finding of fact is not credible [redacted]

[redacted]

2595. [redacted]

Response to Finding No. 2595:

Respondent has no specific response.

2596. [redacted]

Response to Finding No. 2596:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

[redacted]

2597. [redacted]

Response to Finding No. 2597:

Complaint Counsel's proposed finding of fact is irrelevant [redacted]

[redacted]

2599. [redacted]

Response to Finding No. 2599:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598.

2600. [redacted]

Response to Finding No. 2600:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598.

2601. [redacted]

Response to Finding No. 2601:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Respondent's reply to Complaint Counsel's proposed finding of fact 2598. [redacted]

2602. [redacted]

Response to Finding No. 2602:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598. [redacted]

[redacted]

2603. [redacted]

Response to Finding No. 2603:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598. Complaint Counsel's proposed finding of fact is also incomplete because [redacted]

[redacted]

2604. [redacted]

Response to Finding No. 2604:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598.

2605. [redacted]

Response to Finding No. 2605:

Respondent has no specific response.

2606. [redacted]

Response to Finding No. 2606:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to Complaint Counsel's proposed finding of fact no. 2598.

2607. [redacted]

Response to Finding No. 2607:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2608. [redacted]

Response to Finding No. 2608:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to proposed finding no. 2598.

2609. [redacted]

Response to Finding No. 2609:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2599. Complaint Counsel's proposed finding of fact [redacted]

[redacted]

2610. [redacted]

Response to Finding No. 2610:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598.

2611. [redacted]

Response to Finding No. 2611:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598.

2612. [redacted]

Response to Finding No. 2612:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598.

2613. [redacted]

Response to Finding No. 2613:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598.

2614. [redacted]

Response to Finding No. 2614:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598. [redacted]

[redacted]

2615. [redacted]

Response to Finding No. 2615:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598. [redacted]

2616. [redacted]

Response to Finding No. 2616:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598. [redacted]

[redacted]

2617. [redacted]

Response to Finding No. 2617:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598. [redacted]

[redacted]

2618. [redacted]

Response to Finding No. 2618:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598.

2619. [redacted]

Response to Finding No. 2619:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598.

2620. [redacted]

Response to Finding No. 2620:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598.

2621. [redacted]

Response to Finding No. 2621:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598. [redacted]

[redacted]

2622. [redacted]

Response to Finding No. 2622:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598. [redacted]

2623. [redacted]

Response to Finding No. 2623:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598. [redacted]

2624. [redacted]

Response to Finding No. 2624:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598. [redacted]

[redacted]

2625. [redacted]

Response to Finding No. 2625:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

[redacted]

2626. [redacted]

Response to Finding No. 2626:

Respondent has no specific response.

2627. [redacted]

Response to Finding No. 2627:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2628. [redacted]

Response to Finding No. 2628:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598.

2629. [redacted]

Response to Finding No. 2629:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons in Response to CCFF ¶ 2598. [redacted]

[redacted]

(3) [redacted]

2630. [redacted]

Response to Finding No. 2630:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2631. [redacted]

Response to Finding No. 2631:

Respondent has no specific response, other than that [redacted]

2632. [redacted]

Response to Finding No. 2632:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons stated in Respondents' Response to CCFF ¶ 2630.

2633. [redacted]

Response to Finding No. 2633:

Complaint Counsel's proposed finding of fact is incomplete [redacted]

2634. [redacted]

Response to Finding No. 2634:

Respondent has no specific response.

2635. [redacted]

Response to Finding No. 2635:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2636. [redacted]

Response to Finding No. 2636:

Respondent has no specific response.

2637. [redacted]

Response to Finding No. 2637:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons stated in Respondents' Response to CCFF ¶ 2630.

c) [redacted]

(1) [redacted]

2638. [redacted]

Response to Finding No. 2638:

Respondent has no specific response.

2639. [redacted]

Response to Finding No. 2639:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2640. [redacted]

Response to Finding No. 2640:

Respondent has no specific response.

2641. [redacted]

Response to Finding No. 2641:

Complaint Counsel's proposed finding of fact is incomplete and irrelevant because [redacted]

[redacted]

2642. [redacted]

Response to Finding No. 2642:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2643. [redacted]

Response to Finding No. 2643:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2644. [redacted]

Response to Finding No. 2644:

Respondent has no specific response.

2645. [redacted]

Response to Finding No. 2645:

Respondent has no specific response.

2646. [redacted]

Response to Finding No. 2646:

Complaint Counsel's proposed finding of fact is incomplete, first, because [redacted]

[redacted]

2647. [redacted]

Response to Finding No. 2647:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2648. [redacted]

Response to Finding No. 2648:

Complaint Counsel's proposed finding of fact irrelevant because [redacted]

2649. [redacted]

Response to Finding No. 2649:

Respondent has no specific response, other than that [redacted]

2650. [redacted]

Response to Finding No. 2650:

Complaint Counsel's proposed finding of fact incomplete and misleading because [redacted]

[redacted]

2651. [redacted]

Response to Finding No. 2651:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

[redacted]

[redacted]

2652. [redacted]

Response to Finding No. 2652:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

2653. [redacted]

[redacted]

Response to Finding No. 2653:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

(2) [redacted]

2654. [redacted]

Response to Finding No. 2654:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

[redacted]

2655. [redacted]

Response to Finding No. 2655:

Complaint Counsel's proposed finding of fact is incomplete and irrelevant because [redacted]

2656. [redacted]

Response to Finding No. 2656:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

2657. [redacted]

Response to Finding No. 2657:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons stated in Response to CCFF ¶ 2655.

2658. [redacted]

Response to Finding No. 2658:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons stated in Response to CCFF ¶ 2655.

2659. [redacted]

Response to Finding No. 2659:

Complaint Counsel's proposed finding of fact is misleading. [redacted] Complaint Counsel's proposed finding of fact is irrelevant for the reasons stated in Response to CCFF ¶ 2655.

2660. [redacted]

Response to Finding No. 2660:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

2661. [redacted]

Response to Finding No. 2661:

Complaint Counsel's proposed finding of fact is irrelevant and incorrect [redacted]

2662. [redacted]

Response to Finding No. 2662:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

2663. [redacted]

Response to Finding No. 2663:

Respondent has no specific response.

2664. [redacted]

Response to Finding No. 2664:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2665. [redacted]

[redacted]

Response to Finding No. 2665:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

2666. [redacted]

Response to Finding No. 2666:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

[redacted]

2667. [redacted]

Response to Finding No. 2667:

Complaint Counsel's proposed finding of fact is incomplete and misleading [redacted]

2668. [redacted]

Response to Finding No. 2668:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

2669. [redacted]

Response to Finding No. 2669:

Respondent has no specific response.

2670. [redacted]

Response to Finding No. 2670:

Respondent has no specific response.

2671. [redacted]

Response to Finding No. 2671:

Respondent has no specific response.

2672. [redacted]

Response to Finding No. 2672:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2673. [redacted]

Response to Finding No. 2673:

Respondent has no specific response.

2674. [redacted]

Response to Finding No. 2674:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2675. [redacted]

Response to Finding No. 2675:

Respondent has no specific response.

2676. [redacted]

Response to Finding No. 2676:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2677. [redacted]

Response to Finding No. 2677:

Respondent has no specific response.

3. [redacted]

a) **Freedom uses intellectual property that Otto Bock does not plan to sell to develop Quattro and potentially future-generation products**

2678. [redacted]

Response to Finding No. 2678:

Complaint Counsel's proposed finding of fact is of limited probative value because [redacted]

2679. [redacted]

Response to Finding No. 2679:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2680. [redacted]

Response to Finding No. 2680:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2681. [redacted]

Response to Finding No. 2681:

Complaint Counsel's proposed finding of fact lacks credibility because [redacted]

[redacted]

2682. [redacted]

Response to Finding No. 2682:

Respondent has no specific response.

2683. [redacted]

Response to Finding No. 2683:

Complaint Counsel's proposed finding of fact is misleading to the extent [redacted]

[redacted]

[redacted]

2684. [redacted]

Response to Finding No. 2684:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2685. [redacted]

Response to Finding No. 2685:

Respondent has no specific response, other than that Complaint Counsel's proposed finding of fact is incorrect because [redacted]

2686. [redacted]

Response to Finding No. 2686:

Complaint Counsel's proposed finding of fact is misleading to the extent [redacted]

2687. [redacted]

[redacted]

Response to Finding No. 2687:

Complaint Counsel's proposed finding of fact is irrelevant, first, because [redacted]

b) [redacted]

2688. [redacted]

Response to Finding No. 2688:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2689. [redacted]

Response to Finding No. 2689:

Respondent has no specific response.

2690. [redacted]

Response to Finding No. 2690:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2691. [redacted]

Response to Finding No. 2691:

Complaint Counsel's proposed finding of fact is misleading to the extent [redacted]

[redacted]

2692. [redacted]

Response to Finding No. 2692:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2693. [redacted]

Response to Finding No. 2693:

Complaint Counsel's proposed finding of fact is misleading to the extent [redacted]

2694. [redacted]

Response to Finding No. 2694:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2695. [redacted]

Response to Finding No. 2695:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2696. [redacted]

Response to Finding No. 2696:

Respondent has no specific response.

2697. [redacted]

Response to Finding No. 2697:

Respondent has no specific response.

2698. [redacted]

Response to Finding No. 2698:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

2699. [redacted]

Response to Finding No. 2699:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

2700. [redacted]

Response to Finding No. 2700:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

2701. [redacted]

Response to Finding No. 2701:

Respondent has no specific response.

2702. [redacted]

Response to Finding No. 2702:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. [redacted]

[redacted]

2703. [redacted].

[redacted]

Response to Finding No. 2703:

Respondent has no specific response, other than that [redacted]

2704. [redacted]

Response to Finding No. 2704:

Respondent has no specific response.

2705. [redacted]

Response to Finding No. 2705:

Respondent has no specific response.

2706. [redacted]

Response to Finding No. 2706:

Complaint Counsel's proposed finding of fact is incorrect. [redacted]

[redacted]

2707. [redacted]

Response to Finding No. 2707:

Respondent has no specific response, other than that [redacted]

2708. [redacted]

Response to Finding No. 2708:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2709. [redacted]

Response to Finding No. 2709:

Complaint Counsel's proposed finding of fact is irrelevant [redacted]

2710. [redacted]

Response to Finding No. 2710:

Respondent has no specific response.

2711. [redacted]

Response to Finding No. 2711:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2712. [redacted]

Response to Finding No. 2712:

Complaint Counsel's proposed finding of fact is misleading to the extent [redacted]

2713. [redacted]

Response to Finding No. 2713:

Respondent has no specific response.

2714. [redacted]

Response to Finding No. 2714:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

2715. [redacted]

Response to Finding No. 2715:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2716. [redacted]

Response to Finding No. 2716:

Respondent has no specific response.

2717. [redacted]

Response to Finding No. 2717:

Complaint Counsel's proposed finding of fact **is not credible because** [redacted]

[redacted]

2718. [redacted]

Response to Finding No. 2718:

Complaint Counsel's proposed finding of fact is incorrect because [redacted]

2719. [redacted]

Response to Finding No. 2719:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

2720. [redacted]

[redacted]

Response to Finding No. 2720:

Complaint Counsel's proposed finding of fact is irrelevant [redacted]

2721. [redacted]

Response to Finding No. 2721:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

2722. [redacted]

Response to Finding No. 2722:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2723. [redacted]

Response to Finding No. 2723:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

2724. [redacted]

Response to Finding No. 2724:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

4. [redacted]

2725. [redacted]

Response to Finding No. 2725:

Respondent has no specific response, other than that [redacted]

2726. [redacted]

Response to Finding No. 2726:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

[redacted]

2727. [redacted]

Response to Finding No. 2727:

Complaint Counsel's proposed finding of fact is irrelevant [redacted]

2728. [redacted]

Response to Finding No. 2728:

Complaint Counsel's proposed finding of fact is irrelevant [redacted]

[redacted]

a) [redacted]

(1) [redacted]

2729. [redacted]

Response to Finding No. 2729:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2730. [redacted]

Response to Finding No. 2730:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2731. [redacted]

Response to Finding No. 2731:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

[redacted]

[redacted]

2732. [redacted]

Response to Finding No. 2732:

Complaint Counsel's proposed finding of fact is not supported by the cited evidence. [redacted]

2733. [redacted]

Response to Finding No. 2733:

Complaint Counsel's proposed finding of fact is not supported by the cited evidence. [redacted]

2734. [redacted]

Response to Finding No. 2734:

Complaint Counsel's proposed finding of fact is not supported by the cited evidence. [redacted]

2735. [redacted]

Response to Finding No. 2735:

Complaint Counsel's proposed finding of fact is not supported by the cited evidence. [redacted]

2736. [redacted]

Response to Finding No. 2736:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons stated in Response to CCFF ¶ 2726, in particular, that [redacted]

[redacted]

2737. [redacted]

Response to Finding No. 2737:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons stated in response to finding no. 2726, in particular, that [redacted]

2738. [redacted]

Response to Finding No. 2738:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons stated in response to finding no. 2726, in particular, that [redacted]

[redacted]

2739. [redacted]

Response to Finding No. 2739:

Complaint Counsel's proposed finding of fact is irrelevant for the reasons stated in response to finding no. 2726, in particular, that [redacted]

(2) [redacted]

2740. [redacted]

Response to Finding No. 2740:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that [redacted]

[redacted]

2741. [redacted]

Response to Finding No. 2741:

Respondent has no specific response.

2742. [redacted]

Response to Finding No. 2742:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

[redacted]

2743. [redacted]

Response to Finding No. 2743:

Respondent has no specific response.

2744. [redacted]

Response to Finding No. 2744:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2745. [redacted]

Response to Finding No. 2745:

Complaint Counsel's proposed finding of fact is incomplete to the extent it suggests that

[redacted]

2746. [redacted]

Response to Finding No. 2746:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that

[redacted]

[redacted]

2747. [redacted]

Response to Finding No. 2747:

Complaint Counsel's proposed finding of fact **is irrelevant because** [redacted]

2748. [redacted]

Response to Finding No. 2748:

Complaint Counsel's proposed finding of fact is incomplete to the extent it suggests that [redacted]

[redacted]

2749. [redacted]

Response to Finding No. 2749:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that [redacted]

2750. [redacted]

Response to Finding No. 2750:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2751. [redacted]

Response to Finding No. 2751:

Complaint Counsel's proposed finding of fact is incomplete to the extent it suggests that [redacted]

2752. [redacted]

[redacted]

Response to Finding No. 2752:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that [redacted]

2753. [redacted]

Response to Finding No. 2753:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

[redacted]

2754. [redacted]

Response to Finding No. 2754:

Complaint Counsel's proposed finding of fact is incomplete to the extent it suggests that [redacted]

2755. [redacted]

Response to Finding No. 2755:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that [redacted]

[redacted]

2756. [redacted]

Response to Finding No. 2756:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2757. [redacted]

Response to Finding No. 2757:

Complaint Counsel's proposed finding of fact is incomplete to the extent it suggests that [redacted]

[redacted]

2758. [redacted]

Response to Finding No. 2758:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

2759. [redacted]

Response to Finding No. 2759:

Complaint Counsel's proposed finding of fact is irrelevant because [redacted]

2760. [redacted]

Response to Finding No. 2760:

Complaint Counsel's proposed finding of fact is incomplete to the extent [redacted]

2761. [redacted]

Response to Finding No. 2761:

Respondent has no specific response.

2762. [redacted]

Response to Finding No. 2762:

Complaint Counsel's proposed finding of fact is incomplete to the extent it [redacted]

[redacted]

(3) [redacted]

2763. [redacted]

Response to Finding No. 2763:

Respondent has no specific response.

2764. [redacted]

Response to Finding No. 2764:

Complaint Counsel's proposed finding of fact is incorrect because [redacted]

2765. [redacted]

Response to Finding No. 2765:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

2766. [redacted]

Response to Finding No. 2766:

Complaint Counsel's proposed finding of fact is incorrect and misleading because [redacted]

2767. [redacted]

[redacted]

Response to Finding No. 2767:

Complaint Counsel's proposed finding of fact is false because [redacted]

2768. [redacted]

Response to Finding No. 2768:

Respondent has no specific response.

2769. [redacted]

Response to Finding No. 2769:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

2770. [redacted]

Response to Finding No. 2770:

Complaint Counsel's proposed finding of fact is incomplete with respect to [redacted]

2771. [redacted]

Response to Finding No. 2771:

Complaint Counsel's proposed finding of fact is incomplete with respect to [redacted]

2772. [redacted]

Response to Finding No. 2772:

Complaint Counsel's proposed finding of fact is incomplete with respect to [redacted]

2773. [redacted]

Response to Finding No. 2773:

Complaint Counsel's proposed finding of fact is incomplete with respect to [redacted]

[redacted]

2774. [redacted]

Response to Finding No. 2774:

Complaint Counsel's proposed finding of fact is incorrect, first, because [redacted]

2775. [redacted]

Response to Finding No. 2775:

Respondent has no specific response.

2776. [redacted]

Response to Finding No. 2776:

Respondent has no specific response.

2777. [redacted]

Response to Finding No. 2777:

Complaint Counsel's proposed finding of fact is false because [redacted]

b) [redacted]

(1) [redacted]

2778. [redacted]

Response to Finding No. 2778:

Complaint Counsel's proposed finding of fact is of limited probative value because [redacted]

2779. [redacted]

Response to Finding No. 2779:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2780. [redacted]

Response to Finding No. 2780:

Respondent has no specific response.

2781. [redacted]

Response to Finding No. 2781:

This finding is misleading to the extent that it suggests that [redacted]

2782. [redacted]

Response to Finding No. 2782:

Complaint Counsel's proposed finding is misleading. [redacted]

[redacted]

2783. [redacted]

Response to Finding No. 2783:

Complaint Counsel's proposed finding is misleading for the reasons in Response to CCFF ¶ 2782.

2784. [redacted]

Response to Finding No. 2784:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

[redacted]

2785. [redacted]

Response to Finding No. 2785:

Respondent has no specific response.

2786. [redacted]

Response to Finding No. 2786:

Respondent has no specific response.

2787. [redacted]

Response to Finding No. 2787:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

2788. [redacted]

Response to Finding No. 2788:

Complaint Counsel's proposed finding of fact is not supported by the cited evidence. [redacted]

(2) [redacted]

2789. [redacted]

Response to Finding No. 2789:

Respondent has no specific response.

2790. [redacted]

Response to Finding No. 2790:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

2791. [redacted]

Response to Finding No. 2791:

Complaint Counsel's proposed finding of fact is misleading for the reasons in Response to CCFF ¶ 2790.

2792. [redacted]

Response to Finding No. 2792:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2793. [redacted]

Response to Finding No. 2793:

[redacted]

[redacted]

2794. [redacted]

Response to Finding No. 2794:

Respondent has no specific response.

2795. [redacted]

Response to Finding No. 2795:

[redacted]

2796. [redacted]

Response to Finding No. 2796:

[redacted]

[redacted]

2797. [redacted]

Response to Finding No. 2797:

[redacted]

2798. [redacted]

Response to Finding No. 2798:

Respondent has no specific response.

2799. [redacted]

Response to Finding No. 2799:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

2800. [redacted]

Response to Finding No. 2800:

Respondent has no specific response.

2801. [redacted]

Response to Finding No. 2801:

[redacted]

[redacted]

2802. [redacted]

Response to Finding No. 2802:

[redacted]

2803. [redacted]

Response to Finding No. 2803:

[redacted]

[redacted]

2804. [redacted]

Response to Finding No. 2804:

[redacted]

2805. [redacted]

Response to Finding No. 2805:

[redacted]

[redacted]

2806. [redacted]

Response to Finding No. 2806:

[redacted]

[redacted]

2807. [redacted]

Response to Finding No. 2807:

Complaint Counsel's proposed finding of fact is misleading for the reasons in Response to CCFF ¶ 2806.

(3) [redacted]

2808. [redacted]

Response to Finding No. 2808:

Respondent has no specific response.

2809. [redacted]

Response to Finding No. 2809:

[redacted]

2810. [redacted]

Response to Finding No. 2810:

[redacted]

2811. [redacted]

Response to Finding No. 2811:

[redacted]

[redacted]

2812. [redacted]

Response to Finding No. 2812:

[redacted]

2813. [redacted]

Response to Finding No. 2813:

Respondent has no specific response.

2814. [redacted]

Response to Finding No. 2814:

[redacted]

2815. [redacted]

Response to Finding No. 2815:

[redacted]

2816. [redacted]

Response to Finding No. 2816:

[redacted]

2817. [redacted]

Response to Finding No. 2817:

[redacted]

[redacted]

2818. [redacted]

Response to Finding No. 2818:

Respondent has no specific response.

2819. [redacted]

Response to Finding No. 2819:

Respondent has no specific response.

2820. [redacted]

Response to Finding No. 2820:

[redacted]

[redacted]

c) [redacted]

(1) [redacted]

2821. [redacted]

Response to Finding No. 2821:

Respondent has no specific response.

2822. [redacted]

Response to Finding No. 2822:

Respondent has no specific response.

2823. [redacted]

Response to Finding No. 2823:

[redacted]

[redacted]

2824. [redacted]

Response to Finding No. 2824:

[redacted]

2825. [redacted]

Response to Finding No. 2825:

[redacted]

2826. [redacted]

Response to Finding No. 2826:

[redacted]

2827. [redacted]

[redacted]

Response to Finding No. 2827:

[redacted]

[redacted]

2828. [redacted]

Response to Finding No. 2828:

Respondent has no specific response.

2829. [redacted]

Response to Finding No. 2829:

[redacted]

2830. [redacted]

Response to Finding No. 2830:

Respondent has no specific response, other than [redacted]

2831. [redacted]

Response to Finding No. 2831:

Respondent has no specific response, other than [redacted]

2832. [redacted]

Response to Finding No. 2832:

Respondent has no specific response.

2833. [redacted]

Response to Finding No. 2833:

Respondent has no specific response.

2834. [redacted]

Response to Finding No. 2834:

Complaint Counsel's proposed finding of fact is of limited probative value because [redacted]

[redacted]

(2) [redacted]

2835. [redacted]

Response to Finding No. 2835:

Complaint Counsel's proposed finding of fact is misleading and irrelevant. [redacted]

2836. [redacted]

Response to Finding No. 2836:

[redacted]

2837. [redacted]

Response to Finding No. 2837:

[redacted]

2838. [redacted]

Response to Finding No. 2838:

[redacted]

2839. [redacted]

Response to Finding No. 2839:

[redacted]

2840. [redacted]

Response to Finding No. 2840:

[redacted]

2841. [redacted]

Response to Finding No. 2841:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2842. [redacted]

Response to Finding No. 2842:

[redacted]

2843. [redacted]

Response to Finding No. 2843:

[redacted]

2844. [redacted]

Response to Finding No. 2844:

Respondent has no specific response.

2845. [redacted]

Response to Finding No. 2845:

Respondent has no specific response.

2846. [redacted]

Response to Finding No. 2846:

[redacted]

[redacted]

2847. [redacted]

Response to Finding No. 2847:

[redacted]

2848. [redacted]

Response to Finding No. 2848:

[redacted]

[redacted]

2849. [redacted]

Response to Finding No. 2849:

Respondent has no specific response.

2850. [redacted]

Response to Finding No. 2850:

[redacted]

2851. [redacted]

Response to Finding No. 2851:

[redacted]

2852. [redacted]

Response to Finding No. 2852:

Respondent has no specific response.

2853. [redacted]

Response to Finding No. 2853:

Respondent has no specific response.

2854. [redacted]

Response to Finding No. 2854:

[redacted]

2855. [redacted]

Response to Finding No. 2855:

[redacted]

2856. [redacted]

Response to Finding No. 2856:

[redacted]

2857. [redacted]

Response to Finding No. 2857:

[redacted]

(3) [redacted]

2858. [redacted]

Response to Finding No. 2858:

[redacted]

2859. [redacted]

Response to Finding No. 2859:

[redacted]

2860. [redacted]

Response to Finding No. 2860:

[redacted]

2861. [redacted]

Response to Finding No. 2861:

[redacted]

2862. [redacted]

[redacted]

Response to Finding No. 2862:

[redacted]

2863. [redacted]

Response to Finding No. 2863:

[redacted]

2864. [redacted]

Response to Finding No. 2864:

[redacted]

2865. [redacted]

Response to Finding No. 2865:

[redacted]

2866. [redacted]

Response to Finding No. 2866:

[redacted]

2867. [redacted]

Response to Finding No. 2867:

Respondent has no specific response.

2868. [redacted]

Response to Finding No. 2868:

Respondent has no specific response.

2869. [redacted]

Response to Finding No. 2869:

[redacted]

[redacted]

2870. [redacted]

Response to Finding No. 2870:

Respondent has no specific response.

2871. [redacted]

Response to Finding No. 2871:

Respondent has no specific response.

2872. [redacted]

Response to Finding No. 2872:

Complaint Counsel's proposed finding of fact is false because [redacted]

[redacted]

[redacted]

5. [redacted]

a) [redacted]

2873. [redacted]

Response to Finding No. 2873:

Respondent has no specific response.

2874. [redacted]

Response to Finding No. 2874:

[redacted]

2875. [redacted]

Response to Finding No. 2875:

[redacted]

2876. [redacted]

Response to Finding No. 2876:

[redacted]

[redacted]

2877. [redacted]

Response to Finding No. 2877:

[redacted]

2878. [redacted]

Response to Finding No. 2878:

[redacted]

2879. [redacted]

Response to Finding No. 2879:

Respondent has no specific response.

2880. [redacted]

Response to Finding No. 2880:

[redacted]

2881. [redacted]

Response to Finding No. 2881:

[redacted]

2882. [redacted]

Response to Finding No. 2882:

[redacted]

[redacted]

2883. [redacted]

Response to Finding No. 2883:

[redacted]

2884. [redacted]

Response to Finding No. 2884:

[redacted]

2885. [redacted]

Response to Finding No. 2885:

[redacted]

2886. [redacted]

Response to Finding No. 2886:

[redacted]

2887. [redacted]

Response to Finding No. 2887:

Complaint Counsel's proposed finding of fact is irrelevant [redacted]

[redacted]

2888. [redacted]

Response to Finding No. 2888:

[redacted]

2889. [redacted]

Response to Finding No. 2889:

[redacted]

2890. [redacted]

Response to Finding No. 2890:

[redacted]

2891. [redacted]

Response to Finding No. 2891:

[redacted]

[redacted]

2892. [redacted]

Response to Finding No. 2892:

[redacted]

2893. [redacted]

Response to Finding No. 2893:

[redacted]

[redacted]

2894. [redacted]

Response to Finding No. 2894:

[redacted]

[redacted]

2895. [redacted]

Response to Finding No. 2895:

[redacted]

2896. [redacted]

Response to Finding No. 2896:

[redacted]

2897. [redacted]

Response to Finding No. 2897:

[redacted]

2898. [redacted]

Response to Finding No. 2898:

[redacted]

2899. [redacted]

Response to Finding No. 2899:

[redacted]

2900. [redacted]

Response to Finding No. 2900:

[redacted]

[redacted]

2901. [redacted]

Response to Finding No. 2901:

[redacted]

2902. [redacted]

Response to Finding No. 2902:

[redacted]

[redacted]

[redacted]

2903. [redacted]

Response to Finding No. 2903:

[redacted]

[redacted]

2904. [redacted]

Response to Finding No. 2904:

[redacted]

2905. [redacted]

Response to Finding No. 2905:

[redacted]

2906. [redacted]

Response to Finding No. 2906:

[redacted]

[redacted]

2907. [redacted]

Response to Finding No. 2907:

Complaint Counsel's proposed finding of fact is incomplete because [redacted]

2908. [redacted]

Response to Finding No. 2908:

Respondent has no specific response.

2909. [redacted]

Response to Finding No. 2909:

[redacted]

[redacted]

b) [redacted]

2910. [redacted]

Response to Finding No. 2910:

[redacted]

2911. [redacted]

Response to Finding No. 2911:

Respondent has no specific response.

2912. [redacted]

Response to Finding No. 2912:

Respondent has no specific response.

2913. [redacted]

Response to Finding No. 2913:

Respondent has no specific response.

2914. [redacted]

Response to Finding No. 2914:

Respondent has no specific response.

2915. [redacted]

Response to Finding No. 2915:

Respondent has no specific response.

2916. [redacted]

[redacted]

Response to Finding No. 2916:

Respondent has no specific response, other than that [redacted]

2917. [redacted]

Response to Finding No. 2917:

Respondent has no specific response.

2918. [redacted]

Response to Finding No. 2918:

Complaint Counsel's proposed finding of fact is an expert opinion proffered to support factual propositions that should be established by fact witnesses in violation of the Order on Post-Trial Briefs (Oct. 10, 2018).

2919. [redacted]

Response to Finding No. 2919:

[redacted]

2920. [redacted]

Response to Finding No. 2920:

Respondent has no specific response.

2921. [redacted]

Response to Finding No. 2921:

[redacted]

[redacted]

2922. [redacted]

Response to Finding No. 2922:

[redacted]

2923. [redacted]

Response to Finding No. 2923:

[redacted]

2924. [redacted]

[redacted]

Response to Finding No. 2924:

Complaint Counsel's proposed finding of fact is false because [redacted]

6. [redacted]

2925. [redacted]

Response to Finding No. 2925:

Respondent has no specific response.

2926. [redacted]

Response to Finding No. 2926:

Respondent has no specific response.

2927. [redacted] (RX-1049 at 99 (¶ 222) (Argue Expert Report); Argue, Tr. 6391-92 (*in camera*)). According to the Merger Guidelines, "Mergers resulting in highly concentrated markets [HHI > 2500] that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny." (PX08040 at 021-22 (§ 5.3) (Merger Guidelines)). [redacted] **(Argue, Tr. 6394 (*in camera*)).**

Response to Finding No. 2927:

[redacted]

2928. [redacted]

Response to Finding No. 2928:

Respondent has no specific response.

2929. [redacted]

Response to Finding No. 2929:

Respondent has no specific response.

2930. [redacted]

Response to Finding No. 2930:

Respondent has no specific response.

2931. [redacted]

Response to Finding No. 2931:

Respondent has no specific response.

2932. [redacted]

Response to Finding No. 2932:

Respondent has no specific response.

2933. [redacted]

Response to Finding No. 2933:

[redacted]

2934. [redacted].

Response to Finding No. 2934:

Respondent has no specific response.

2935. [redacted]

Response to Finding No. 2935:

Respondent has no specific response.

XV. RESPONDENT'S EXPERTS FAIL TO REBUT PRESUMPTION THAT THE ACQUISITION IS ILLEGAL

A. FLAWS IN DR. ARGUE'S ANALYSIS

1. Dr. Argue's Critical Loss Analysis is Flawed

2936. [redacted] (RX-1049 at 021-023 (§ IV.C) (Argue Expert Report) (*in camera*); (PX05173 (Argue) Dep. at 180)).

Response to Finding No. 2936:

Complaint Counsel's proposed finding of fact is incomplete, vague and misleading. [redacted]

[redacted]

[redacted]

2937. One assumption of Dr. Argue's symmetrical critical loss test was that every MPK has the same margin. (PX05173 (Argue) Dep. at 176)).

Response to Finding No. 2937:

Complaint Counsel's proposed finding of fact is incomplete. Complaint Counsel ignores testimony from Dr. Argue that the assumption is justified based upon his expert opinion of the contribution margins or gross margins of the different manufacturers, and that the "margins calculated in this case are very similar." (Argue, Tr. 6283, 6285).

2938. Dr. Argue testified that Otto Bock's and Freedom's MPKs have different average sales prices and different margins. (Argue Tr. 6285).

Response to Finding No. 2938:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

2939. Dr. Argue testified that MPKs are differentiated products. (Argue Tr. 6285).

Response to Finding No. 2939:

Respondent has no specific response.

2940. According to the Merger Guidelines, "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." (PX08040 at 015 (§ 4.1.3) (Merger Guidelines)).

Response to Finding No. 2940:

Complaint Counsel's proposed finding of fact is actually an incomplete and improper legal conclusion.

2941. Dr. Argue's critical loss analysis tested the effect of a price increase on all MPKs. (Argue, Tr. 6285-86). Dr. Argue did not model the effect of a SSNIP on just one product in the candidate market. (Argue Tr. 6288-89).

Response to Finding No. 2941:

Complaint Counsel's proposed finding of fact is incomplete. Dr. Argue testified at trial that he conducted the critical loss analysis in such a way because the Merger Guidelines provide that the effect of a SSNIP should be imposed on "*at least* one product in the market." (Argue, Tr. 6289 (emphasis added)).

2942. According to the Merger Guidelines, critical loss analysis involves an analysis of whether "the predicted loss is less than the critical loss." (PX08040 at 015 (§ 4.1.3) (Merger Guidelines)). "The 'critical loss' is defined as the number of lost unit sales that would leave profits unchanged." (PX08040 at 015 (§ 4.1.3) (Merger Guidelines)). "The 'predicted loss' is defined as the number of unit sales that the hypothetical monopolist is predicted to lose due to the price increase." (PX08040 at 015 (§ 4.1.3) (Merger Guidelines)).

Response to Finding No. 2942:

Complaint Counsel's proposed finding of fact is actually an incomplete and improper legal conclusion.

2943. [redacted] **(Argue Tr. 6291 (*in camera*)).**

Response to Finding No. 2943:

Complaint Counsel's proposed finding of fact is incomplete because it ignores the fact that

[redacted]

[redacted]

2944. Dr. Scott Morton concluded that Dr. Argue did not perform a complete critical loss analysis because Dr. Argue did not calculate a predicted loss to compare to his critical loss estimate. (PX06003 at 011 (¶ 17) (Morton Rebuttal Report)).

Response to Finding No. 2944:

Complaint Counsel's proposed finding of fact is incomplete because it ignores the fact that [redacted]

2945. [redacted] (PX06003 at 011-012 (¶¶ 18-21) (Morton Rebuttal Report) (*in camera*)). [redacted] (PX06003 at 012 (¶ 21) (Morton Rebuttal Report) (*in camera*)). [redacted] (PX06003 at 011-012 (¶¶ 21-22) (Morton Rebuttal Report) (*in camera*)).

Response to Finding No. 2945:

Complaint Counsel's proposed finding of fact is confusing and misleading. [redacted]

[redacted]

[redacted]

2. Dr. Argue's Model of Clinic Operations Is Flawed and Based on Inaccurate Assumptions

2946. Dr. Argue "constructed a model of clinic operations" to address the question of "whether a 5% increase in the price of MPKs would actually make MPKs unprofitable for clinics and thus compel them to switch some patients from MPKs to non-MPKs." (RX-1049 at 025 (¶ 43) (Argue Report)).

Response to Finding No. 2946:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

a) Dr. Argue's Model of Clinic Operations Is based on Unreliable Assumptions and Data

2947. [redacted] (RX-1049 at 025-026 (¶ 44) (Argue Expert Report) (*in camera*)).

Response to Finding No. 2947:

Respondent has no specific response.

2948. [redacted] RX-1049 at 026-027 (¶ 45, Table 2) (Argue Expert Report) (*in camera*)).

Response to Finding No. 2948:

Complaint Counsel's proposed finding of fact is inaccurate and incomplete. [redacted]

2949. [redacted] (Argue Tr. 6296-97 (*in camera*)). [redacted] (Argue Tr. 6297 (*in camera*)).

Response to Finding No. 2949:

Complaint Counsel's proposed finding of fact is irrelevant, inaccurate and incomplete. [redacted]

2950. [redacted] **(RX-1049 at 025-026 (¶ 44) (Argue Expert Report) (*in camera*)).**

Response to Finding No. 2950:

Complaint Counsel's proposed finding of fact is incomplete because it ignores the fact that Dr. Argue made this assumption based upon the testimony of various clinicians. (RX-1049 at 023-024 n.105). [redacted]

2951. [redacted] (Argue Tr. 6297-98 (*in camera*)). **Dr. Argue relied solely on clinic testimony for this assumption.}** (Argue Tr. 6298 (*in camera*)).

Response to Finding No. 2951:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

2952. [redacted] (RX-1049 at 025-026 (¶ 44) (Argue Expert Report) (*in camera*)).

Response to Finding No. 2952:

Respondent has no specific response.

2953. [redacted]

Response to Finding No. 2953:

Complaint Counsel's proposed finding of fact is incomplete and misleading because [redacted]

2954. [redacted]
(Argue Tr. 6304 (*in camera*)).

Response to Finding No. 2954:

Complaint Counsel's proposed finding of fact is misleading. First, it ignores the fact that [redacted]

2955. [redacted]

Response to Finding No. 2955:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that [redacted]

2956. [redacted] (Argue Tr. 6304-05 (*in camera*)).

Response to Finding No. 2956:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it ignores the fact that [redacted]

2957. [redacted] (Argue Tr. 6305 (*in camera*)).

Response to Finding No. 2957:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it ignores the fact that [redacted]

b) Dr. Argue's Model of Clinic Operations Incorrectly Focuses on the Margin for Only the Knee

2958. [redacted] (RX-1049 at 026-027 (¶ 45, Table 2) (Argue Expert Report) (*in camera*)). [redacted] (Argue Tr. 6315 (*in camera*)).

Response to Finding No. 2958:

Complaint Counsel's proposed finding of fact is incomplete because it ignores the fact that [redacted]

2959. [redacted] (Argue Tr. 6314 (*in camera*)). [redacted] (Argue Tr. 6314 (*in camera*); *see also* CCFF ¶¶ 3044-3048, below).

Response to Finding No. 2959:

Complaint Counsel's proposed finding of fact is incomplete because it ignores the fact that [redacted]

2960. [redacted] (Argue Tr. 6314 (*in camera*); *see also* CCFF ¶¶ 3043, 3047-3048, below). [redacted] (Argue Tr. 6315-16 (*in camera*)).

Response to Finding No. 2960:

Complaint Counsel's proposed finding of fact is incomplete because it ignores the fact that [redacted]

2961. Dr. Argue's limitation of his model of clinic operations to only MPK profitability, rather than the profitability of the entire prosthetic limb, is inconsistent with how prosthetic clinics assess their profits when fitting a limb with an MPK. (*See* CCFF ¶¶ 3041-3042, 3044, below).

Response to Finding No. 2961:

Complaint Counsel's proposed finding of fact is incomplete because it ignores the fact that [redacted]

[redacted]

c) Dr. Argue's Model of Clinic Operations Ignores Other Means of Reducing Costs

2962. [redacted] (RX-1049 at 027 (¶ 45, Table 2) (Argue Expert Report) (*in camera*)).

Response to Finding No. 2962:

Respondent has no specific response.

2963. [redacted] (Argue Tr. 6311 (*in camera*)).

Response to Finding No. 2963:

Respondent has no specific response.

2964. [redacted] (Argue Tr. 6311 (*in camera*)).

Response to Finding No. 2964:

Respondent has no specific response.

2965. [redacted] (Argue Tr. 6311 (*in camera*)).

Response to Finding No. 2965:

Complaint Counsel's proposed finding is incomplete and misleading because it ignores

[redacted]

2966. [redacted] (Argue Tr. 6311 (*in camera*); PX06003 at 017 (¶ 31) (Morton Rebuttal Report)).

Response to Finding No. 2966:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it ignores [redacted]

d) Dr. Argue's Conclusions from his Model of Clinic Operations Are Flawed

2967. [redacted] (RX-1049 at 027 (¶ 45, Table 2) (Argue Expert Report) (*in camera*); Argue Tr. 6311-12 (*in camera*)).

Response to Finding No. 2967:

Respondent has no specific response.

2968. [redacted] (RX-1049 at 027 (¶ 45, Table 2) (Argue Report) (*in camera*); Argue Tr. 6312 (*in camera*)).

Response to Finding No. 2968:

Respondent has no specific response.

2969. [redacted] (*See* CCFF ¶¶ 824-828, above).

Response to Finding No. 2969:

Complaint Counsel's proposed finding of fact is inaccurate. Complaint Counsel fails to cite any evidence for this proposed finding, other than to cite CCFF ¶¶ 824-828, above. Respondent incorporates its responses to CCFF ¶¶ 824-828, above.

2970. [redacted] (Argue Tr. 6312-13 (*in camera*)).

Response to Finding No. 2970:

Complaint Counsel's proposed finding of fact is inaccurate. First, Complaint Counsel's citation does not support the proposition. Second, [redacted]

2971. 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. (PX06003 at 015-16 (¶ 28) (Morton Rebuttal Report)).

Response to Finding No. 2971:

Complaint Counsel's proposed finding of fact is misleading. [redacted] Dr. Argue further testified that even if some clinicians chose to switch to alternative MPKs, the Critical Loss is sufficiently small that it would be exceeded by the switching to non-MPK fluid-controlled knees by other clinicians. (Argue, Tr. 6177).

2972. [redacted] (PX06003 at 015-017 (¶¶ 28-30, Table 1) (Morton Rebuttal Report) (*in camera*)).

Response to Finding No. 2972:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

3. Dr. Argue's Claim that MPKs Create Significant Reimbursement Risks to Clinics Is Flawed

a) Existence of RAC Audits is Irrelevant to Analysis of the Likely Competitive Effects of the Merger

(1) RAC Audits Existed Prior to the Merger

2973. Medicare and other payers conduct Recovery Audit Contractor ("RAC") audits. (Schneider (Otto Bock) Tr. 4744; Senn (POA) Tr. 210;; Ell (Mid-Missouri O&P) Tr. 1749-50; *see also* [redacted].

Response to Finding No. 2973:

Complaint Counsel's proposed finding of fact is incomplete. It is true that Medicare and other payers conduct RAC audits, 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). However, these are not the only audits that are conducted. There are various other audits, including preauthorizations. (Blatchford, Tr. 2259). The various types of audits, including RAC audits and preauthorizations, are important factors in a prosthetist's knee selection. (Blatchford, Tr. 2259).

2974. During a RAC audit, the payer reviews a patient file from a prosthetic clinic associated with a particular insurance reimbursement claim. (PX05139 (Schneider (Otto Bock) Dep. at 82); Senn (COPC) Tr. 210). If the patient's file does not contain the proper documentation, the payer may recoup the insurance reimbursement payment to the prosthetic clinic for that claim. (PX05139 (Schneider (Otto Bock) Dep. at 82–84); Senn (COPC) Tr. 210).

Response to Finding No. 2974:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Medicare can recoup the full reimbursement amount from the prosthetic clinic if a prosthetic device is subjected to a RAC audit and the claim is denied, (Senn, Tr. 258-259; Ford, Tr. 973-974; Sabolich, Tr. 5828). During a 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). Further, 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; Kannenberg, Tr. 1894-1895). 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). During the time that an appeal is pending, many times the amputee goes without a knee. (Brandt, Tr. 3754).

2975. [redacted]

Response to Finding No. 2975:

Complaint Counsel's proposed finding of fact is incomplete. 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; Kannenberg, Tr. 1894-1895). 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). During

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

2976. RAC audits started to intensify in the prosthetic industry around 2011 and 2012. (Schneider (Otto Bock) Tr. 4745; PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 25); Ford (POA) Tr. 973 (testifying that RAC audits came to the prosthetic industry in 2012)).

Response to Finding No. 2976:

Complaint Counsel's proposed finding of fact is incomplete. Not only did RAC audits start to intensify in 2011 (Schneider, Tr. 4745), but RAC audits have increased in the last three years and have negatively affected smaller clinics. (Mattear, Tr. 5655-5656).

2977. RAC audits existed before the Merger and have continued after the Merger. (Carkhuff (Freedom) Tr. 717). The Merger has not changed anything about the way payers conduct RAC audits. (Carkhuff (Freedom) Tr. 717-18).

Response to Finding No. 2977:

Complaint Counsel's proposed finding of fact is misleading and incomplete. While the presence of RAC audits existed for every sale Freedom has made before the Merger, that does not change the fact that RAC audits are a frequent occurrence. (Senn, Tr. 210-211). Indeed, RAC audits have increased in the last three years and have negatively affected the smaller clinics. (Mattear, Tr. 5655-5656).

2978. Before the Merger, the presence of RAC audits existed for every sale that Freedom has made. (Carkhuff (Freedom) Tr. 718).

Response to Finding No. 2978:

Complaint Counsel's proposed finding of fact is misleading and incomplete. While the presence of RAC audits existed for every sale Freedom has made before the Merger, that does not change the fact that RAC audits are a frequent occurrence. (Senn, Tr. 210-211). Indeed, RAC

audits have increased in the last three years and have negatively affected the smaller clinics. (Mattear, Tr. 5655-5656).

2979. [redacted] In response to the advent of RAC audits, prosthetic clinics "found ways to create better documentation and feel more secure about their billing practices." (PX05107 (Carver (College Park Industries) Dep. at 210–212)).

Response to Finding No. 2979:

Complaint Counsel's proposed finding of fact is incomplete. RAC audits are still a frequent occurrence. (Senn, Tr. 210-211). Indeed, RAC audits have increased in the last three years and have negatively affected the smaller clinics. (Mattear, Tr. 5655-5656).

2980. 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. (Carkhuff (Freedom) Tr. 717).

Response to Finding No. 2980:

Complaint Counsel's proposed finding of fact is misleading because the threat of RAC audits still incentivizes clinicians to be conservative in fitting high-technology items that are more likely to be subject to RAC audits. (RFOF ¶¶ 439-441). Further, despite changing its records process, Hanger had $49 million in disallowed revenue as a result of audits in 2016, which it reported on its 10-K filing. (Asar, Tr. 1552). [redacted]

2981. Prosthetic and Orthotic Associates ("POA") has a 27-step procedure used to avoid exposure to RAC audits. (Ford (POA) Tr. 973). Before POA submits a reimbursement claim, "you have to have all 27 boxes checked." (Ford (POA) Tr. 975). POA has never failed a RAC audit. (Ford (POA) Tr. 977).

Response to Finding No. 2981:

Complaint Counsel's proposed finding of fact is misleading because the threat of RAC audits still incentivizes clinicians to be conservative in fitting high-technology items that are more likely to be subject to RAC audits, which is exemplified by POA's costly 27-step procedure. (RFOF ¶¶ 439-441). It also creates higher costs associated with fitting MPKs that would not be present with non-MPKs. (RFOF ¶ 416).

2982. [redacted]

Response to Finding No. 2982:

Complaint Counsel's proposed finding of fact is misleading because the threat of RAC audits still incentivizes clinicians to be conservative in fitting high-technology items that are more likely to be subject to RAC audits, which is exemplified by [redacted] (RFOF ¶¶ 439-441). It also creates higher costs associated with fitting MPKs that would not be present with non-MPKs. (RFOF ¶ 416).

2983. [redacted]

Response to Finding No. 2983:

Complaint Counsel's proposed finding of fact is misleading because the threat of RAC audits still incentivizes clinicians to be conservative in fitting high-technology items that are more likely to be subject to RAC audits, which is exemplified by [redacted] (RFOF ¶¶ 439-441). It also creates higher costs associated with fitting MPKs that would not be present with non-MPKs. (RFOF ¶ 416).

2984. [redacted]

Response to Finding No. 2984:

Complaint Counsel's proposed finding of fact is misleading because the threat of RAC audits still incentivizes clinicians to be conservative in fitting high-technology items that are more likely to be subject to RAC audits. (RFOF ¶¶ 439-441). Further, despite changing its records process, Hanger had $49 million in disallowed revenue as a result of audits in 2016, which it reported on its 10-K filing. (Asar, Tr. 1552). [redacted]

2985. In response to a June 2017 inquiry from Freedom's Vice President of Marketing and Product Development, Eric Ferris, Hanger relayed that it did not anticipate any reduction in MPK sales (or increase in mechanical knee sales) in response to an expansion of CMS "L5856 Prepayment Authorization Review[s]". Hanger noted that it is "confident in their documentation and will continue to submit MPKs based on patient requirements." (RX-0441 (Freedom) at 2).

Response to Finding No. 2985:

Complaint Counsel's proposed finding of fact is incomplete. In the same document cited in this proposed finding of fact, Ferris reports that [redacted]

2986. In order to protect against RAC audits, Keith Senn, the President and COO of COPC of Kentucky, testified that his clinic maintains records of practitioner and physician's notes, patient's measurements (i.e. height, weight, etc.), prescriptions, and records detailing the fitting process. (Senn (COPC) Tr. 211-12).

Response to Finding No. 2986:

Respondent has no specific response.

2987. MPK manufacturers have also begun offering services to prosthetic clinics to assist them in responding to RAC audits. (Schneider (Otto Bock) Tr. 4746; De Roy (Össur) Tr. 3561–62).

Response to Finding No. 2987:

Respondent has no specific response, other than that this is consistent with the idea that RAC audits are a threat to MPK sales, and manufacturers are incentivized to assist their customers in dealing with RAC audits.

2988. [redacted] (Asar (Hanger) Tr. 1368–69 (*in camera*)).

Response to Finding No. 2988:

Respondent has no specific response, other than that this is consistent with the idea that RAC audits are a threat to MPK sales, and manufacturers are incentivized to assist their customers in dealing with RAC audits.

2989. Otto Bock provides a service to its customers where Otto Bock looks at claims to ensure the claims would meet the requirements of a payer's protocols and procedures. (Schneider (Otto Bock) Tr. 4746).

Response to Finding No. 2989:

Respondent has no specific response, other than that this is consistent with the idea that RAC audits are a threat to MPK sales, and manufacturers are incentivized to assist their customers in dealing with RAC audits.

2990. Otto Bock's Scott Schneider, Vice President of Government, Medical Affairs, and Future Development, testified that he "believe[s] that our service helps reduce the number of deficiencies within a claim to have a clean claim," which would help with a RAC audit. (PX05139 (Schneider (Otto Bock) Dep. at 95-96).

Response to Finding No. 2990:

Respondent has no specific response, other than that this is consistent with the idea that RAC audits are a threat to MPK sales, and manufacturers are incentivized to assist their customers in dealing with RAC audits.

2991. Otto Bock also conducts webinars open to any clinic customer on different reimbursement topics, including claim submittals, coding and reimbursement. (Schneider (Otto Bock) Tr. 4746). The webinars have information to help customers understand reimbursement deficiencies and what they can do going forward to reduce those deficiencies. (Schneider (Otto Bock) Tr. 4746).

Response to Finding No. 2991:

Respondent has no specific response, other than that this is consistent with the idea that RAC audits are a threat to MPK sales, and manufacturers are incentivized to assist their customers in dealing with RAC audits. It is also another example of how Ottobock's resources help the entire industry.

2992. Beginning around 2012, Össur began to "educate and help the customers build a stronger patient file and provide the necessary information to ensure that if you do put the patient on a microprocessor device or advanced foot device that you had the right motivation and that you would not be at risk of having to refund or repay that later in the process." (De Roy (Össur) Tr. 3561–62).

Response to Finding No. 2992:

Respondent has no specific response, other than that this is consistent with the idea that RAC audits are a threat to MPK sales, and manufacturers are incentivized to assist their customers in dealing with RAC audits.

2993. Össur created a "step-by-step guide to a successful claim" for its Rheo MPK. The guide contains information about the proper procedure and documentation for insurance reimbursement claims of an MPK. (PX03242 (Össur) at 001–015).

Response to Finding No. 2993:

Respondent has no specific response, other than that that this is consistent with the idea that RAC audits are a threat to MPK sales, and manufacturers are incentivized to assist their customers in dealing with RAC audits. Moreover, this document was not used at trial.

2994. Prosthetic clinics have not reduced their purchases of MPKs in response to RAC audits. (Ford (POA) Tr. 976–77; Senn (COPC) Tr. 212; Ell (Mid-Missouri) Tr. 1749–50; Brandt (Ability) Tr. 3768; PX05141 (Bright (North Bay Prosthetics) Dep. at 177); PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 26); PX05166 (Watson (Fourroux Prosthetics) Dep. at 182)).

Response to Finding No. 2994:

Complaint Counsel's proposed finding of fact is misleading. Ford testified that POA has a process in place now to guard against RAC audits, but does not indicate whether the implementation of that process caused POA to fit fewer MPKs. (Ford, Tr. 976-977). Senn may not have instructed his clinicians to avoid fitting MPKs, but the incentives that face COPC clinicians relating to profitability could cause RAC audits to have an impact on clinician's product selections. Senn has no experience with component selection. (*See* Response to CCFF ¶ 652).

2995. Mark Ford, President and Managing Partner of Prosthetic and Orthotic Associates, testified that the concern of RAC audits does not cause POA to shift patients from MPKs to mechanical knees. (Ford (POA) Tr. 976–77).

Response to Finding No. 2995:

Complaint Counsel's proposed finding of fact is misleading. Ford testified that POA has a process in place now to guard against RAC audits, but does not indicate whether or not the implementation of that process caused POA to fit fewer MPKs. (Ford, Tr. 976-977). Further, Ford is not competent to testify regarding product selection because he is not and has never been a prosthetist and therefore does not fit patients with prosthetic devices. (Ford, Tr. 918).

2996. Keith Senn, President of the Kentucky and Indiana operations for COPC, testified that COPC has not instructed its prosthetic clinics to avoid fitting any specific MPKs due to the risk of a RAC audit. (Senn (COPC) Tr. 212).

Response to Finding No. 2996:

Complaint Counsel's proposed finding of fact is misleading because though Senn may not have instructed his clinicians to avoid fitting MPKs, the incentives that face COPC clinicians relating to profitability could cause RAC audits to have an impact on clinician's product selections. (RFOF ¶¶ 427, 428). Senn has very little experience with component selection, so his testimony should not be credited. (Response to CCFF ¶ 652).

2997. 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. (Brandt (Ability) Tr. 3768).

Response to Finding No. 2997:

Complaint Counsel's proposed finding of fact should not be adopted, because Brandt is not credible on this point. First, he testified that Ability has never undergone a RAC audit. (Brandt, Tr. 3767). [redacted]

2998. Mr. Brandt expects "an uptick in the number of RAC audits in the future." (PX05149 (Brandt (Ability) Dep. at 256–57)). Despite the anticipated uptick in RAC audits, Mr. Brandt testified that Ability would not fit fewer MPKs, including Pliés, as a result, because "our documentation process around rationale and justification for an MPK is sound, clinically sound." (PX05149 (Brandt (Ability) Dep. at 257)).

Response to Finding No. 2998:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because Brandt is not credible on this point. First, he testified that Ability has never undergone a RAC audit. (Brandt, Tr. 3767). [redacted]

[redacted]

2999. 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. (PX05141 (Bright (North Bay Prosthetics) Dep. at 177)). 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. (PX05141 (Bright (North Bay) Dep. at 177–178)).

Response to Finding No. 2999:

Complaint Counsel's proposed finding of fact is misleading because Bright's testimony does not comment on whether or not the risk of RAC audits factors in at all in the decision as to what type of knee to fit on a patient. The answer to the question "if you deemed that an MPK was medically appropriate for a patient would you fit the patient with a mechanical knee just for fear of a RAC audit" does not indicate whether, if *both knees were appropriate*, then the threat posed by a RAC audit could influence the decision between the two. (PX05141 (Bright, Dep. at 17)).

3000. Jim Weber, President and CEO of Prosthetic & Orthotic Care ("P&O Care"), testified that RAC audits have not had an "impact from P&O Care's perspective on the purchase of [prosthetic] components. It was an impact on the clinical documentation, the procedure by which we would submit a claim." (PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 26)).

Response to Finding No. 3000:

Complaint Counsel's proposed finding of fact is incomplete because it ignores the substantive impact that process can have on outcome. In fact, later in his deposition, Complaint Counsel asked that precise follow-up question: "Q: As a result of the policy change at CMS, would prosthetists fit a patient with a mechanical knee instead of a microprocessor knee even if they determined that the patient would be best fit on a microprocessor knee? A *You would have to ask my practitioners*." PX05135 (Weber, Dep. at 29)) (emphasis added).

3001. Keith Watson, President of Fourroux Prosthetics, testified that "Fourroux contends that [RAC audit] impacts on its clinics and clinical assessments regarding prosthetic devices containing microprocessor controlled knees or mechanical knees has been negligible." (PX05166 (Watson (Fourroux Prosthetics) Dep. at 182)).

Response to Finding No. 3001:

Complaint Counsel's proposed finding of fact should not be adopted by the Court because Keith Watson testified that Fourroux has never experienced RAC audits, and that he is not entirely sure what the consequences of a RAC audit are. (PX05166 (Watson, Dep. at 181-182)).

3002. Tracy Ell, owner and Chief Prosthetist of Mid-Missouri Orthotics and Prosthetics, testified that RAC audits have not limited Mid-Missouri from fitting MPKs because "the process that we go through in having the proper documentation in place prior to submissions [of claims to Medicare or payers] is vital to the approval and acceptance" of those claims. (Ell (Mid-Missouri) Tr. 1749–50).

Response to Finding No. 3002:

Complaint Counsel's proposed finding of fact should not be adopted because Ell testified that he has not been subjected to RAC Audits and lacks the foundation to testify about it. (Ell, Tr. 1749-1750).

3003. 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." (PX05132 (Sabolich (Scott Sabolich Prosthetics) Dep. at 219-220)).

Response to Finding No. 3003:

Complaint Counsel's proposed finding of fact is misleading and incomplete because although Sabolich testified that his clinic would not necessarily make that decision, other clinics do because "there's people that want to keep their doors open and not file bankruptcy." (PX05132 (Sabolich, Dep. at 219-220)).

3004. 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)).

Response to Finding No. 3004:

Complaint Counsel's proposed finding of fact is incomplete because Weott testified that the RAC audits cause such a big impact on his business and the business of other clinics that they have forced clinics out of business, and his clinic survived by the skin of its teeth. (PX05140 (Weott, Dep. at 106)). In addition, Weott testified that they improved their assessment processes and hired a person whose job it is to keep track of documentation. (PX05140 (Weott, Dep. at 106)).

3005. When RAC audits became more common, Wright & Filippis did not change its "clinical determinations on patients." (PX05167 (Filippis (Wright & Filippis) Dep. at 81)). The percentage of MPKs that Wright & Filippis fit "changed hardly at all over a three year period." (PX05167 (Filippis (Wright & Filippis) Dep. at 81)).

Response to Finding No. 3005:

Respondent has no specific response.

3006. MPK manufacturers have not observed a substantial decline in the MPK business due to RAC audits. For example, Kim De Roy, Össur's Executive Vice President of R&D, testified that "I don't believe there's any substantial impact . . . from RAC audits on the [MPK] business today." (De Roy (Össur) Tr. 3567).

Response to Finding No. 3006:

Complaint Counsel's proposed finding of fact is incomplete. DeRoy also testified that when RAC audits are more frequent, customers have a tendency to select more non-MPKs to avoid the potential big repayment associated with a RAC audit. (DeRoy, Tr. 3567).

3007. Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs, and Future Development, testified that he did not even know how many RAC audits were conducted in the United States in 2016 or 2017, including how many RAC audits were conducted on MPKs. (Schneider (Otto Bock) Tr. 4744-45). He also did not know what percentage of RAC audits on MPK reimbursements resulted in finding a deficiency. (Schneider (Otto Bock) Tr. 4745).

Response to Finding No. 3007:

Respondent has no specific response, other than that this proposed finding of fact is irrelevant.

3008. [redacted]

Response to Finding No. 3008:

Complaint Counsel's proposed finding of fact is misleading because other Ottobock documents express concern regarding the effect that RAC audits will have on MPK sales. (*See, e.g.*, PX01010). Further, this document is unreliable because it was not used at trial, or in a deposition, so the context of the document is not in the record.

3009. [redacted] **(PX05144 (Blatchford (Endolite) Dep. at 182–183 (*in camera*))).**

Response to Finding No. 3009:

Complaint Counsel's proposed finding of fact is misleading because Blatchford clearly testified that [redacted]

(2) RAC Audits Do Not Impact the Brand of MPK Fit

3010. RAC audits also have not impacted the brand of MPK that customers purchase. (*See, e.g.*, Senn (COPC) Tr. 213; PX05129 (Ell (Mid-Missouri) Dep. at 161); Brandt (Ability) Tr. 3768).

Response to Finding No. 3010:

Complaint Counsel's proposed finding of fact should not be adopted because these witnesses are not competent to testify on this topic. Senn is not involved *at all* in component

selection. (Senn, Tr. 152-153, 159-160). Ell testified at trial that he also is not involved in selecting componentry. (Ell, Tr. 1761-1762). Brandt testified he has never experienced a RAC audit for an MPK, and was not a credible witness. (Brandt, Tr. 3765-3766).

3011. Keith Senn, President of the Kentucky and Indiana operations for Center for Orthotic and Prosthetic Care, testified that he has not found particular brands of MPKs to present a higher risk during a RAC audit than others. (Senn (COPC) Tr. 212-13).

Response to Finding No. 3011:

Respondent incorporates its response to CCFF ¶ 3010.

3012. Tracy Ell, owner and Chief Prosthetist of Mid-Missouri Orthotics and Prosthetics, similarly testified that he is not aware of certain MPKs presenting a higher risk of a RAC audit. (PX05129 (Ell (Mid-Missouri) Dep. at 161)).

Response to Finding No. 3012:

Respondent incorporates its response to CCFF ¶ 3010.

3013. Jeffrey M. Brandt, CEO of Ability Prosthetics and Orthotics, testified that the threat of RAC audits has not affected the number of Freedom Plié MPKs that Ability fits on its patients. (Brandt (Ability) Tr. 3768).

Response to Finding No. 3013:

Respondent incorporates its response to CCFF ¶ 3010.

b) PDAC Verification Is Irrelevant to Analysis of the Merger's Likely Competitive Effects

(1) PDAC Verification of Prosthetic Devices Is Not Required

3014. Payers use the "L-Code system" to determine the amount of reimbursement they provide to clinics for the provision of an above-the-knee prosthesis on a patient. (PX05118 (Testerman (Freedom) Dep. at 84-85); PX05135 (Weber (Prosthetic & Orthotic Care) Dep. at 37-38); PX05108 (Yates (Jonesboro P&O Lab) Dep. at 34-35).

Response to Finding No. 3014:

Respondent has no specific response.

3015. Prosthetic manufacturers typically recommend L-codes for their prosthetic devices to assist clinic customers in the reimbursement process. (PX05158 (Swain (Ability Dynamics) Dep. at 100; PX05139 (Schneider (Otto Bock) Dep. at 27-28); *see also* Kannenberg (Otto Bock) Tr. 1999-2000 (discussing the L-codes that manufactures recommend for various MPKs); PX08023 (Otto Bock) (listing recommended L Codes for each of Otto Bock's MPKs); PX08020 (Otto Bock) at 001 (Otto Bock C-Leg website, including "Suggested HCPCS Coding")).

Response to Finding No. 3015:

Respondent has no specific response.

3016. [redacted] (Solorio (Otto Bock) Tr. 1623 (*in camera*); PX05139 (Schneider (Otto Bock) Dep. at 27-28); PX05165 (Sanders (United) Dep. at 75)).

Response to Finding No. 3016:

Respondent has no specific response.

3017. Noridian Healthcare Solutions, LLC has served as the PDAC contractor for CMS for "approaching 10 years now." (Sanders (United) Tr. 5383-84). PDAC receives, evaluates, and processes coding verification applications for CMS. (PX05165 (Sanders (United) Dep. at 28, 75-76)).

Response to Finding No. 3017:

Respondent has no specific response.

3018. Otto Bock's Executive Medical Director, Dr. Andreas Kannenberg, testified that "[t]he verifications of codes by PDAC are always product specific." Therefore, PDAC approval for one prosthetic device like an MPK will not apply to other competing MPKs. (PX05150 (Kannenberg (Otto Bock) Dep. at 112-13)).

Response to Finding No. 3018:

Respondent has no specific response.

3019. With respect to MPKs, only Otto Bock's C-Leg and Compact and Össur's Rheo and Power Knee have received PDAC verification. (Schneider (Otto Bock) Tr. 4381-82; PX05139 (Schneider (Otto Bock) Dep. at 30-31); De Roy (Össur) Tr. 3646-47).

Response to Finding No. 3019:

Respondent has no specific response.

3020. [redacted] (Schneider (Otto Bock) Tr. 4381-82; 4747-48 (*in camera*); PX05150 (Kannenberg (Otto Bock) Dep. at 111).

Response to Finding No. 3020:

Complaint Counsel's proposed finding of fact is misleading because PDAC verification goes hand in hand with CMS reimbursement, and reimbursement that uses the CMS system. (CCFF ¶ 3023). It is not as important to have PDAC verification for a product that does not receive CMS reimbursement. For example, Kenevo could obtain PDAC verification for L5858 (microprocessor stance control), but that would not assist in connection with reimbursement because Kenevo is designed for K-2 patients (Solorio, Tr. 1634), and L5858 is only an allowable code for K-3 patients. In addition, Ottobock would not want to seek PDAC verification for L5856 for Genium and X3 because Ottobock suggests the use of a miscellaneous code for Genium and X3 (L5999) to attempt to argue for reimbursement adequate to cover the costs of that product. (PX05150 (Kannenberg, Dep at 75-76).

3021. Despite releasing the Rheo in 2004, Össur only received PDAC verification for the MPK in December 2017. (De Roy (Össur) Tr. 3613, 3646-47).

Response to Finding No. 3021:

Complaint Counsel's proposed finding of fact is incomplete, because DeRoy testified that "PDAC verification provide[s] a level of comfort to the prosthetists that they will get reimbursement for the product that they select for an amputee." (DeRoy Tr., 3646). [redacted]

[redacted]

3022. Endolite has not obtained PDAC verification for the Orion. (PX05144 (Blatchford (Endolite) Dep. at 20, 73); Kannenberg (Otto Bock) Tr. 2001).

Response to Finding No. 3022:

Respondent has no specific response.

3023. PDAC verification is only directly applicable to reimbursement under Medicare. (PX05114 (Ferris (Freedom) Dep. at 161-62); PX05158 (Swain (Ability Dynamics) Dep. at 100-01) ("The PDAC approved coding only applies to Medicare claims.")).

Response to Finding No. 3023:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that most private insurance is based off of CMS coverage criteria and the L-Code system. (RFOF ¶ 126).

3024. [redacted]

Response to Finding No. 3024:

Complaint Counsel's proposed finding of fact is misleading because although PDAC verification is not required, having a product PDAC verified provides value to clinics. (DeRoy, Tr. 3646; [redacted]). Some clinics believe that without PDAC verification, a product poses a greater audit risk to their clinics. (PX05141 (Bright, Dep. at 107-108); PX05140 (Weott, Dep. at 67-68)).

3025. [redacted]

[redacted]

Response to Finding No. 3025:

Complaint Counsel's proposed finding of fact is misleading because although PDAC verification is not required, having a product PDAC verified provides value to clinics. (DeRoy, Tr. 3646; [redacted]). Some clinics believe that without PDAC verification, a product poses a greater audit risk to their clinics. (PX05141 (Bright, Dep. at 107-108); PX05140 (Weott, Dep. at 67-68)).

3026. Freedom's 2015 Plié 3 Fact Sheet, in a section entitled "Ottobock Claims vs Reality," addresses head on Otto Bock's marketing tactic criticizing the Plié for its lack of PDAC approval by stating that "PDAC is not required for reimbursement." (PX08008 (Freedom) at 001).

Response to Finding No. 3026:

Complaint Counsel's proposed finding of fact is misleading because although PDAC verification is not required, having a product PDAC verified provides value to clinics. (DeRoy, Tr. 3646; [redacted]). Further, for a product like the Plié, for which there is doubt in the industry whether it is properly reimbursed at L5856, PDAC verification would likely be very valuable to quell those concerns. (*Cf.* Kaufman, Tr. 889; DeRoy, Tr. 3646).

3027. Otto Bock executives concurred that PDAC is not required for prosthetic devices. Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs, and Future Development, testified that MPKs are not required to have PDAC verification, and that manufacturers of MPKs can market their devices without PDAC verification. (Schneider (Otto Bock) Tr. 4747) [redacted] Executive Medical Director Andreas Kannenberg also testified that, "there is no obligation of manufacturers to seek verification of coding recommendations by PDAC." (Kannenberg (Otto Bock) Tr. 1970).

Response to Finding No. 3027:

Complaint Counsel's proposed finding of fact is misleading because although PDAC verification is not required, having a product PDAC verified provides value to clinics. (DeRoy, Tr. 3646; [redacted]). Some clinics believe that without PDAC verification, a product poses a greater audit risk to their clinics. (PX05141 (Bright, Dep. at 107-108); PX05140 (Weott, Dep. at 67-68)).

3028. [redacted] (Sanders (United) Tr. 5495-96 (*in camera*)).

Response to Finding No. 3028:

Complaint Counsel's proposed finding of fact is misleading because although PDAC verification is not required, having a product PDAC verified provides value to clinics. (DeRoy, Tr. 3646; [redacted]). Some clinics believe that without PDAC verification, a product poses a greater audit risk to their clinics. (PX05141 (Bright, Dep. at 107-108); PX05140 (Weott, Dep. at 67-68)).

(2) Freedom Plié's PDAC Status Has Not, and Will Not Inhibit Competition between the Plié and C-Leg

3029. Freedom recommends that customers seek reimbursement for the Plié under L-Code 5856, for microprocessor swing and stance knees. (*See* CCFF ¶¶ 3067-3069, below).

Response to Finding No. 3029:

Respondent incorporates its Responses to CCFF ¶¶ 3067-3069, below.

3030. The Plié is reimbursed as a swing and stance MPK, under L-Code 5856. (*See* CCFF ¶¶ 3070, 3072, 3074-3075, below)

Response to Finding No. 3030:

Respondent incorporates its Responses to CCFF ¶¶ 3070, 3072, 3074-3075, below.

3031. Jack Sanders, Senior Clinical Program Consultant at United Healthcare, testified that United is agnostic to the manufacturer of a particular prosthetic device. (PX05165 (Sanders (United) Dep. at 104)). Mr. Sanders testified that the lack of PDAC verification has not stopped United from reimbursing for the Plié. (Sanders (United) Tr. 5496) (*in camera*)).

Response to Finding No. 3031:

Complaint Counsel's proposed finding of fact is misleading because although PDAC verification is not required, having a product PDAC verified provides value to clinics. (DeRoy, Tr. 3646; [redacted]). Some clinics believe that without PDAC verification, a product poses a greater audit risk to their clinics. (PX05141 (Bright, Dep. at 107-108); PX05140 (Weott, Dep. at 67-68)).

3032. Freedom's clinic customers do not view a lack of PDAC verification to be a bar to seeking reimbursement for the Plié. (PX05141 (Bright (North Bay Prosthetics) Dep. at 174); Oros (Scheck & Siress) Tr. 4877-78; PX05116 (Endrikat (Empire Medical) Dep. at 195)).

Response to Finding No. 3032:

Complaint Counsel's proposed finding of fact is misleading because although PDAC verification is not required, having a product PDAC verified provides value to clinics. (DeRoy, Tr. 3646; [redacted]). Some clinics believe that without PDAC verification, a product poses a greater audit risk to their clinics. (PX05141 (Bright, Dep. at 107-108); PX05140 (Weott, Dep. at 67-68)).

3033. Michael Bright, a certified prosthetist and owner of North Bay Prosthetics, testified that North Bay continues to fit Pliés regardless of its PDAC approval status. (PX05141 (Bright (North Bay) Dep. at 174.) Mr. Bright further testified that a product's lack of PDAC approval does not affect the risk of a RAC audit. (PX05141 (Bright (North Bay) Dep. at 178)).

Response to Finding No. 3033:

Complaint Counsel's proposed finding of fact is misleading because although PDAC verification is not required, having a product PDAC verified provides value to clinics. (DeRoy, Tr. 3646; [redacted]). Some clinics believe that without PDAC verification, a product poses a greater audit risk to their clinics. (PX05141 (Bright, Dep. at 107-108); PX05140 (Weott, Dep. at 67-68)).

3034. [redacted] (De Roy (Ossur) Tr. 3609-010 (*in camera*)).

Response to Finding No. 3034:

Complaint Counsel's proposed finding of fact is misleading, incomplete, and inaccurate.

[redacted]

3035. [redacted] (Scott Morton Tr. 4247-48) (*in camera*)).

Response to Finding No. 3035:

Complaint Counsel's proposed finding of fact is misleading because although PDAC verification is not required, having a product PDAC verified provides value to clinics. (DeRoy, Tr. 3646; [redacted]).

4. Dr. Argue's Claim that Reimbursement Would Prevent an MPK Price Increase is Flawed

3036. The amount of reimbursement provided by an insurer, including Medicare, to a clinic is typically called an "allowable" or a "fee." (*See, e.g.*, PX05010 (Schneider (Otto Bock) IHT at 80)).

Response to Finding No. 3036:

Complaint Counsel's proposed finding of fact is incomplete. The "allowable" that Complaint Counsel references is the total amount the clinic could possibly collect, including a portion that is a patient's responsibility, which many times the clinics have difficulty collecting. [redacted]; RFOF ¶¶ 410-411).

3037. The difference between the acquisition cost of an MPK and the overall reimbursement allowable goes to the clinic or prosthetist. (PX05124 (De Roy (Össur) Dep. at 135-136)).

Response to Finding No. 3037:

Complaint Counsel's proposed finding of fact is incomplete. The "allowable" that Complaint Counsel references is the total amount the clinic could possibly collect, including a portion that is a patient's responsibility, which many times the clinics have difficulty collecting. [redacted]; RFOF ¶¶ 410-411). The margin between what is collected and the acquisition cost is intended to cover necessary costs that relate to the delivery of care to amputees. (RFOF ¶ 409).

3038. This reimbursement amount "reflects the time spent in assembling the device and the time spent teaching the patients" as well as time spent by the prosthetist "following up on care

with the patient." (PX05124 (De Roy (Össur) Dep. at 135-136)). Kim De Roy, Executive Vice President of R&D at Össur, testified that "there's fair margins" for the prosthetists to "fulfill the requirements of fitting, teaching, and then follow-up" at the current reimbursement levels. (PX05124 (De Roy (Össur) Dep. at 136)).

Response to Finding No. 3038:

Complaint Counsel's proposed finding of fact is misleading because it cites to a prosthetics manufacturer and not to a clinic for this proposition. The evidence shows that the margins for prosthetic clinics are extremely tight. (RFOF ¶ 418). Moreover, the margin between clinics' reimbursement and component costs must cover *all* other clinic costs, not just fitting, teaching, and follow-up.

3039. Insurers, including Medicare, do not tie the amount of reimbursement to the prices charged by manufacturers for prosthetic devices. (Carkhuff (Freedom) Tr. 596-97; PX05165 (Sanders (United) Dep. at 33-34) ("Q. And does the reimbursement that United provides to its vendor clinics for fitting a United beneficiary with a microprocessor knee vary in any way based on the clinic vendor's acquisition cost for the knee? A. No."))

Response to Finding No. 3039:

Respondent has no specific response.

3040. Instead, a clinic "gets paid not by brand or by product selected but by function of the product." (PX05010 (Schneider (Otto Bock) IHT at 84); *see also* Kannenberg (Otto Bock) Tr. 1872; PX05117 (Choi (ST&G) Dep. at 47-49); PX05165 (Sanders (United) Dep. at33-34)).

Response to Finding No. 3040:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

3041. [redacted] (Brandt (Ability) Tr. 3772-73 (*in camera*)).

Response to Finding No. 3041:

Complaint Counsel's proposed finding of fact is misleading because the evidence shows that the knee is by far the most expensive part of the prosthesis, and the most highly reimbursed. (RFOF ¶ 422). Further, the other portions would remain the same, regardless whether an MPK or non-MPK was selected. (RFOF ¶ 420).

3042. [redacted] (Brandt (Ability) Tr. 3773 (*in camera*)).

Response to Finding No. 3042:

Complaint Counsel's proposed finding of fact is misleading because the evidence shows that the knee is by far the most expensive part of the prosthesis, and the most highly reimbursed. (RFOF ¶ 422). Further, the other portions would remain the same, regardless whether an MPK or non-MPK was selected. (RFOF ¶ 420). Other clinics make practitioners aware of the margins earned on each individual component. (RFOF ¶ 428).

3043. Michael Bright, owner of North Bay Prosthetics & Orthotics, testified that his clinic makes a profit on all of the combined components that are part of the lower limb prosthetic. (PX05141 (Bright (North Bay) Dep. at 178-179)).

Response to Finding No. 3043:

Complaint Counsel's proposed finding of fact is misleading because the evidence shows that the knee is by far the most expensive part of the prosthesis, and the most highly reimbursed.

(RFOF ¶ 422). Further, the other portions would remain the same, regardless whether an MPK or non-MPK was selected. (RFOF ¶ 420).

3044. Tracy Ell, owner and Chief Prosthetist of Mid-Missouri Orthotics and Prosthetics, considers the margin from the "entire above-the-knee prosthetic" that he bills for, not just the MPK. (Ell (Mid-Missouri O&P) Tr. 1815).

Response to Finding No. 3044:

Complaint Counsel's proposed finding of fact is misleading because the evidence shows that the knee is by far the most expensive part of the prosthesis, and the most highly reimbursed. (RFOF ¶ 422). Further, the other portions would remain the same, regardless whether an MPK or non-MPK was selected. (RFOF ¶ 420). [redacted]

3045. In fitting a MPK, "it typically comes with other components that make up a leg" and the "reimbursement associated with the entire leg would be greater than the amounts" for the MPK itself. (Carkhuff (Freedom) Tr. 378).

Response to Finding No. 3045:

Complaint Counsel's proposed finding of fact should not be credited because the witness cited does not work at a clinic. Senn, who deals with clinic finances, testified that the reimbursement associated with the knee is roughly half of the total reimbursement for the prosthetic. (Senn, Tr. 200).

3046. [redacted] (Senn (COPC) Tr. 275-76) (*in camera*).

Response to Finding No. 3046:

Complaint Counsel's proposed finding of fact is incomplete because Senn testified that roughly half of the overall reimbursement comes from the MPK. (Senn, Tr. 200).

3047. Paul Weott, owner of Orthotic and Prosthetic Centers, testified that when he fits an above-the-knee amputee with a prosthetic, he earns margin on the foot, the "socket and the liners," as well as the knee. (PX05140 (Weott (Orthotic Prosthetic Center) Dep. at 44-45)).

Response to Finding No. 3047:

Complaint Counsel's proposed finding of fact is misleading because the evidence shows that the knee is by far the most expensive part of the prosthesis, and the most highly reimbursed. (RFOF ¶ 422). Further, the other portions would remain the same, regardless whether an MPK or non-MPK was selected. (RFOF ¶ 420).

3048. According to Scott Sabolich, owner and Clinical Director of Scott Sabolich Prosthetics and Research, a "typical K3 definitive, above-the-knee, Medicare allowable is around 40,000, $45,000" so the co-pay for a patient for an MPK or mechanical knee "doesn't move the needle as much as the entire cost of the leg." (PX05132 (Sabolich (Scott Sabolich Prosthetics) Dep. at 190)). However, the knee is the single most profitable component, followed by the foot. (PX05132 (Sabolich (Scott Sabolich Prosthetics) Dep. at 238)).

Response to Finding No. 3048:

Complaint Counsel's proposed finding of fact is misleading because the evidence shows that the knee is by far the most expensive part of the prosthesis, and the most highly reimbursed. (RFOF ¶ 422). Further, the other portions would remain the same, regardless whether an MPK or non-MPK was selected. (RFOF ¶ 420).

3049. The "total allowables" for the "C-Leg (Current), Orion, Rheo, and Plié" are "roughly" $28,000. (PX05010 (Schneider (Otto Bock) IHT at 80); *see also* PX05007 (Carkhuff (Freedom) IHT at 112 (discussing PX01023 (Freedom) at 003) (*in camera*)). Reimbursement for a C-Leg 4 is the same as a Plié 3, from either Medicare or a private insurer. (*See, e.g.*, PX05007 (Carkhuff (Freedom) IHT at 112-113); PX05165 (Sanders (United) Dep. at33)).

Response to Finding No. 3049:

Complaint Counsel's proposed finding of fact is vague and incomplete because it is not clear with which payer Complaint Counsel is contending the C-Leg, Orion, Rheo, and Plié have a $28,000 allowable. Private payers frequently pay a fraction of the Medicare rate, which is an incredibly important dynamic for clinics. (Senn, Tr. 261-262).

3050. [redacted]

Response to Finding No. 3050:

Complaint Counsel's proposed finding of fact is misleading because Ottobock takes into account the reimbursement rate when setting prices to clinics. In fact, Solorio testified [redacted]

3051. [redacted]

Response to Finding No. 3051:

Complaint Counsel's proposed finding of fact is misleading because it assumes that the clinic is receiving Medicare-level reimbursement, and that the patient is fully paying his or her portion of the allowable amount. (RFOF ¶¶ 410-413).

3052. [redacted]

Response to Finding No. 3052:

Complaint Counsel's proposed finding of fact is misleading. Clinics' margin between reimbursement and component cost is not "profit" but rather reflects payments intended to cover all non-billable costs, inclusive of overhead. (See Response to CCFF No. 3038). Complaint Counsel states that [redacted]

3053. [redacted]

Response to Finding No. 3053:

Respondent has no specific response.

3054. Current reimbursement rates are such that fitting an MPK would remain profitable even were the price of MPKs to increase. Kim De Roy, Executive Vice President of R&D of Össur, testified that there is "room" for Össur to raise the price of its MPK with the current reimbursement rates. (PX05124 (De Roy (Össur) Dep. at 138-139)).

Response to Finding No. 3054:

Complaint Counsel's proposed finding of fact is incomplete, as it ignores the context of DeRoy's testimony. DeRoy explains: "There is room, but everything within reason. As I explained earlier this morning, if you want to increase the price you would have to address the value proposition, you would have to increase the value of the product considerably to justify to the user the out-of-pocket payment, to justify to the prosthetist the fact that they're actually decreasing their margin somewhat. So there are things like if his fitting time is included. If we were to develop a knee that would be fit faster, more efficiently, would reduce that time, then it's possible the prosthetist would actually accept that and compromise the margin somewhat." (PX05124 (DeRoy, Dep. at 138-139)). Importantly, this answer shows that Össur tracks the prosthetists margin, and sets prices based on that reimbursement amount, and that in order to decrease the prosthetist's margin, he would have to justify that with a "value proposition." This *fully supports* Dr. Argue's opinion that reimbursement levels act as a check on anticompetitive effects in this industry. Further, Mr. DeRoy's testimony does not distinguish between the margin on low reimbursement of commercial payers and the high reimbursement of Medicare. (RFOF ¶ 126).

3055. The reimbursement amount for prosthetic components is usually double the amount that prosthetists pay for the component. (PX05010 (Schneider) IHT at 64)).

Response to Finding No. 3055:

Complaint Counsel's proposed finding of fact is misleading because it is not clear to which payer Complaint Counsel's proposed finding of fact relates. The evidence shows that private

payers pay a significantly lower amount than CMS. (RFOF ¶ 126). Further, the testimony is imprecise, is therefore unhelpful, and should not be adopted.

3056. [redacted] (Asar (Hanger) Tr. 1382-1383 (*in camera*)).

Response to Finding No. 3056:

Complaint Counsel's proposed finding of fact is incomplete. [redacted] Clinics' margin between reimbursement and component cost is not "profit" but rather reflects payments intended to cover all non-billable costs, inclusive of overhead. (Response to CCFF ¶ 3038). Further, Mr. Asar's testimony does not distinguish between the margin on low reimbursement of commercial payers and the high reimbursement of Medicare. (RFOF ¶ 126).

3057. [redacted] (Asar (Hanger) Tr. 1384 (*in camera*)).

Response to Finding No. 3057:

Complaint Counsel's proposed finding of fact should not be credited, because Asar lacks the foundation to support this statement, given that he does not select prosthetic componentry for patients. (Asar, Tr. 1546).

3058. [redacted]

Response to Finding No. 3058:

Respondent has no specific response, other than to state reimbursement differs between payers, and Senn did not precisely calculate the expenses COPC incurs in fitting a Plié.

3059. [redacted]
(PX05144 (Blatchford (Endolite) Dep. at 87-88) (*in camera*)).

Response to Finding No. 3059:

Respondent has no specific response.

3060. [redacted]

Response to Finding No. 3060:

Complaint Counsel's proposed finding of fact should not be credited because by its very terms, it is speculation.

3061. **Respondent could raise the price of the Plié 3 by 10% post-Merger and it would still cost less than several clinics currently pay for the C-Leg, which is fit profitably on patients with all types of insurance. Jonesboro Prosthetic & Orthotic Laboratory, pays $12,500 for Freedom's Plié 3 and "in the range of $16,000 to $17,000" for Otto Bock's C-Leg 4**.} (PX05108 (Yates (Jonesboro) Dep. at 29) (*in camera*)). [redacted]
(PX05108 (Yates (Jonesboro) Dep. at 29) (*in camera*). [redacted]
(Asar (Hanger) Tr. 1381-82 (*in camera*)). [redacted]
(Brandt (Ability Prosthetics and Orthotics) Tr. 3770-71 (*in camera*)). [redacted]

(PX05166 (Watson (Fourroux Prosthetics) Dep. at 48) (*in camera*)).

(Argue, Tr. 6295 (*in camera*)).

Response to Finding No. 3061:

Complaint Counsel's proposed finding of fact is misleading.

5. Dr. Argue's Claim that Plié 3 Does Not Compete Closely with C-Leg 4 due to Alleged Functional Differences Is Contradicted by the Record

3062.

[redacted]

Response to Finding No. 3062:

Respondent has no specific response.

3063. 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, above).

Response to Finding No. 3063:

Complaint Counsel's proposed finding of fact is inaccurate and contrary to the overwhelming weight of evidence presented at trial. Respondent incorporates its Responses to CCFF ¶¶ 1028-1139, above.

3064. Freedom considers the Plié to be an MPK with swing and stance functionality. (Carkhuff (Freedom) Tr. 350-51; Ferris (Freedom) Tr. 2351; PX05111 (Prince (Freedom) Dep. at 94-97) (*in camera*); PX05114 (Ferris (Freedom) Dep. at 141) ("We do actually have swing and stance functionality in our knee."); PX05114 (Ferris (Freedom) Dep. at 159); PX01022 (Freedom) at 063 ("The MPC knee market consists of two major categories: (a) Stance only knees (L-5858) and (b) Swing & Stance knee (L-5856). . . . Products under the Swing & Stance category are: C-Leg from Otto Bock, Rheo from Össur, Orion from Endolite, and Plié 2.0 from Freedom Innovations."); PX01214 (Freedom) at 025, 035; PX01686 (Freedom) at 011).

Response to Finding No. 3064:

Complaint Counsel's proposed finding of fact is misleading. Respondent incorporates its Response to CCFF ¶ 884.

3065. The Plié is marketed by Freedom as a swing and stance MPK. (Carkhuff (Freedom) Tr. 350-51; Schneider (Otto Bock) Tr. 4729-30, 4732; Arbogast (Ohio Willow Wood) Tr. 5110 (*in camera*); PX05150 (Kannenberg (Otto Bock) Dep. at 156); PX01214 (Freedom) at 030, 035 ("Plié 3 is a water resistant (IP67) microprocessor controlled swing and stance knee"); PX01732 (Otto Bock) at 007; PX01847 (Freedom) at 004).

Response to Finding No. 3065:

Complaint Counsel's proposed finding of fact is misleading. Respondent incorporates its Response to CCFF ¶ 884.

3066. 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." (PX01214 (Freedom) at 030 (chart comparing "Ottobock Claims vs Reality)).

Response to Finding No. 3066:

Complaint Counsel's proposed finding of fact is misleading. The document cited by Complaint Counsel is a marketing document, and should not be taken as fact. (PX01214). Asked about a similar document, Freedom's Chairman, Maynard Carkhuff testified that:

> "Yes. Just for clarity, that's true. The -- there are differences in that *the swing and stance control is provided by our hydraulic system*, and our product switches -- the *microprocessor switches* the knee from stance to swing. I believe the Otto Bock and I believe *all other knees, the microprocessor actually will be controlling it throughout*, but they do have swing and stance control, just simply different modes of operation."
>
> (Carkhuff, Tr. 350-351).

3067. Freedom recommends that customers seek reimbursement for the Plié under L-Code 5856, which is for microprocessor swing and stance knees. (Kannenberg (Otto Bock) Tr. 2000; Carkhuff (Freedom) Tr. 350; Schneider (Otto Bock) Tr. 4651-52, 4727-28 (*in camera*); Arbogast (Ohio Willow Wood) Tr. 5110 (*in camera*); PX05137 (Matthews (Freedom) Dep. at 154); PX01214 (Freedom) at 025; PX01732 (Otto Bock) at 002, 007; PX01975 (Freedom) at 012 (*in camera*); PX07008 (Otto Bock) at 004).

Response to Finding No. 3067:

Complaint Counsel's proposed finding of fact is misleading because though Freedom recommends that customers seek reimbursement under L5856, Freedom executives have admitted

that it is not the microprocessor that provides swing-and-stance control, but rather that there is *hydraulic* swing and stance control, with a microprocessor to switch between the two gait phases. (Carkhuff, Tr. 350-351 ("[T]here are differences in that *the swing and stance control is provided by our hydraulic system*, and our product switches -- the *microprocessor switches* the knee from stance to swing. I believe the Otto Bock and I believe *all other knees, the microprocessor actually will be controlling it throughout*, but they do have swing and stance control, just simply different modes of operation.")) (emphasis added).

3068. [redacted] (PX05010 (Schneider (Otto Bock) IHT at 184)).

Response to Finding No. 3068:

Complaint Counsel's proposed finding of fact is misleading because though Schneider agrees that *Freedom* recommends L5856 for its Plié, Schneider also testified that the Plié 3's coding recommendation for L5856 swing and stance microprocessor control is not proper and is costing the US 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]

3069. [redacted] **(PX07008 at 004 (¶ 8) (Respondent's Confidential Responses to Complaint Counsel's First Set of Requests for Admissions) (*in camera*)).**

Response to Finding No. 3069:

Respondent has no specific response, other than to note that Complaint Counsel has not proposed a market defined by L-Code. (Compl., ¶ 17).

3070. [redacted]

Response to Finding No. 3070:

Respondent has no specific response, other than to note that Complaint Counsel has not proposed a market defined by L-Code. (Compl., ¶ 17).

3071. [redacted] (PX07008 at 004 (¶ 9) (Respondent's Confidential Responses to Complaint Counsel's First Set of Requests for Admissions) (*in camera*)).

Response to Finding No. 3071:

Respondent has no specific response, other than to note that Complaint Counsel has not proposed a market defined by L-Code. (Compl., ¶ 17).

3072. The Plié is reimbursed as a swing and stance MPK, under L-Code 5856. (Carkhuff (Freedom) Tr. 350, 714-15; Kannenberg (Otto Bock) Tr. 1969-70, 2000; Schneider (Otto Bock) Tr. 4728; Ell (Mid-Missouri) Tr. 1732; [redacted]; PX05150 (Kannenberg (Otto Bock) Dep. at 76); PX05163 (Stuch (Otto Bock) Dep. at 189); PX05108 (Yates (Jonesboro) Dep. at 195-96); PX05144 (Blatchford (Endolite) Dep. at 64-65); PX01880 (Otto Bock) at 001 (noting, with regard to the Rheo, Orion, and Plié, that "these other standard MPKs are billed with the same codes as the C-Leg"); [redacted]

Response to Finding No. 3072:

Complaint Counsel's proposed finding of fact is misleading and incomplete. The evidence is clear that Plié 3 is not a true swing-and-stance MPK despite Freedom's recommendations that customers seek reimbursement for it under L5856. RFOF ¶¶ 603-606. 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). The Plié 3's coding recommendation for L5856 swing and stance microprocessor control is not proper and is costing the US 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]

3073. Market participants consider the Plié to be an MPK**.** [redacted]**;** PX05117 (Choi (ST&G) Dep. at 124-26); PX05124 (De Roy (Ossur) Dep. at 147-49); PX05144 (Blatchford (Endolite) Dep. at 74); PX05146 (Marquette (DAW) Dep. at 57)).

Response to Finding No. 3073:

Complaint Counsel's proposed finding of fact is misleading and incomplete. The evidence is clear that Plié 3 is not a true swing-and-stance MPK despite Freedom's recommendations that customers seek reimbursement for it under L5856. RFOF ¶¶ 603-606. 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). The Plié 3's coding recommendation for L5856 swing and stance microprocessor control is not proper and is costing the US 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] 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). [redacted]

3074. Specifically, prosthetists consider the Plié to be an MPK because they receive reimbursement for the Plié under L-Code 5856. (Schneider (Otto Bock) Tr. 4727-28; [redacted]**;** *see* PX05108 (Yates (Jonesboro) Dep. at 64); PX05128 (Senn (COPC) Dep. at 76); PX05129 (Ell (Mid-Missouri) Dep. at 64); PX05145 (Ford (POA) Dep. at 142)).

Response to Finding No. 3074:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Prosthetists have testified that it is risky to bill the Plié 3 at L5856: [redacted]

[redacted]

3075. [redacted]

Response to Finding No. 3075:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Prosthetists have testified that it is risky to bill the Plié 3 at L5856: [redacted]

3076. Mid-Missouri Orthotics & Prosthetics uses the same L codes for the C-Leg 4 as it does for the Plié 3 when seeking reimbursement and has received reimbursement for both MPKs using those L codes. (Ell (Mid-Missouri) Tr. 1732).

Response to Finding No. 3076:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Prosthetists have testified that it is risky to bill the Plié 3 at L5856: [redacted]

[redacted]

3077. [redacted] (PX01023 (Freedom) at 003 (*in camera*)).

Response to Finding No. 3077:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Prosthetists have testified that it is risky to bill the Plié 3 at L5856: [redacted]

3078. [redacted] (PX01062 (Otto Bock) at 004 (*in camera*)).

Response to Finding No. 3078:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Prosthetists have testified that it is risky to bill the Plié 3 at L5856: [redacted]

[redacted]

3079. [redacted] (RX-1049 at 52 (¶ 101) (Argue Expert Report) (*in camera*)).

Response to Finding No. 3079:

Complaint Counsel's proposed finding of fact is misleading and incomplete. The portion of the sentence in Dr. Argue's report immediately preceding the one cited by Complaint Counsel reads: [redacted] Some Prosthetists think that it is risky to bill the Plié 3 at L5856. [redacted]

3080. United Healthcare reimburses clinics the same amount for Otto Bock's C-Leg 4 and Freedom's Plié 3. (PX05165 (Sanders (United Healthcare) Dep. at 33)).

Response to Finding No. 3080:

Complaint Counsel's proposed finding of fact is misleading and incomplete. Prosthetists have testified that it is risky to bill the Plié 3 at L5856: [redacted]

[redacted]

3081. 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. (Ferris (Freedom) Tr. 2351 (Q: But the Plié does in fact have swing and stance control, doesn't it? A: I believe so. Again, according to my engineers, yes.).

Response to Finding No. 3081:

Complaint Counsel's proposed finding of fact is misleading and incomplete. The evidence is clear that Plié 3 is not a true swing-and-stance MPK despite Freedom's recommendations that customers seek reimbursement for it under L5856. RFOF ¶¶ 603-606. Carkhuff, *Freedom's Chairman*, 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). Stephen Prince, one of Freedom's engineers, corroborated Carkhuff's testimony. [redacted]

The Plié 3's coding recommendation for L5856 swing and stance microprocessor control is not proper and is costing the US 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]

[redacted] 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). [redacted]

3082. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5110 (*in camera*)).

Response to Finding No. 3082:

Respondent has no specific response.

3083. Prosthetists consider the Plié to offer comparable functionality to the C-Leg and other swing and stance MPKs. [redacted] PX05128 (Senn (COPC) Dep. at 82); PX05129 (Ell (Mid-Missouri) Dep. at 21-22, 63-64)).

Response to Finding No. 3083:

Complaint Counsel's proposed finding of fact is misleading and inaccurate. In reality, Prothetists testified at trial that Plié 3 is the most distant from the C-Leg 4 among MPKs in terms of functionality, and the Plié is not a good substitute for C-Leg. (Oros, Tr. 4817; Sabolich Tr. 5859-5960). Freedom recognizes that the Plié 3 is behind in terms of technology, and is at the end of its product lifecycle. (RFOF ¶ 591). Carkhuff testified that [redacted]

[redacted]

3084. [redacted] (Asar (Hanger) Tr. 1380–81 (*in camera*)).

Response to Finding No. 3084:

Respondent has no specific response.

3085. Mark Ford, President and Managing Partner of Prosthetic & Orthotic Associates, testified, "C-Leg and the Plié knees are our clinicians' preference" for MPKs. (Ford (POA) Tr. 937).

Response to Finding No. 3085:

Complaint Counsel's proposed finding of fact is misleading, grossly inaccurate and should not be adopted by the Court. Mark Ford testified that POA has only purchased *three* Plié 3's in the past three and a half years. POA purchased zero Plié 3s in 2016, and zero Plié 3s in 2017. POA purchased one Plié 3 in 2018, for a patient who didn't have insurance. Mark Ford testified that POA prosthetists believe that C-Leg is simply a better product than the Plié, and that is why they have not bought very many Plié 3s. (Ford, Tr. 1044). He also testified that despite only fitting about seven MPKs per year, that, Endolite, Ottobock, and Freedom are all trying to get POA's MPK business.

3086. Freedom considers other swing and stance MPKs to be the Plié's primary competition. (*See, e.g.*, PX05112 (Ammouri (Freedom) Dep. at 109); PX05114 (Ferris (Freedom) Dep. at 30); PX05114 (Ferris (Freedom) Dep. at 145); PX05118 (Testerman (Freedom) Dep. at 27-28); [redacted]

Response to Finding No. 3086:

Respondent has no specific response.

3087. According to Freedom's Vice President of National and Key Accounts, Mark Testerman, "[Freedom's] main competitors that I would see in key accounts would be Össur, Endolite, Otto Bock. Those are the primary three that we compete with." (PX05118 (Testerman (Freedom) Dep. at 27-28)).

Response to Finding No. 3087:

Respondent has no specific response.

3088. Otto Bock identifies the Plié, along with other swing and stance MPKs, to be the competitors to the C-Leg. [redacted]; PX01732 (Otto Bock) at 002; PX01742 (Otto Bock) at 008 (identifying the Rheo 3, Plié 3, and Orion 2 as "Primary Competitors"); PX01868 (Otto Bock) at 002; [redacted]; **PX01874 (Otto Bock) at 005).**

Response to Finding No. 3088:

Respondent has no specific response.

6. Dr. Argue's Power Buyer Analysis is Flawed and Contradicted by the Record

3089. According to the Merger Guidelines, "[n]ormally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer." (PX08040 at 030 (§ 8) (Merger Guidelines)).

Response to Finding No. 3089:

Respondent has no specific response, other than that this proposed finding of fact is actually an improper and incomplete conclusion of law.

3090. Maynard Carkhuff, Freedom's Chairman, testified that the ability of Hanger to negotiate lower MPK prices turns in part on whether Hanger could credibly threaten to switch to another MPK, such as the C-Leg 4. Mr. Carkhuff agreed that if Hanger's threat to switch to another MPK such as the C-Leg 4 were credible, Hanger may use that to negotiate lower prices from Freedom for the Plié 3. (PX05007 (Carkhuff (Freedom) IHT at 122) ("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.")).

Response to Finding No. 3090:

Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted] Moreover, as Asar testified at trial, [redacted] He also specifically testified that he believes the [redacted]

3091. [redacted]

Response to Finding No. 3091:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

3092. [redacted]

Response to Finding No. 3092:

Respondent has no specific response.

3093. [redacted]

Response to Finding No. 3093:

Respondent has no specific response.

3094. [redacted]

Response to Finding No. 3094:

Since the Acquisition, [redacted]

[redacted]

3095. [redacted]

Response to Finding No. 3095:

Respondent has no specific response.

3096. [redacted]

Response to Finding No. 3096:

Complaint Counsel's proposed finding of fact is misleading and incomplete, [redacted]

3097. [redacted]

Response to Finding No. 3097:

Respondent has no specific response.

3098. [redacted]

Response to Finding No. 3098:

Complaint Counsel's proposed finding of fact is misleading. The evidence shows that MPKs last for about three to five years. (PX05151, Patton (Prosthetic Solutions), Dep. at 105)). Typically, a new version of an MPK has been released in that timeframe, so in any event a patient would need a new version of the knee they previously had. (PX05151, Patton (Prosthetic Solutions), Dep. at 105)). Further, there was no evidence presented at trial of componentry brand loyalty among patients. In addition, Asar lacks the requisite foundation to testify about component selection, because he is not a clinician and he does not interact with clinicians as part of his every day job. (Asar, Tr. 1546).

3099. [redacted]

[redacted]

Response to Finding No. 3099:

Complaint Counsel's proposed finding of fact is misleading, as there is significant evidence that Hanger has taken steps to implement its plan.

First, [redacted]

[redacted]

3100. [redacted] (Asar (Hanger) Tr. 1457-58 (*in camera*)).

Response to Finding No. 3100:

Complaint Counsel's proposed finding of fact is incomplete, because it omits that [redacted]

3101. In the event that the combined firm raises prices, Hanger's CEO testified that Hanger "would be forced to absorb the price increase." (PX05002 (Asar (Hanger) IHT at 52) (*in camera*)).

Response to Finding No. 3101:

Complaint Counsel's proposed finding of fact should not be accepted by the Court. Complaint Counsel cites to only one piece of evidence for this proposed finding: [redacted]

3102. According to Mr. Asar, "it's going to be hard for Hanger, a Hanger Clinic, our patient care segment, to switch that much volume from one manufacturer to the other, especially from Otto Bock." (Asar (Hanger) Tr. 1447 (*in camera*)).

Response to Finding No. 3102:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

3103. As such, Mr. Asar believes that the Merger is "worrisome" and that the "price flexibility" Hanger experienced pre-Merger "may go away from the marketplace for us at Hanger." (PX05153B (Asar (Hanger) Dep. at 123-125 (*in camera*)); PX05002 (Asar (Hanger) IHT at 58) (*in camera*)).

Response to Finding No. 3103:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

3104. Respondent Expert, Dr. Argue, concluded that adverse competitive effects are unlikely to occur because Hanger, as the largest operator of orthotic and prosthetic clinics in the United States, serves as a "powerful buyer" and has the ability to constrain any increase in prices by the combined Otto Bock and Freedom. (RX-1049 at 61 (¶ 122) (Argue Expert Report)).

Response to Finding No. 3104:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

[redacted]

3105. [redacted] (RX-1049 at 63-64 (¶ 123) (Argue Expert Report) (*in camera*)).

Response to Finding No. 3105:

Complaint Counsel's proposed finding of fact is incomplete, [redacted]

3106. [redacted] Dr. Scott Morton concluded that by not implementing either scenario, Hanger revealed its preference for its current pattern of microprocessor knee purchases even in view of significant cost reductions. (PX06003 at 025 (¶ 48) (Morton Rebuttal Report)).

Response to Finding No. 3106:

Complaint Counsel's proposed finding of fact is misleading and ignores the practical realities of this case. [redacted]

[redacted]

3107. [redacted] (PX06003 at 027 (¶ 51) (Scott Morton Rebuttal Report) (*in camera*)). [redacted] (PX06003 at 027 (¶ 51) (Scott Morton Rebuttal Report) (*in camera*)).

Response to Finding No. 3107:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. There is ample evidence in the record that [redacted]

3108. According to the Merger Guidelines, "even if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers." (PX08040 at 030 (§ 8) (Merger Guidelines)).

Response to Finding No. 3108:

Respondent has no specific response, other than that this proposed finding of fact is actually an improper and incomplete conclusion of law.

3109. [redacted] (Carkhuff (Freedom) Tr. 695 (*in camera*)).

Response to Finding No. 3109:

Respondent has no specific response.

3110. [redacted] (Solorio (Otto Bock) Tr. 1626-27 (*in camera*)).

Response to Finding No. 3110:

Respondent has no specific response.

7. Dr. Argue Does Not Present an Entry Analysis

3111. Respondent Expert, Dr. Argue, admits that Section 9 of the Merger Guidelines relates to entry. (Argue (Respondent) Tr. 6261).

Response to Finding No. 3111:

Respondent has no specific response.

3112. [redacted] (Argue, Tr. 6261-62 (*in camera*); PX05173 (Argue (Respondent) Dep. at 25).

Response to Finding No. 3112:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

3113. [redacted] (Argue, Tr. 6263 (*in camera*); PX05173 (Argue (Respondent) Dep. at 26)).

Response to Finding No. 3113:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

3114. Respondent Expert, Dr. Argue, did not perform any analysis of how long it would take a firm without a microprocessor knee to develop a microprocessor knee. (Argue (Respondent) Tr. 6265-66; PX05173 (Argue (Respondent) Dep. at 26)).

Response to Finding No. 3114:

Respondent has no specific response.

3115. Dr. Argue's Report does not contain any analysis of how much it would cost a firm without a microprocessor knee to develop a microprocessor knee. (Argue, Tr. 6266; PX05173 (Argue (Respondent) Dep. at 26-27)).

Response to Finding No. 3115:

Respondent has no specific response.

3116. Respondent Expert, Dr. Argue, did not perform any analysis of whether anyone beyond current microprocessor knee manufacturers have microprocessor knees in development. (Argue, Tr. 6266; PX05173 (Argue (Respondent) Dep. at 27)).

Response to Finding No. 3116:

Respondent has no specific response.

3117. Dr. Argue did not perform any analysis of the intellectual property held by Otto Bock related to its microprocessor knees. (Argue, Tr. 6266; PX05173 (Argue (Respondent) Dep. at 27-28)).

Response to Finding No. 3117:

Respondent has no specific response.

3118. Respondent Expert, Dr. Argue, did not perform any analysis specific to the intellectual property held by Freedom for its microprocessor knees. (Argue, Tr. 6266; PX05173 (Argue (Respondent) Dep. at 28)).

Response to Finding No. 3118:

Respondent has no specific response.

3119. Dr. Argue's Report does not contain any analysis of failed microprocessor knee development efforts by other manufacturers. (Argue, Tr. 6266; PX05173 (Argue (Respondent) Dep. at 28)).

Response to Finding No. 3119:

Respondent has no specific response.

8. Dr. Argue Does Not Present an Efficiencies Analysis

3120. Apart from relying on the expert report of Respondent efficiencies expert, Mr. James Peterson, Respondent's other expert, Dr. Argue did not conduct any separate analysis of cost savings from the Merger. (Argue, Tr. 6259; PX05173 (Argue (Respondent) Dep. at 30)).

Response to Finding No. 3120:

Respondent has no specific response.

3121. Respondent Expert, Dr. Argue, did not perform any independent assessment to verify the cost savings estimate that Mr. Peterson calculated in his report. (Argue, Tr. 6259; PX05173 (Argue (Respondent) Dep. at 30-31)).

Response to Finding No. 3121:

Respondent has no specific response.

3122. Dr. Argue did not perform any independent assessment to determine whether the cost savings Mr. Peterson cites in his report are merger-specific. (Argue, Tr. 6259; PX05173 (Argue (Respondent) Dep. at 31)).

Response to Finding No. 3122:

Respondent has no specific response.

3123. Respondent Expert, Dr. Argue, did not perform any assessment to determine whether the efficiencies that Mr. Peterson estimates in his report would be passed on to MPK customers. (Argue, Tr. 6259; PX05173 (Argue (Respondent) Dep. at 35)).

Response to Finding No. 3123:

Respondent has no specific response.

3124. Dr. Argue did not perform any assessment to determine whether the efficiencies Mr. Peterson calculates in his report would result in lower prices for MPK customers. (Argue, Tr. 6259-60; PX05173 (Argue (Respondent) Dep. at 35-36)).

Response to Finding No. 3124:

Respondent has no specific response.

B. Flaws in Mr. James Peterson's Analysis

1. Mr. Peterson's Efficiencies Analysis Is Flawed

3125. The efficiencies analysis of Respondent's expert witness, James Peterson, relies on speculative cost-savings estimates and are not verifiable. (*See* CCFF ¶¶ 1748-1782, above).

Response to Finding No. 3125:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

3126. [redacted] (*See* CCFF ¶¶ 1748-1782, above).

Response to Finding No. 3126:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it ignores [redacted]

[redacted]

3127. [redacted] But Dr. Baggenstoss, the A.T. Kearney executive responsible for the Integration Team, testified that synergy opportunities were "all early stage" at the time work stopped. (PX05154 (Baggenstoss (A.T. Kearney) Dep. at 27); PX05127 (Röessing (Otto Bock) Dep. at 34, 50–51) (noting that Dr. Baggenstoss was the "project lead" of the Integration Team)).

Response to Finding No. 3127:

Complaint Counsel's proposed finding of fact relies upon testimony from a witness (Dr. Baggenstoss) who was not called to testify at trial and thus was not subject to cross-examination before this Court. Peterson's testimony was provided at trial, with the opportunity for cross-examination.

3128. Dr. Baggenstoss of A.T. Kearney was the integration project lead. (PX05127 (Röessing (Otto Bock) Dep. at 34, 50–51)). [redacted]

Response to Finding No. 3128:

Complaint Counsel's proposed finding of fact relies upon testimony from a witness (Dr. Baggenstoss) who was not called to testify at trial and thus was not subject to cross-examination

before this Court. Peterson's testimony was provided at trial, with the opportunity for cross-examination.

3129. [redacted]
(PX05174 (Peterson (Respondent) Dep. at 277) (*in camera*)).

Response to Finding No. 3129:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

3130. [redacted] **(PX05174 (Peterson (Respondent) Dep. at 276) (*in camera*)).**

Response to Finding No. 3130:

Complaint Counsel's proposed finding relies solely upon deposition testimony, not subject to cross-examination in this Court. [redacted]

3131. Regarding Mr. Peterson's range of claimed efficiencies, Ms. Hammer, Complaint Counsel's efficiencies expert, concluded that using a "haircut" to estimate efficiencies does not meet the requirements of the Merger Guidelines because one does not "know what a reasonably derived estimate of the future efficiency would be." (Hammer Tr. 2900–901).

Response to Finding No. 3131:

Complaint Counsel's is misleading because Complaint Counsel's attempt to discredit [redacted]

3132. [redacted]

Response to Finding No. 3132:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

3133. Mr. Peterson's efficiencies analysis did not analyze the extent to which the claimed efficiencies could be achieved through independent cost-savings initiatives nor did it take into account practical alternatives (e.g., divestiture or licensing) that could mitigate competitive concerns. (*See* CCFF ¶¶ 1784-1797, above).

Response to Finding No. 3133:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that

[redacted]

3134. [redacted] (RX-1048 at 51–52 (¶ 132) (Peterson Expert Report) (*in camera*)).

Response to Finding No. 3134:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that

[redacted]

3135. [redacted] (Peterson

Tr. 6738-39 (*in camera*); *see also* (PX05174 (Peterson (Respondent) Dep. at 278) (*in camera*).

Response to Finding No. 3135:

Respondent has no specific response.

3136. Ms. Hammer, Complaint Counsel's efficiencies expert, concluded that the claimed efficiencies were not demonstrated to be merger-specific, as Mr. Peterson failed to assess whether or not the alleged efficiencies could result from Freedom implementing non-proprietary best practices. (Hammer Tr. 2901–902; PX06004 at 036 (¶ 78) (Hammer Rebuttal Report)).

Response to Finding No. 3136:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that

[redacted]

3137. [redacted] (Hammer Tr. 2901; *see also* PX06004 at 037-38 (¶ 82) (Hammer Rebuttal Report)).

Response to Finding No. 3137:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

[redacted]

[redacted]

3138. [redacted] (Peterson Tr. 6749 (*in camera*)).

Response to Finding No. 3138:

Respondent has no specific response.

3139. [redacted] (RX-1048 at 45–53 (¶ 120–135) (Peterson Expert Report) (*in camera*)).

Response to Finding No. 3139:

Respondent has no specific response.

3140. Complaint Counsel expert, Ms. Hammer, concluded that because Mr. Peterson did not specify what portion of any claimed efficiencies are fixed versus marginal costs, he failed to show what portion of the claimed efficiencies would be more likely to be passed on to consumers. (Hammer Tr. 2904; PX06004 at 039 (¶ 87) (Hammer Rebuttal Report)).

Response to Finding No. 3140:

Complaint Counsel's proposed finding of fact is not a fact; rather, it is an improper and inaccurate legal conclusion.

2. Mr. Peterson's Failing Firm Analysis is Flawed

a) Mr. Peterson Focused on Freedom's Financial History Prior to the 2017 Turnaround

3141. [redacted] (RX-1048 at 6-16 (¶¶ 15-36) (Peterson Expert Report) (*in camera*)).

Response to Finding No. 3141:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted]

3142. [redacted] (PX05174 (Peterson (Respondent) Dep. at 259); RX-1048 at 007-08 (¶ 16) Chart 1 (Peterson Expert Report) (*in camera*)).

Response to Finding No. 3142:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that other [redacted]

b) Mr. Peterson Does Not Calculate a Liquidation Value

3143. The Merger Guidelines define a "reasonable alternative offer" as "[a]ny offer to purchase the assets of the failing firm for a price above the liquidation value of those assets[.]" (PX08040 at 035 n.16 (§ 11) (Merger Guidelines)).

Response to Finding No. 3143:

Complaint Counsel's proposed finding of fact is not a fact; rather, it is an improper and incomplete legal conclusion.

3144. Mr. Peterson, Respondent's expert, agreed that under the Merger Guidelines, a reasonable alternative offer is any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets. (Peterson, Tr. 6690–91).

Response to Finding No. 3144:

Complaint Counsel's proposed finding of fact is inaccurate, incomplete and misleading. [redacted]

3145. Mr. Peterson's expert report did not contain a liquidation analysis of Freedom's business. (RX-1048 at 044 (¶ 115) (Peterson Expert Report)).

Response to Finding No. 3145:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

3146. At trial, Mr. Peterson, Respondent's expert witness, testified, "I did not calculate a point estimate of the liquidation value of Freedom." (Peterson Tr. 6691).

Response to Finding No. 3146:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

3147. Mr. Peterson did not calculate the liquidation value of Freedom's inventory. (Peterson Tr. 6691-92).

Response to Finding No. 3147:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

3148. Mr. Peterson did not calculate the liquidation value of Freedom's accounts receivable. (Peterson Tr. 6692).

Response to Finding No. 3148:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

3149. Mr. Peterson did not calculate the liquidation value of Freedom's property, plants or equipment. (Peterson Tr. 6692).

Response to Finding No. 3149:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

3150. Mr. Peterson did not calculate the liquidation value of any of Freedom's tangible assets. (Peterson Tr. 6692).

Response to Finding No. 3150:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

3151. Mr. Peterson did not calculate the liquidation value of any of Freedom's intangible assets. (Peterson Tr. 6693).

Response to Finding No. 3151:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

c) Mr. Peterson's Argument that Össur's Bid was Insincere is Contradicted by the Record

3152. [redacted] (Peterson Tr. 6653 (*in camera*)).

Response to Finding No. 3152:

Respondent has no specific response.

3153. In his deposition, Mr. Peterson stated that he had not offered an opinion on whether [redacted] was a reasonable alternative offer; in particular, Mr. Peterson did not have an opinion as to whether [redacted] "exceeded liquidation value." (PX05174

(Peterson (Respondent) Dep. at 126)).

Response to Finding No. 3153:

Respondent has no specific response.

3154. (PX05122 (Smith (HEP) Dep. at 178-179) (*in camera*)).

Response to Finding No. 3154:

Respondent has no specific response.

3155. (PX05124 (De Roy (Ossur) Dep. at 212) (*in camera*)).

Response to Finding No. 3155:

Complaint Counsel's proposed finding of fact is incomplete and misleading.

3156. **(De Roy (Ossur) Tr. 3610-11 (*in camera*)).**

Response to Finding No. 3156:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

3157. [redacted]

Response to Finding No. 3157:

Complaint Counsel's proposed finding of fact is misleading as ignores certain testimony at trial regarding the [redacted]

3158. In a September 8, 2017 email to Maynard Carkhuff of Freedom, David Smith, Freedom's then-CEO, classified Össur's bid as one of "several good offers in hand." (PX01288 (Freedom) at 001)).

Response to Finding No. 3158:

Respondent has no specific response.

3159. [redacted] (Peterson Tr. 6823-24 (*in camera*)).

Response to Finding No. 3159:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that [redacted]

3160. With respect to Mr. Peterson's third claim regarding the non-solicitation agreement, Mr. Hammack of Moelis testified at his deposition that Freedom "didn't withhold any people from [Össur], but initially, at the beginning, we withheld some information that [Össur] said they didn't want to get because it was sensitive around certain product categories." (PX05110 (Hammack (Moelis) Dep. at 86-87)). Overall, Mr. Hammack could not "recall there being significant differences" in the information that Otto Bock and Össur received during the due diligence process. (PX05110 (Hammack (Moelis) Dep. at 91-92).

Response to Finding No. 3160:

Complaint Counsel's proposed finding of fact is inaccurate. Whereas Complaint Counsel cites deposition testimony, [redacted]

3161. [redacted] (Peterson Tr. 6825-26 (*in camera*); PX05174 (Peterson (Respondent) Dep. at 108 (*in camera*))).

Response to Finding No. 3161:

Complaint Counsel's proposed finding of fact is incomplete and inaccurate. Peterson's testimony was that "I'm not sure if I can point to anything either way [regarding Össur's access to Freedom employees]. I – once again, wasn't there." (Peterson, Tr. 6826). Complaint Counsel cites no evidence to the opposite.

d) Mr. Peterson's Argument that Freedom's Revenue Gains Were Unsustainable is Contradicted by the Record

3162. [redacted] (Peterson, Tr. 6619, 6622) (*in camera*).

Response to Finding No. 3162:

Respondent has no specific response.

3163. [redacted] (Smith, Tr. 6574) (*in camera*).

Response to Finding No. 3163:

Complaint Counsel's proposed finding of fact is misleading because it ignores the fact that, [redacted]

XVI. WITNESS BACKGROUNDS

A. LAY WITNESSES WHO TESTIFIED AT TRIAL

1. Respondent's Witnesses

a) Respondent's Executives

Maynard Carkhuff

3164. Maynard Carkhuff is Chairman of Freedom. This is a senior strategic position within Freedom. His current Chairman position does not refer to Freedom's board of directors. (Carkhuff (Freedom) Tr. 290).

Response to Finding No. 3164:

Respondent has no specific response.

3165. At the time of the Merger, Mr. Carkhuff was on Freedom's board of directors. (Carkhuff (Freedom) Tr. 291).

Response to Finding No. 3165:

Respondent has no specific response.

3166. Mr. Carkhuff joined Freedom in 2005 as President of the company. In 2012, Mr. Carkhuff became CEO and President, and was the top executive of the Company with responsibility for all aspects of the company's operations. In 2015, Mr. Carkhuff became Chairman of the board of directors. (Carkhuff (Freedom) Tr. 291-294).

Response to Finding No. 3166:

Respondent has no specific response.

3167. Subsequently, in April 2016, Mr. Carkhuff became Vice Chairman and Chief Innovation Officer at Freedom. As Chief Innovation Officer, he focused on strategic issues at Freedom, chaired the technology committee, and collaborated the with Chairman of Freedom's board and CEO on potential acquisitions and new product development efforts. (Carkhuff (Freedom) Tr. 292, 296).

Response to Finding No. 3167:

Respondent has no specific response.

3168. Mr. Carkhuff then entered into his current role as Chairman in October 2017. (Carkhuff (Freedom) Tr. 292).

Response to Finding No. 3168:

Respondent has no specific response.

3169. Mr. Carkhuff is also manager for the Hold Separate agreement between the FTC and Otto Bock. (Carkhuff (Freedom) Tr. 290-291).

Response to Finding No. 3169:

Respondent has no specific response.

3170. Prior to the Merger, Mr. Carkhuff sat on Freedom's Product Approval Committee ("PAC"). PAC approves all new products that Freedom launches. Mr. Carkhuff sat on committee when Freedom was evaluating its new Quattro MPK. (Carkhuff (Freedom) Tr. 296-298).

Response to Finding No. 3170:

Complaint Counsel's proposed finding of fact is misleading, as Carkhuff was just one of several individuals who sat on Freedom's PAC. (Carkhuff, Tr. 296-298).

Eric Ferris

3171. Eric Ferris has been the Vice President of Marketing, Customer Service and Product Development at Freedom since February 2018. (Ferris (Freedom) Tr. 2299). From July 2015 through February 2018, he was the Director of Marketing and Customer Service. (Ferris (Freedom) Tr. 2298).

Response to Finding No. 3171:

Respondent has no specific response.

3172. Mr. Ferris is a member of Freedom's Operating Committee, which is responsible for the overall management of Freedom, Freedom's Executive Committee, which deals with urgent issue, Freedom's Product Approval Committee, which approves the product development phases for the overall organization and particular development projects, and the IP committee, which reviews patent proposals. (Ferris (Freedom) Tr. 2299-300).

Response to Finding No. 3172:

Respondent has no specific response.

3173. Mr. Ferris's responsibilities include marketing Freedom's products, promoting the products, messaging, competitive assessments, pricing, education, and strategy regarding messaging for sales into the different sales channels. (Ferris (Freedom) Tr. 2303-05).

Response to Finding No. 3173:

Respondent has no specific response

Dr. Andreas Kannenberg

3174. Dr. Andreas Kannenberg is Executive Medical Director for Otto Bock HealthCare North America. He has been in that position since 2013. (Kannenberg (Otto Bock) Tr. 1819). As Executive Medical Director, Dr. Kannenberg's responsibilities include clinical research and education, and reimbursement. (Kannenberg (Otto Bock) Tr. 1824).

Response to Finding No. 3174:

Complaint Counsel's proposed finding of fact is incomplete. 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).

3175. Prior to joining Otto Bock, Dr. Kannenberg received his M.D. and Ph.D. from Humboldt University in Berlin, Germany. (Kannenberg (Otto Bock) Tr. 1820).

Response to Finding No. 3175:

Respondent has no specific response

3176. Dr. Kannenberg joined Otto Bock as Director of Medical Affairs. In this role, Dr. Kannenberg provided education and training to prosthetists and orthotists, including education about the evidence supporting the use of Otto Bock products. (Kannenberg (Otto Bock) Tr. 1821-22).

Response to Finding No. 3176:

Respondent has no specific response.

3177. In 2003, Dr. Kannenberg established Otto Bock's clinical research department, which grew from a one-person department to a group of 20 Otto Bock employees. (Kannenberg (Otto Bock) Tr. 1821). This department gathers existing evidence and develops new evidence to convince payers to reimburse for Otto Bock products. It also organizes and supervises clinical research related to Otto Bock's products. (Kannenberg (Otto Bock) Tr. 1821-22).

Response to Finding No. 3177:

Respondent has no specific response.

Lee Kim

3178. Lee Kim is the Chief Financial Officer of Freedom and has been since he started working at Freedom in February of 2008. (Kim (Freedom) Tr. 2492). Mr. Kim continues to hold the position of Chief Financial Officer following Freedom's acquisition by Otto Bock. (Kim (Freedom) Tr. 2492).

Response to Finding No. 3178:

Respondent has no specific response.

3179. Mr. Kim is licensed as a Certified Public Accountant in California. (Kim (Freedom) Tr. 2495-96).

Response to Finding No. 3179:

Respondent has no specific response.

3180. As the Chief Financial Officer of Freedom, Mr. Kim reported directly to the CEO of Freedom. (Kim (Freedom) Tr. 2493).

Response to Finding No. 3180:

Respondent has no specific response.

3181. As CFO of Freedom, Mr. Kim is the executive responsible for managing Freedom's accounting operations and preparing the company's financial statements. (Kim (Freedom) Tr. 2493). Mr. Kim established internal controls to ensure Freedom reported financial statements that were materially correct. (Kim (Freedom) Tr. 2493). Mr. Kim also prepared the company's financial forecasts. (Kim (Freedom) Tr. 2494).

Response to Finding No. 3181:

Respondent has no specific response.

3182. Mr. Kim reported financial statements that he prepared and the financial forecasts he developed to Freedom's board of directors. (Kim (Freedom) Tr. 2494).

Response to Finding No. 3182:

Respondent has no specific response.

3183. Mr. Kim was the Freedom executive with the ultimate authority for ensuring the accuracy of Freedom financial statements. (Kim (Freedom) Tr. 2494).

Response to Finding No. 3183:

Respondent has no specific response.

3184. Lee Kim is a Certified Public Accountant licensed in California and is familiar with the Financial Accounting Standards Board Codification. (Kim (Freedom) Tr. 2495-96).

Response to Finding No. 3184:

Respondent has no specific response, other than that Complaint Counsel's proposed finding of fact is duplicative of its finding of fact at 3179.

3185. 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. (Kim (Freedom) Tr. 2497). Mr. Kim testified that he "had overall responsibility for the audit" process. (Kim (Freedom) Tr. 2498). Mr. Kim acknowledged that as a member of Freedom's management team he had an obligation to provide outside auditors with information free from material misstatement. (Kim (Freedom) Tr. 2500).

Response to Finding No. 3185:

Respondent has no specific response.

3186. Following Freedom's acquisition by Otto Bock, Mr. Kim continues to be the executive overseeing the annual audit process for Freedom. (Kim (Freedom) Tr. 2500).

Response to Finding No. 3186:

Respondent has no specific response.

Dr. Stephen Prince

3187. Dr. Stephen Prince is currently the Quattro Project Manager and Technical Leader at Freedom. He began working at Freedom in June 2012 and became Project Manager in 2015. (Prince (Freedom) Tr. 2672-73).

Response to Finding No. 3187:

Respondent has no specific response.

3188. Dr. Prince received his bachelor's degree, master's degree, and Ph.D. in mechanical engineering from UCLA in 2007, 2009, and 2011, respectively. (Prince (Freedom) Tr. 2672-73).

Response to Finding No. 3188:

Complaint Counsel's proposed finding of fact is inaccurate. Dr. Prince officially received his Ph.D. in 2012. (Prince, Tr. 2672).

3189. Dr. Prince was one of the two mechanical engineers who developed Freedom's Kinnex. (Prince (Freedom) Tr. 2674).

Response to Finding No. 3189:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

3190. 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. (Prince (Freedom) Tr. 2675). The R&D team is comprised of approximately ten engineers at any given time, including mechanical engineers, software engineers, and firmware engineers. (Prince (Freedom) Tr. 2676). The core team is comprised of "clinical representative, marketing, purchasing, finance, [and] quality[.]" (Prince (Freedom) Tr. 2679).

Response to Finding No. 3190:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

[redacted]

3191. As the Quattro Project Manager and Technical Leader, Dr. Prince holds daily status meetings with the R&D team responsible for the Quattro. (Prince (Freedom) Tr. 2678-79). Dr. Prince also hosts a weekly meeting with the core team for the Quattro project in order to review milestones for the project. (Prince (Freedom) Tr. 2679).

Response to Finding No. 3191:

Respondent incorporates its response to Complaint Counsel's proposed finding of fact no.

3192. Dr. Prince also helps lead the internal Project Approval Committee ("PAC") for the Quattro project. His responsibilities include "prepar[ing] the documentation and present[ing] the majority of that material." (Prince (Freedom) Tr. 2681). The PAC consists of Freedom's CEO, CFO, Vice President of Marketing, Vice President of R&D, and Senior Director of Quality. (Prince (Freedom) Tr. 2680-81). The PAC must approve each of the six phases in the Product Development Process ("PDP") in order for the project to progress. (Prince (Freedom) Tr. 2681).

Response to Finding No. 3192:

Respondent incorporates its response to Complaint Counsel's proposed finding of fact no.

3193. [redacted] (Prince (Freedom) Tr. 2683 (*in camera*)). John Robertson testified that Dr. Prince was the team leader for the Quattro project when it was initiated. (PX05006 (Robertson (Freedom) IHT at 19)).

Response to Finding No. 3193:

Complaint Counsel's proposed finding of fact is inaccurate. [redacted] Respondent incorporates its response to Complaint Counsel's proposed finding of fact no. 3190.

3194. [redacted] (PX05115 (Robertson (Freedom) Dep. at 179-80) (*in camera*)).

Response to Finding No. 3194:

Complaint Counsel's proposed finding of fact is inaccurate. Robertson is no longer at Freedom. *See* Complaint Counsel's Proposed Post-Trial Order, Appendix C, n.1. Respondent incorporates its response to Complaint Counsel's proposed finding of fact no. 3190.

Cali Solorio

3195. Cali Solorio has been the Senior Prosthetics Marketing Manager at Otto Bock since March 2017. (Solorio (Otto Bock) Tr. 1575). In this role, Ms. Solorio manages Otto Bock's MPK products through their life cycles in the North American market. Solorio (Otto Bock) Tr. 1575). She leads Otto Bock's prosthetic marketing team. (Solorio (Otto Bock) Tr. 1577). She leads the strategic direction of Otto Bock's marketing initiatives as it relates to Otto Bock's prosthetic products, including pricing, advertising promotions and product promotions. (Solorio (Otto Bock) Tr. 1578-79).

Response to Finding No. 3195:

Respondent has no specific response.

3196. Ms. Solorio joined Otto Bock in December of 2014 as a marketing manager generalist and held that position until July 2015. (Solorio (Otto Bock) Tr. 1574). From July 2015 to March 2017, Ms. Solorio was market manager for microprocessor knees. (Solorio (Otto Bock) Tr. 1574). In this position, Ms. Solorio was involved in the marketing strategy, advertising, product pricing and promotions, and educating the sales team regarding prosthetic knees. (Solorio (Otto Bock) Tr. 1577-78).

Response to Finding No. 3196:

Respondent has no specific response.

3197. Ms. Solorio assisted with the launch of Otto Bock's C-Leg 4 in April 2015 and took responsibility for the product in July of 2017. (Solorio (Otto Bock) Tr. 1576).

Response to Finding No. 3197:

Respondent has no specific response.

3198. Sales representatives and market managers report to Ms. Solorio whenever they see competitors running promotions, including promotions involving competing MPKs. (Solorio (Otto Bock) Tr. 1580).

Response to Finding No. 3198:

Complaint Counsel's proposed finding of fact is incomplete. Sales representatives and marketing managers may also report the prices they see competitors charging for their products. (Solorio, Tr. 1581).

Matthew Swiggum

3199. Matthew Swiggum joined Otto Bock in 1997 as a sales representative. He held various roles in the company for almost 21 years. (Swiggum (Otto Bock) Tr. 3315-17).

Response to Finding No. 3199:

Respondent has no specific response.

3200. Mr. Swiggum became Regional President and CEO of Otto Bock HealthCare North America in September 2016. He was in that position at the time of the Merger and was personally involved in meetings regarding the integration of Freedom after it was acquired by Otto Bock. (Swiggum (Otto Bock) Tr. 3309-10).

Response to Finding No. 3200:

Complaint Counsel's proposed finding of fact fails to mention that 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). Swiggum did not participate in any commercial due diligence meetings related to the Acquisition. (Schneider, Tr. 4411). Swiggum

did not analyze Freedom's product portfolio and how that would fit in with Ottobock's product portfolio. (Schneider, Tr. 4408). Instead, 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). Further, Complaint Counsel's proposed finding of fact fails to mention that Swiggum was terminated as regional president and CEO of Ottobock after less than two years in the role. (Swiggum, Tr. 3313, 3316).

3201. As Regional President and CEO, Mr. Swiggum was responsible for maintaining and generating a sustainable profit for Otto Bock and for all customer-facing responsibilities. (Swiggum (Otto Bock) Tr. 3317).

Response to Finding No. 3201:

Complaint Counsel's proposed finding of fact is misleading to the extent it suggests that Swiggum achieved his goals. Indeed, Swiggum was terminated as regional president and CEO of Ottobock after less than two years in the role. (Swiggum, Tr. 3313, 3316). He was asked to leave in part based upon the sales performance at Otto Bock at the time. (Swiggum, Tr. 3314).

3202. Mr. Swiggum was also involved in analyzing Freedom's Plié 3 business after Otto Bock's acquisition of Freedom. (Swiggum (Otto Bock) Tr. 3343).

Response to Finding No. 3202:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

3203. Mr. Swiggum's employment with Otto Bock was terminated on February 22, 2018. (Swiggum (Otto Bock) Tr. 3313-3314).

Response to Finding No. 3203:

Complaint Counsel's proposed finding of fact fails to mention that Swiggum was terminated as regional president and CEO of Ottobock after less than two years in the role. (Swiggum, Tr. 3313, 3316).

3204. Mr. Swiggum currently receives $30,000 per month from Otto Bock. (Swiggum (Otto Bock) Tr. 3311). This arrangement will continue until about April 2019, and provides that Mr. Swiggum may provide Otto Bock with consulting services. (Swiggum (Otto Bock) Tr. 3312).

Response to Finding No. 3204:

Complaint Counsel's proposed finding of fact is misleading. While the arrangement provides that Swiggum may provide Otto Bock with consulting services, the record is devoid of any evidence that he has actually been asked to do so.

Mark Testerman

3205. Mark Testerman is Freedom's Vice President of National and Key Accounts, a position he has held since February 2014. (Testerman (Freedom) Tr. 1073). Key accounts are the top 50 domestic customers based on volume of products sold. (Testerman (Freedom) Tr. 1073). Mr. Testerman builds relationships with these key accounts and works with them on contracting and pricing. (Testerman (Freedom) Tr. 1079).

Response to Finding No. 3205:

Respondent has no specific response.

3206. The majority of Mr. Testerman's time is spent "maintaining and nursing existing key accounts" with some time devoted to "identifying new key accounts." (Testerman (Freedom) Tr. 1182).

Response to Finding No. 3206:

Respondent has no specific response.

3207. Mr. Testerman updates the marketing and clinical teams on specific key accounts during weekly conference calls. (Testerman (Freedom) Tr. 1088).

Response to Finding No. 3207:

Respondent has no specific response.

3208. Prior to becoming Vice President of National and Key Accounts, Mr. Testerman was Freedom's Vice President of Domestic Sales from October 2010 through February 2014. (Testerman (Freedom) Tr. 1072-73). In that role, Mr. Testerman managed the sales team and implemented Salesforce.com at the company. (Testerman (Freedom) Tr. 1075). He was also involved in new product launches and worked with the marketing, operating and finance business units at Freedom. (Testerman (Freedom) Tr. 1078).

Response to Finding No. 3208:

Complaint Counsel's proposed finding of fact fails to mention that 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).

b) Third Party Witnesses

Vinit Asar

3209. Vinit Asar is President and Chief Executive Officer of Hanger, Incorporated ("Hanger") and a board member of Hanger's executive board. (Asar (Hanger) Tr. 1308).

Response to Finding No. 3209:

Respondent has no specific response.

3210. As President and CEO, Mr. Asar is responsible for the operational and strategic sides of the business. (Asar (Hanger) Tr. 1310).

Response to Finding No. 3210:

Respondent has no specific response.

3211. Prior to his current position, Mr. Asar was Chief Growth Officer at Hanger from December 2009 until 2011 and Chief Operating Officer from 2011-2012. (Asar (Hanger) Tr. 1310-11). As Chief Growth Officer, Mr. Asar was responsible for business development opportunities. (Asar (Hanger) Tr. 1311). As Chief Operating Officer, Mr. Asar maintained

his Chief Growth Officer duties and was responsible for some additional business in the products and services segment. (Asar (Hanger) Tr. 1311).

Response to Finding No. 3211:

Respondent has no specific response.

3212. Mr. Asar is familiar with the prosthetic fitting process. (Asar (Hanger) Tr. 1321). He visits between 60 and 80 clinics a year. (Asar (Hanger) Tr. 1312). During a clinic visit, Mr. Asar generally spends time with the clinicians, and "in some cases will sit with a patient while the clinician is fitting the patient . . . ." (Asar (Hanger) Tr. 1323). He talks with clinicians about the technology and what types of fittings they are doing. (Asar (Hanger) Tr. 1324).

Response to Finding No. 3212:

Complaint Counsel's proposed finding of fact is misleading. Vinit Asar is not a prosthetist, has never fit a device, and is not involved in patient care. [redacted]

3213. Hanger's annual educational fair, which includes education related to MPKs, is "tremendously helpful" for Mr. Asar's role as CEO. (Asar (Hanger) Tr. 1327) Otto Bock, Freedom, Össur and Endolite have booths at the annual educational fair. (Asar (Hanger) Tr. 1328).

Response to Finding No. 3213:

Complaint Counsel's proposed finding of fact is misleading because it is incomplete. Asar also noted that "[a]ll the companies do attend" the Hangar Education Fair, but did not indicate whether he meant companies in addition to Otto Bock, Freedom, Össur and Endolite. (Asar, Tr. 1328).

3214. Mr. Asar is familiar with MPKs and mechanical knees from his visits to Hanger's clinics, where he sees patients wearing both types of prosthetic knees. (Asar (Hanger) Tr. 1335). Mr. Asar is familiar with MPKs and mechanical knees from monthly business reviews. (Asar (Hanger) Tr. 1335). During Hanger's annual educational fair, he sits in sessions, which have allowed him to understand the differences between MPKs and mechanical knees. (Asar (Hanger) Tr. 1335).

Response to Finding No. 3214:

Complaint Counsel's proposed finding of fact is misleading. It is important to note that Vinit Asar is not a prosthetist, has never fit a device, and is not involved in patient care. [redacted]

3215. [redacted] (Asar (Hanger) Tr. 1392-93 (*in camera*)).

Response to Finding No. 3215:

Complaint Counsel's proposed finding of fact is misleading. It is important to note that Vinit Asar is not a prosthetist, has never fit a device, and is not involved in patient care. [redacted]

3216. [redacted] (Asar (Hanger) Tr. 1356 (*in camera*)).

Response to Finding No. 3216:

Complaint Counsel's proposed finding of fact is misleading. Asar testified that he was familiar with the reimbursement process "in general," and stated "I don't know if I would know all the reimbursement rates and the codes, et cetera, but in general, I would know the process of how we get reimbursed." [redacted]

3217. [redacted] (Asar (Hanger) Tr. 1362 (*in camera*)).

Response to Finding No. 3217:

Respondent has no specific response.

3218. [redacted] (Asar (Hanger) Tr. 1373 (*in camera*)). [redacted] (Asar (Hanger) Tr. 1372, 1381-82, 1396-97 (*in camera*)). [redacted] (Asar (Hanger) Tr. 1396-98 (*in camera*)).

Response to Finding No. 3218:

Complaint Counsel's proposed finding of fact is misleading. Asar is "not personally involved in the actual purchasing" of any devices. (Asar, Tr. 1372). Hanger has a chief purchasing officer that has a team which performs that activity. (Asar, Tr. 1372).

3219. Hanger provides healthcare services for orthotic and prosthetic patients in 44 states and Washington, D.C. (Asar (Hanger) Tr. 1307).

Response to Finding No. 3219:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it does not provide a complete picture of Hanger. 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). Hanger is the largest US customer of virtually every seller of prosthetics in the United States, including Freedom, [redacted] (Carkhuff, Tr. 298, Testerman, Tr. 1098; [redacted]). Indeed, 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).

3220. Approximately 80% of Hanger's revenues (about $850 million) come from its patient care segment, which includes patient care clinics across the country. (Asar (Hanger) Tr. 1307-08). This segment fits mechanical and microprocessor prosthetic knees. (Asar (Hanger) Tr. 1309). There are about 700 full-time Hanger clinics and 120 part-time satellite clinics

in the United States. (Asar (Hanger) Tr. 1312). The clinics employ about 1500 orthotist-prosthetists. (Asar (Hanger) Tr. 1313).

Response to Finding No. 3220:

Complaint Counsel's proposed finding of fact is incomplete and misleading because it does not provide a complete picture of Hanger. While Hanger's revenues from its *patient care segment* total $850 million, its *total* revenues are approximately $1 billion. (Asar, Tr. 1307-1309). Not only does Hanger employs about 1500 clinicians, but there are about 6,000 clinicians in total in the United States. (Asar, Tr. 1313, 1380). Hanger is the largest US customer of virtually every seller of prosthetics in the United States, including Freedom, [redacted] (Carkhuff, Tr. 298, Testerman, Tr. 1098; Solorio, Tr. 1626, [redacted]). Indeed, 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).

3221. The products and services division at Hanger is called Southern Prosthetic Supply, or SPS. (Asar (Hanger) Tr. 1319). SPS distributes orthotic and prosthetic devices from manufacturers to independent clinics outside of Hanger. (Asar (Hanger) Tr. 1319). SPS has a sales force but it does not assist in fittings. (Asar (Hanger) Tr. 1320). SPS has five distribution centers in the United States. (Asar (Hanger) Tr. 1320-21).

Response to Finding No. 3221:

Complaint Counsel's proposed finding of fact is incomplete. SPS also provides training on the features and benefits of its products. (Asar, Tr. 1320).

3222. Hanger fits approximately 1,800 to 2,000 MPKs on patients per year. (Asar (Hanger) Tr. 1373 (*in camera*)).

Response to Finding No. 3222:

Respondent has no specific response.

Brian Stephen Blatchford

3223. Brian Stephen Blatchford is Executive Chairman of Charles, A Blatchford & Sons Limited, (Endolite), a family-owned business in the United Kingdom. (Blatchford (Endolite) Tr. 2089, 2091). He owns just under a quarter of the shares of the company. (Blatchford (Endolite) Tr. 2090-91).

Response to Finding No. 3223:

Complaint Counsel's proposed finding of fact is misleading because it fails to mention that

[redacted]

3224. As Executive Chairman, Mr. Blatchford looks at the strategic direction of Endolite, manages the board of directors and is responsible for the strategic direction of developing products. (Blatchford (Endolite) Tr. 2091).

Response to Finding No. 3224:

Respondent has no specific response

3225. Prior to becoming Executive Chairman, Mr. Blatchford was CEO of Endolite from January 1, 1986 to March 31, 2015. (Blatchford (Endolite) Tr. 2094). As CEO, Mr. Blatchford ensured Endolite met its overall plan, managed the management team, and was responsible for each area of operation of the company. (Blatchford (Endolite) Tr. 2094).

Response to Finding No. 3225:

Respondent has no specific response

Jeffrey Brandt

3226. Jeffrey Brandt is CEO of Ability Prosthetics and Orthotics ("Ability"). (Brandt (Ability) Tr. 3742). He has worked at Ability since 2004, when he founded it. (Brandt (Ability) Tr. 3743).

Response to Finding No. 3226:

Respondent has no specific response

3227. Mr. Brandt is a certified prosthetist. (Brandt (Ability) Tr. 3743). He received that certification after completing Northwestern University's orthotic-prosthetic residency program, completing two one-year residencies, and passing the board examinations. (Brandt (Ability) Tr. 3744).

Response to Finding No. 3227:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

3228. Mr. Brandt acted as a certified prosthetist at Ability from 2004 through 2012, during which time he "generally" made the decision of which type of knee to fit on above-the-knee amputees. (Brandt (Ability) Tr. 3751).

Response to Finding No. 3228:

Respondent has no specific response

3229. As CEO, Mr. Brandt is currently involved in business development and with AOPA. (Brandt (Ability) Tr. 3756). He also has "ultimate responsibility with respect to the profitability" of Ability. (Brandt (Ability) Tr. 3757).

Response to Finding No. 3229:

Respondent has no specific response

3230. Ability operates ten facilities across Maryland, Pennsylvania and North Carolina where prosthetists and orthotists "evaluate, design, fit the device that's prescribed and then provide ongoing follow-up care and maintenance for that patient over the course of the lifetime of the device." (Brandt (Ability) Tr. 3742-43).

Response to Finding No. 3230:

Respondent has no specific response

3231. Ability has "roughly 43" employees, 18 of whom are certified prosthetists. (Brandt (Ability) Tr. 3743).

Response to Finding No. 3231:

Respondent has no specific response

William Carver, III

3232. William Carver, III is President and Chief Operating Officer of College Park Industries ("College Park"), a prosthetic manufacturer. (Carver, (College Park) Tr. 2003). Prior to his current position, Mr. Carver was the Director of Operations and the Operations Manager. (Carver, (College Park) Tr. 2003-04).

Response to Finding No. 3232:

Respondent has no specific response

3233. While Director of Operations, Mr. Carver was responsible for quality, shipping and receiving, returns, toolmaking, machining, and some of the manufacturing and engineering departments. (Carver, (College Park) Tr. 2004).

Response to Finding No. 3233:

Respondent has no specific response

3234. As Chief Operating Officer and President, Mr. Carver is currently in charge of the strategy, business plan, vision and public image of College Park. (Carver, (College Park) Tr. 2005-07). The executive team reports to him. (Carver, (College Park) Tr. 2006).

Response to Finding No. 3234:

Respondent has no specific response

3235. College Park manufactures and sells prosthetic feet for K1, K2 and K3 users, some mechanical knees, liners, endo components, and upper limb products such as myoelectric elbows, mechanical elbows, shoulder joints, electrodes, mechanical fingers and hands. (Carver (College Park) Tr. 2003). College Park's only knee is the Guardian knee which is a "safety knee" for K2 users. (Carver (College Park) Tr. 2012). College Park is developing the Capital hydraulic knee for K3 users. (Carver (College Park) Tr. 81-82).

Response to Finding No. 3235:

Complaint Counsel's proposed finding of fact is incomplete, as it fails to mention that [redacted]

3236. College Park has three manufacturing facilities in Boston, Massachusetts, Warren, Michigan and Mount Clemens, Michigan. (Carver, (College Park) Tr. 2010).

Response to Finding No. 3236:

Respondent has no specific response.

3237. Founded in 1986, College Park has approximately 130 employees. (Carver, (College Park) Tr. 2011).

Response to Finding No. 3237:

Respondent has no specific response.

Jeffrey Collins

3238. Jeffrey Collins is President of Cascade Orthopedic Supply and its Canadian subsidiary, OrtoPed ULC. (Collins (Cascade) Tr. 3270).

Response to Finding No. 3238:

Respondent has no specific response.

3239. "Cascade is a wholesale distributor of medical supplies and equipment, specifically serving certified prosthetists and orthotists in the United States. (Collins (Cascade) Tr. 3271). Cascade's 2017 revenue was approximately $100 million, with less than 5 percent coming from sales of prosthetic knees. (Collins (Cascade) Tr. 3288 (*in camera*)).

Response to Finding No. 3239:

Complaint Counsel's proposed finding of fact is misleading because it omits key information. Cascade serves 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).

3240. As President, Mr. Collins leads Cascade's directors and oversees the business. (Collins (Cascade) Tr. 3271).

Response to Finding No. 3240:

Complaint Counsel's proposed finding of fact is incomplete. Collins also oversees day-to-day management of his team, provides strategic planning efforts for the business, and performs other administrative tasks. (Collins, Tr. 3271). Collins speaks with Cascade's customers at least weekly, and discusses industry-related matters with customers. (Collins, Tr. 3272. Collins also discusses specific commercial questions and topics that are relevant to his commercial activities. (Collins, Tr. 3273). 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). 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). Collins became president of Cascade in 2006. (Collins, Tr. 3271).

Tracy Ell

3241. Tracey Ell is the owner and Chief Prosthetist at Mid-Missouri Orthotics and Prosthetics ("Mid-Missouri O&P"). (Ell (Mid-Missouri O&P) Tr. 1659). He has had that position for 18 years. (Ell (Mid-Missouri O&P) Tr. 1659).

Response to Finding No. 3241:

Respondent has no specific response.

3242. As owner of Mid-Missouri O&P, Mr. Ell coordinates referral sources, coordinates the fabrication facilities, supervises residents, fits orthotics and approves L codes prior to submissions for authorization of insurance. (Ell (Mid-Missouri O&P) Tr. 1662). As Chief

Prosthetists at Mid-Missouri O&P, Mr. Ell supervises the majority of all prosthetic fittings, coordinates resident training and fabrication. (Ell (Mid-Missouri O&P) Tr. 1662-63).

Response to Finding No. 3242:

Respondent has no specific response.

3243. Mr. Ell became a certified prosthetist in 1998 after obtaining a bachelor's from Truman State University, being trained at Northwestern University's medical school program in prosthetics and sitting for the national certification exam. (Ell (Mid-Missouri O&P) Tr. 1664-66). Mr. Ell also obtained a certification as a fitter in orthotics. (Ell (Mid-Missouri O&P) Tr. 1667).

Response to Finding No. 3243:

Respondent has no specific response.

3244. In addition to his positions at Mid-Missouri O&P, Mr. Ell does prosthetic claims review for the State of Missouri, educates prosthetic residents at the University of Missouri at their biweekly clinics and engages in resident education with the Veteran's Administration. (Ell (Mid-Missouri O&P) Tr. 1672-73).

Response to Finding No. 3244:

Respondent has no specific response.

3245. Mid-Missouri O&P was founded by Mr. Ell and his partner, Shawn Bright in 2000. (Ell (Mid-Missouri O&P) Tr. 1660). It has four clinics located in Columbia, Missouri, Jefferson City, Missouri, Rolla, Missouri and O'Fallon, Missouri. (Ell (Mid-Missouri O&P) Tr. 1660-61).

Response to Finding No. 3245:

Respondent has no specific response.

3246. Mid-Missouri O&P employs three certified prosthetists and one prosthetic resident. (Ell (Mid-Missouri O&P) Tr. 1661). These prosthetists fit between 30-50 mechanical knees each year and 10-20 MPKs each year. (Ell (Mid-Missouri O&P) Tr. 1676).

Response to Finding No. 3246:

Respondent has no specific response.

Mark Ford

3247. Mark Ford is President and Managing Partner of Prosthetic and Orthotic Associates ("POA"), a full-service orthotic and prosthetic patient care practice. (Ford (POA) Tr. 902). Mr. Ford has held this position since June of 2016. (Ford (POA) Tr. 902). As President and Managing Partner of POA, Mr. Ford oversees all the business operations and facilities, negotiates with manufacturer, and manages the partner team of the company and the profitability of the business. (Ford (POA) Tr. 902, 904-05).

Response to Finding No. 3247:

Respondent has no specific response.

3248. POA has three full-time clinics in Middletown, New York, Kingston, New York, and Poughkeepsie, New York and one part-time clinic in Mahwah, New Jersey. (Ford (POA) Tr. 905-06). POA employs 22 people. (Ford (POA) Tr. 906). Nine of them are prosthetists. (Ford (POA) Tr. 917).

Response to Finding No. 3248:

Respondent has no specific response.

3249. Mr. Ford has "almost twenty years of experience" in the prosthetics industry. (Ford (POA) Tr. 918). 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." (Ford (POA) Tr. 918-19).

Response to Finding No. 3249:

Complaint Counsel's proposed finding of fact is misleading because it omits crucial information regarding Ford's background. Ford is not a prosthetist, has never been a prosthetist, and is not personally involved in providing patient care. (Ford, Tr. 918-919).

3250. Prior to his work at POA, Mr. Ford was the marketing manager and then director of marketing at Ohio Willow Wood, director of marketing and VP of Operations for North America at Touch Bionics, and Director of Business Development and then Chief Business Development Officer and later President of OPIE Choice Network at O&P Digital Technologies. (Ford (POA) Tr. 907-910).

Response to Finding No. 3250:

Respondent has no specific response.

3251. Mr. Ford is "personally involved" in negotiations with prosthetic manufacturers and is responsible for managing the profitability of the POA business. (Ford (POA) Tr. 904-05).

Response to Finding No. 3251:

Complaint Counsel's proposed finding of fact is misleading because it omits crucial information regarding Ford's background. Ford is not a prosthetist, has never been a prosthetist, and is not personally involved in providing patient care. (Ford, Tr. 918-919).

3252. 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." (Ford (POA) Tr. 920-21, 923-24).

Response to Finding No. 3252:

Complaint Counsel's proposed finding of fact is misleading because it omits crucial information regarding Ford's background. Ford is not a prosthetist, has never been a prosthetist, and is not personally involved in providing patient care. (Ford, Tr. 918-919).

3253. 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." (Ford (POA) Tr. 924-25).

Response to Finding No. 3253:

Complaint Counsel's proposed finding of fact is misleading because it omits crucial information regarding Ford's background. Ford is not a prosthetist, has never been a prosthetist, and is not personally involved in providing patient care. (Ford, Tr. 918-919).

3254. Mr. Ford is generally familiar with the Otto Bock C-Leg 4 and Freedom Plié 3 "through their marketing, through attending their seminars at national meetings, through discussions with [POA] clinicians, [and] through their website." (Ford (POA) Tr. 948). Moreover, Mr. Ford personally attends the MPK manufacturer training sessions, in particular from Otto Bock, Freedom, and Össur. (Ford (POA) Tr. 948-49).

Response to Finding No. 3254:

Respondent has no specific response.

Dr. Kenton Kaufman

3255. Dr. Kenton Kaufman is the W. Wendel Hall, Jr. Musculoskeletal Research Professor, a professor of biomedical engineering, Director of the Motion Analysis Laboratory and is on staff as a consultant in orthopedic surgery, physiology and biomedical engineering departments at the Mayo Clinic. (Kaufman (Mayo) Tr. 808). In those roles, Dr. Kaufman is involved in research, clinical care and education. (Kaufman (Mayo) Tr. 809).

Response to Finding No. 3255:

Complaint Counsel's proposed finding of fact is incomplete to the extent it omits crucial information regarding Dr. Kaufman relevant to this case. In particular, 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).

3256. Additionally, Dr. Kaufman is on the editorial board for Prosthetics and Orthotics International, the official journal of the International Society for Prosthetics and Orthotics and the editorial board for Gait and Posture, the official journal of the Gait and Clinical Movement Analysis Society. (Kaufman (Mayo) Tr. 816). He is on the advisory board for the National Center for Medical Rehabilitation Research at NIH and the medical advisory board for Prosthetics 202, an initiative with the American Orthotic and Prosthetic Association. (Kaufman (Mayo) Tr. 816).

Response to Finding No. 3256:

Complaint Counsel's proposed finding of fact is incomplete to the extent it omits crucial information regarding Dr. Kaufman relevant to this case. In particular, 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).

3257. As Director of the Motion Analysis Laboratory at the Mayo Clinic, Dr. Kaufman is responsible for the operation, the quality of data, the final recommendations, the operations and the financial aspects of the laboratory. (Kaufman (Mayo) Tr. 812-13). He is also the principal investigator for most of the projects the laboratory takes on. (Kaufman (Mayo) Tr. 813).

Response to Finding No. 3257:

Complaint Counsel's proposed finding of fact is incomplete to the extent it omits crucial information regarding Dr. Kaufman relevant to this case. In particular, 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).

3258. Dr. Kaufman has published 250 peer-reviewed journal articles to date, of which, 11 involve prosthetic microprocessor knees in the last decade. (Kaufman (Mayo) Tr. 818-19).

Response to Finding No. 3258:

Respondent has no specific response.

3259. The Mayo Clinic, based in Rochester, Minnesota, is a nonprofit academic medical center that provides clinical care, research and education. (Kaufman (Mayo) Tr. 807). The clinic treats approximately 1.3 million patients each year and physicians from the clinic publish about 700,000 articles each year. (Kaufman (Mayo) Tr. 807).

Response to Finding No. 3259:

Respondent has no specific response.

3260. Dr. Kaufman received his Bachelor's and Master's degrees from South Dakota State University, and a Ph.D from North Dakota State University. (Kaufman (Mayo) Tr. 809).

Response to Finding No. 3260:

Respondent has no specific response.

3261. Before moving to the Mayo Clinic, Dr. Kaufman was the director of orthopedic research at the Children's Hospital in San Diego for seven years. (Kaufman (Mayo) Tr. 810).

Response to Finding No. 3261:

Respondent has no specific response.

Lieutenant Colonel Dr. Benjamin Kyle Potter

3262. Dr. Benjamin Kyle Potter works at Walter Reed National Military Medical Center in Bethesda, Maryland, as the Chief of the Department of Orthopedics and the Chief Orthopedic Surgeon for the Amputee Patient Care Program. (Potter (Walter Reed) Tr. 744).

Response to Finding No. 3262:

Respondent has no specific response.

3263. Dr. Potter has been Chief Orthopedic Surgeon for 10 years. In his role, he "personally perform[s] and/or supervise[s] the vast majority of the amputation surgery that goes on within the Department of Orthopedics and . . . tend[s] to follow the vast majority of the persons with limb loss recovery at Walter Reed once they become outpatients in the postsurgical setting." (Potter (Walter Reed) Tr. 744-735)

Response to Finding No. 3263:

Respondent has no specific response.

3264. Prior to his employment at Walter Reed, Dr. Potter received his Bachelor of Science from the United States Military Academy at West Point in 1997. He received his Doctorate of Medicine from the University of Chicago in 2001, and he did his orthopedic surgery residence at Walter Reed, graduating in 2007. (Potter (Walter Reed) Tr. 752).

Response to Finding No. 3264:

Respondent has no specific response.

3265. Dr. Potter also served in the United States Army, where he was eventually promoted to Lieutenant Colonel. He was deployed to Afghanistan twice in 2011 and 2016. (Potter (Walter Reed) Tr. 752-753).

Response to Finding No. 3265:

Respondent has no specific response.

3266. During his career, Dr. Potter performed over 100 amputations and has been involved in approximately 500. (Potter (Walter Reed) Tr. 754-755)

Response to Finding No. 3266:

Complaint Counsel's proposed finding of fact omits key information regarding Dr. Potter's background. 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). In particular, 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).

Kim De Roy

3267. Kim De Roy has been the Executive Vice President of Research and Development at Össur hf (Össur) since November of 2017. (De Roy (Össur) Tr. 3525-28). He was Vice President of Global Marketing, Prosthetics, for five years beginning in 2012, and Vice President of Sales, Prosthetics, Americas for four and a half years beginning in 2013. (De Roy (Össur)

Tr. 3528). He has worked in other positions at Össur since 2002. (De Roy (Össur) Tr. 3534).

Response to Finding No. 3267:

Respondent has no specific response.

3268. As Vice President of Sales, Prosthetics, Americas, Mr. De Roy was "responsible to oversee all sales-created activities for prosthetics in the Americas market" including MPKs and K3 mechanical knees. (De Roy (Össur) Tr. 3528-29). As Vice President of Global Marketing, Prosthetics, Mr. De Roy "oversaw the global activities in marketing for prosthetics." (De Roy (Össur) Tr. 3529).

Response to Finding No. 3268:

Respondent has no specific response.

3269. Mr. De Roy has personal experience with orthotics because he is a below the knee amputee. (De Roy (Össur) Tr. 3534). His academic background in orthotics includes a Bachelor's degree with prosthetics and orthotics and a Master's degree with physical therapy and rehabilitation. (De Roy (Össur) Tr. 3536).

Response to Finding No. 3269:

Respondent has no specific response.

3270. Headquartered in Iceland, Reykjavik, Össur manufactures a broad range of lower and upper limb prosthetics. (De Roy (Össur) Tr. 3537). Össur's U.S. headquarters is in Foothill Ranch, California. (De Roy (Össur) Tr. 3537). Össur employs "about 300-400" people in the United States. (De Roy (Össur) Tr. 3538).

Response to Finding No. 3270:

Respondent has no specific response.

3271. [redacted]

Response to Finding No. 3271:

Respondent has no specific response.

Keith Senn

3272. Keith Senn is the President of the Kentucky and Indiana operations of the Center for Orthotic and Prosthetic Care ("COPC"). (Senn (COPC) Tr. 149). Mr. Senn began working at COPC in January 1997 as its Chief Financial Officer. (Senn (COPC) Tr. 149-150).

Response to Finding No. 3272:

Respondent has no specific response.

3273. COPC is an orthotic and prosthetic clinic that provides "customer and off-the-shelf orthotic and prosthetic services to patients." COPC began operating with one clinic in Louisville, Kentucky in January 1997. (Senn (COPC) Tr. 149-150). Currently, COPC operates 25 clinics located in Kentucky, Indiana, North Carolina, New York, and Pennsylvania, including 8 clinic locations in Kentucky and Indiana. (Senn (COPC) Tr. 151-152, 157).

Response to Finding No. 3273:

Complaint Counsel's proposed finding of fact is incorrect. COPC is an orthotic and prosthetic clinic that provides "*custom* and off-the-shelf orthotic and prosthetic services to patients." (Senn, Tr. 149) (emphasis added).

3274. COPC has 120 employees, including approximately 50 employees who serve as either certified prosthetists, orthotists, or both. In its Indiana and Kentucky offices, COPC employs 15 clinical prosthetists and fits lower-limb prosthetics at each location. (Senn (COPC) Tr. 157-158).

Response to Finding No. 3274:

Complaint Counsel's proposed finding of fact is misleading. Senn testified that COPC has 50 clinical people; however, not all of them provide just prosthetics. (Senn, Tr. 158).

3275. As CFO, Mr. Senn helped develop COPC as a new business by overseeing its "financial side, human resources, payroll, purchasing, accounts payable, contracting, setting up offices, [and] setting up procedures." (Senn (COPC) Tr. 150). These responsibilities

included establishing guidelines for insurance reimbursement and compliance, as well as establishing a process for purchasing and accounts receivable. (Senn (COPC) Tr. 150-151).

Response to Finding No. 3275:

Respondent has no specific response.

3276. 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. (Senn (COPC) Tr. 151).

Response to Finding No. 3276:

Respondent has no specific response.

3277. As President, Mr. Senn helps create policy manuals to establish set procedures for patient care across the clinics in the Kentucky and Indiana regions. (Senn (COPC) Tr. 151-152). These policy manuals include a "purchasing guideline" listing preferred products for patients based on feedback from prosthetists across COPC's clinics. (Senn (COPC) Tr. 154-155). 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. (Senn (COPC) Tr. 165-166).

Response to Finding No. 3277:

Complaint Counsel's proposed finding of fact is misleading to the extent it omits key information regarding Senn's background. In particular, 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). Senn has never observed COPC patients with MPKs navigating terrain such as hills or stairs. (Senn, Tr. 173).

3278. Four employees in the Kentucky and Indiana region report directly to Mr. Senn, including the general manager, accounts receivable manager, and marketing staff. (Senn (COPC) Tr. 157-158). The general manager is a certified prosthetist who oversees the other prosthetists employed at COPC's clinics in the region. (Senn (COPC) Tr. 152-153). 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. (Senn (COPC) Tr. 157-158).

Response to Finding No. 3278:

Respondent has no specific response.

3279. In his roles at COPC, Mr. Senn directly interacts with patients to assist with payment and insurance issues as they arise. (Senn (COPC) Tr. 154). Mr. Senn previously interacted daily with patients during their visits and prosthetists when his office was located in a COPC clinic. (Senn (COPC) Tr. 152-153, 161).

Response to Finding No. 3279:

Complaint Counsel's proposed finding of fact is misleading to the extent it omits key information regarding Senn's background. In particular, 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). Senn has never observed COPC patients with MPKs navigating terrain such as hills or stairs. (Senn, Tr. 173).

3280. Mr. Senn also meets with sales representatives from MPK manufacturers to discuss products, outreach to COPC's prosthetists regarding training on devices, and other issues involving the sale of MPK products. (Senn (COPC) Tr. 161-162).

Response to Finding No. 3280:

Complaint Counsel's proposed finding of fact is inaccurate, as Senn testified that he interacts with sales representatives from MPK manufacturers, but did not testify that he met with such representatives. (Senn, Tr. 161).

1. Respondent's Witnesses

a) Respondent's Executives

Scott Schneider

3281. Scott Schneider is Otto Bock's Vice President of Government, Medical Affairs and Future Development. (Schneider (Otto Bock) Tr. 4260).

Response to Finding No. 3281:

Complaint Counsel's proposed finding of fact is incomplete—especially considering since December 2017, Schneider testified at trial for two full days, at three depositions, and at an investigative hearing. 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). Schneider also analyzes new technologies, new business models, and strategic opportunities. (Schneider, Tr. 4272). 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, Schneider fitted patients with prosthetic devices, including prosthetic knees. (Schneider, Tr. 4261, 4264). 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, Schneider sold the business to Ottobock in 2003. (Schneider, Tr. 4262-4263). 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, 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).

David Smith

3282. David Smith was CEO of Freedom from April 1, 2016 to September 2017. (Smith (HEP) Tr. 6408).

Response to Finding No. 3282:

Respondent has no specific response.

3283. Mr. Smith's employment at Freedom ended in September 2017, around the time of the Merger. (Smith (HEP) Tr. 6407).

Response to Finding No. 3283:

Complaint Counsel's proposed finding of fact is incomplete. In particular, Smith's tenure as Chairman and CEO of Freedom ended the Friday before the Acquisition. (PX05122, Smith, Dep. at 7). Prior to the Acquisition, Smith had been involved in approximately 130 to 150 merger and acquisition transactions. (Smith, Tr. 6412).

3284. Just before the Merger closed, Mr. Smith "was asked to resign." (Smith (HEP) Tr. 6518 (*in camera*)). Mr. Smith testified that if he had been asked to stay on as CEO of Freedom, he would have. (Smith (HEP) Tr. 6519 (*in camera*)).

Response to Finding No. 3284:

Respondent has no specific response, other than that Complaint Counsel's proposed finding of fact omits key information regarding Smith's background relevant to this case. *See* RFOF ¶¶ 73-74.

b) Lay Witnesses

Ryan Arbogast

3285. Ryan Arbogast is majority owner and CEO of Ohio Willow Wood Company. (Arbogast (Willow Wood) Tr. 4929).

Response to Finding No. 3285:

Respondent has no specific response.

3286. [redacted] (Arbogast (Ohio Willow Wood) Tr. 4991-92 (*in camera*)).

Response to Finding No. 3286:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

3287. [redacted] (RX-1042 (Otto Bock/OWW) at 030 (APA) (*in camera*); Arbogast (Ohio Willow Wood) Tr. 5098-99 (*in camera*)).

Response to Finding No. 3287:

Respondent has no specific response.

3288. [redacted] (RX-1042 (Otto Bock/OWW) at 030 (APA) (*in camera*); Arbogast (Ohio Willow Wood) Tr. 5100-01 (*in camera*)).

Response to Finding No. 3288:

Respondent has no specific response.

3289. [redacted]

[redacted] (RX-1042 (Otto Bock/OWW) at 030 (APA) (*in camera*); Arbogast (Ohio Willow Wood) Tr. 5100 (*in camera*)).

Response to Finding No. 3289:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

3290. [redacted] (RX-1042 (Otto Bock/OWW) at 030 (APA) (*in camera*); Arbogast (Ohio Willow Wood) Tr. 5101 (*in camera*)).

Response to Finding No. 3290:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

3291. [redacted] (RX-1042 (Otto Bock/OWW) at 030 (APA) (*in camera*); Arbogast (Ohio Willow Wood) Tr. 5101 (*in camera*)).

Response to Finding No. 3291:

Complaint Counsel's proposed finding of fact is misleading and duplicative of its proposed finding of fact no. 3289. [redacted]

[redacted]

3292. [redacted] (RX-1042 (Otto Bock/OWW) at 030 (APA) (*in camera*); Arbogast (Ohio Willow Wood) Tr. 5101-02 (*in camera*)).

Response to Finding No. 3292:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

3293. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5103-04 (*in camera*); PX03021 (Ohio Willow Wood) (*in camera*)).

Response to Finding No. 3293:

Complaint Counsel's proposed finding of fact is misleading, both in content and chronology. [redacted]

3294. [redacted] (PX05159 (Arbogast (Ohio Willow Wood) Dep. at 150) (*in camera*)).

Response to Finding No. 3294:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

3295. [redacted] (PX05159 (Arbogast (Ohio Willow Wood) Dep. at 33-34) (*in camera*)).

Response to Finding No. 3295:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

3296. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5091 (*in camera*)).

Response to Finding No. 3296:

Complaint Counsel's proposed finding of fact is argumentative to the extent it [redacted]

3297. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5090-91 (*in camera*)).

Response to Finding No. 3297:

Complaint Counsel's proposed finding of fact is misleading because [redacted]

3298. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5009) (*in camera*)).

Response to Finding No. 3298:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

3299. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5187 (*in camera*)).

Response to Finding No. 3299:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

3300. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5186-87 (*in camera*)).

Response to Finding No. 3300:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

3301. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5187 (*in camera*)).

Response to Finding No. 3301:

Complaint Counsel's proposed finding of fact is inaccurate and misleading. [redacted]

Jon Hammack

3302. Jon Hammack is a Managing Director at Moelis & Company. (Hammack (Moelis) Tr. 6062-063).

Response to Finding No. 3302:

Complaint Counsel's proposed finding of fact is incomplete because it omits the fact that Moelis is an independent investment bank. (Hammack, Tr. 6062–6063). Further, it omits key information regarding Hammack's background. *See* Ottobock's RFOF ¶ 77.

3303. Mr. Hammack testified that he was the lead at Moelis managing the client relationship with Freedom. (Hammack (Moelis) Tr. 6064).

Response to Finding No. 3303:

Complaint Counsel's proposed finding of fact is incomplete because it omits the fact that Moelis is an independent investment bank. (Hammack, Tr. 6062–6063). Further, it omits key information regarding Hammack's background. *See* Ottobock's RFOF ¶ 77.

3304. Mr. Hammack testified that Moelis was formally engaged by Freedom in May 2017. (Hammack (Moelis) Tr. 6063). Moelis served as Freedom's financial advisor in exploring the sale of the company. (Hammack (Moelis) Tr. 6065). Moelis also advised Freedom on potential refinancing alternatives. (Hammack (Moelis) Tr. 6065). [redacted] (Hammack (Moelis) Tr. 6068) (*in camera*).

Response to Finding No. 3304:

Complaint Counsel's proposed finding of fact is incomplete because it omits the fact that Moelis is an independent investment bank. (Hammack, Tr. 6062–6063). Further, it omits key information regarding Hammack's background. *See* Ottobock's RFOF ¶ 77.

3305. [redacted] (Hammack (Moelis) Tr. 6085-86) (*in camera*). Mr. Hammack, along with others at Moelis, also had responsibility for contacting potential refinancing partners on behalf of Freedom. (Hammack (Moelis) Tr. 6071).

Response to Finding No. 3305:

Complaint Counsel's proposed finding of fact is incomplete because it omits the fact that Moelis is an independent investment bank. (Hammack, Tr. 6062–6063). Further, it omits key information regarding Hammack's background. *See* Ottobock's RFOF ¶ 77. In particular, Hammack has worked at Moelis for five years, and has sixteen years' of experience in the investment bank industry. (Hammack, Tr. 6063). 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, 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).

John Matera

3306. John Matera is Chief Operating Officer of Ohio Willow Wood Company. (Matera (Ohio Willow Wood) Tr. 5224-25).

Response to Finding No. 3306:

Respondent has no specific response.

3307. Mr. Matera joined Ohio Willow Wood in October 2012 as Senior Director of Operations. (Matera (Ohio Willow Wood) Tr. 5296). Mr. Matera's title changed approximately five years ago but his responsibilities have not changed. (Matera (Ohio Willow Wood) Tr. 5296).

Response to Finding No. 3307:

Respondent has no specific response.

3308. Ohio Willow Wood is the first prosthetics company that Mr. Matera has worked for in his career. (Matera (Ohio Willow Wood) Tr. 5296). Mr. Matera has approximately six years of experience in the prosthetics industry. (Matera (Ohio Willow Wood) Tr. 5296).

Response to Finding No. 3308:

Complaint Counsel's proposed finding of fact is incomplete. Prior to joining Willow Wood, Matera worked for General Electric Company in operations positions, with Tosoh SMD as the operations manager and purchasing manager, and at Diamond. RFOF ¶ 47 (citing Matera, Tr. 5225).

3309. Mr. Matera has no prior experience with microprocessor knees. (Matera (Ohio Willow Wood) Tr. 5296).

Response to Finding No. 3309:

Complaint Counsel's proposed finding of fact is misleading. Willow Wood already manufactures prosthetic knees. RFOF ¶ 44. [redacted]

3310. Mr. Matera has no prior experience in the assembly or manufacture of microprocessor knees. (Matera (Ohio Willow Wood) Tr. 5296).

Response to Finding No. 3310:

Complaint Counsel's proposed finding of fact is misleading. Willow Wood already manufactures prosthetic knees. RFOF ¶ 44. [redacted]

3311. Mr. Matera has no experience troubleshooting issues arising during the development of a microprocessor knee. (Matera (Ohio Willow Wood) Tr. 5296-297).

Response to Finding No. 3311:

Complaint Counsel's proposed finding of fact is misleading. Willow Wood already manufactures prosthetic knees. RFOF ¶ 44. [redacted]

[redacted]

3312. Mr. Matera has no experience in handling repairs of microprocessor knees. (Matera (Ohio Willow Wood) Tr. 5297).

Response to Finding No. 3312:

Complaint Counsel's proposed finding of fact is misleading. Willow Wood already manufactures prosthetic knees. RFOF ¶ 44. [redacted]

3313. During his time at Ohio Willow Wood, Mr. Matera has not been involved in any acquisitions. (Matera (Ohio Willow Wood) Tr. 5305).

Response to Finding No. 3313:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

3314. In his deposition, Mr. Matera testified that his experience involving relocation of assets during his never involved a transition services agreement (PX05156 (Matera (Ohio Willow Wood) Dep. at 41)).

Response to Finding No. 3314:

Respondent has no specific response.

3315. [redacted] (Matera (Ohio Willow Wood) Tr. 5306-07).

Response to Finding No. 3315:

Respondent has no specific response.

3316. [redacted] (Matera (Ohio Willow Wood) Tr. 5308-09) (*in camera*) (*in camera*).

Response to Finding No. 3316:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

3317. [redacted] (Matera (Ohio Willow Wood) Tr. 5309) (*in camera*).

Response to Finding No. 3317:

Complaint Counsel's proposed finding of fact is incomplete. [redacted]

3318. [redacted]

[redacted] (Matera (Ohio Willow Wood) Tr. 5311) (*in camera*).

Response to Finding No. 3318:

Respondent has no specific response.

3319. [redacted] (Matera (Ohio Willow Wood) Tr. 5317) (*in camera*).

Response to Finding No. 3319:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

3320. [redacted] (PX05156 (Matera (Ohio Willow Wood) Dep. at 58-59)) (*in camera*).

Response to Finding No. 3320:

Complaint Counsel's proposed finding of fact is misleading. [redacted]

[redacted]

3321. [redacted] (Matera (Ohio Willow Wood) Tr. 5322) (*in camera*).

Response to Finding No. 3321:

Respondent has no specific response.

3322. [redacted] (Matera (Ohio Willow Wood) Tr. 5324) (*in camera*).

Response to Finding No. 3322:

Respondent has no specific response.

3323. [redacted] (Matera (Ohio Willow Wood) Tr. 5326-27) (*in camera*).

Response to Finding No. 3323:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

3324. [redacted] (Matera (Ohio Willow Wood) Tr. 5349) (*in camera*).

Response to Finding No. 3324:

Complaint Counsel's proposed finding of fact is incomplete and misleading. [redacted]

3325. [redacted] (Matera (Ohio Willow Wood) Tr. 5361-62) (*in camera*).

Response to Finding No. 3325:

Complaint Counsel's proposed finding of fact is grossly inaccurate and should not be adopted by the Court. [redacted]

Bradley Mattear

3326. Bradley Mattear Vice President of Orthotics at Proteor, Inc. (d/b/a Proteor and Nabtesco USA). (Mattear (Proteor Inc.) Tr. 5710). At the time of his deposition in April 2018, he was the Managing Director USA of Proteor Inc. (Mattear (Proteor, Inc.) Tr. 5518-19).

Response to Finding No. 3326:

Respondent has no specific response.

3327. Proteor Inc. is a distributor of prosthetic goods manufactured by Proteor Holdings ("Proteor France") and Nabtesco Corporation. (Mattear (Proteor Inc.) Tr. 5713-14). Nabtesco Corporation is located in Kobe, Japan. (Mattear (Proteor Inc.) Tr. 5714).

Response to Finding No. 3327:

Respondent has no specific response.

3328. At the time of his deposition, in April 2018, Proteor Inc. operated a single location in Muskego, Wisconsin and employed five employees including Mr. Mattear. (Mattear (Proteor Inc.) Tr. 5712-13).

Response to Finding No. 3328:

Complaint Counsel's proposed finding of fact is incomplete. 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).

3329. Proteor Inc. has moved from Muskego, Wisconsin to Tempe, Arizona. (Mattear (Proteor Inc.) Tr. 5519). Mr. Mattear testified that this move occurred on August 31, 2018. (Mattear (Proteor Inc.) Tr. 5519).

Response to Finding No. 3329:

Complaint Counsel's proposed finding of fact is incomplete. 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).

3330. Mr. Mattear is a certified prosthetist assistant. (Mattear (Proteor, Inc.) Tr. 5511). He testified that, as a prosthetist assistant, he can "evaluate," "fit, "adjust," "modify," but he cannot sign forms associated with "insurance purposes." (Mattear (Proteor, Inc.) Tr. 5511-

12). In comparison to a prosthetist assistant, a prosthetist "went to a little more school than" Mr. Mattear. (Mattear (Proteor, Inc.) Tr. 5511).

Response to Finding No. 3330:

Respondent has no specific response.

3331. Mr. Mattear estimated that, as of September 2018, he had worked in the prosthetics and orthotics industry for roughly 15 to 17 years. (Mattear (Proteor, Inc.) Tr. 5510).

Response to Finding No. 3331:

Respondent has no specific response, other than that 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, 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, 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, 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).

3332. Proteor Inc. is owned by Proteor Holdings. (Mattear (Proteor Inc.) Tr. 5712). Proteor Holdings is entirely owned by family members. (Mattear (Proteor Inc.) Tr. 5712). Nabtesco Corporation does not own Proteor Inc. (Mattear (Proteor Inc.) Tr. 5714).

Response to Finding No. 3332:

Respondent has no specific response.

3333. Mr. Mattear reports directly to a supervisor at Proteor Holdings. (Mattear (Proteor Inc.) Tr. 5712). At the time of his deposition in April 2018, Mr. Mattear reported to Frederic Desprez from Proteor Holdings who is located in Dijon, France. (Mattear (Proteor Inc.) 5716-17). He currently reports to Edouard Archambeaued, the COO of Proteor Holdings. (Mattear (Proteor Inc.) Tr. 5717).

Response to Finding No. 3333:

Respondent has no specific response.

Michael Oros

3334. Michael Oros is the President and CEP of Scheck & Siress Prosthetics, Incorporated. (Oros (Scheck & Siress) Tr. 4771).

Response to Finding No. 3334:

Complaint Counsel's proposed finding of fact is inaccurate and incomplete. Mr. Oros is a certified prosthetist and orthotist and is the president and *CEO* of Scheck & Siress. (Oros, Tr. 4774, 4771). 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, Oros was a clinical lab manager of one of its facilities for approximately six or seven years. (Oros, Tr. 4773).

3335. Mr. Oros testified that the last time he fit prosthetic devices on patients on a regular basis was in 2016. (Oros (Scheck & Siress) Tr. 4849). Mr. Oros testified that he visits a pediatric clinic half a day a week but is "not involved in the ongoing care of those patients after [he] see[s] them." (Oros (Scheck & Siress) Tr. 4850).

Response to Finding No. 3335:

Complaint Counsel's proposed finding of fact is inaccurate and incomplete. Mr. Oros is a certified prosthetist and orthotist. (Oros, Tr. 4774). Mr. Oros testified that he does "[a]n occasional spot duty" fitting of patients with a prosthetic device. (Oros, Tr. 4849).

3336. Mr. Oros testified that he has not personally tested or fit a Nabtesco knee on a patient. (Oros (Scheck & Siress) Tr. 4868). At the time of his deposition on March 29, 2018, Mr. Oros was not aware of any Nabtesco Allux knees being fit at Scheck & Siress. (Oros (Scheck & Siress) Tr. 4867), (Oros (Scheck & Siress) Dep. at 135).

Response to Finding No. 3336:

Complaint Counsel's proposed finding of fact is misleading. At trial, while Oros testified that he has not personally fit any Nabtesco knees on patients, he did testify that one or two Nabtesco Allux knees may have been fit at Scheck & Siress. (Oros, Tr. 4867).

3337. At the time of his deposition on March 29, 2018, Mr. Oros was not aware of any microprocessor knee product offered by DAW. (Oros (Scheck & Siress) Tr. 4868.

Response to Finding No. 3337:

Complaint Counsel's proposed finding of fact is misleading. At trial, Oros testified that he was aware that DAW was a manufacturer of MPKs. (Oros, Tr. 4868).

3338. Mr. Oros was the President of AOPA when the organization sponsored and released the RAND Study on the health economic benefits of MPKs compared to non-MPKs. (Oros (Scheck & Siress) Tr. 4891-92). Mr. Oros testified that he was involved with the RAND study from "start to completion" serving as the clinical expert in that – in the work group." (Oros (Scheck & Siress) Tr. 4893-94).

Response to Finding No. 3338:

Respondent has no specific response.

3339. 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. (Oros (Scheck & Siress) Tr. 4904; (Oros (Scheck & Siress) Dep. at 231-232).

Response to Finding No. 3339:

Respondent has no specific response.

3340. Mr. Oros testified that within the past year Scheck & Siress entered into a partnership agreement with Otto Bock. (Oros (Scheck & Siress) Tr. 4890-91); (Oros (Scheck & Siress) Dep. at 232-33). Mr. Oros testified that one of the goals of the partnership was to develop the health economic argument for the service that Scheck & Siress delivers. (Oros (Scheck & Siress) Tr. 4890-91), (PX05134 (Oros (Scheck & Siress) Dep. at 232-33).

Response to Finding No. 3340:

Respondent has no specific response.

3341. Mr. Oros testified that Scheck & Siress will work with Otto Bock on "one-off projects on a new foot" or "a new knee." (PX05134 (Oros (Scheck & Siress) Dep. at 235).

Response to Finding No. 3341:

Respondent has no specific response.

3342. Mr. Oros testified that Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs, and Future Development, asked if he "[w]ould be willing to testify on behalf of Ottobock" in this proceeding. (PX05134 (Oros (Scheck & Siress) Dep. at 235-36).

Response to Finding No. 3342:

Respondent has no specific response.

Scott Sabolich

3343. Scott Sabolich is the owner and Clinical Director of Scott Sabolich Prosthetics and Research ("SSPR"). (Sabolich (SSPR) Tr. 5788).

Response to Finding No. 3343:

Complaint Counsel's proposed finding of fact is incomplete. SSPR is a prosthetics-only facility which was founded in 1947 by 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). Sabolich has been the owner of SSPR since May 1999. (Sabolich, Tr. 5790). He has been involved in the US Paralympics since 1996. (Sabolich, Tr. 5812).

3344. Mr. Sabolich testified that he does everything that he can every day to keep his clinic and Otto Bock moving forward. (Sabolich (Sabolich Prosthetics & Research) Tr. 5875 (*in camera*)); (Sabolich (SSPR) Tr. 5936). Mr. Sabolich is very concerned to make sure that Otto Bock and his company grow together. (Sabolich (SSPR) Tr. 5924); (Sabolich (SSPR) Dep. at 97-98 (*in camera*)) (testifying that he is "very concerned to make sure that [Otto Bock] and his company continue to grow."); (Sabolich (SSPR) Dep. at 242-243) (testifying that "I'm doing everything I can every day to keep our companies moving forward. We've got to work together in this craziness. I'm not a manufacturer and they're not a prosthetist, but together we're stronger and we keep moving forward.").

Response to Finding No. 3344:

Respondent has no specific response.

3345. Mr. Sabolich testified that Otto Bock asked him to testify in this matter. (Sabolich (SSPR) Tr. 5935); (Sabolich (SSPR) Dep. at 241). Scott Schneider, Otto Bock's Vice President of Government, Medical Affairs, and Future Development, asked him. (Sabolich (SSPR) Tr. 5935); (Sabolich (SSPR) Dep. at 241) (testifying that "Head of medical care, Scott Schneider, put me in contact with Erica Fruiterman.").

Response to Finding No. 3345:

Respondent has no specific response.

3346. Mr. Sabolich testified that he met with Respondent's counsel, Sean and Simeon, for "maybe three hours" the Wednesday before his trial testimony (Sabolich (SSPR) Tr. 5935-36).

Response to Finding No. 3346:

Complaint Counsel's proposed finding of fact is irrelevant.

3347. Mr. Sabolich testified that he agreed to testify at this trial because Otto Bock does a lot for him so he tries to do a lot for Otto Bock. (Sabolich (SSPR) Tr. 5936); (Sabolich (SSPR)

Dep. at 242-243) (testifying that he agreed to testify because "Ottobock [sic] does a lot for me, I try to do a lot for Ottobock [sic].").

Response to Finding No. 3347:

Respondent has no specific response.

3348. Mr. Sabolich testified that "Sabolich Prosthetics is a clinical partner of Otto Bock." (Sabolich (SSPR) Tr. 5925); (Sabolich (SSPR) Dep. at 102-104) (testifying that he formed a "clinical partnership with Otto Bock").

Response to Finding No. 3348:

Respondent has no specific response.

3349. Mr. Sabolich testified that his clinical partnership with Otto Bock has been going on about five years though he is "not sure of the exact date." (Sabolich (SSPR) Tr. 5928); (Sabolich (SSPR) Dep. at 102-104) (testifying that the clinical partnership has been going on about five years).

Response to Finding No. 3349:

Respondent has no specific response.

3350. Mr. Sabolich testified that Otto Bock does product releases out of his clinic. (Sabolich (SSPR) Tr. 5925); (Sabolich (SSPR) Dep. at 97-98).

Response to Finding No. 3350:

Respondent has no specific response.

3351. Mr. Sabolich testified that he has done Face Book Live events from his clinic with Otto Bock. (Sabolich (SSPR) Tr. 5925); (Sabolich (SSPR) Dep. at 97-98).

Response to Finding No. 3351:

Respondent has no specific response.

3352. Mr. Sabolich testified that Otto Bock has done photo shoots at his clinic using his patients. (Sabolich (SSPR) Tr. 5925); (Sabolich (SSPR) Dep. at 97-98).

Response to Finding No. 3352:

Respondent has no specific response.

3353. Mr. Sabolich testified that Otto Bock has included photos from photos taken at Sabolich Prosthetics in Otto Bock ads. (Sabolich (SSPR) Tr. 5925); (Sabolich (SSPR) Dep. at 97-98).

Response to Finding No. 3353:

Respondent has no specific response.

3354. Mr. Sabolich testified that he beta-tests products for Otto Bock as part of his clinical partnership. (Sabolich (SSPR) Tr. 5928); (Sabolich (SSPR) Dep. at 105). He testified that he tests Otto Bock products before they are released to the general public. (Sabolich (SSPR) Tr. 5928); (Sabolich (SSPR) Dep. at 105).

Response to Finding No. 3354:

Respondent has no specific response.

3355. Mr. Sabolich tests Otto Bock products on his patients. (Sabolich (SSPR) Tr. 5928-29); (Sabolich (SSPR) Dep. at 105). Mr. Sabolich testified that he provides feedback to Otto Bock about the tested products. (Sabolich (SSPR) Tr. 5929); (Sabolich (SSPR) Dep. at 105). Otto Bock accepts that feedback from him. (Sabolich (SSPR) Tr. 5929); (Sabolich (SSPR) Dep. at 105).

Response to Finding No. 3355:

Respondent has no specific response.

3356. Mr. Sabolich testified that as of March 2018, he was product testing feet for Otto Bock. (Sabolich (SSPR) Tr. 5929); (PX05132 (Sabolich (SSPR) Dep. at 239-240).

Response to Finding No. 3356:

Respondent has no specific response.

3357. Mr. Sabolich testified that he "sure did" help Otto Bock obtain a prosthetic foot from another manufacturer to assist Otto Bock in development of its feet. (Sabolich (SSPR) Tr. 5929); (Sabolich (SSPR) Dep. at 240) (testifying that Otto Bock requested that Mr. Sabolich provide them with prosthetic feet from another manufacturer)).

Response to Finding No. 3357:

Complaint Counsel's proposed finding of fact is incomplete. Sabolich obtained the other manufacturer's foot "after [Sabolich] asked [the Ottobock representative] to try to beat the foot. [Sabolich] said that [Ottobock's] feet aren't really that good, and if you can make a foot as good as the Pro-Flex XC that [Sabolich] and the rest of the world would buy it. And [the Ottobock representative] asked me to acquire one, and [Sabolich] gladly did so." (Sabolich, Tr. 5929).

3358. Mr. Sabolich testified that Michael Leach of Otto Bock asked him to obtain an Össur Pro-Flex XC foot for him and so he "gladly did so." (Sabolich (SSPR) Tr. 5929); (Sabolich (SSPR) Dep. at 240) (testifying that "He asked me would I buy one and sell it to him, so I did."). At the time of the request in October 2017, Mr. Leach worked for Otto Bock's R&D division. (Sabolich (SSPR) Tr. 5929); Sabolich (SSPR) Dep. at 240).

Response to Finding No. 3358:

Complaint Counsel's proposed finding of fact is incomplete. Sabolich obtained the other manufacturer's foot "after [Sabolich] asked [the Ottobock representative] to try to beat the foot. [Sabolich] said that [Ottobock's] feet aren't really that good, and if you can make a foot as good as the Pro-Flex XC that [Sabolich] and the rest of the world would buy it. And [the Ottobock representative] asked me to acquire one, and [Sabolich] gladly did so." (Sabolich, Tr. 5929).

3359. Mr. Sabolich testified that his company bought the Össur foot on behalf of Otto Bock. (Sabolich (SSPR) Tr. 5930).

Response to Finding No. 3359:

Complaint Counsel's proposed finding of fact is incomplete. Sabolich obtained the other manufacturer's foot "after [Sabolich] asked [the Ottobock representative] to try to beat the foot. [Sabolich] said that [Ottobock's] feet aren't really that good, and if you can make a foot as good as the Pro-Flex XC that [Sabolich] and the rest of the world would buy it. And [the Ottobock representative] asked me to acquire one, and [Sabolich] gladly did so." (Sabolich, Tr. 5929).

3360. Mr. Leach of Otto Bock emailed Mr. Sabolich to ask him to order Össur feet for Otto Bock: "Recently, Össur has decided to pay a little closer attention and will not sell us feet…we still have a need to source the feet and was wondering if you would be willing to order them for us, send them to us along with an invoice so we can pay ASAP for your support." (PX01339 (Otto Bock) at 003 (*in camera*)).

Response to Finding No. 3360:

Respondent has no specific response, other than that this exchange clearly shows Ottobock's commitment to innovation.

3361. When directing his employee to order the Össur foot for Otto Bock, Mr. Sabolich instructed, "Please read email below from my good friend Michael Leach at Ottobock [sic] R&D in Salt Lake. They need some Össur feet for testing and can't order them. I need SSPR to order these two feet and send it with the invoice for the feet, (our cost) directly to Michael at Salt Lake City, Utah. Don't give Össur any patient name. Do not tell them they are for Otto Bock." (PX01339 (Otto Bock) at 003 (*in camera*)).

Response to Finding No. 3361:

Respondent has no specific response, other than that this exchange clearly shows Ottobock's commitment to innovation.

3362. Mr. Sabolich testified that he uses Otto Bock's All Claims division at part of his partnership with Otto Bock. (Sabolich (SSPR) Tr. 5930); (Sabolich (SSPR) Dep. at 108-110). This allows Mr. Sabolich to use Otto Bock contracts with private insurance companies when his clinic does not have a contract with a particular insurer like Aetna or UnitedHealthcare. (Sabolich (SSPR) Tr. 5934); (Sabolich (SSPR) Dep. at 110).

Response to Finding No. 3362:

Respondent has no specific response.

3363. Mr. Sabolich testified that he speaks to other clinics who are exploring partnerships with Otto Bock about his experience as an Otto Bock clinical partner. (Sabolich (SSPR) Tr. 5934-35); (Sabolich (SSPR) Dep. at 103).

Response to Finding No. 3363:

Respondent has no specific response.

3364. Mr. Sabolich tells Otto Bock that he "will do my best to try to get them on board with our partnership program[.]" (PX01911 (Otto Bock) at 002). Mr. Sabolich testified that he tries to get them on board with Otto Bock's partnership program. (Sabolich (SSPR) Tr. 5935); (Sabolich (SSPR) Dep. at 103) (testifying that he tries to "do his best to try to get them on board with [Otto Bock's] partnership program.").

Response to Finding No. 3364:

Respondent has no specific response, other than to note that Complaint Counsel's proposed finding of fact relies upon a document which was not used at trial and thus was not subject to cross-examination before the Court.

3365. Mr. Sabolich testified that he spoke to Scheck & Siress about the Otto Bock partnership program. (Sabolich (SSPR) Tr. 5935). Mr. Sabolich testified that Scheck & Siress eventually joined the partnership. (Sabolich (SSPR) Tr. 5935); (Sabolich (SSPR) Dep. at 103).

Response to Finding No. 3365:

Respondent has no specific response.

3366. Mr. Sabolich has an "Otto Bock Value Rewards Program Agreement" with Otto Bock. (RX0393 (Otto Bock) (*in camera*)).

Response to Finding No. 3366:

Respondent has no specific response.

3367. Mr. Sabolich's "Otto Bock Value Rewards Program" agreement contains a "Customer Commitment" for Mr. Sabolich "[t]o continue collaborating with Otto Bock in order to provide high quality products and services to every patient." (RX0393 (Otto Bock) (*in camera*)). Mr. Sabolich testified that this is a "rewards program" to "give [Otto Bock] more market share." (Sabolich (SSPR) Tr. 5877 (*in camera*)).

Response to Finding No. 3367:

Respondent has no specific response.

3368. In his deposition, Mr. Sabolich testified that, "We have a commitment agreement with Ottobock [sic] that we will try to use their parts to give them more market shares." (Sabolich (SSPR) Dep. at 95).

Response to Finding No. 3368:

Respondent has no specific response.

3369. Under his Otto Bock Value Rewards Program, Mr. Sabolich receives rebates as his purchasing volume of Otto Bock products increases so that "the more Otto Bock parts [he] buy[s], the more rebate" that he gets. (Sabolich (SSPR) Tr. 5878 (*in camera*)).

Response to Finding No. 3369:

Respondent has no specific response, other than that these rebates are quite common in many industries.

3370. Under his Otto Bock Value Rewards Program, Mr. Sabolich receives "special C-Leg 4 pricing to all Sabolich facilities." (RX0393 (Otto Bock) (*in camera*)).

Response to Finding No. 3370:

Respondent has no specific response.

3371. Mr. Sabolich testified that C-Leg 4 is the "biggest ticket" item in dollar value that he purchases from Otto Bock. (Sabolich (SSPR) Tr. 5878 (*in camera*)); (Sabolich (SSPR) Dep. at 94-95) (testifying that C-Leg 4 is specifically called out in the agreement because "that the biggest ticket item we purchase and that's the one that we've tried to get better discounting on.").

Response to Finding No. 3371:

Respondent has no specific response.

3372. Mr. Sabolich testified that "39 percent" of his business goes to Otto Bock. (Sabolich (SSPR) Tr. 5880 (*in camera*)). Mr. Sabolich further testified that "most of my money goes to them, 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." (Sabolich (SSPR) Tr. 5880 (*in camera*)); (Sabolich (SSPR) Tr. 5924) (agreeing that most of his money goes to Otto Bock); (Sabolich (SSPR) Dep. at 97-98 (*in camera*)).

Response to Finding No. 3372:

Respondent has no specific response.

3373. Mr. Sabolich testified that he is involved in research projects with Otto Bock. (Sabolich (SSPR) Tr. 5882). Mr. Sabolich testified about an "outcomes study" that he is "working on with Otto Bock" and that "Dr. Kannenberg and Russ Lundstrom collect our data, collaborate on our data to purpose it" for a talk being given in Vancouver. (Sabolich (SSPR) Tr. 5882).

Response to Finding No. 3373:

Respondent has no specific response.

3374. Mr. Sabolich testified that, for the outcomes study, Mr. Lundstrom "takes all of our data and deciphers it into appreciable difference, and then Dr. Kannenberg with his Ph.D. can publish it as actual research findings." (Sabolich (SSPR) Tr. 5882).

Response to Finding No. 3374:

Respondent has no specific response, other than that this quote attributable to Sabolich appears at (Oros, Tr. 5883).

3375. Mr. Sabolich has been purchasing Otto Bock products for a long time. (Sabolich (SSPR) Tr. 5924).

Response to Finding No. 3375:

Respondent has no specific response.

3376. Mr. Sabolich testified that he's known Brad Ruhl of Otto Bock "for quite a while, certainly I think more than ten years." (Sabolich (SSPR) Tr. 5924); (Sabolich (SSPR) Dep. at 96) (testifying that he has known Brad Ruhl "10 years or more.").

Response to Finding No. 3376:

Respondent has no specific response.

3377. Mr. Sabolich testified that Walter Governor, formerly of Otto Bock, was his "first rep" and he has known Mr. Governor a "very long time." (Sabolich (SSPR) Tr. 5924); (Sabolich (SSPR) Dep. at 96).

Response to Finding No. 3377:

Respondent has no specific response.

3378. Mr. Sabolich further testified that he works directly with Cali Solorio of Otto Bock. (Sabolich (SSPR) Tr. 5924); (Sabolich (SSPR) Dep. at 97-98).

Response to Finding No. 3378:

Respondent has no specific response.

3379. Mr. Sabolich testified that he works with the Otto Bock medical care team, including Scott Schneider, former Otto Bock employee Adam McPherson, Russ Lundstrom, and Dr. Andreas Kannenberg. (Sabolich (SSPR) Tr. 5926); (Sabolich (SSPR) Dep. at 97-98).

Response to Finding No. 3379:

Respondent has no specific response.

3380. Mr. Sabolich testified that Dr. Kannenberg of Otto Bock trained Mr. Sabolich's outcomes testing team. (Sabolich (SSPR) Tr. 5926).

Response to Finding No. 3380:

Respondent has no specific response.

3381. Mr. Sabolich testified that he talks about strategic positions of his clinics with Brad Ruhl of Otto Bock. (Sabolich (SSPR) Tr. 5926); (Sabolich (SSPR) Dep. at 97-98).

Response to Finding No. 3381:

Respondent has no specific response.

3382. Mr. Sabolich testified that Brad Ruhl influenced him in deciding to open a Sabolich clinic in Dallas. (Sabolich (SSPR) Tr. 5926-27); (Sabolich (SSPR) Dep. at 97-98) (testifying that "He's the one that helped me decide[] I should go to Dallas").

Response to Finding No. 3382:

Respondent has no specific response.

3383. Mr. Sabolich testified that he has met with Hans Georg Näder, the owner of Otto Bock. (Sabolich (SSPR) Tr. 5928); (Sabolich (SSPR) Dep. at 97-98).

Response to Finding No. 3383:

Respondent has no specific response.

3384. Mr. Sabolich testified that Otto Bock invited him to tour its facilities in Duderstadt, Germany. (Sabolich (SSPR) Tr. 5928); (Sabolich (SSPR) Dep. at 106). He also visited Otto Bock's R&D facilities in Vienna. (Sabolich (SSPR) Tr. 5928).

Response to Finding No. 3384:

Respondent has no specific response.

Jack Sanders

3385. Jack Sanders is a senior clinical program consultant at United Healthcare, a subsidiary of United Health Group. (Sanders (United) Tr. 5371).

Response to Finding No. 3385:

Respondent has no specific response.

3386. Mr. Sanders has held this position at United Healthcare for just over five years. (Sanders (United) Tr. 5371).

Response to Finding No. 3386:

Respondent has no specific response.

3387. As part of Mr. Sanders's responsibilities, he provides training to the members of United's staff that are charged with reviewing prior-authorization requests and reimbursement claims. (Sanders (United) Tr. 5463-64).

Response to Finding No. 3387:

Respondent has no specific response.

3388. The clinical staff that Mr. Sanders trains consists of thousands of nurses, as well as hundreds of physicians (who are referred to internally as medical directors). (Sanders (United) Tr. 5463-64).

Response to Finding No. 3388:

Respondent has no specific response.

3389. United Healthcare provides coverage for prosthetic devices and related services, including microprocessor knees. (Sanders (United) Tr. 5465). As a result, Mr. Sanders provides training to his clinical staff on microprocessor knees. (Sanders (United) Tr. 5464). This

training includes, among other things, the current state of the equipment and offerings for microprocessor knees available in the marketplace. (Sanders (United) Tr. 5464).

Response to Finding No. 3389:

Respondent has no specific response, other than that Sanders is not and has never been a certified prosthetist. (Sanders, Tr. 5377).

Douglas Smith

3390. Douglas Smith is a professor emeritus in the Department of Orthopedic Surgery at the University of Washington in Seattle. (Smith (retired) Tr. 5961). Dr. Smith stopped working as a full time physician in December of 2016. (Smith (retired) Tr. 5965).

Response to Finding No. 3390:

Complaint Counsel's proposed finding of fact is incomplete and misleading. Dr. Smith is an orthopedic surgeon who is board-certified in orthopedic surgery. (Doug Smith, Tr. 5961, 5968). 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. (Doug Smith, Tr. 5961-5962). Dr. Smith was asked to 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. (Doug Smith, Tr. 5971). 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. (Doug 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. (Doug Smith, Tr. 5965, 5968). Harborview is the only Level 1 trauma center for Washington, Alaska, Montana, Idaho, and part of Wyoming. (Doug Smith, Tr. 5964-5965). Dr. 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. 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. (Doug 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. (Doug Smith, Tr. 5970).

3391. Dr. Smith's laboratory received $240,000 in funding directly from Otto Bock each year for three and a half years to study the C-Leg. (Smith (retired) Tr. 6034-35). Otto Bock also spent $84,000 a year for three years so Dr. Smith could record videos showing how to conduct amputations. (Smith (retired) Tr. 6035).

Response to Finding No. 3391:

Complaint Counsel's proposed finding of fact is incomplete. Dr. Smith's laboratory also received funding from Nike and the Department of Education. (Doug Smith, Tr. 6034-6035). Dr. Smith specifically testified that Ottobock was interested in funding Dr. Smith's passion project to make surgery better for amputees. (Doug Smith, Tr. 6035-6036). At that time, web-based education was just starting, so Dr. Smith's goal was to have just-in-time education for surgeons so they could actually see a surgery being done. (Doug Smith, Tr. 6035-6036). The night before surgery, a surgeon in a rural area who only did one or two amputations a year could get a 20 to 30-minute refresher course from Dr. Smith's videos funded by Ottobock. (Doug Smith, Tr. 6035-6036). Brad Ruhl specifically told Dr. Smith that if surgery is done better, amputees will do better, and Ottobock products would look better. (Doug Smith, Tr. 6035-6036). Ottobock told Dr. Smith

that they really believe in this, so they did some of the funding toward that project. (Doug Smith, Tr. 6035-6036).

3392. Dr. Smith is not a certified orthotist or prosthetist and does not fabricate limbs for patients. (Smith (retired) Tr. 6036-37).

Response to Finding No. 3392:

Complaint Counsel's proposed finding of fact is misleading. Dr. Smith has "gone through the fabrication process for some select research subjects" but does not clinically do that. (Doug Smith, Tr. 6036). He recognizes that is the role for the prosthetist, but he knows how it is done. (Doug Smith, Tr. 6036). He has physically done it for a few people so that he could better understand it. (Doug Smith, Tr. 6036).

3393. Dr. Smith has not performed an amputation and has not written a prescription for a prosthetic knee since December of 2016. (Smith (retired) Tr. 6038-39).

Response to Finding No. 3393:

Complaint Counsel's proposed finding of fact is misleading. Dr. Smith testified that he has not been primary surgeon for a patient, but he has been in the operating room, and that he has observed some surgeries at the Salt Lake City VA and others. (Doug Smith, Tr. 6039). He also testified that although he has not been the prescriber since December 2016, he has provided input through his consultations at Walter Reed and the Seattle Harborview clinic where he has given his opinion. (Doug Smith, Tr. 6039).

3394. At the time of his deposition, Dr. Smith did not know which version of the C-Leg was on the market. (Smith (retired) Tr. 6044). At trial, 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. (Smith (retired) Tr. 6043-44).

Response to Finding No. 3394:

Respondent has no specific response, other than that Dr. Smith is not in the business of selling any prosthetic knees.

3395. Dr. Smith does not know how much Össur's Rheo weighs, what happens to the Rheo when the battery dies, how loud the product is, how big Össur's sales force is and how long Össur spent developing the Rheo. (Smith (retired) Tr. 6045-46).

Response to Finding No. 3395:

Respondent has no specific response, other than that Dr. Smith is not in the business of selling any prosthetic knees.

3396. Dr. Smith last experience with the Endolite Orion was "at least eight years ago" when he visited two clinics in the United Kingdom. (Smith (retired) Tr. 6046). He has not trialed the Orion 3 on any patients, has never written a prescription for an Orion 3, does not know how the Orion 3 differs from other prosthetic knees and does not know which patients would most benefit from wearing the Orion 3. (Smith (retired) Tr. 6046-47).

Response to Finding No. 3396:

Respondent has no specific response, other than that Dr. Smith is not in the business of selling any prosthetic knees.

3397. Dr. Smith has not seen a DAW knee in the last ten years and only knows details about their knees "from looking online." (Smith (retired) Tr. 48). 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 people DAW has selling MPKs in the United States and does not know how long DAW spent developing its MPK. (Smith (retired) Tr. 6048-49).

Response to Finding No. 3397:

Respondent has no specific response, other than that Dr. Smith is not in the business of selling any prosthetic knees.

3398. Dr. Smith is not sure he has ever seen a Nabtesco knee. (Smith (retired) Tr. 6049-50). He has never written a prescription for a Nabtesco Allux and his familiarity with the Allux is limited to what he has seen on the Nabtesco website "and possibly at a booth at a prosthetic

meeting." (Smith (retired) Tr. 6050-51). Dr. Smith is not aware of any of his patients ever using an Allux, does not know how big Nabtesco's U.S. sales force is and does not know how long Nabtesco took to develop the Allux. (Smith (retired) Tr. 6051).

Response to Finding No. 3398:

Complaint Counsel's proposed finding of fact is misleading. Dr. Smith testified that he has been to Hong Kong, China, and Vietnam. (Doug Smith, Tr. 6049-6050). While he was there, he saw "Asian built" knees but did not know exactly who built them. (Doug Smith, Tr. 6049-6050). The knees he saw were not built by Ottobock or Össur, so they were probably Nabtesco or The Lin/DAW, which are very popular knees in Asia. (Doug Smith, Tr. 6049-6050).

3399. Dr. Smith is not sure he has ever seen a Freedom Plié 3. (Smith (retired) Tr. 6052). He may not have ever seen a patient using one. (Smith (retired) Tr. 6052). He is not aware of any improvements Freedom made to the Plié knee in 2016 or 2017 because he "did not follow the product." (Smith (retired) Tr. 6053-54). As such, he is not familiar with the product specifications of the Plié 3. (Smith (retired) Tr. 6055).

Response to Finding No. 3399:

Complaint Counsel's proposed finding of fact is incomplete. Dr. Smith testified that he has "probably held a Plié 3 at a prosthetic meeting." (Doug Smith, Tr. 6052). He also testified that Plié "had a horrible reputation. [He] did not like it personally . . . so [he] did not prescribe it. [He] prescribed Rheos and C-Legs when [he] got brand-specific." (Doug Smith, Tr. 6052-6053).

B. EXPERT WITNESSES WHO TESTIFIED AT TRIAL

1. Complaint Counsel's Expert Witnesses

Christine Hammer

3400. Christine Hammer is self-employed at Hammer & Associates, a C corporation. (Hammer Tr. 2868). In that position, Ms. Hammer performs a variety of financial and managerial accounting projects. (Hammer Tr. 2870). Some of them are consulting involving accounting systems, management reporting systems, forecasting, strategic planning, and helping companies become more profitable. (Hammer Tr. 2870). She also performs expert witness work. (Hammer Tr. 2870).

Response to Finding No. 3400:

Complaint Counsel's proposed finding of fact is incomplete. Hammer & Associates currently only employs Hammer. (Hammer, Tr. 2868). 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, Hammer had earned about $300,000 working on this case. (Hammer, Tr. 3001). Hammer was assisted in this case by Cornerstone Research, an economic consulting firm. (Hammer, Tr. 3001). Hammer receives an additional financial benefit, on top of the $800 per hour, from Cornerstone Research's work; although, 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 $1 million by the Federal Trade Commission for work on this case. (Hammer, Tr. 3008).

3401. As a managerial and financial accountant, Ms. Hammer has consulted for companies in several industries including transportation, banking, retailing, computer hardware, computer software, medical diagnostic companies and oil slurry pipelines. (Hammer Tr. 2871).

Response to Finding No. 3401:

Complaint Counsel's proposed finding of fact is incomplete. During 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 Hammer involved before the transaction was consummated. (Hammer, Tr. 3018). Hammer has only worked on two pre-consummation transactions on behalf of a target company, and, during those two transactions, Hammer did not focus on any bidding process. (Hammer, Tr. 3019). One of those transactions occurred in the late 1970s, and the other transaction took place in the early 1980s. (Hammer, Tr. 3020). Neither transaction involved the healthcare industry. (Hammer, Tr. 3020).

3402. Ms. Hammer has had an active Certified Public Accountant license in California since 1978. (Hammer Tr. 2867). She is also a certified global management accountant. (Hammer Tr. 2867).

Response to Finding No. 3402:

Respondent has no specific response.

3403. Ms. Hammer has a Master's in Business Administration from Stanford University and a Bachelor's in Economics and Political Science from Indiana University of Pennsylvania. (Hammer Tr. 2867).

Response to Finding No. 3403:

Respondent has no specific response.

3404. 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. (Hammer Tr. 2869).

Response to Finding No. 3404:

Respondent has no specific response.

Fiona Scott Morton

3405. Fiona Scott Morton is the Theodore Nierenberg Professor of Economics at the Yale University School of Management and a senior consultant at Charles River Associates. (Morton Tr. 3847, 3853). At Yale, Dr. Scott Morton teaches Competitive Strategy, an industrial organization class for M.B.A. students and Advanced Competition Economics, an economics class targeted on competition enforcement. (Morton Tr. 3853).

Response to Finding No. 3405:

Complaint Counsel's proposed finding of fact is incomplete. Morton is being paid $945 an hour to work on this case. (Morton, Tr. 3963). While 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).

3406. Dr. Scott Morton studies industrial economics, a "branch of microeconomics that covers firms, markets and competition. (Morton Tr. 3848). Her empirical work involves working with data sets to study how firms compete with one another. (Morton Tr. 3848). Her research is "primarily focused on competition in the healthcare sector and also on antitrust topics." (Morton Tr. 3853).

Response to Finding No. 3406:

Respondent has no specific response.

3407. In 2011 and 2012, Dr. Scott Morton took 19 months of leave from Yale to serve as Deputy Assistant Attorney General for Economic Analysis at the Department of Justice Antitrust Division, which is "known as the chief economist job" at the Antitrust Division. (Morton Tr. 3849). In that position, Dr. Scott Morton oversaw the analysis of "dozens and dozens of mergers" and several proposed divestitures that occurred in that period. (Morton Tr. 3850-51).

Response to Finding No. 3407:

Respondent has no specific response.

3408. Dr. Scott Morton received a B.A. in economics from Yale College and a Ph.D. in economics from Massachusetts Institute of Technology. (Morton Tr. 3847). Her academic career began as an assistant professor at the Graduate School of Business at Stanford University. (Morton Tr. 3849). She then became an assistant professor at the Graduate School of Business at the University of Chicago before starting at Yale University in 1999. (Morton Tr. 3849).

Response to Finding No. 3408:

Respondent has no specific response.

3409. Dr. Scott Morton has published "twenty-plus" articles in peer-reviewed academic journals relating to the economic analysis of competition among firms. (Morton Tr. 3857). 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. (Morton Tr. 3857).

Response to Finding No. 3409:

Respondent has no specific response.

2. Respondent Counsel's Expert Witness

David Argue

3410. David Argue is a corporate vice president and principal at Economists Incorporated. (Argue, Tr. 6132).

Response to Finding No. 3410:

Respondent has no specific response.

3411. Dr. Argue did not testify as an expert in lower limb prosthetics. (Argue, Tr. 6257).

Response to Finding No. 3411:

Respondent has no specific response, other than that Morton did not testify as an expert in lower limb prosthetics.

3412. Dr. Argue does not have expertise in how to purchase lower limb prosthetics. (Argue, Tr. 6257).

Response to Finding No. 3412:

Respondent has no specific response, other than that Morton did not testify as an expert in lower limb prosthetics.

3413. Dr. Argue does not have expertise in how to fit lower limb prosthetics. (Argue, Tr. 6257).

Response to Finding No. 3413:

Respondent has no specific response, other than that Morton did not testify as an expert in lower limb prosthetics.

3414. Dr. Argue did not testify as an expert on microprocessor knees. (Argue, Tr. 6257).

Response to Finding No. 3414:

Respondent has no specific response, other than that Morton did not testify as an expert on microprocessor knees.

3415. Dr. Argue does not have expertise in how to fit microprocessor knees. (Argue, Tr. 6257).

Response to Finding No. 3415:

Respondent has no specific response, other than that Morton did not testify as an expert on microprocessor knees.

3416. Dr. Argue does not have expertise in how to operate a prosthetic clinic. (Argue, Tr. 6257).

Response to Finding No. 3416:

Respondent has no specific response, other than that Morton does not have expertise in how to operate a prosthetic clinic.

James Peterson

3417. James Peterson is a principal at Deloitte within the Transactions and Business Analytics LLP division. (Peterson, Tr. 6593-95; RX1048 at 3 (¶ 3) (Peterson Expert Report)).

Response to Finding No. 3417:

Complaint Counsel's proposed finding of fact is incomplete. Peterson is the head of Deloitte's Life Sciences and Healthcare Mergers and Acquisitions practice group ("LSHMA"). (Peterson, Tr. 6595). 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, Peterson worked in Arthur Andersen's economic financial consulting practice group for five to six years. (Peterson, Tr. 6595). For the last twenty-two years, during his time at Deloitte and Arthur Andersen, Peterson has focused solely on healthcare merger and acquisition transactions.

(Peterson, Tr. 6594-6595). 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). Peterson has worked on hundreds of merger and acquisition transactions. (Peterson, Tr. 6596). 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). 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, Peterson also performed liquidation valuations and sensitivity analyses. (Peterson, Tr. 6597). Peterson has been involved in the sale bidding process for dozens of merger and acquisition transactions. (Peterson, Tr. 6598). 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). Peterson has, however, served as an expert witness during public hearings. (Peterson, Tr. 6601). 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).

3418. [redacted] (Peterson, Tr. 6775 (*in camera*); (PX05174 (Peterson (Respondent) Dep. at 20)).

Response to Finding No. 3418:

Respondent has no specific response, other than that Peterson is permitted to offer expert financial opinions in this case.

3419. Mr. Peterson trial testimony is the first time that he has been an expert witness at trial in an adversarial litigation. (Peterson, Tr. 6602).

Response to Finding No. 3419:

Respondent has no specific response, other than that Peterson is permitted to offer expert financial opinions in this case, and that he has previously made a presentation to the Federal Trade Commission to assist a client with a failing firm analysis in a hospital analysis. (Peterson, Tr. 6603-6604).

3420. The current matter was the second time Mr. Peterson had been retained as an expert witness offering an opinion as to whether a particular transaction would yield cognizable efficiencies as defined under the Merger Guidelines, and the first time he issued an expert report on such an opinion. (PX05174 (Peterson (Respondent) Dep. at 11-12)).

Response to Finding No. 3420:

Respondent has no specific response, other than that Peterson is permitted to offer expert financial opinions in this case.

3421. 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. (PX05174 (Peterson (Respondent) Dep. at 169))

Response to Finding No. 3421:

Respondent has no specific response, other than that Peterson is permitted to offer expert financial opinions in this case.

C. WITNESSES WHO TESTIFIED BY DEPOSITION AND/OR INVESTIGATIONAL HEARING ONLY

1. Respondent's Executives

Manar Ammouri

3422. Manar Ammouri is Freedom's Senior Product Manager. (PX05112 (Ammouri (Freedom) Dep. at 9)). Her responsibilities include working with the R&D team to "prep a product from ideation to requirements to customer feedback to testing of the product before it goes to production." (PX05112 (Ammouri (Freedom) Dep. at 9-10)).

Response to Finding No. 3422:

Complaint Counsel's proposed finding of fact is incomplete. Ammouri's responsibilities include "upstream and downstream product readiness, upstream being working with the R&D team to prep a product from ideation to requirements to customer feedback to testing of the product before it goes to production, and then for the downstream portion is the marketing efforts for it, the campaigns, the advertising, the logos, any brochures, any support material that the sales representatives require to sell the product through to their customers" and competitive intelligence. (PX05112 (Ammouri, Dep. at 9-10)).

3423. She is also responsible for marketing efforts for products, including "the campaigns, the advertising, the logos, any brochures," and any support materials needed to sell the product. (PX05112 (Ammouri (Freedom) Dep. at 9-10)).

Response to Finding No. 3423:

Respondent has no specific response.

3424. As Senior Product Manager, Ms. Ammouri is involved in gathering intelligence on competitor products. (PX05112 (Ammouri (Freedom) Dep. at 10-11)). She also directly talks to customers and attends trade shows. (PX05112 (Ammouri (Freedom) Dep. at 10-11)). After she attends trade shows, Ms. Ammouri writes notes regarding what "the customers are doing, clinicians are doing, and then we share [the information] with everybody." (PX05112 (Ammouri (Freedom) Dep. at 12-13)).

Response to Finding No. 3424:

Respondent has no specific response.

3425. Ms. Ammouri also works with the Research and Development department at Freedom. (PX05112 (Ammouri (Freedom) Dep. at 14)). She works with R&D to "initially develop an idea from conception. (PX05112 (Ammouri (Freedom) Dep. at 15)). After a product is approved, Ms. Ammouri is "in charge of making sure that [the product] gets through the

process and ensures that the product still meets those requirements." (PX05112 (Ammouri (Freedom) Dep. at 15)).

Response to Finding No. 3425:

Respondent has no specific response.

3426. Ms. Ammouri is a member of the Quattro development team. (PX05112 (Ammouri (Freedom) Dep. at 69)). The goal of the Quattro development team is to ensure that Freedom has a "viable product that's manufacturable for sale." (PX05112 (Ammouri (Freedom) Dep. at 69)).

Response to Finding No. 3426:

Respondent has no specific response.

3427. Ms. Ammouri has been involved with focus groups related to feedback for the Quattro. (PX05112 (Ammouri (Freedom) Dep. at 19)). The goal of the focus groups was to "gauge [clinicians'] initial impressions of the product." (PX05112 (Ammouri (Freedom) Dep. at 22)).

Response to Finding No. 3427:

Respondent has no specific response.

Andreas Eichler

3428. Andreas Eichler is Head of Business Unite Prosthetics Lower Limb Mechatronic Systems at Otto Bock Austria GmbH. (PX05131 (Eichler (Otto Bock) Dep. at 4)). He started working at Otto Bock in 2014. (PX05131 (Eichler (Otto Bock) Dep. at 4-5)).

Response to Finding No. 3428:

Respondent has no specific response.

Walter Joseph Governor

3429. Walter Governor was the Senior Director of Sales and Clinical Services for North America at Otto Bock until February 20, 2018. (PX05130 (Governor (Otto Bock) Dep. at 9)).

Response to Finding No. 3429:

Complaint Counsel's proposed finding of fact is incomplete. Governor left Ottobock on February 20, 2018 when his position was eliminated. (PX05130 (Governor, Dep. at 9)).

Tammie Jacobson

3430. Tammie Jacobson is the IT business solutions manager for infrastructure and technology for Otto Bock. (PX05102 (Jacobson (Otto Bock) Dep. at 4)).

Response to Finding No. 3430:

Respondent has no specific response.

Sven Ehrich

3431. Sven Ehrich is the Director of Research and Development, Quality and Regulatory Affairs in Duderstadt at Otto Bock. (PX05155 (Ehrich (Otto Bock) Dep. at 5)).

Response to Finding No. 3431:

Respondent has no specific response.

3432. Mr. Ehrich is responsible for all of Otto Bock's development activities at its Duderstadt and Boston sites. (PX05155 (Ehrich (Otto Bock) Dep. at 13)).

Response to Finding No. 3432:

Complaint Counsel's proposed finding of fact is misleading. Ottobock carries out R&D for its MPKs in Vienna, but Ehrich is not responsible for any activities in Vienna. (PX05155 (Ehrich, Dep. at 13, 25)).

3433. Mr. Ehrich has held his current position since July 2014. (PX05155 (Ehrich (Otto Bock) Dep. at 17)). Prior to that, he was Director, Global Office, at Giesecke & Devrient in Munich, Germany. (PX05155 (Ehrich (Otto Bock) Dep. at 17)).

Response to Finding No. 3433:

Respondent has no specific response.

Jeremy David Mathews

3434. Jeremy Mathews is Freedom's Senior Vice President of Sales and Marketing. (PX05137 (Mathews (Freedom) Dep. at 5)).

Response to Finding No. 3434:

Respondent has no specific response.

3435. Mr. Mathews started at Freedom on June 10, 2016 as the Vice President of Domestic Sales. (PX05137 (Mathews (Freedom) Dep. at 13)). He reported to the CEO at the time, David Smith but now reports to David Reissfelder. (PX05137 (Mathews (Freedom) Dep. at 13)).

Response to Finding No. 3435:

Respondent has no specific response.

3436. Mr. Mathews is responsible for Freedom's U.S. sales and marketing. (PX05137 (Mathews (Freedom) Dep. at 13)).

Response to Finding No. 3436:

Respondent has no specific response.

3437. Mr. Mathews testified that he was hired to increase Freedom product sales. (PX05137 (Mathews (Freedom) Dep. at 17)).

Response to Finding No. 3437:

Respondent has no specific response.

3438. Mr. Mathews participates on the Freedom operating committee, executive committee, and the product acceptance committee. (PX05137 (Mathews (Freedom) Dep. at 96-97)).

Response to Finding No. 3438:

Respondent has no specific response.

Helmut Pfuhl

3439. Helmut Pfuhl is Executive Vice President, Prosthetics, at Otto Bock. (PX05157 (Pfuhl (Otto Bock) Dep. at 6)).

Response to Finding No. 3439:

Respondent has no specific response.

3440. Dr. Pfuhl joined Otto Bock in 1996 as assistant to the owner and "built up the company's strategic planning." (PX05157 (Pfuhl (Otto Bock) Dep. at 15)). His official title at the time was head of strategic business planning. (PX05157 (Pfuhl (Otto Bock) Dep. at b15)).

Response to Finding No. 3440:

Respondent has no specific response.

3441. His second role at Otto Bock was to take "over marketing, which includes international product management, the internal company communication – international marketing communication, and the event management, trade shows, et cetera." (PX05157 (Pfuhl (Otto Bock) Dep. at 16)).

Response to Finding No. 3441:

Respondent has no specific response.

3442. In 2012, Dr. Pfuhl became head of the prosthetics business unit. (PX05157 (Pfuhl (Otto Bock) Dep. at 17)). The focus of his activity in this role is "portfolio development and portfolio strategy." (PX05157 (Pfuhl (Otto Bock) Dep. at 22)). His group reviews marketing and marketing potential and attempts to figure out "where the growth potentials are the best." (PX05157 (Pfuhl (Otto Bock) Dep. at 22**)).**

Response to Finding No. 3442:

Respondent has no specific response.

John Robertson

3443. John Robertson is Freedom's Senior Vice President of R&D and Irvine Manufacturing. (PX05115 (Robertson (Freedom) Dep. at 5)). Mr. Robertson is responsible for research and development efforts at Freedom. (PX05115 (Robertson (Freedom) Dep. at 7)).

Response to Finding No. 3443:

Complaint Counsel's proposed finding of fact is inaccurate. Robertson no longer works at Freedom. *See* Complaint Counsel's Proposed Post-Trial Order, Appendix C, n.1.

3444. [redacted] (PX05115 (Robertson (Freedom) Dep. at 7-9) (*in camera*)). His responsibilities include supervising approximately 20 employees in the R&D department at Freedom. (PX05115 (Robertson (Freedom) Dep. at 8)).

Response to Finding No. 3444:

Complaint Counsel's proposed finding of fact is misleading. Robertson no longer works at Freedom. *See* Complaint Counsel's Proposed Post-Trial Order, Appendix C, n.1.

3445. [redacted] (PX05115 (Robertson (Freedom) Dep. at 20-21) (*in camera*)).

Response to Finding No. 3445:

Complaint Counsel's proposed finding of fact is misleading. Robertson no longer works at Freedom. *See* Complaint Counsel's Proposed Post-Trial Order, Appendix C, n.1.

3446. **Mr. Robertson's responsibilities also included preparing the budget forecasts for the R&D budget and monitoring the spending of the department on a monthly basis. (PX05115 (Robertson (Freedom) Dep. at 11)). He testified at his deposition in March 2018 that he submits the R&D budget to Lee Kim, Freedom's CFO.** (PX05115 (Robertson (Freedom) Dep. at 13)).

Response to Finding No. 3446:

Complaint Counsel's proposed finding of fact is misleading. Robertson no longer works at Freedom. *See* Complaint Counsel's Proposed Post-Trial Order, Appendix C, n.1.

3447. Mr. Robertson served as the chair of Freedom's PAC committee, which he has served on since he first began working at Freedom in approximately 2014. (PX05115 (Robertson (Freedom) Dep. at 20)).

Response to Finding No. 3447:

Complaint Counsel's proposed finding of fact is misleading. Robertson no longer works at Freedom. *See* Complaint Counsel's Proposed Post-Trial Order, Appendix C, n.1.

3448. [redacted] (PX05115 (Robertson (Freedom) Dep. at 11-12) (*in camera*)).

Response to Finding No. 3448:

Complaint Counsel's proposed finding of fact is misleading. Robertson no longer works at Freedom. *See* Complaint Counsel's Proposed Post-Trial Order, Appendix C, n.1.

Sönke Rössing

3449. Sönke Rössing is Chief Strategy and Human Resource Officer for Otto Bock HealthCare Gmbh. (PX05104 (Rössing (Otto Bock) Dep. at 4)). He has worked at Otto Bock for nine years. (PX05104 (Rössing (Otto Bock) Dep. at 7)). Dr. Rössing has a Ph.D. in business from WHU in Vallendar in Germany. (PX05104 (Rössing (Otto Bock) Dep. at 7)).

Response to Finding No. 3449:

Respondent has no specific response.

3450. Dr. Rössing was designated to testify on behalf of Otto Bock to respond to Complaint Counsel's Notice of Deposition to Respondent regarding integration of Freedom into Otto Bock. (PX05104 (Rössing (Otto Bock) Dep. at 8-10)).

Response to Finding No. 3450:

Respondent has no specific response.

Brad Ruhl

3451. Brad Ruhl is Managing Director, North America at Otto Bock. (PX05162 (Ruhl (Otto Bock) Dep. at 5)). He assumed this position in 2018. (PX05162 (Ruhl (Otto Bock) Dep. at 8)). Mr. Ruhl took over the position on an interim basis. (PX05162 (Ruhl (Otto Bock) Dep. at 9)).

Response to Finding No. 3451:

Respondent has no specific response.

3452. Prior to his current position, Mr. Ruhl was the president of Otto Bock's prosthetics business unit for North America. (PX05162 (Ruhl (Otto Bock) Dep. at 8-9)). He held that position since 2010. (PX05162 (Ruhl (Otto Bock) Dep. at 11)).

Response to Finding No. 3452:

Respondent has no specific response.

3453. As the Managing Director, North America, Mr. Ruhl is responsible for prosthetics, orthotics, the division known as "medical care" as well as Otto Bock Orthopedic Services. (PX05162 (Ruhl (Otto Bock) Dep. at 10)).

Response to Finding No. 3453:

Respondent has no specific response.

Ralf Stuch

3454. Ralf Stuch is the Chief Sales and Marketing Officer and interim CFO at Otto Bock. (PX05163 (Stuch (Otto Bock) Dep. at 4, 13)).

Response to Finding No. 3454:

Respondent has no specific response.

3455. As Chief Sales and Marketing Officer, each of the business units, prosthetics, orthotics and mobility, as well as the marketing functions report in to Mr. Stuch. (PX05163 (Stuch (Otto Bock) Dep. at 13)).

Response to Finding No. 3455:

Respondent has no specific response.

3456. Mr. Stuch is on the global management team, which consists of all the executives responsible for each of the business units, each of the regions and each of the management functions. (PX05163 (Stuch (Otto Bock) Dep. at 21)). The global management team discusses strategic projects and global initiatives. (PX05163 (Stuch (Otto Bock) Dep. at 21)).

Response to Finding No. 3456:

Respondent has no specific response.

2. Clinic Customers

Michael Bright

3457. Michael Bright is the owner of North Bay Prosthetics. (PX05141 (Bright (North Bay) Dep. at 10)). Mr. Bright spends about 50% of his time seeing patients. (PX05141 (Bright (North Bay) Dep. at 117)).

Response to Finding No. 3457:

Respondent has no specific response.

3458. Mr. Bright is a certified prosthetist and a certified orthotist. (PX05141 (Bright (North Bay) Dep. at 11)).

Response to Finding No. 3458:

Respondent has no specific response.

3459. North Bay Prosthetics is "a health provider that provides prosthetic and orthotic care to [its] patients." (PX05141 (Bright (North Bay) Dep. at 13)). North Bay Prosthetics has six locations, all within California. (PX05141 (Bright (North Bay) Dep. at 14-15)). Clinical staff at North Bay Prosthetics are "involved directly in patient care and fabrication and assembly of the prosthetic and orthotic devices." (PX05141 (Bright (North Bay) Dep. at 16)).

Response to Finding No. 3459:

Respondent has no specific response.

3460. North Bay practitioners only fit patients with Otto Bock and Freedom MPKs. (PX05141 (Bright (North Bay) Dep. at 35-36)). North Bay practitioners conducted trials on patients of the Endolite Orion and Össur Rheo but no patients were permanently fit with either MPK because the patients preferred the "feel and function" of either the Freedom Plié or the Otto Bock C-Leg. (PX05141 (Bright (North Bay) Dep. at 37-38)).

Response to Finding No. 3460:

Respondent has no specific response.

3461. Mr. Bright attends "conventions and other gatherings of prosthetists at which manufacturers of microprocessor knees exhibit their latest products." (PX05141 (Bright (North Bay) Dep. at 39-40)). He has "observed exhibitions by manufacturers in connection

with those types of gatherings of new model – newer models of microprocessor knees" in the last three years. (PX05141 (Bright (North Bay) Dep. at 40)).

Response to Finding No. 3461:

Respondent has no specific response.

3462. North Bay fits about 10 MPKs per year and spends close to $160,000 annually on MPKs. (PX05141 (Bright (North Bay) Dep. at 74)). North Bay spends "anywhere from $400 to $3,000 for the mechanical knees." (PX05141 (Bright (North Bay) Dep. at 74)).

Response to Finding No. 3462:

Respondent has no specific response.

Jonathan Endrikat

3463. Jonathan Endrikat is CEO of Empire Medical, Inc. ("Empire"). (PX05001 (Endrikat (Empire) IHT at 4)). He took on that title in 2014. (PX05001 (Endrikat (Empire) IHT at 8)). As CEO, Mr. Endrikat is involved in "strategic direction, collections, human resources, operations and dealing with the board of directors." (PX05001 (Endrikat (Empire) IHT at 8)).

Response to Finding No. 3463:

Respondent has no specific response.

3464. Mr. Endrikat started Empire in 2009, when he was the operations manager. (PX05001 (Endrikat (Empire) IHT at 7-8)).

Response to Finding No. 3464:

Respondent has no specific response.

3465. Empire, located in Medford, Oregon, is a "virtual distributor in the prosthetic and orthotic industry." (PX05001 (Endrikat (IHT at 9-10)). Empire's 2016 revenues were $16.5 million. (PX05116 (Endrikat (Empire Medical) Dep. at 21)). "The heart of what Empire does is we're a comparative software based on L Codes." (PX05116 (Endrikat (Empire Medical) Dep. at 17)). A customer can use Empire's software to place all of their prosthetic and orthotic orders, which simplifies their purchasing. (PX05001 (Endrikat (Empire) IHT at 9)). When customers place orders through Empire, they use an Empire account number so that the product is shipped to the customer, then the invoice is sent to Empire for

payment. (PX05116 (Endrikat (Empire Medical) Dep. at 21-22)). Empire can also facilitate orders for customers that have an existing account with a specific manufacturer. (PX05116 (Endrikat (Empire Medical) Dep. at 21-22)).

Response to Finding No. 3465:

Respondent has no specific response.

3466. In his role, Mr. Endrikat works with prosthetists with ordering issues, with "questions about pricing, L Codes, product options" as well as "data research" and "purchasing data." (PX05116 (Endrikat (Empire Medical) Dep. at 16-17)).

Response to Finding No. 3466:

Respondent has no specific response.

3467. Empire contracts directly with prosthetic manufacturers and distributors. (PX05116 (Endrikat (Empire Medical) Dep. at 26-27)). Mr. Endrikat personally negotiates contracts with MPK manufacturers. (PX05116 (Endrikat (Empire Medical) Dep. at 50)).

Response to Finding No. 3467:

Respondent has no specific response.

Anthony Filippis

3468. Anthony Filippis has been CEO of Wright & Filippis since 1997. (PX05167 (Filippis (Wrights & Filippis) Dep. at 10)).

Response to Finding No. 3468:

Respondent has no specific response.

3469. Mr. Filippis is a certified prosthetist and orthotist. (PX05167 (Filippis (Wrights & Filippis) Dep. at 10)). In the mid -2000s, Mr. Filippis moved to a business administrative role. (PX05167 (Filippis (Wrights & Filippis) Dep. at 14)).

Response to Finding No. 3469:

Respondent has no specific response.

James Curtis Patton, III

3470. James Curtis Patton, III is the President and owner of Prosthetic Solutions. (PX05151 (Patton (Prosthetic Solutions) Dep. at 7)). He started Prosthetic Solutions in October of 2015. (PX05151 (Patton (Prosthetic Solutions) Dep. at 7)).

Response to Finding No. 3470:

Respondent has no specific response.

Jeffrey Sprinkle

3471. Jeffrey Sprinkle is the owner of Sprinkle Prosthetics. (PX05168 (Sprinkle (Sprinkle) Dep. at 4)).

Response to Finding No. 3471:

Respondent has no specific response.

3472. Mr. Sprinkle is a certified prosthetist orthoptist. (PX05168 (Sprinkle (Sprinkle) Dep. at 4)). He went to prosthetic orthotic school at UT Southwestern in Dallas, Texas and graduated there with a Bachelor of Science degree in prosthetics and orthotics in 1995. (PX05168 (Sprinkle (Sprinkle) Dep. at 11)).

Response to Finding No. 3472:

Respondent has no specific response.

3473. As the owner, Mr. Sprinkle does "everything from seeing all the patients either at the office, the hospital, nursing homes, [and] at patients' homes." (PX05168 (Sprinkle (Sprinkle) Dep. at 14)). He supervised the other employees, is involved in marketing, and is involved in the procurement of lower-limb prosthetics. (PX05168 (Sprinkle (Sprinkle) Dep. at 14-15)). He spends approximately 80 percent of his time seeing patients. (PX05168 (Sprinkle (Sprinkle) Dep. at 16)).

Response to Finding No. 3473:

Respondent has no specific response.

3474. Sprinkle Prosthetics operates one clinical office in Spartanburg, South Carolina. (PX05168 (Sprinkle (Sprinkle) Dep. at 18)).

Response to Finding No. 3474:

Respondent has no specific response.

Keith Watson

3475. Keith Watson is President of Fourroux Prosthetics. (PX05166 (Watson (Fourroux) Dep. at 4)).

Response to Finding No. 3475:

Respondent has no specific response.

3476. As President, Mr. Watson's responsibilities are to "provide guidance for [Fourroux's] clinicians and [] staff, to remove barriers to [Fourroux's] growth, and to make sure that [Fourroux] stand[s] by our vision, which is we make people whole." (PX05166 (Watson (Fourroux) Dep. at 21)).

Response to Finding No. 3476:

Respondent has no specific response.

James Weber

3477. James Weber is the President and CEO of Prosthetic & Orthotic Care. (PX05135 (Weber (P&O Care) Dep. at 4)).

Response to Finding No. 3477:

Complaint Counsel's proposed finding of fact is incomplete. Weber is also the current President of AOPA. (PX05135 (Weber, Dep. at 18)).

3478. Mr. Weber does not have any degrees or certifications related to clinical prosthetics. (PX05135 (Weber (P&O Care) Dep. at 12)).

Response to Finding No. 3478:

Respondent has no specific response.

3479. Mr. Weber does not participate in any of the continuing education programs that manufacturers offer to prosthetic clinics. (PX05135 (Weber (P&O Care) Dep. at 13)).

Response to Finding No. 3479:

Respondent has no specific response.

3480. Mr. Weber testified that he does not "get into specifics" when it comes to discussing the features of microprocessor knees, and stated that, "it's the practitioner preference in our business as to all component that they work with relative to their patients." (PX05135 (Weber (P&O Care) Dep. at 14-15)).

Response to Finding No. 3480:

Respondent has no specific response.

3481. Mr. Weber does not see prosthetic patients clinically at P&O clinics. (PX05135 (Weber (P&O Care) Dep. at 18)).

Response to Finding No. 3481:

Respondent has no specific response.

3482. Mr. Weber testified that Otto Bock has a close relationship with P&O Care. (PX05135 (Weber (P&O Care) Dep. at 72)).

Response to Finding No. 3482:

Respondent has no specific response.

3483. Mr. Weber "know[s] a lot of the Otto Bock people" and has known Brad Ruhl, Otto Bock North America's Managing Director, since 2002 and regards him as a personal friend. (PX05135 (Weber (P&O Care) Dep. at 71)).

Response to Finding No. 3483:

Respondent has no specific response.

3484. Mr. Weber testified that that Brad Ruhl asked him "if [he] would consider being a witness and had the Duane Morris attorney call [him]" regarding the FTC's investigation of the Freedom acquisition. (PX05135 (Weber (P&O Care) Dep. at 74)).

Response to Finding No. 3484:

Complaint Counsel's proposed finding of fact is irrelevant.

3485. When asked if he had any close business associates at Freedom, Mr. Weber testified that he knows Maynard Carkhuff from the American Orthotics & Prosthetics Association Board and has known him for "probably six years, seven maybe." (PX05135 (Weber (P&O Care) Dep. at 76)).

Response to Finding No. 3485:

Respondent has no specific response.

Paul Weott

3486. Paul Weott is the owner of Orthotic and Prosthetic Centers. (PX05140 (Weott (O&P Centers) Dep. at 4)). Mr. Weott has been the owner for approximately 20 years. (PX05140 (Weott (O&P Centers) Dep. at 11)).

Response to Finding No. 3486:

Respondent has no specific response.

3487. Mr. Weott is a certified prosthetist. (PX05140 (Weott (O&P Centers) Dep. at 12)).

Response to Finding No. 3487:

Respondent has no specific response.

3488. Orthotic and Prosthetic Centers operates 23 locations in Florida, North Carolina, and South Carolina. (PX05140 (Weott (O&P Centers) Dep. at 9)).

Response to Finding No. 3488:

Respondent has no specific response.

3489. Orthotic and Prosthetic Centers has 111 employees. (PX05140 (Weott (O&P Centers) Dep. at 9)). Approximately 30 employees are certified prosthetists. (PX05140 (Weott (O&P Centers) Dep. at 9)).

Response to Finding No. 3489:

Respondent has no specific response.

Rob Anthony Yates

3490. Rob Anthony Yates is the president and CEO for David A. Yates and Associates, Incorporated, also known as JP&O Prosthetic & Orthotic Laboratory and Jonesboro Prosthetic & Orthotic Laboratory ("Jonesboro"). (PX05108 (Yates (Jonesboro) Dep. at 5)). He took on that title in 2007. (PX05108 (Yates (Jonesboro) Dep. at 14)).

Response to Finding No. 3490:

Respondent has no specific response.

3491. As president and CEO, Mr. Yates is "responsible for the overall management and performance and success of the organization." (PX05108 (Yates (Jonesboro) Dep. at 14)). He also provides patient care and devotes "50 percent of [his] time" to patient care. (PX05108 (Yates (Jonesboro) Dep. at 14)).

Response to Finding No. 3491:

Respondent has no specific response.

3492. In his time spent performing patient care, Mr. Yates "will see the patient, take a history, you know, that's related to their care, the reason I'm seeing them, evaluate their needs, formulate a treatment plan of care for them related to their prosthetic or orthotic management, take whatever measurements/impressions are necessary in order to fabricate the device, direct [his] technical team to fabricate whatever they need to fabricate, [and] direct [his] purchasing staff to purchase whatever they need to purchase." Once the prosthetic device is ready for fitting, Mr. Yates will fit the prosthesis on the patient and "regularly interface with physicians, physical therapists, about that patient's care, their needs for changes or training to ensure success" with the prosthetic device. Lastly, Mr. Yates will work with patients "to educate them in the proper use of their device, particularly with lower limb prostheses or with limb prostheses, more complex devices." (PX05108 (Yates (Jonesboro) Dep. at 18-19)).

Response to Finding No. 3492:

Respondent has no specific response.

3493. In 2017, Mr. Yates provided roughly 30 prosthetic limbs, including microprocessor and non-microprocessor knees. (PX05108 (Yates (Jonesboro) Dep. at 19)).

Response to Finding No. 3493:

Respondent has no specific response.

3494. Jonesboro is located in Jonesboro, Arkansas and "five other communities in Arkansas and Missouri." (PX05108 (Yates (Jonesboro) Dep. at 20)). All six locations employ prosthetists that see patients and fit patients with prosthetic limbs. (PX05108 (Yates (Jonesboro) Dep. at 22)).

Response to Finding No. 3494:

Respondent has no specific response.

3. Other Market Participants

Juerg Baggenstoss

3495. Jürg Baggenstoss is a Manager at A.T. Kearney (International) AG in Switzerland. (PX05154 (Baggenstoss (A.T. Kearney) Dep. at 4)). As a manager, Mr. Baggenstoss is "mostly responsible for delivering projects, and [is] involved in business development."

Response to Finding No. 3495:

Respondent has no specific response, other than that Dr. Baggenstoss is a third-party consultant, not a "market participant."

3496. [redacted] (PX05154 (Baggenstoss (A.T. Kearney) Dep. at 12)).

Response to Finding No. 3496:

Respondent has no specific response, other than that any integration plans never were carried out. [redacted]

3497. [redacted]

Response to Finding No. 3497:

Respondent has no specific response.

Hugues Belzidsky

3498. Hugues Belzidsky is President of DAW Industries. (PX05147 (Belzidsky (DAW) Dep. at 4)).

Response to Finding No. 3498:

Respondent has no specific response.

3499. Mr. Belzidsky began working at DAW Industries in 1975. As President, four employees report directly to him. He does not report to anyone within DAW Industries. (PX05147 (Belzidsky (DAW) Dep. at 14)).

Response to Finding No. 3499:

Respondent has no specific response.

Glenn Choi

3500. Glenn Choi is President of ST&G USA Corporation ("ST&G"). (PX05117 (Choi (ST&G) Dep. at 4)). He has held this position for eleven years. (PX05117 (Choi (ST&G) Dep. at 11)).

Response to Finding No. 3500:

Respondent has no specific response.

3501. From 1998 to 2005, Mr. Choi worked as director of research and development at United States Manufacturing Company, a company that manufactured lower limb prosthetic devices, upper limb prosthetic devices, and orthotic braces. (PX05117 (Choi (ST&G) Dep. at 12)).

Response to Finding No. 3501:

Respondent has no specific response.

3502. Mr. Choi's role at ST&G includes overall management of the business, as well as managing business development for the company. (PX05117 (Choi (ST&G) Dep. at 11)). On a day-to-day basis, Mr. Choi spends the majority of his time reviewing sales data, addressing issues with his team, and looking at future business development processes. (PX05117 (Choi (ST&G) Dep. at 11)).

Response to Finding No. 3502:

Respondent has no specific response.

3503. ST&G sells "mainly lower limb prosthetics and small amount of orthotics." (PX05117 (Choi (ST&G) Dep. at 15)).

Response to Finding No. 3503:

Respondent has no specific response.

3504. Including Mr. Choi, ST&G has a total of thirteen employees. (PX05117 (Choi (ST&G) Dep. at 19)).

Response to Finding No. 3504:

Respondent has no specific response.

Thomas Chung

3505. Thomas Chung is Vice President at Health Evolution Partners. (PX05113 (Chung (HEP) Dep. at 9)). Mr. Chung joined HEP in June 2011 as an Associate. (PX05113 (Chung (HEP) Dep. at 14-15)) He was elevated to Vice President in February 2014. (PX05113 (Chung (HEP) Dep. at 15)).

Response to Finding No. 3505:

Respondent has no specific response.

3506. Mr. Chung was on the original investment team when Freedom became a portfolio company for HEP in 2012. (PX05113 (Chung (HEP) Dep. at 17)). Mr. Chung testified that as an associate his responsibilities relating to Freedom included preparing "modeling, legal documentation, presentation[s]" and "general administrative duties." (PX05113 (Chung (HEP) Dep. at 17-18)). Mr. Chung would provide his financial modeling to the HEP investment committee, which "oversees any and all major decisions that the fund does, particularly with regard to acquisition and sale of assets and major decisions about the direction that portfolio companies take." (PX05113 (Chung (HEP) Dep. at 18-19, 21)).

Response to Finding No. 3506:

Respondent has no specific response.

3507. When he became a Vice President, Mr. Chung maintained the same responsibilities he had as an associate in addition to providing the investment committee with his perspectives on the various portfolio companies, including Freedom. (PX05113 (Chung (HEP) Dep. at 23)).

Response to Finding No. 3507:

Respondent has no specific response.

3508. As part of his responsibilities relating to Freedom, Mr. Chung would interact directly with Freedom employees. (PX05113 (Chung (HEP) Dep. at 24)). Lee Kim, CFO of Freedom, was the employee Mr. Chung "interacted with most." (PX05113 (Chung (HEP) Dep. at 24)). Mr. Chung would interact with Mr. Kim on a day-to-day basis. (PX05113 (Chung (HEP) Dep. at 24)). His interactions with Mr. Kim included "Discussion of board materials, discussion of projections, discussion of debt amendments, discussion of any sort of, maybe, you know, strategic recommendations they were making, whether to HEP or external parties." (PX05113 (Chung (HEP) Dep. at 25)).

Response to Finding No. 3508:

Respondent has no specific response.

3509. Mr. Chung would regularly attend Freedom board of directors meetings. (PX05113 (Chung (HEP) Dep. at 26). Mr. Chung testified that he attended board of directors meetings "to provide another set of ears" and "to expedite any analysis or any kind of to-do's that might follow from the board of directors meetings to partnership." (PX05113 (Chung (HEP) Dep. at 26). Beginning in 2015, Mr. Chung would regularly send "e-mail summaries" of the board meetings to the HEP partners. (PX05113 (Chung (HEP) Dep. at 27).

Response to Finding No. 3509:

Complaint Counsel's proposed finding of fact is inaccurate. Regarding sending email summaries of board meetings, Chung testified that he thought "it probably started later on . . . [he] couldn't tell you exactly when it started." (PX05113 (Chung, Dep. at 27-28)).

Achilleas Dorotheou

3510. Achilleas Dorotheou is the VP and Head of Human Motion, Business Unit at Parker-Hannifin Corporation. (PX05125 (Dorotheou (Parker-Hannifin) Dep. at 4)).

Response to Finding No. 3510:

Respondent has no specific response.

3511. Parker-Hannifin is a conglomerate of different industrial businesses, "notably hydraulics, aerospace, and other industrial businesses." (PX05125 (Dorotheou (Parker-Hannifin) Dep. at 7)).

Response to Finding No. 3511:

Respondent has no specific response.

3512. At the time of the Merger, Parker Hannifin was the minority shareholder of Freed. (Carkhuff (Freedom) Tr. 311).

Response to Finding No. 3512:

Respondent has no specific response, other than that Parker Hannifin was the minority shareholder of *Freedom*. (Carkhuff, Tr. 311).

3513. Mr. Dorotheou became a board member of Freedom in approximately December 2015. (PX05125 (Dorotheou (Parker-Hannifin) Dep. at 10)).

Response to Finding No. 3513:

Complaint Counsel's proposed finding of fact is inaccurate. Dorotheou became a board member of Freedom in approximately December 2014. (PX05125 (Dorotheou, Dep. at 10)).

3514. Mr. Dorotheou was a member of the board of directors of Freedom at the time of the Merger. (PX05125 (Dorotheou (Parker-Hannifin) Dep. at 10); PX05103 (Kim (Freedom) Dep. at 113-114)).

Response to Finding No. 3514:

Respondent has no specific response.

Karl Michael Fillauer

3515. Karl Michael Fillauer is CEO of Fillauer Companies, Inc. ("Fillauer"), headquartered in Chattanooga, Tennessee. (PX05105 (Fillauer (Fillauer) Dep. at 5)).

Response to Finding No. 3515:

Respondent has no specific response.

3516. As CEO, Mr. Fillauer is responsible for "the overall direction of the company, the strategic plan going forward, and to oversee the divisions within Fillauer" to ensure they are profitable. (PX05105 (Fillauer (Fillauer) Dep. at 10-11)).

Response to Finding No. 3516:

Respondent has no specific response.

3517. Fillauer, which is a private company, operates three separate entities in Chattanooga: the corporate headquarters, the manufacturing division and a patient care clinic. (PX05105 (Fillauer (Fillauer) Dep. at 11)). In Salt Lake City, Fillauer owns Motion Control and Fillauer Composites. (PX05105 (Fillauer (Fillauer) Dep. at 11)). Fillauer Europe is based in Stockholm, Sweden. (PX05105 (Fillauer (Fillauer) Dep. at 11)). Fillauer North Carolina is "orthotics-focused." (PX05105 (Fillauer (Fillauer) Dep. at 11)).

Response to Finding No. 3517:

Complaint Counsel's proposed finding of fact is incomplete. Fillauer has about 250 employees and annual revenues of about $37 to $38 million. (PX05105 (Fillauer Dep. at 25)). Fillauer does not presently sell MPKs. (PX05105 (Fillauer Dep. at 19-20)). [redacted] In addition, Fillauer distributed an Italian MPK in the United States in 2011-2012. (PX05105 (Fillauer, Dep. at 10)). [redacted] Fillauer makes and sells a microprocessor ankle, the Raize. (PX05105 (Fillauer, Dep. at 88-89)). [redacted]

Robert Stuart Gailey, Junior

3518. Robert Dr. Robert Stuart Gailey, Jr is the director of the Functional Outcomes and Research Evaluation Center at the University of Miami. (PX05142 (Gailey (University of Miami) Dep. at 4-5)). Dr. Gailey also serves as a professor at the university. (PX05142 (Gailey (University of Miami) Dep. at 16)).

Response to Finding No. 3518:

Respondent has no specific response.

3519. Dr. Gailey received a bachelor's and master's degree in physical therapy from the University of Miami and a Ph.D. in prosthetics/orthotics engineering from the University of Strathclyde in Glasgow, Scotland. (PX05142 (Gailey (University of Miami) Dep. at 7-8)). Following the completion of his graduate degrees, Dr. Gailey worked at the University of Miami with clinical, research, student advisory, and administrative responsibilities. His clinical responsibilities at that time included evaluating the fit between the prosthetic device and a patient. (PX05142 (Gailey (University of Miami) Dep. at 10-12)).

Response to Finding No. 3519:

Respondent has no specific response.

3520. Dr. Gailey's current responsibilities include clinical responsibilities and performing research. (PX05142 (Gailey (University of Miami) Dep. at 16)). He described the Functional Outcomes and Research Evaluation Center, where he serves as a director, as focused on prosthetics and "research on looking at functional research but mostly geared to even with the prosthetics looking at outcomes and development of devices to improve or enhance the ability for people to use prostheses . . . ." (PX05142 (Gailey (University of Miami) Dep. at 16-17)). The center performs clinical studies in this work. (PX05142 (Gailey (University of Miami) Dep. at 17)).

Response to Finding No. 3520:

Complaint Counsel's proposed finding of fact is incomplete. Dr. Gailey testified that "Primarily we look at feet. There are other research labs around the country that are more focused on knees. We're looking more at feet and that's been the majority of the publications, although there is the odd comment that would relate to knees." (PX05142 (Gailey, Dep. at 17)).

3521. Dr. Gailey is also a "co-investigator" in research funded by grants from the Department of Veteran Affairs and the Department of Defense. (PX05142 (Gailey (University of Miami) Dep. at 74-75)).

Response to Finding No. 3521:

Respondent has no specific response.

Michael Highsmith

3522. Michael Highsmith is the Deputy Chief of the Research and Surveillance division of the Extremity Trauma and Amputation Center of Excellence at the Department of Veterans Affairs ("VA"). (PX05164 (Highsmith (VA) Dep. at 6)). He is also an associate professor in the School of Physical Therapy and Rehab Sciences at the University of Southern Florida and a captain and physical therapist in the Army Reserves. (PX05164 (Highsmith (VA) Dep. at 6)).

Response to Finding No. 3522:

Respondent has no specific response.

3523. Dr. Highsmith has not seen prosthetic patients in a clinical setting since 2005. (PX05164 (Highsmith (VA) Dep. at 20)).

Response to Finding No. 3523:

Complaint Counsel's proposed finding of fact is misleading. Dr. Highsmith testified that he has seen research subjects and provided care as it relates to clinical research, but he has not provided reimbursable patient care since 2005. (PX05164 (Highsmith, Dep. at 20)).

3524. In his role at the VA, Dr. Highsmith provides leadership to the different VA sites and to create a unified set of outcomes at the different clinical locations. (PX05164 (Highsmith (VA) Dep. at 23-24)).

Response to Finding No. 3524:

Respondent has no specific response.

Jason Kahle

3525. Jason Kahle is the CEO of OP Solutions. (PX05119 (Kahle (OP Solutions) Dep. at 4)). He started the company in 2012. (PX05119 (Kahle (OP Solutions) Dep. at 13)). OP Solutions "share[s] space" with Prosthetic Design and Research, where Mr. Kahle serves as Director of R&D and sees patients. (PX05119 (Kahle (OP Solutions) Dep. at 13-14)).

Response to Finding No. 3525:

Respondent has no specific response.

3526. As CEO of OP Solutions, Mr. Kahle sees patients when there are "some challenging aspects to it." (PX05119 (Kahle (OP Solutions) Dep. at 15)). Most of the patients he sees are transfemoral amputees. (PX05119 (Kahle (OP Solutions) Dep. at 15-16)).

Response to Finding No. 3526:

Respondent has no specific response.

3527. Mr. Kahle is also a "co-principal investigator on several grants" performed by the University of South Florida. (PX05119 (Kahle (OP Solutions) Dep. at 14)).

Response to Finding No. 3527:

Respondent has no specific response, other than that the quote actually appears at (PX05119 (Kahle, Dep. at 4)).

3528. Mr. Kahle has published "somewhere between 40 and 50" articles and approximately half of the articles are related to microprocessor knees. (PX05119 (Kahle (OP Solutions) Dep. at 17-18)). He personally presents the results of his research to owners of prosthetic clinics. (PX05119 (Kahle (OP Solutions) Dep. at 22)).

Response to Finding No. 3528:

Respondent has no specific response.

3529. Otto Bock has hired Mr. Kahle twice to perform research projects related to microprocessor knees. (PX05119 (Kahle (OP Solutions) Dep. at 23)).

Response to Finding No. 3529:

Respondent has no specific response.

Larry Fredrick Knudsen

3530. Larry Fredrick Knudsen is Vice President of Sales and Marketing at Trulife. (PX05136 (Knudsen (Trulife) Dep. at 4)). Mr. Knudsen has held this position since 1997. (PX05136 (Knudsen (Trulife) Dep. at 10)).

Response to Finding No. 3530:

Respondent has no specific response.

3531. As Vice President of Sales and Marketing, Mr. Knudsen is responsible for "developing strategies, managing budgets," ensuring Trulife achieves EBITDA objectives, and managing distributors. (PX05136 (Knudsen (Trulife) Dep. at 9)).

Response to Finding No. 3531:

Respondent has no specific response.

3532. Trulife is headquartered in Dublin, Ireland and owns two facilities in the UK, one in Canada, and three in the United States. (PX05136 (Knudsen (Trulife) Dep. at 14)). Trulife sells orthotics, prosthetics, mastectomy products and a Pressure Care product line. (PX05136 (Knudsen (Trulife) Dep. at 14)).

Response to Finding No. 3532:

Respondent has no specific response.

3533. In the category of prosthetic products, Trulife sells "prosthetic feet, prosthetic components, prosthetic knees, and then also valves which are incorporated in lower limb system, primarily the socket." (PX05136 (Knudsen (Trulife) Dep. at 15)).

Response to Finding No. 3533:

Respondent has no specific response.

Stuart Marquette

3534. Stuart Marquette is Vice President of DAW Industries. (PX05146 (Marquette (DAW) Dep. at 4)). DAW is a "manufacturer and distributor of prosthetic componentries." (PX05146 (Marquette (DAW) Dep. at 14)).

Response to Finding No. 3534:

Complaint Counsel's proposed finding of fact is incomplete. [redacted] DAW also sells prosthetic feet, ankles, liners, skins, foam, and titanium components along with the prosthetic knees. (PX05146 (Marquette, Dep. at 23)). DAW employs six or seven sales and customer service representatives. (PX05146 (Marquette, Dep. at 25)). DAW uses sales representatives to sell MPKs and non-MPKs and offers a full range of prosthetic products. (PX05147 (Belzidsky, Dep. at 34-35)).

3535. Mr. Marquette began working at DAW Industries in 1987. He became the Vice President in approximately 1997. (PX05146 (Marquette (DAW) Dep. at 13)).

Response to Finding No. 3535:

Respondent has no specific response.

3536. As Vice President, Mr. Marquette is "in charge of operations." He elaborated that he spends "most of [his] time advising clients, practitioners on which one of [DAW's] knees or components is the best for their patient." (PX05146 (Marquette (DAW) Dep. at 14)).

Response to Finding No. 3536:

Respondent has no specific response.

Blount Swain

3537. Blount Swain is president of Ability Dynamics. (PX05158 (Swain (Ability Dynamics) Dep. at 8)).

Response to Finding No. 3537:

Respondent has no specific response.

3538. As president, Mr. Swain is responsible for general management of the company including operations, sales, finance, accounting and customer service. (PX05158 (Swain (Ability Dynamics) Dep. at 9)).

Response to Finding No. 3538:

Respondent has no specific response.

3539. Mr. Swain was hired by Ability Dynamics roughly seven and a half years ago, charged to "create the company and the infrastructure. To work on product development. Hire people for the staff. You know, basically start from zero." (PX05158 (Swain (Ability Dynamics) Dep. at 11-12)).

Response to Finding No. 3539:

Finding no. 3539 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Respondent has no specific response.

3540. Ability Dynamics' "business is mechanical prosthetic feet," which it manufactures and sells out of Tempe, Arizona. (PX05158 (Swain (Ability Dynamics) Dep. at 17-18)).

Response to Finding No. 3540:

Finding no. 3540 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Respondent has no specific response.

3541. [redacted] (PX05158 (Swain (Ability Dynamics) Dep. at 18-19) (*in camera*).

Response to Finding No. 3541:

Finding no. 3541 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Respondent has no specific response.

3542. Ability Dynamics launched its RUSH line of glass composite prosthetic feet in 2012. (PX05158 (Swain (Ability Dynamics) Dep. at 29)).

Response to Finding No. 3542:

Finding no. 3542 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Respondent has no specific response.

3543. Proteor, Inc. acquired Ability Dynamics in or around June of 2018. (Mattear (Proteor) Tr. 5527-28). Following this acquisition, Proteor, Inc. moved its U.S. operation to Tempe, Arizona. (Mattear (Proteor) Tr. 5527-28).

Response to Finding No. 3543:

Finding no. 3543 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Complaint Counsel's proposed finding of fact is incomplete. 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). Of these seven sales people acquired through Nabtesco Proteor's acquisition of Ability Dynamics, several of them previously worked for Freedom. (Mattear, Tr. 5527-5528, 5562-5567). These sales people are familiar with Freedom products and sales strategies. (Mattear, Tr. 5562-5567). Proteor also has

an existing sales force familiar with Freedom products and sales strategies and ties with Nabtesco, which has over 30 years' experience designing microprocessor products. (Mattear, Tr. 5537, 5562-5567).

3544. [redacted] (Mattear (Proteor) Tr. 5750 (*in camera*)).

Response to Finding No. 3544:

Finding no. 3544 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Complaint Counsel's proposed finding of fact is inaccurate. Mattear testified that Swain "will be the CEO of Proteor, Inc." but Mattear did not testify when that will occur. (Mattear, Tr. 5750).

Linda Wise

3545. Linda Wise is Chief Marketing Officer at Ohio Willow Wood (PX05152 (Wise (Willow Wood) Dep. at 4)). She moved to that position "two years ago" after being Sales Manager for seven years. (PX05152 (Wise (Willow Wood) Dep. at 7-8)).

Response to Finding No. 3545:

Finding no. 3545 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Respondent has no specific response.

3546. Sixteen people report to Ms. Wise in her current position. (PX05152 (Wise (Willow Wood) Dep. at 9)).

Response to Finding No. 3546:

Finding no. 3546 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Respondent has no specific response.

3547. Ms. Wise's responsibilities are "[t]o grow sales, maintain [the] sales force and to ensure all [of Ohio Willow Wood's] products are marketed' which "flows into increasing sales." (PX05152 (Wise (Willow Wood) Dep. at 10)). She is also responsible for managing personnel and, as a member of the executive team, is "responsible for strategic plans within the company." (PX05152 (Wise (Willow Wood) Dep. at 10)).

Response to Finding No. 3547:

Finding no. 3547 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Respondent has no specific response.

3548. Ms. Wise is good at her job. (Arbogast (Ohio Willow Wood) Tr. 5069).

Response to Finding No. 3548:

Finding no. 3548 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Respondent has no specific response.

3549. Ohio Willow Wood's CEO, Ryan Arbogast, relies on Ms. Wise to make sales and marketing decisions for Ohio Willow Wood. (Arbogast (Ohio Willow Wood) Tr. 5069-70).

Response to Finding No. 3549:

Finding no. 3549 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Respondent has no specific response.

3550. Ms. Wise is the final decision maker with respect to sales and marketing decisions within Ohio Willow Wood. (Arbogast (Ohio Willow Wood) Tr. 5070).

Response to Finding No. 3550:

Finding no. 3550 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Complaint Counsel's proposed finding of fact is misleading and incomplete. According to Arbogast, CEO of Willow Wood, Wise is the final decision maker with respect to sales and marketing decisions within Willow Wood, *unless Arbogast overrules her*. (Arbogast, Tr. 5070).

3551. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5184-85 (*in camera*)).

Response to Finding No. 3551:

Finding no. 3551 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Complaint Counsel's proposed finding of fact is misleading and incomplete. [redacted]

3552. [redacted] (Arbogast (Ohio Willow Wood) Tr. 5185 (*in camera*)).

Response to Finding No. 3552:

Finding no. 3552 only appears in the MS Word version of Complaint Counsel's Proposed Findings of Fact—it does not appear in the PDF versions electronically filed. In an abundance of caution, Respondent responds as follows: Respondent has no specific response.

RESPONDENT'S REPLY TO
COMPLAINT COUNSEL'S POST-TRIAL PROPOSED CONCLUSIONS OF LAW

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RESPONDENT'S REPLY TO COMPLAINT COUNSEL'S POST-TRIAL PROPOSED CONCLUSIONS OF LAW[1]

I. THE FEDERAL TRADE COMMISSION HAS JURISDICTION OVER THIS MATTER

1. The Federal Trade Commission has jurisdiction over Respondent Otto Bock HealthCare North America, Inc., and the subject matter of this proceeding pursuant to Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act, 15 U.S.C. § 18, 21(b).

Response to Conclusion No. 1:

Respondent has no specific response.

2. The FTC is an administrative agency of the U.S. Government established, organized, and existing pursuant to the FTC Act, 15 U.S.C. § 41 *et seq*. (2006). The FTC is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 18.

Response to Conclusion No. 2:

Respondent has no specific response.

3. Respondent, including its relevant operating subsidiaries, are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44 (2006), and Section 1 of the Clayton Act, 15 U.S.C. § 12 (2006).

Response to Conclusion No. 3:

Respondent has no specific response.

II. CLAYTON ACT SECTION 7 AND FTC ACT SECTION 5 STANDARDS

4. Complaint Counsel's antitrust claims are based on Section 7 of the Clayton Act and Section 5 of the FTC Act. Section 7 of the Clayton Act prohibits mergers "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce . . . in any section of the country." 15 U.S.C. § 18. Section 5 of the FTC Act proscribes "[u]nfair methods of competition in or affecting commerce . . . ." 15 U.S.C. § 45(a)(1). An acquisition that violates the Clayton Act, by definition, is a

[1] Although not required by the Court's Order on Post-Trial Briefs (Oct. 10, 2018), Respondent submits these responses to Complaint Counsel's Proposed Conclusions of Law pursuant to 16 C.F.R. § 3.46(a). Respondent also incorporates by reference the legal arguments and application of facts to those legal arguments set forth in Respondent's Post-Trial Brief and Post-Trial Reply Brief into every response contained herein.

violation of Section 5 of the FTC Act. *See, e.g.*, *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

Response to Conclusion No. 4:

Respondent has no specific response, other than to note that *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) did not allege a violation of the Clayton Act. Respondent does not dispute that the same standard governs Complaint Counsel's claims under Section 7 of the Clayton Act and Section 5 of the FTC Act. *See* RFOF ¶ 1635.

5. 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, at 323.

Response to Conclusion No. 5:

This proposed conclusion is vague (because it does not specify for what it is that "certainty . . . need not be shown"). Respondent also objects to this proposed conclusion to the extent that it suggests that Complaint Counsel's burden is anything less than proving "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)); RFOF ¶ 1638. *Brown Shoe*, cited by Complaint Counsel, is not to the contrary. It provides that "[m]ergers with a probable anticompetitive effect were to be proscribed by this Act." *Brown Shoe*, 370 U.S. at 323.

6. Section 7 of the Clayton Act bars mergers "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or . . . activity affecting commerce in any section of the country." 15 U.S.C. § 18 (2012). "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) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)); *ProMedica Health Sys.*, 749 F.3d at 564 (quotation omitted).

Response to Conclusion No. 6:

Respondent has no specific response, other than to note that none of the cited authority suggests that Complaint Counsel's burden is anything less than proving "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)); RFOF ¶ 1638.

7. "Section 7 prohibits acquisitions that create a reasonable probability of anticompetitive effects." *Polypore*, 150 F.T.C. at 598. 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).

Response to Conclusion No. 7:

Respondent has no specific response, other than to note that none of the cited authority suggests that Complaint Counsel's burden is anything less than proving "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)); RFOF ¶ 1638.

8. "Even in a consummated merger, the ultimate issue under Section 7 is whether anticompetitive effects are reasonably probable in the future, not whether such effects have occurred as of the time of trial." *Polypore*, 150 F.T.C. at 598-99 (citing *United States v. General Dynamics Corp.*, 415 U.S. 486, 505-06 (1974)).

Response to Conclusion No. 8:

Respondent has no specific response, except to note that this is consistent with the fact that the proposed divestiture of Freedom's MPK assets is a complete defense to Complaint Counsel's claims. *See* RFOF ¶¶ 1681-1700.

9. Courts typically assess whether a merger violates Section 7 by determining the (1) relevant product market, (2) the relevant geographic market, and (3) the merger's probable effect on competition in those relevant markets. *See United States v. Marine Bancorp.*, 418 U.S. 602, 618-23 (1974); *see also U.S. Steel Corp. v. FTC*, 426 F.2d 592, 595-96 (6th Cir. 1970).

Response to Conclusion No. 9:

Respondent has no specific response.

10. Courts often rely on the Merger Guidelines framework to assess how acquisitions may harm competition. *See, e.g.*, *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565 (6th Cir. 2014); *FTC v. Bass Bros. Enter., Inc.*, 1984 WL 355, *24 (N.D. Ohio 1985).

Response to Conclusion No. 10:

Respondent has no specific response, other than to note that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

11. Courts traditionally analyze Section 7 cases using a burden-shifting framework. *In re ProMedica Health Sys., Inc.*, No. 9346, 2012 WL 1155392, *12; *Polypore*, 150 F.T.C. at 599 (citations omitted). This framework "first requires the Government to establish a *prima facie* case that an acquisition is unlawful." *Chicago Bridge & Iron, Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) (citations omitted); *see also ProMedica*, 2012 WL 1155392, *12; *Polypore*, 150 F.T.C. at 600; *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990); *Heinz*, 246 F.3d at 715.

Response to Conclusion No. 11:

Respondent has no specific response.

12. "Under this framework, the government can establish a presumption of liability by defining a relevant product and geographic market and showing that the transaction will lead to undue concentration in the relevant market." *ProMedica*, 2012 WL 1155392, *12; *Polypore*, 150 F.T.C. at 600 (citing *Baker Hughes*, 908 F.2d at 982-83).

Response to Conclusion No. 12:

No specific response, other than that any presumption of liability is rebuttable. *See Polypore*, 149 F.T.C. at 798 (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)).

13. As the Commission has previously noted, establishing a presumption of illegality based on undue concentration "'does not exhaust the possible ways to prove a § 7 violation on the merits.'" *ProMedica*, 2012 WL 1155392 at *13 (quoting *Whole Foods*, 548 F.3d at 1036) (citations omitted); *see also Polypore*, 150 F.T.C. at 600 (noting that "qualitative evidence regarding pre-acquisition competition between the merging parties can in some cases be sufficient to create a *prima facie* case even without quantitative evidence of changes in market concentration") (citing *Chi. Bridge*, 138 F.T.C. 1024, 1053 (2004); *Merger Guidelines* §2.1.4).

Response to Conclusion No. 13:

Respondent objects to this conclusion to the extent that it suggests that proving a Section 7 violation on the merits is generally possible without consideration of market concentration. In fact, although Complaint Counsel correctly quotes *ProMedica*, market concentration evidence was presented in each of the cases that Complaint Counsel cites. In fact, the authority cited was making the point that over-reliance on statistical evidence is to be avoided. *See Promedica*, 2012 WL 1155392, at *13 ("[I]n some merger cases, depending on the facts, it may make sense to begin the analysis with an examination of the competitive effects."); *Polypore*, 2010 WL 9549988, at *10 (noting that "[b]oth Complaint Counsel and Respondent developed their evidence and litigated this case by reference to a relevant market and this traditional burden-shifting framework.").

14. Once the presumption is established, the burden of rebutting the *prima facie* case shifts to Respondent who can then rebut the presumption by producing "evidence showing that the plaintiff's evidence paints an inaccurate picture of the merger's likely competitive effects." *Polypore*, 150 F.T.C at 600 (citing *Marne Bancorp.*, 418 U.S. 602); *see also Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *Baker Hughes*, 908 F.2d at 982. "The stronger the plaintiff's *prima facie* case, the greater the defendant's burden of production on rebuttal." *Polypore*, 150 F.T.C. at 600 (citing *Heinz*, 246 F.3d at 725; *Baker Hughes*, 908 F.2d at 991); *see also ProMedica Health Sys., Inc.*, 2012 WL 1155392, at *12.

Response to Conclusion No. 14:

Respondent has no specific response, other than to note if the presumption is established, Respondent is not required to "clearly" disprove future anticompetitive effects, because such a

requirement would impermissibly shift the ultimate burden of persuasion. *Baker Hughes*, 908 F.2d at 991.

15. If Respondent successfully rebuts the *prima facie* case, the burden shifts again to the government, which has the ultimate burden of persuasion. *Chi. Bridge*, 534 F.3d at 423; *Baker Hughes*, 908 F.2d at 983; *ProMedica*, 2011 WL 1219281, at *53.

Response to Conclusion No. 15:

Respondent has no specific response.

III. RESPONDENT'S CONSUMMATED MERGER IS PRESUMPTIVELY UNLAWFUL

A. THE RELEVANT MARKET IS THE MANUFACTURE AND SALE OF MICROPROCESSOR PROSTHETIC KNEES TO PROSTHETIC CLINICS IN THE UNITED STATES

16. In defining a relevant antitrust market, courts are guided by the Supreme Court's decision in *Brown Shoe*, 370 U.S. 294. Courts also rely heavily on the "hypothetical monopolist test" in *U.S. Department of Justice & Federal Trade Commission's Horizontal Merger Guidelines* (2010) (hereinafter "*Merger Guidelines*") as an analytical method for defining relevant markets. *See United States v. H&R Block*, 833 F. Supp. 2d at 51-52; *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016); *FTC v. Staples Inc.*, 190 F. Supp. 3d 100, 121-22 (D.D.C. 2016) (hereinafter *"Staples 2016")*; *ProMedica*, 749 F.3d at 565.

Response to Conclusion No. 16:

Respondent has no specific response, other than to note that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

17. "As the United States Supreme Court observed in [*Brown Shoe*], 'The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country').'" *U.S. Steel Corp. v. FTC*, 426 F.2d 592, 595-96 (6th Cir. 1970) (quoting *Brown Shoe*, 370 U.S. at 324). In this case, the area of effective competition is the manufacture and sale of microprocessor prosthetic knees to prosthetic clinics in the United States.

Response to Conclusion No. 17:

Respondent has no specific response to Complaint Counsel's quotation of *U.S. Steel* and *Brown Shoe*. Respondent does not dispute that the relevant geographic market is the United

States. Respondent objects to the identified product market because, as described below in response to proposed Conclusions of Law ¶¶ 18-46, Complaint Counsel has not established that the relevant product market is limited to the manufacture and sale of microprocessor prosthetic knees.

B. MICROPROCESSOR PROSTHETIC KNEES IS A RELEVANT PRODUCT MARKET

18. The relevant product market refers to the "product and services with which the defendants' products compete." *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 193 (D.D.C. 2017), *aff'd* 855 F.3d 345 (D.C. Cir.). In other words, the relevant product market is the "line of commerce" affected by a merger. *Brown Shoe*, 370 U.S. at 324.

Response to Conclusion No. 18:

Respondent has no specific response.

19. "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. . Stated another way, a product market includes all goods that are "reasonable substitutes". *Sysco*, 113 F. Supp. 3d at 25 (citing *Cardinal Health*, 12 F. Supp. 2d at 46; *Staples*, 970 F. Supp. at 1074); *United States v H & R Block, Inc.*, 833 F. Supp. 2d 36, 51 (D.D.C. 2011) (citation omitted) (holding "courts look at 'whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.").

Response to Conclusion No. 19:

Respondent has no specific response.

20. To determine whether products are "reasonable substitutes" requires an evaluation of cross elasticity of demand and "functional interchangeability." *Sysco*, 113 F. Supp. 3d at 25. "'Interchangeability of use and cross-elasticity of demand look to the availability of products that are similar in character or use to the product in question *and* the degree to which buyers are willing to substitute those similar products for the product.'" *Polypore*, 150 F.T.C. at 602-03 (quoting *FTC v. Swedish Match*, 131 F.Supp. 2d 151, 157 (D.D.C. 2000)) (emphasis added); *H & R Block, Inc.*, 833 F. Supp. 2d at 51 (quoting *Staples*, 970 F.Supp. at 1074) ("courts look at 'whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other").

Response to Conclusion No. 20:

Respondent has no specific response.

21. Functional interchangeability, *i.e.*, the fact that some products may superficially (or even under careful examination) appear to be similar in use, does not alone warrant inclusion in the relevant product market. *Staples*, 970 F. Supp. at 1074; *see also H&R Block*, 833 F. Supp. 2d at 54.

Response to Conclusion No. 21:

To the extent that this finding suggests that "functional interchangeability" requires any more stringent showing than that "there are other products available to consumers which are similar in character or use to the products in question," *Staples*, 970 F. Supp. at 1074, it is not supported by the cited authority. Instead, the court in *Staples* merely noted that after determining functional interchangeability, the court should go on to consider cross-elasticity of demand. In *H&R Block*, the court made the point that not all competing products are "reasonably interchangeable" but it did not redefine "functional interchangeability." 833 F. Supp. 2d at 54.

22. A relevant product market for antitrust purposes "need only include 'reasonable substitutes.'" *Anthem*, 236 F. Supp. 3d at 194-95 (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).

Response to Conclusion No. 22:

Respondent has no specific response.

23. To determine cross-elasticity of demand between products, one should consider "the responsiveness of the sales of one product to price changes of the other." *United States v. E.I. du Pont De Nemours*, 351 U.S. 377, 400 (1956) (hereinafter "*du Pont 1956*"); *Sysco*, 113 F. Supp. 3d at 25. For example, "[i]f an increase in the price for product A causes a substantial number of customers to switch to product B, the products compete in the same market." *Sysco*, 113 F. Supp. 3d at 25; *see also du Pont (1956)*, 351 U.S. at 400.

Response to Conclusion No. 23:

Respondent has no specific response, other than to note that *E.I. du Pont* identified the responsiveness of sales of one product to prices changes of the other is "*an* element for consideration." *E.I. du Pont*, 351 U.S. at 400 (emphasis added). Likewise, *Sysco* stated that "[a]s

for cross-elasticity of demand, there the question turns *in part* on price." *Sysco*, 113 F. Supp. 3d at 25. It went on to state that "[p]rice is not, however, the only variable in determining the cross-elasticity of demand between products." *Id.*

24. 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.'" *Advocate*, 841 F.3d at 469 (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.'").

Response to Conclusion No. 24:

Respondent has no specific response, other than to note that the quote from *Advocate* was in the context of an analysis of geographic market, not product market. *Advocate*, 841 F.3d at 469.

25. Determination of the relevant market "is a matter of business reality—a matter of how the market is perceived by those who strive for profit in it." *FTC v. Staples*, 970 F. Supp. 1066, 1079 (D.D.C. 1997) (internal quotation marks and citation omitted); *see also FTC v. Coca Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C. 1986); *see also Aetna*, 240 F. Supp. 3d at 21 ("Ordinary course of business documents reveal the contours of competition of the parties. . .and may be presumed to 'have accurate perceptions of economic realities.'") (quoting *Whole Foods*, 548, F.3d at 1045 (Tatel, J.)). As such, "When determining the relevant product market, courts often pay close attention to the defendants' ordinary course of business documents." *Sysco*, 113 F. Supp. 3d at 41 (quoting *H&R Block*, 833 F. Supp. 2d at 52); *Aetna*, 240 F. Supp. 3d at 21 (same).

Response to Conclusion No. 25:

Respondent has no specific response.

26. Courts frequently define relevant product markets using two analyses—the *Brown Shoe* practical indicia and the hypothetical monopolist test. *See e.g., Sysco*, 113 F. Supp. 3d at 27-34; *Staples 2016*, 190 F. Supp. at 118-22.

Response to Conclusion No. 26:

Respondent has no specific response.

27. In *Brown Shoe*, the Supreme Court identified a series of "practical indicia" for courts to consider in determining the relevant product market. 370 U.S. at 325. Courts consistently apply these practical indicia in defining relevant antitrust markets. *See e.g.*,

Anthem, 236 F. Supp. 3d at 194; *Sysco*, 113 F. Supp. at 27*; H&R Block* 833 F. Supp. 2d at 51.

Response to Conclusion No. 27:

Respondent has no specific response.

28. The indicia outlined in *Brown Shoe* include, "industry or public recognition of the [market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe*, 370 U.S. at 325; *see also U.S. v. Aetna*, 240 F. Supp. 3d 1, 21 (D.D.C. 2017); *Sysco* 113 F. Supp. 3d at 27; *H&R Block*, 833 F. Supp. 2d at 51; *Rothery Storage & Van Co.*, 792 F.2d at 218 n.4 (D.C. Cir. 1986); *Polypore*, 150 F.T.C. at 603.

Response to Conclusion No. 28:

Respondent has no specific response.

29. "Practical indicia" serve as "evidentiary proxies for proof of substitutability and cross-elasticities of supply and demand." *H&R Block*, 833 F. Supp. 2d at 51 (citing *Rothery Storage & Van*, 792 F.2d at 218); *Polypore*, 150 F.T.C. at 603 (quoting *Brown Shoe*, 370 U.S. at 325) (citations omitted). As the Commission noted in *Polypore*, "[t]hese observable market facts provide evidence of interchangeability and the cross-elasticity of demand." 150 F.T.C. at 603.

Response to Conclusion No. 29:

Respondent has no specific response.

30. "'[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.'" *Cardinal Health*, 12 F. Supp. 2d at 47 (quoting *Staples*, 970 F. Supp. at 1075-76); *Sysco*, 113 F. Supp. 3d at 26; *see also Swedish Match*, 131 F. Supp. 2d at 164-65 (finding that while moist snuff competed with the product at issue – loose leaf snuff – it was not in the relevant product market because it was "incapable of inducing substitution sufficient enough to render loose leaf price increases unprofitable[.]").

Response to Conclusion No. 30:

Respondent has no specific response, other than to note that the court in *Cardinal Health* was making the point that "[t]he Supreme Court has recognized that within a broad market, 'well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.'" 12 F. Supp. 2d at 47 (quoting *Staples*, 970 F. Supp. at 1075-76.)

31. Microprocessor prosthetic knees constitutes a distinct relevant market in which to assess the competitive effects of the proposed merger. MPKs can sense variations in walking cadence and terrain and make thousands of adjustments per second to stiffness and positioning of the knee joint providing increased stability and safety to certain amputees. (CCFF ¶¶ 363-68). The fact that for some amputees MPKs are not medically necessary does not justify defining the relevant product market to include mechanical knees. *See Polypore*, 150 F.T.C. at 604 (defining relevant market based on end use of product).

Response to Conclusion No. 31:

This proposed conclusion of law is false because any relevant product market is broader than only MPKs and includes certain non-MPKs. In particular, Sophisticated Non-MPKs for K-3 and K-4 users are functionally interchangeable with MPKs, and the Plié 3 in particular (RFOF ¶¶ 335-391); users substitute between all fluid-controlled knees based on functionality and cost (RFOF ¶¶ 392-406); prosthetists substitute among all Sophisticated Non-MPKs and MPKs appropriate for K-3 and K-4 patients based on the margin between reimbursement and their costs (RFOF ¶¶ 407-460); manufacturers develop, manufacture, and sell Sophisticated Non-MPKs and MPKs in the same fashion (RFOF ¶¶ 461-468); and market participants recognize competition by K-Level classification (RFOF ¶¶ 469-495). Notably, Freedom's Plié 3 cannot adjust the "stiffness and positioning of the knee joint providing increased stability and safety to certain amputees." (RFOF ¶¶ 168-173; RFOF ¶¶ 350- 419).

Polypore is distinguishable because in that case, products that were "manufactured for a particular end use or customer [are not] reasonably interchangeable with other [products]." 2010 WL 9549988, at *11. In this case, MPKs and Sophisticated Non-MPKs are *not* manufactured for different end uses.

32. MPKs have peculiar characteristics and uses that distinguish them from other types of prosthetic knees. (CCFF ¶¶ 607-700). The unique characteristics and functionality provided by MPKs, which Respondent recognizes in its own documents, supports an MPK product market. (CCFF ¶¶ 657-687). *See Brown Shoe*, 370 U.S. at 325 ("the product's peculiar characteristics and uses" support distinct relevant markets).

Response to Conclusion No. 32:

This proposed conclusion of law is false, first, because Complaint Counsel overstates the distinction between MPKs and Sophisticated Non-MPKs. The evidence at trial indicated that there is a range of MPKs with a range of microprocessor control, and a range of Non-MPKs at various levels of functionality, and the industry does not divide those knees up into two distinct groups. (RFOF ¶¶ 135-249; RFOF ¶ 337). Respondent's own documents refer to the unique characteristics and functionality provided by Respondent's MPKs, not the Plié 3, which functions more like a Sophisticated Non-MPK than an MPK, even though it has a microprocessor in it. (RFOF ¶¶ 168-173, 350-419). Industry participants characterize the Plié 3 as a hybrid knee, which is in between an MPK and a Non-MPK. (Response to CCFF ¶ 613). In addition, to the extent that some MPKs have some unique features, it does not follow that they constitute a separate relevant product market. As described above and in Respondent's Proposed Conclusions of Law, whether products are in the same relevant market depends on the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. (RFOF ¶¶ 1645-1652).

33. MPKs are used by a distinct subset of amputees who prosthetists determine are healthy enough and regularly engage in activities that make wearing an MPK a medical necessity. (CCFF ¶¶ 400-429, 447-87). *See Brown Shoe*, 370 U.S. at 325 (the existence of "distinct customers" for a product support distinct relevant markets). Indeed, insurance providers will only provide reimbursement when medical necessity is established. (CCFF § IV.C).

Response to Conclusion No. 33:

This proposed conclusion of law is false because for many patients, MPKs and Sophisticated Non-MPKs are reasonably interchangeable alternatives. (RFOF ¶¶ 335-391; Response to CCFF ¶¶ 400-487). As such, it is incorrect that there are "distinct customers" for the two types of products.

34. MPK prices and reimbursement amounts are significantly higher than mechanical knees, (CCFF § VI.B) indicating MPKs constitute a separate market. *See FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 119-120 (D.D.C. 2016) (discussing distinct pricing as evidence of relevant product market); *Aetna*, 240 F. Supp. 3d 1, 21 (D.D.C. 2017), ("distinct prices" may be considered in assessing the boundaries of a market) (citing *Brown Shoe*, 370 U.S. at 325).

Response to Conclusion No. 34:

This proposed conclusion of law is false, first, because it does not account for the effect of the reimbursement system and because it focuses only on prices and reimbursement amounts and not on the most important consideration, margins. (RFOF ¶¶ 407-460). Furthermore, this proposed conclusion of law ignores the fact that, under the U.S.'s third-party reimbursement system, many patients do not pay the full out-of-pocket price for a knee. (RFOF ¶¶ 110, 407-460). To the extent that prosthetists and patients sometimes choose Sophisticated Non-MPKs over MPKs on the basis of price, it only proves that for many patients, Non-MPKs and MPKs are functionally interchangeable. (RFOF ¶¶ 407-460).

35. MPKs and mechanical knees are in separate product markets because there is no "responsiveness of the sales of one product to price changes of the other." (CCFF § VI.C.); *du Pont 1956*, 351 U.S. at 400. MPK manufacturers, including Otto Bock and Freedom, "make pricing and marketing decisions based primarily on comparisons with rival [MPKs], with little if any concern about possible competition" from mechanical knees. (CCFF ¶¶ 755-56, 758); *Coca Cola Co.*, 641 F. Supp. at 1133; *H&R Block*, 833 F. Supp. 2d at 53 (development of "pricing and business strategy with [a particular] market and those competitors in mind" is "strong evidence" of the relevant product market); *see also Swedish Match*, 131 F. Supp. 2d at 165 ("The Commission amassed evidence showing that loose leaf pricing is determined upon the basis of competition with other loose leaf products . . . .").

Response to Conclusion No. 35:

This proposed conclusion of law is false because not only do users substitute between all fluid-controlled knees based on functionality and cost, (RFOF ¶ 392), but prosthetists also substitute among all Sophisticated Non-MPKs and MPKs appropriate for K-3 and K-4 patients based on margins between reimbursement and costs, which include product acquisition costs and

patient-servicing costs. (RFOF ¶¶ 407-460). Likewise, manufacturers develop, manufacture, and sell Sophisticated Non-MPKs and MPKs in the same fashion. (RFOF ¶ 461-468; *see also* Response to CCFF ¶¶ 530, 755-56, 758).

36. Market definition is a matter of "business reality" of "how the market is perceived by those who strive to profit in it," *Coca-Cola Co*., 641 F. Supp. at 1132 (D.D.C. 1986), vacated as moot, 829 F.2d 191 (D.C. Cir. 1987). Industry participants, including Respondent, widely recognize MPKs as a distinct market from mechanical knees. (CCFF §§ VI.E). *See Brown Shoe*, 370 U.S. at 325; *Sysco*, 113 F. Supp. 3d at 30 (considering industry recognition as evidence of relevant product market). Otto Bock, Freedom and other MPK manufacturers assess and evaluate a separate MPK market. (CCFF ¶¶ 717-28, 752-58); *see H&R Block, Inc.*, 833 F. Supp. 2d at 52-53 (describing merging parties' documents as "strong evidence" of product market definition) (citing *Whole Foods*, 548 F.3d at 1045 (Tatel, J.)). Customers similarly view MPKs and mechanical knees as being in separate markets. (CCFF ¶¶ 649-56); *see Sysco*, 113 F. Supp. 3d at 30 (considering customer perception of the industry as evidence of a relevant product market definition).

Response to Conclusion No. 36:

This proposed conclusion of law is false because it is contradictory to the evidence. Manufacturers develop, manufacture, and sell Sophisticated Non-MPKs and MPKs in the same fashion, (RFOF ¶¶ 461-468), and market participants recognize competition by K-Level classification. (RFOF ¶¶ 469-495; *see also* Response to CCFF ¶¶ 530, 649-56, 717-28, 752-58).

37. To sell MPKs effectively requires highly specialized sales and clinical personnel (CCFF ¶¶ 1676, 1678, 1686-87, 1692, 1695, 1697-98), which supports an MPK market. *See Brown Shoe*, 370 U.S. at 325 (presence of "specialized vendors" support distinct relevant markets).

Response to Conclusion No. 37:

This proposed conclusion of law is irrelevant, because the cited evidence does not support that similar expertise is not required for the sale of Sophisticated Non-MPKs, or that Sophisticated Non-MPKs and MPKs are actually sold by different sales representatives. *See* (Response to CCFF ¶¶ 1676, 1678, 1686-87, 1695, 1697-98). A sales force must be knowledgeable about all the products it sells. (Response to CCFF ¶ 1695).

38. Non-microprocessor knees (i.e., mechanical knees) are not reasonably interchangeable with microprocessor knees. Unlike MPKs, mechanical knees do not contain a microprocessor and thus do not make adjustments. Mechanical knees are, therefore, less responsive than MPKs to sudden movements and, for certain amputees, lead to a greater risk of falling. (CCFF ¶¶ 607-16); *see Polypore*, 150 F.T.C. at 604 ("The fact that two [products] may have one characteristic in common. . .does not mean that the [products] can be substituted for one another in a particular application if other features are different…").

Response to Conclusion No. 38:

This proposed conclusion of law is false because it is contradictory to the evidence. Sophisticated Non-MPKs for K-3 and K-4 knees are functionally interchangeable with MPKs and the Plié 3 in particular (RFOF ¶¶ 335-391); users substitute between all fluid-controlled knees based on functionality and cost (RFOF ¶¶ 392-406); prosthetists substitute among all sophisticated knees appropriate for K-3 and K-4 patients based on the margin between reimbursement and their costs (RFOF ¶¶ 407-460); manufacturers develop, manufacture, and sell non-MPKs and MPKs in the same fashion (RFOF ¶¶ 461-468); and market participants recognize competition by K-Level classification (RFOF ¶¶ 469-495). Significant record evidence establishes that many Non-MPKs are sophisticated, enable ambulation, and facilitate activity – particularly for active amputees. (Response to CCFF ¶ 608; *see also* Response to CCFF ¶¶ 461-468). Further, the sophistication of the Plié 3, and the adjustments its microprocessor can make, are limited, and there is no evidence in the record that the Plié 3 leads to greater risk of falling relative to Sophisticated Non-MPKs. (Response to CCFF ¶ 609-14; RFOF ¶¶ 350-391).

39. In addition to the *Brown Shoe* indicia, courts often rely on the approach prescribed by the *Merger Guidelines*—the hypothetical monopolist test. *See FTC v. Advocate Health Care Network*, 841 F.3d 460, 468-69 (7th Cir. 2016) (applying the hypothetical monopolist test to define a relevant geographic market); *see also ProMedica*, 2012 WL 1155392, *14; *Sysco*, 113 F. Supp. 3d at 33; *Staples 2016*, 190 F. Supp. 3d at 121-22; *Merger Guidelines* § 4.

Response to Conclusion No. 39:

Respondent has no specific response, other than to note that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

40. Application of the *Merger Guidelines* further supports that MPKs is a relevant antitrust product market. The Merger Guidelines explain that relevant product market definition focuses 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 or a corresponding non-price change such as a reduction in product quality or service." *Merger Guidelines* §4 (emphasis added).

Response to Conclusion No. 40:

This proposed conclusion of law is false because it is contradictory to the evidence. Sophisticated Non-MPKs for K-3 and K-4 users are functionally interchangeable with MPKs and the Plié 3 in particular (RFOF ¶¶ 335-391); users substitute between all fluid-controlled knees based on functionality and cost (RFOF ¶¶ 392-406); prosthetists substitute among all sophisticated knees appropriate for K-3 and K-4 patients based on the margin between reimbursement and their costs (RFOF ¶¶ 407-460); manufacturers develop, manufacture, and sell non-MPKs and MPKs in the same fashion (RFOF ¶¶ 461-468); and market participants recognize competition by K-Level classification (RFOF ¶¶ 469-495).

41. Under the hypothetical monopolist test, a candidate market constitutes a relevant antitrust market if a hypothetical monopolist could profitably impose a "small but significant and non-transitory increase in price" (SSNIP), typically five percent, on at least ***one*** product of the merging parties in the candidate market. *Merger Guidelines* §§ 4.1.1-4.1.3; *see also CCC Holdings*, 605 F. Supp. 2d at 38 n.12. Here, the relevant inquiry is whether a hypothetical monopolist of all MPKs could profitably impose a SSNIP on either Freedom's Plié or one of Otto Bock's MPKs (if so, MPKs is a relevant market). *See Merger Guidelines* §§ 4.1.1-4.1.3.

Response to Conclusion No. 41:

This proposed conclusion of law is incomplete because it does not fully state the hypothetical monopolist test, as stated in the *Merger Guidelines*. According to the *Merger*

Guidelines, "the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of [substitute] products . . . likely would impose at least a small but significant and non-transitory increase in price . . . on at least one product in the market, including at least one product sold by one of the merging firms." *Merger Guidelines* § 4.1.1. "[W]hat constitutes a "small but significant" increase in price, commensurate with a significant loss of competition caused by the merger, depends upon the nature of the industry and the merging firms' positions in it." *Id.* § 4.1.2. This proposed conclusion of law is also false because Ottobock's High-End MPKs are not in the same market. (RFOF ¶¶ 496-509). Finally, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

42. In determining the bounds of the relevant product market, the first step is to apply the hypothetical monopolist test on a candidate market comprised of at least one product of each merging firm. *Merger Guidelines* §§ 4.1.1-4.1.3. The candidate market is too narrow only if enough customers would switch to products outside the candidate market in the face of a price to render the price increase unprofitable. *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]" *Advocate*, 841 F.3d at 468 (citation omitted). A relevant antitrust product market is defined when a hypothetical monopolist of a candidate market could profitably impose a SSNIP. *Merger Guidelines* §§ 4.1.1-4.1.3.

Response to Conclusion No. 42:

Respondent has no specific response.

43. As Dr. Scott Morton, Complaint Counsel's expert, concluded MPKs is a relevant product market because it is a set of products over which a hypothetical monopolist of all MPKs could profitably impose a SSNIP on at least one of the merging parties' products. (CCFF § VI.F.1). Because mechanical knees are not substitutes for the K3/K4 patients for whom MPKs are medically necessary, clinics would be unlikely to substitute mechanical knees to such an extent that SSNIP would be profitable. (CCFF §VI.F.2).

Response to Conclusion No. 43:

This proposed conclusion of law is false because it is contradictory to the evidence. In particular, Dr. Scott Morton's analysis is flawed and lacking in credibility, (*see* Response to CCFF § VI.F.1, RFOF ¶ 538-564), and the evidence shows that Sophisticated Non-MPKs are reasonably interchangeable with MPKs for the reasons described above in response to proposed Conclusion of Law ¶ 38, (*see* Response to CCFF § VI.F.2).

44. The *Merger Guidelines*, therefore, bolster the conclusion under the *Brown Shoe* factors that it is appropriate to analyze the competitive effects of the Merger separately for MPKs. *See Merger Guidelines* §§ 4.1.1-4.1.3.

Response to Conclusion No. 44:

This conclusion of law is false for the reasons described above in response to Conclusions of Law ¶¶ 39-43.

45. Respondent's attempt to include mechanical knees in the relevant product market violates the principle that the relevant product market should be defined as the smallest product market that will satisfy the hypothetical monopolist test. *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). There is substantial evidence showing that 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 (1956)*, 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.

Response to Conclusion No. 45:

This proposed conclusion of law is false and misleading to the extent it mischaracterizes the relevant market in this case, which includes Sophisticated Non-MPKs but not constant friction mechanical knees for K-1 and K-2 users. (RFOF ¶¶ 335-564). Moreover, evidence establishes that users substitute between all fluid-controlled knees based on functionality and cost, (RFOF ¶¶ 392-406), and that prosthetists substitute among Sophisticated Non-MPKs and MPKs for K-3 and K-4 patients based on the margin between reimbursement and their costs,

which include both acquisition costs and patient-services costs. (RFOF ¶¶ 407-460; *see also* Response to CCFF ¶¶ 795-806).

46. There is no basis in law or economics for defining the relevant market based on a single attribute of the patient class—e.g. that MPK patients are designated as K3/K4 under the Medicare classification—and then expanding the relevant market non-substitute products used by patients sharing that single attribute. *Cf. Merger Guidelines* §§ 4 (focus in market definition is substitutability); *see also Sysco*, 113 F. Supp. 3d at 25; *du Pont 1956*, 351 U.S. at 400.

Response to Conclusion No. 46:

This proposed conclusion of law should be rejected because it is based on a false and misleading premise – that even though K-3 and K-4 patients use both MPKs and Sophisticated Non-MPKs, that those products are somehow "non-substitute" products. As described above in response to proposed Conclusion of Law ¶ 38, and the facts cited therein, MPKs and Sophisticated Non-MPKs are considered substitutes by the same K-3 and K-4 patients, the doctors that prescribe them, and the prosthetists that fit them.

C. THE RELEVANT GEOGRAPHIC MARKET IS THE UNITED STATES

47. The relevant geographic market is the area "where the effect of the merger on competition will be direct and immediate." *Advocate*, 841 F.3d at 476 (citing *U.S. v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357) (internal quotations omitted). Here, the relevant geographic market is the United States. (CCFF § VII) (Counsel for Respondent agreed there is no dispute that the relevant geographic market is the United States).

Response to Conclusion No. 47:

Respondent has no specific response.

48. The United States is where "the defendants compete in marketing their products or services," *H&R Block*, 833 F. Supp. 2d at 50 n.7 (quoting *CCC Holdings*, 605 F. Supp. 2d at 37).

Response to Conclusion No. 48:

Respondent has no specific response.

49. Relevant geographic market definition is determined by assessing the alternative sources of the relevant product to which customer could turn. *See, e.g., Phila. Nat'l Bank*, 374 U.S. at 359; *Polypore*, 150 F.T.C. at 612; *see also Merger Guidelines* § 4.2.

Response to Conclusion No. 49:

Respondent has no specific response.

50. The Supreme Court explained that the relevant geographic market must "correspond to the commercial realities of the industry," as determined through a "pragmatic, factual approach." *Brown Shoe*, 370 U.S. at 336 (internal quotations omitted).

Response to Conclusion No. 50:

Respondent has no specific response.

51. There is substantial evidence that "commercial realities" of the industry, show that the sale of MPKs to clinics located in the United States is a distinct geographic market. (CCFF § VII.B) MPK firms that only operate outside of the United States are not viable options for U.S. prosthetic clinics. (CCFF § VII.B.2).

Response to Conclusion No. 51:

Respondent has no specific response.

52. Courts commonly use the hypothetical monopolist test prescribed by the *Merger Guidelines* to assess the commercial reality of a relevant geographic market. *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016); *St. Alphonsus Med. Ctr. V. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015) (quotation omitted).

Response to Conclusion No. 52:

Respondent has no specific response.

53. "Under the Horizontal Merger Guidelines, a relevant geographic market is the smallest region in which a hypothetical monopolist that was the only seller of the relevant product located within that region could profitably implement a 'small but significant non transitory' increase in price." *Polypore*, 150 F.T.C. at 612 (quoting *Merger Guidelines* § 4.2). If, in response to a SSNIP, enough customers were to purchase from suppliers outside of the proposed geographic market, then the market is too narrow. *See St. Alphonsus Med. Ctr.*, 778 F.3d at 784) (citing *Theme Promotions v. News Am. Mktg. FSI*, 546 F.3d 991, 1002 (9th Cir. 2008).

Response to Conclusion No. 53:

Respondent has no specific response.

54. Here, the relevant question is whether a hypothetical monopolist of MPKs currently sold in the United States could profitably impose a SSNIP to clinics in the U.S. See Merger Guidelines § 4.2. There is extensive evidence showing that customers could not, and would not, turn to an MPK supplier that lacked a substantial U.S. presence. (CCFF § VII.B.2). Because a hypothetical monopolist of MPKs currently sold in the United States could profitably raise prices to U.S. customers, the United States is a relevant geographic market. *See Merger Guidelines* §4.2.

Response to Conclusion No. 54:

To the extent that this proposed conclusion of law assumes that the relevant product market is limited to MPKs, it is false for the reasons stated above in response to proposed Conclusions of Law ¶¶ 18-48.

D. HIGH MARKET CONCENTRATION AND MARKET SHARES ESTABLISH A STRONG PRESUMPTION THAT THE MERGER IS ILLEGAL

55. A merger that significantly increases market shares and concentration to high levels creates a presumption that the merger is illegal under Section 7 of the Clayton Act. *Phila. Nat'l Bank*, 374 U.S. at 363; *Heinz*, 246 F.3d at 715; *see also Baker Hughes*, 908 F.2d 982-83. A merger is presumed to violate the Clayton Act and FTC Act if it produces a firm controlling an "undue concentration in the relevant market." *ProMedica*, 2012 WL 1155392 at *12 (citing *Phila. Nat'l Bank*, 374 U.S. at 363; *Baker Hughes*, 908 F.2d at 982-83).

Response to Conclusion No. 55:

This conclusion of law is vague to the extent it refers simply to "high" levels of concentration. The standard as articulated in *Philadelphia National Bank* is that "a merger which produces a firm controlling an *undue* percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market 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." 374 U.S. at 363 (emphasis added). Further, any presumption of liability is rebuttable. *See Polypore*, 149 F.T.C. at 798 (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)).

56. The Commission may rely on the "closest available approximation" of market shares when calculating concentration levels. *See FTC v. PPG Indus.*, 798 F. 2d 1500, 1505 (D.C. Cir. 1986). The "FTC need not present market shares and HHI estimates with the precision of a NASA scientist." *Sysco*, 113 F. Supp. 3d at 54 (market share estimates were reliable because they were a close approximation); *see also H&R Block*, 833 F.Supp. 2d at 72 (a "reliable, reasonable, close approximation of relevant market share data is sufficient").

Response to Conclusion No. 56:

This proposed conclusion of law is false to the extent it suggests that Complaint Counsel may rely on unreliable data to prove its *prima facie* case. As *H&R Block* indicates, approximate data may be used only if "reliable, reasonable" and "close." 833 F. Supp. 2d at 72. Moreover, statistics reflecting market share and concentration are not conclusive indicators of anticompetitive effects. *Heinz*, 246 F.3d at 717 n. 2 (requiring further examination of the particular market, including its structure, history and probable future).

57. The Herfindahl-Hirschman Index (the "HHI") is the typical measure for determining market concentration. *ProMedica*, 2012 WL 1155392, at *12 (citing *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009)); *see also Polypore*, 150 F.T.C. at 623 (citing *Heinz*, 246 F.3d at 716); *Sysco*, 113 F. Supp. 3d at 52-53. "The HHI is calculated by summing the squares of the individual firms' market shares." Merger Guidelines § 5.3; *see also Sysco*, 113 F. Supp. 3d at 52.

Response to Conclusion No. 57:

Respondent has no specific response, other than that the HHI is not dispositive, *see Baker Hughes*, 908 F.2d at 992 ("The Herfindahl-Hirschman Index cannot guarantee litigation victories"), and that while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016). "[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).

58. "Sufficiently large HHI figures" establish "[a] prima facie case that a merger is anti-competitive." *Heinz*, 246 F.3d at 716; *Polypore*, 150 F.T.C. at 623 (concentration data was sufficient to create a presumption of illegality).

Response to Conclusion No. 58:

This proposed conclusion of law is misleading to the extent it cites *Heinz* out of context. In *Heinz*, the court stated that "[s]ufficiently large HHI figures establish *the* FTC's prima facie case that a merger is anticompetitive." *Heinz*, 246 F.3d at 716 (emphasis added). Thus, the statement from *Heinz* was referring to the figures in that case specifically. This is consistent with the fact that the HHI is not dispositive, *see Baker Hughes*, 908 F.2d at 992 ("The Herfindahl-Hirschman Index cannot guarantee litigation victories"), and that while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016). "[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).

59. Under the Merger Guidelines, mergers "that involve an increase in the HHI of more than 200 points" in a highly concentrated market (i.e., with HHI over 2500), are presumptively anticompetitive. Merger Guidelines § 5.3; *Sysco*, 113 F. Supp. 3d at 52-53; *H&R Block*, 833 F. Supp. 2d at 71-72; *see Heinz*, 246 F.3d at 716-17.

Response to Conclusion No. 59:

This proposed conclusion of law is incorrect because it misquotes the *Merger Guidelines*. The *Merger Guidelines* provide that such a merger "will be presumed to be likely to enhance market power," a presumption that "may be rebutted by persuasive evidence showing that the

merger is unlikely to enhance market power." *Merger Guidelines* § 5.3. Further, the HHI is not dispositive, *see Baker Hughes*, 908 F.2d at 992 ("The Herfindahl-Hirschman Index cannot guarantee litigation victories"), and while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

60. Here, the Merger results in an HHI of 5,245 and an increase in HHI of 1,522, (CCFF ¶¶ 964-66), far exceeding the established thresholds to establish a strong presumption that the Merger is likely to enhance market power. *See Merger Guidelines* § 5.3.

Response to Conclusion No. 60:

This proposed conclusion of law should be rejected because it is based on the false premise that the relevant market consists only of a market for MPKs. For the reasons stated above in response to Conclusions of Law ¶¶ 18-46, any relevant market must include Sophisticated Non-MPKs. The proposed conclusion of law should be rejected also because other pertinent factors, including the inability of Freedom Innovations to meet its debt obligations and fund operations, (RFOF ¶¶ 1291-1531), and expansion by Respondent's rivals, (RFOF ¶¶ 707-940), require a conclusion that no substantial lessening of competition occurred or was threatened by the Acquisition. *General Dynamics*, 415 U.S. at 498.

In addition, this proposed conclusion of law is incorrect because, as stated below in response to Conclusion of Law ¶ 60, the Acquisition includes an MPK Divestiture. Further, the HHI is not dispositive, *see Baker Hughes*, 908 F.2d at 992 ("The Herfindahl-Hirschman Index cannot guarantee litigation victories"), and while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016). "[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).

61. Respondent's own market share estimates prepared in the ordinary course of business are remarkably consistent with market shares calculated by Professor Scott Morton, underscoring the reliability of the shares and concentration levels. (CCFF ¶¶ 967-80); *Sysco*, 113 F. Supp. 3d at 59 (merging parties' ordinary course documents corroborated economic expert's market share calculations).

Response to Conclusion No. 61:

This proposed conclusion of law is false because it is not supported by the evidence. In particular, Complaint Counsel ignores and misconstrues certain evidence and relies on outdated, unreliable evidence regarding supposed "market share estimates." (Response to CCFF ¶¶ 967-980).

62. Even if one were to accept Respondent's overbroad proposed product market definition and include mechanical knees in the relevant market, the market share and concentration levels would yield market shares and concentration levels that establish, by a wide margin, a presumption of anticompetitive effects. (CCFF ¶¶ 985-990). Therefore, even in the broadest conceivable market, merger is presumptively unlawful. *See Merger Guidelines* § 5.3.

Response to Conclusion No. 62:

This proposed conclusion of law is misleading and without support to the extent it characterizes any presumption as being by "a wide margin." The proposed conclusion of law should be rejected also because other pertinent factors, including the inability of Freedom Innovations to meet its debt obligations and fund operations, (RFOF ¶¶ 1291-1531), and expansion by Respondent's rivals, (RFOF ¶¶ 707- 940), require a conclusion that no substantial lessening of competition occurred or was threatened by the Acquisition. *General Dynamics*, 415 U.S. at 498.

In addition, this proposed conclusion of law is incorrect because, as stated below in response to Conclusion of Law ¶ 60, the Acquisition includes and MPK Divestiture. Further, the

HHI is not dispositive, *see Baker Hughes*, 908 F.2d at 992 ("The Herfindahl-Hirschman Index cannot guarantee litigation victories"), and while courts may cite the Merger Guidelines, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016). "[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).

IV. THE MERGER SUBSTANTIALLY REDUCED COMPETITION IN THE U.S. MPK MARKET

63. "A plaintiff can bolster a *prima facie* case based on market structure with evidence showing that anticompetitive unilateral . . . effects are likely." *Polypore*, 150 F.T.C. at 600 (citing *Heinz*, 246 F.3d at 717).

Response to Conclusion No. 63:

Respondent has no specific response.

64. "The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition." *Merger Guidelines* § 6. This type of anticompetitive effect is referred to as a "unilateral effect," as it does not depend on a coordinated response by other firms in the market. *See Sysco*, 113 F. Supp. 3d at 61 (quoting *H&R Block*, 833 F. Supp. 2d at 81) ("a merger 'is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms.'").

Response to Conclusion No. 64:

This proposed conclusion of law is incomplete to the extent it omits important qualifications. Among other things, "[t]he extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects." *Merger Guidelines* § 6.1; *see also Sysco*, 113 F. Supp. 3d at 61 (referring to "a merger that eliminates head-to-head competition between close competitors"). Further, while courts may cite the *Merger Guidelines*,

they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

65. The Commission and courts have repeatedly found that mergers that eliminate significant head-to-head competition are likely to result in anticompetitive unilateral effects. *See, e.g.*, *ProMedica*, 749 F.3d at 569 ("The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects.") (quoting *Merger Guidelines* §6.1) (internal quotation marks omitted); *Swedish Match*, 131 F. Supp. 2d at169 ("[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).

Response to Conclusion No. 65:

Respondent has no specific response other than to note that "unilateral-effects analysis examines whether differentiated products are not merely substitutes for one another, but *close* substitutes for some fraction of consumers," *ProMedica*, 749 F.3d at 569, and that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

66. "A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising price of ***one*** or both products above the pre-merger level." *Merger Guidelines* § 6.1 (emphasis added). Where "sales lost due to the price" increase are "merely [ ] diverted to the product of the merger partner," the recapture of those sales "may make the price increase profitable even though it would not have been profitable prior to the merger." *Merger Guidelines* § 6.1.

Response to Conclusion No. 66:

Respondent has no specific response other than that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

67. The risk of anticompetitive effects is greater, when the merging firms, as is the case with Otto Bock and Freedom, are particularly close competitors. *Merger Guidelines* § 6.1. ("Unilateral price effects are greater, the more buyers of products sold by one merging firm consider products sold by the other merging firm to be their next best choice.").

Response to Conclusion No. 67:

This proposed conclusion of law is false because its underlying premise, that Ottobock and Freedom are close competitors, is contradictory to the weight of the evidence. (*See* RFOF ¶¶ 577-746). Indeed, among prosthetic knees that contain a microprocessor, the Plié 3 is most functionally distant from the C-Leg 4. (RFOF ¶ 577).

68. For a merger to yield anticompetitive unilateral price effects, the fraction of buyers that consider the merging firms products to be closest competitors "need not approach a majority" particularly where premerger margins are high, as they are here. (CCFF ¶¶ 778-88, 781); *Merger Guidelines* §6.1. Indeed, "[a] merger may produce significant unilateral effects . . . even though many more sales are diverted to . . . non-merging firms than to . . . the merger partner." *Merger Guidelines* § 6.1; *see also ProMedica*, 749 F.3d at 569.

Response to Conclusion No. 68:

This proposed conclusion of law is inaccurate to the extent it suggests that there is a particular definition of what constitutes a "high" margin. Further, this proposed conclusion of law is unsupported by the evidence to the extent that it relies on Dr. Scott Morton's flawed critical loss analysis. (*See* Response to CCFF ¶¶ 780-81, 783-86). Further, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

69. Diversion ratios—"the fraction of unit sales lost by" one of the merging firm's products due to a price increase "that would be diverted to" a product of the other merger partner—are often used to quantify the "extent of direct competition between" products sold by the merging firms. *Merger Guidelines* § 6.1; *see also H&R Block, Inc.*, 833 F. Supp. 2d at 86 (finding harm likely where estimated diversion was only 12 percent). Diversion ratios "can be very informative for assessing unilateral price effects." *Merger Guidelines* § 6.1.

Response to Conclusion No. 69:

Respondent has no specific response other than that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

70. "Adverse unilateral price effects can arise when the merger gives the merged entity an incentive to raise the price of a product previously sold by ***one*** merging firm and thereby divert sales to products previously sold by the other merging firm, boosting the profits on the latter products." *Merger Guidelines* § 6.1 (emphasis added).

Response to Conclusion No. 70:

Respondent has no specific response other than that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

71. Even though they are here, merging parties need not be each other's *closest* competitors for a merger to result in significant unilateral anticompetitive effects. *H&R Block*, 833 F. Supp. 2d at 83-84 (finding unilateral effects where the merging firms were "each other's *second* closest rivals" and the closest competitor to both firms remained independent) (emphasis added); *see also ProMedica,* 749 F.3d at 569 ("For a merger to raise concerns about unilateral effects, however, not every consumer in the relevant market must regard the products of the merging firms as her top two choices."). There only needs to be sufficient diversion between the products of the merging firms to make a price increase on one of the merger partner's products profitable. *See Merger Guidelines* § 6.1.

Response to Conclusion No. 71:

This proposed conclusion of law is false because its underlying premise, that Ottobock and Freedom are close competitors, is contradictory to the evidence. (*See* RFOF ¶¶ 577-746). To the contrary, among prosthetic knees that contain a microprocessor, the Plié 3 is most functionally distant from the C-Leg 4. (RFOF ¶ 577). Moreover, the "diversion ratios" used by Complaint Counsel's economist were shown to be unreliable at trial. (RFOF ¶¶ 783-794).

72. Anticompetitive effects can also include "non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation." *Merger Guidelines* § 1. Indeed, withdrawal of a product from the market "that a significant number of customers strongly prefer to those that would remain available . . . can constitute a harm to customers over and above any effects on the price or quality of any given product." *Merger Guidelines* § 6.4.

Response to Conclusion No. 72:

Respondent has no specific response other than that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

73. "Documents created by the merging parties in the ordinary course of business are often highly probative of both industry conditions and the likely competitive effects of a merger." *Polypore*, 150 F.T.C. at 600 (citing *Merger Guidelines* § 2.2.1); *see also H&R Block*, 833 F. Supp. 2d at 81-82 (relying on defendants' ordinary course documents to conclude merging parties are head-to-head competitors). Indeed, "qualitative evidence on pre-acquisition competition can in some cases be sufficient to create a *prima facie* case even without quantitative evidence of changes in market concentration. *Polypore*, 150 F.T.C. at 600 (citing *Chi. Bridge*, 138 F.T.C. at 1053; *Merger Guidelines* §2.1.4).

Response to Conclusion No. 73:

This proposed conclusion of law is incorrect to the extent it suggests that proof of the effect on concentration in a relevant product market is not generally necessary for Complaint Counsel to establish their case, as described in response to Conclusion of Law ¶ 13, above. Further, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

74. "In a consummated merger, post-acquisition evidence of actual anticompetitive harm may in some cases be sufficient to establish Section 7 liability…" *Polypore*, 150 F.T.C. at 601 (citation omitted). However, the absence of "concrete anticompetitive symptoms . . . does not itself imply that competition has not already been affected." *Gen. Dynamics*, 415 U.S. at 505.

Response to Conclusion No. 74:

This proposed conclusion of law is incorrect to the extent it suggests that post-acquisition evidence is relevant to show anticompetitive harm (*i.e.*, when it benefits Complaint Counsel), but not relevant to show an absence of harm (*i.e.*, when it hurts Complaint Counsel). In *General Dynamics*, the court was qualifying (but not abrogating) the principle established in earlier precedent that "post-acquisition evidence tending to diminish the probability or impact of

anticompetitive effects might be considered in a § 7 case." 415 U.S. at 505. Indeed, in *General Dynamics*, the court held that post-acquisition evidence *was* relevant to show an absence of anticompetitive harm.

75. The Merger eliminated significant and intense head-to-head competition between Otto Bock and Freedom. (CCFF § IX.A). Evidence from a variety of sources, including Respondent's own ordinary course documents, demonstrates that prior to the Merger Otto Bock and Freedom had a history of engaging in intense competition and that competition was set to intensify. (CCFF §§ IX.B). This pre-acquisition competition led to lower prices and improved products and services for customers. (CCFF § IX.A.5). The loss of this competition provides direct evidence of the likely anticompetitive effects of the Merger. *See, e.g., Polypore*, 150 F.T.C. at 625-26 (pre-acquisition competition between merging parties supported likely anticompetitive unilateral effects); *Staples*, 970 F. Supp. at 1083; *Merger Guidelines* § 6.1.

Response to Conclusion No. 75:

This proposed conclusion of law is false because its underlying premise, that Ottobock and Freedom are close competitors when they are not, and that there was significant head-to-head competition between them when there was not, is contradictory to the evidence. (*See* RFOF ¶¶ 577-746; Response to CCFF § IX.A, IX.B, IX.A.5). To the contrary, among prosthetic knees that contain a microprocessor, the Plié 3 is most functionally distant from the C-Leg 4. (RFOF ¶ 577). In addition, this proposed conclusion of law is incorrect because, as stated below in response to Conclusion of Law ¶ 60, the Acquisition includes the MPK Divestiture.

76. Diversion estimates created by Respondent in the ordinary course, which is the same analysis applied by Complaint Counsel and its expert, shows that Otto Bock has both the incentive and ability to raise prices for MPKs sold in the United States, if this Court does not stop the Merger and order an effective remedy. *See* (CCFF ¶¶ 1362-64, 1394-95, 1397-98, 1404); *see also H&R Block, Inc.*, 833 F. Supp. 2d at 86 (finding harm likely where estimated diversions ranged from 12 to 14 percent).

Response to Conclusion No. 76:

This proposed conclusion of law is false because Complaint Counsel's claim that Respondent created "diversion estimates" or that they conducted any analysis similar to that employed by Complaint Counsel and its expert is unsupported by and contradictory to the

evidence. (*See* Response to CCFF ¶¶ 1362-64, 1394-95, 1397-98, 1404). . Moreover, the "diversion ratios" used by Complaint Counsel's economist were shown to be unreliable at trial. (RFOF ¶¶ 783-794).

77. Here, ordinary course strategic documents shed light on Otto Bock's post-Merger plans and the likely competitive effects of the Merger. (CCFF ¶¶ 1392-1411); *see Polypore*, 150 F.T.C. at 600 ("Evidence that sheds light on the strategic objectives of the merging parties is also probative of likely competitive effects.") (citing *Whole Foods*, 548 F.3d at 1047 (Tatel, J., concurring); Areeda & Hovenkamp, *Antitrust Law* ¶ 964 (3d ed. 2009); *Merger Guidelines* § 2.2.1). These documents unambiguously show that Respondent [redacted] (CCFF ¶¶ 1394-1404, 1407-11) (*in camera*).

Response to Conclusion No. 77:

This proposed conclusion of law is false because it is unsupported by and inconsistent with the evidence and is based on evidence and testimony that are not credible. (Response to CCFF ¶¶ 1392-1411).

78. Otto Bock's internal business documents, reveal that Otto Bock viewed the acquisition of Freedom as a way to eliminate a close competitor and increase its already dominant position in the MPK market (CCFF ¶¶ 1353-70, 1381-82), providing further confirmation of the likely unilateral effects that will result from the Merger. *See Polypore*, 150 F.T.C. at 626 (holding that anticompetitive intent is evidence of likely anticompetitive effects). The fact that Otto Bock may have had other non-anticompetitive motivations for the Merger "does not contradict the strong evidence of anticompetitive intent." *Polypore*, 150 F.T.C. at 626.

Response to Conclusion No. 78:

This proposed conclusion of law is false because it is unsupported by and inconsistent with the evidence and is based on evidence and testimony that are not credible. (Response to CCFF ¶¶ 1353-70, 1381-82).

79. The anticompetitive effects of the Merger are evident from the harm that has already occurred since that transaction was consummated. *Polypore*, 150 F.T.C. at 626 (evidence of post-acquisition anticompetitive effects probative of likely anticompetitive effects). Evidence shows that the Merger provided Otto Bock with the incentive and ability to raise MPK prices and to compete less aggressively with Freedom, and vice versa. (CCFF ¶¶ 1394-95, 1397-98, 1404, 1469-79). Evidence of post-Merger product development

delays, (CCFF ¶¶ 1446-68), are also indicative of the likely anticompetitive effects of the Merger. *See Merger Guidelines* § 1.

Response to Conclusion No. 79:

This proposed conclusion of law is false because it is unsupported by and inconsistent with the evidence and is based on evidence and testimony that are not credible. (Response to CCFF ¶¶ 1394-95, 1397-98, 1404, 1446-68, 1469-79). Freedom has maintained its independence since the Acquisition. (RFOF ¶¶ 1042, 1084, 1111-15, 1160, 1686). [redacted] [redacted] (Response to CCFF ¶¶ 1448, 1452).

V. RESPONDENT DID NOT REBUT THE STRONG PRESUMPTION THAT THE MERGER IS ILLEGAL

80. Respondent has not produced evidence sufficient to rebut the presumption of harm likely to result from the Merger.

Response to Conclusion No. 80:

This proposed conclusion of law is false because it contradicts the evidence. "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 & Chem. Corp. v. FTC*, 652 F.2d 1324, 1341 (7th Cir. 1981)); *see also* RFOF ¶¶ 1671-1680. For example only, Respondent has rebutted any presumption of harm likely to result from the Acquisition because:

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 Plié, on the other hand. (RFOF ¶¶ 577-746).

b. Ottobock's closest competitor, [redacted], and other manufacturers selling MPKs, are willing and able to expand to compete for share of MPK sales. (RFOF ¶¶ 777-940).

c. Hanger and other sophisticated customers have significant buying power and have promoted expansion and innovation. These buyers have the power to discipline and constrain manufacturers from raising the prices of MPKs and to prevent any reasonably likely anticompetitive effects. (RFOF ¶¶ 967-1003).

d. The third-party payer reimbursement system in the United States severely constrains the ability of prosthetic knee manufacturers to raise prices. (RFOF ¶¶ 962-66).

e. Freedom was a "flailing firm" at the time of the Acquisition as a result of insurmountable debt obligations, [redacted] and as a result of these circumstances, posed no significant competitive threat in the alleged market. (RFOF ¶¶ 1291-1531).

f. The Acquisition will promote competition through a "Dual Brand Strategy" [redacted] and there has been no evidence of anticompetitive conduct post-Acquisition. (RFOF ¶¶ 1039-1073).

g. The Acquisition will generate substantial cognizable, merger-specific efficiencies that will benefit consumers. (RFOF ¶¶ 1532-1570).

81. Respondent bears a heavy burden to rebut the presumption in the instant case given the strength of Complaint Counsel's *prima facie* case. *See, e.g.*, *ProMedica*, 2012 WL 1155392, at *12. "'The more compelling the prima facie case'—including other evidence presented by Complaint Counsel that reinforces the structural presumption—'the more evidence defendant must present to rebut it successfully.'" *ProMedica*, 2012 WL 1155392 at *25 (quoting *Baker Hughes*, 908 F.2d at 991; *accord Chi. Bridge*, 534 F.3d at 426); *Staples*, 190 F. Supp. 3d at 115.

Response to Conclusion No. 81:

This proposed conclusion of law is false, because its underlying premise – that Complaint Counsel's *prima facie* case is strong – is wrong. Complaint Counsel has failed to make out a *prima facie* case, much less a strong *prima facie* case because, *inter alia*, Complaint Counsel has failed to prove anticompetitive effects in a properly defined market, *see* Responses to Proposed Conclusions of Law ¶¶ 16-79, and in light of the planned MPK Divestiture, *see* Responses to Proposed Conclusions of Law ¶¶ 132-151.

82. While evidence of anticompetitive intent, which is present here, may be probative of the likely effects of the merger, the absence of anticompetitive intent is not a defense to an otherwise anticompetitive merger and cannot rebut a *prima facie* case. *See* Areeda &

Hovenkamp, *Antitrust Law* ¶ 964a ("evidence of neutral or procompetitive intent cannot be taken to rebut a prima facie case based on market shares"). Indeed, even where there are non-anticompetitive motivations for a merger, that cannot "contradict [] strong evidence of anticompetitive intent." *Polypore*, 150 F.T.C. at 626

Response to Conclusion No. 82:

This proposed conclusion of law should be rejected because it is not supported by the law. The statement in *Polypore* was limited to the facts in that case. It does not mean that evidence of a lack of anticompetitive intent is never probative. Further, Areeda & Hovenkamp qualifies the importance of evidence of anticompetitive intent in proving likely effects of a merger. Areeda & Hovenkamp, *Antitrust Law* ¶ 964c ("[T]he role of intent evidence . . . is likely to be a quite limited one.") This proposed conclusion of law should also be rejected because its premise, that there was evidence of anticompetitive intent, is contrary to the record (and is unsupported by citation to the record).

A. REMAINING MPK SELLERS WILL NOT PREVENT THE MERGER'S ANTICOMPETITIVE EFFECTS

83. Respondent bears the burden to show that "ease of expansion is sufficient 'to fill the competitive void that will result if [it is] permitted to purchase' [its] acquisition target." *H&R Block*, 833 F. Supp. 2d at 73 (quoting *Swedish Match*, 131 F. Supp. 2d at 169); *see also Sysco*, 113 F. Supp. 3d at 80.

Response to Conclusion No. 83:

Respondent has no specific response.

84. Expansion of existing competitors must 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.

Response to Conclusion No. 84:

Respondent has no specific response.

85. To determine whether the remaining firms would effectively constrain the merged Otto Bock/Freedom, the relevant question is not whether remaining competitors would be able to replace "*some* of the competition provided by [an acquisition target], which [was]

vitiated" post-acquisition, but rather whether "such competition will defeat a likely anticompetitive price increase in a post-acquisition . . . market." *See Swedish Match*, 131 F. Supp. 2d at 170 (emphasis added). As the court in *H&R Block* made clear, harm occurs even if other competitors in the market are present in the marketplace. 833 F. Supp. 2d at 81-89 (blocking the merger even though a competitor with more than 60% share still existed).

Response to Conclusion No. 85:

Respondent has no specific response.

86. The remaining competitors are unable to "fill the competitive void" left after the Merger in the market for MPKs sold to U.S. clinics. *See Swedish Match*, 131 F. Supp. 2d at 169. Neither the two next largest MPK suppliers, Össur and Endolite, nor the remaining fringe players, Nabtesco and DAW, could effectively discipline the merged firm's anticompetitive behavior. (CCFF § X). While the remaining firms might conceivably replace "some of the competition" Freedom provided before the merger, because for many clinics those firms' MPKs are unattractive alternatives to the merged firms' MPKs, such competition would be insufficient to defeat post-Merger anticompetitive effects. (CCFF ¶¶ 1493-1527, 1533-47, 1574-1604, 1614-26); *see H&R Block*, 833 F. Supp. 2d at 73-74 (competition from an existing competitor was insufficient because expansion was unlikely to allow it to "compete 'on the same playing field' as the merged company); *Chi. Bridge*, 138 F.T.C. 1024, *1071 (2004) ("the mere fact that … fringe firms have an intent to compete does not necessarily mean that those firms are significant competitors capable of replacing lost competition").

Response to Conclusion No. 86:

This proposed conclusion of law is false because its underlying premise – that remaining firms are unable to replace any lost competition – is unsupported by and contradictory to the evidence. (*See* RFOF ¶¶ 777-940; Response to CCFF § X). Weak or fringe competitors, such as those described in *H&R Block* are very distinguishable from [redacted] (*See* RFOF ¶¶ 789-859).

87. Existing MPK manufacturers are unlikely to expand in a manner that is timely or sufficient to counteract the anticompetitive effects resulting from the transaction. (CCFF § X).

Response to Conclusion No. 87:

This proposed conclusion of law is false because its underlying premise – that remaining firms are unable to replace any lost competition – is unsupported by and contradictory to the evidence. (*See* RFOF ¶¶ 777-940; Response to CCFF § X).

B. NEW ENTRY WILL NOT BE TIMELY, LIKELY, OR SUFFICIENT TO PREVENT THE MERGER'S ANTICOMPETITIVE EFFECTS

88. Respondent has "the burden of showing that the entry [] of competitors will be 'timely, likely and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.'" *Staples 2016*, 190 F. Supp. 3d at 133 (citation omitted); *see also Sysco*, 113 F. Supp. 3d at 80; *Merger Guidelines* § 9. The higher the barriers to entry, the less likely it is that the "timely, likely, and sufficient" test can be met. *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001).

Response to Conclusion No. 88:

Respondent has no specific response, other than that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

89. "In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable the overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect." *Merger Guidelines* §9.1. For entry to be considered timely, the "impact of entrants" must be "rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to the entry." *Merger Guidelines* §9.1.

Response to Conclusion No. 89:

Respondent has no specific response, other than that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

90. In addition to being timely, Respondent must show that entry is likely—meaning both technically possible and economically sensible—and that it will replace the competition that existed prior to the merger. *See Cardinal Health*, 12 F. Supp. 2d at 56-57; *Chi. Bridge*, 138 F.T.C. at 1071 (noting new entrants might not replace lost competition).

Response to Conclusion No. 90:

This proposed conclusion of law should be rejected as vague to the extent that it suggests that "economically sensible" is the standard. *Cardinal Health* quoted the *Merger Guidelines'* statement that entry is to be considered "likely if it would be profitable at premerger prices, and if such prices could be secured by the entrant." *Cardinal Health*, 12 F. Supp. 2d at 56.

91. To meet their burden that entry is likely, Respondent must "produce evidence sufficient to show that the likelihood of entry 'reaches a threshold ranging from reasonable probability to certainty.'" *Polypore*, 150 F.T.C. at 632 (quoting *Chi. Bridge*, 534 F.3d at 430 n.10). It is not sufficient merely to identify other firms that might possibly expand. *See H&R Block*, 833 F. Supp. 2d at 73-76.

Response to Conclusion No. 91:

Respondent has no specific response.

92. "The history of entry in the relevant markets 'is a central factor in assessing the likelihood of entry in the future.'" *Polypore*, 150 F.T.C. at 633 (quoting *Cardinal Health*, 12 F. Supp. 3d at 56; citing *Merger Guidelines* § 9).

Response to Conclusion No. 92:

Respondent has no specific response, other than that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

93. Even where entry is both timely and likely, it "may not be sufficient to deter or counteract the competitive effects of concern." *Merger Guidelines* §9.3. To prevent harm from the Merger, "the scale [of entry] must be large enough to constrain prices post-acquisition." *Polypore*, 150 F.T.C. at *29 (citing *Chi. Bridge*, 534 F.3d at 429); *see also Cardinal Health*, 12 F. Supp. 2d at 58. Here, a new entrant would need to achieve the size and competitive vigor that Freedom would have achieved absent the Merger. *See Chi. Bridge*, 138 F.T.C. at 1071; *Merger Guidelines* § 9 (entry must be sufficient to "replicate at least the size and strength of one of the merging firms").

Response to Conclusion No. 93:

This proposed finding is false and misleading because it suggests that a new entrant must be the same size to be considered an adequate entrant under the *Merger Guidelines*. The *Merger*

Guidelines actually state that "[e]ntry by a single firm that will replicate at least the *scale* and strength of one of the merging firms is sufficient. Entry by one or more firms operating at a smaller scale may be sufficient if such firms are not at a significant competitive disadvantage." *Merger Guidelines* § 9.3.

94. In evaluating sufficiency of entry it is relevant to consider whether "products offered by entrants are [] close enough substitutes to the products offered by the merged firm to render a price increase by the merged firm unprofitable." *Merger Guidelines* § 9.3.

Response to Conclusion No. 94:

Respondent has no specific response, other than that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

95. Respondent failed to demonstrate that entry by any firm would be timely, likely, and sufficient, to counteract the anticompetitive effects resulting from the Merger. (CCFF § XI).

Response to Conclusion No. 95:

To the extent this proposed conclusion of law refers to expansion by existing market participants, it is false for the reasons stated above in response to proposed Conclusions of Law ¶¶ 86-87, and the facts cited therein.

C. RESPONDENT'S ASSERTED EFFICIENCIES DO NOT REBUT THE STRONG PRESUMPTION OF COMPETITIVE HARM

96. "High market concentration levels require 'proof of extraordinary efficiencies'" to rebut the presumption of likely anticompetitive effects, and "courts 'generally have found inadequate proof of efficiencies to sustain rebuttal of the government's case.'" *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Heinz*, 246 F.3d at 720); *Sysco*, 113 F. Supp. at 81-82; *CCC Holdings*, 605 F. Supp. 2d at 72. Indeed, no court has permitted an otherwise unlawful transaction to proceed based on claimed efficiencies. *See Wilhelmsen*, 2018 WL 4705816, at *23 (citing *CCC Holdings*, 605 F. Supp. 2d at 72); *Sysco*, 113 F. Supp. 3d at 82 ("The court is not aware of any case . . . where the merging parties have successfully rebutted the government's *prima facie* case on the strength of the efficiencies.").

Response to Conclusion No. 96:

This proposed conclusion of law is inaccurate to the extent it suggests that there is doubt about whether efficiencies may be accepted as a defense. "[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)); *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").

97. In assessing efficiencies claims, "the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior." *Heinz*, 246 F.3d at 721; *see also Wilhelmsen*, 2018 WL 4705816, at *23; *H&R Block*, 833 F. Supp. 2d at 89; *CCC Holdings*, 605 F. Supp. 2d at 72–73.

Response to Conclusion No. 97:

This response is inaccurate to the extent it suggests that the statement in *Heinz* was a general statement of the law as opposed to the standard that the court determined applied in that case.

98. Respondent bears the heavy burden of establishing that its claimed efficiencies are cognizable, meaning they are "merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service." *Merger Guidelines* § 10; *see also Heinz*, 246 F.3d at 720; *Staples 2016*, 190 F. Supp. 3d at 137-38 n.15; *Sysco*, 113 F. Supp. 3d at 82.

Response to Conclusion No. 98:

Respondent has no specific response, other than that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

99. For claimed efficiencies to be verifiable, it must be "possible to 'verify by reasonable means the likelihood and magnitude of each asserted efficiency[.]" *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Merger Guidelines* § 10); *see also Sysco*, 114 F. Supp. 3d at 82. Because "[e]fficiencies are inherently difficult to verify and quantify' . . . 'it is incumbent upon the merging firms to substantiate efficiency claims.'" *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Merger Guidelines* § 10); *see also Wilhelmsen*, 2018 WL 4705816, at *23. To meet this high standard, Respondent's "estimate of the predicted saving must be reasonably verifiable by an independent party." *H&R Block*, 833 F. Supp. 2d at 89; *see also Sysco*, 114 F. Supp. 3d at 82.

Response to Conclusion No. 99:

Respondent has no specific response, other than that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

100. To be merger-specific, claimed efficiencies, "must represent a type of cost saving that could not be achieved without the merger." *H&R Block*, 833 F. Supp. 2d at 89; *see also Sysco*, 113 F. Supp. 3d at 82. If a company could achieve its purported cost savings either alone or via a less anticompetitive alternative, such as a licensing agreement or less anticompetitive transaction, then its claimed efficiencies are not merger-specific. *See H&R Block*, 833 F. Supp. 2d at 90; *Cardinal Health*, 12 F. Supp. 2d 34 at 62; *Merger Guidelines* § 10, n.13. "Defendants bear the burden of demonstrating that their claimed efficiencies are merger specific," *Sysco*, 113 F. Supp. 3d at 82 (citing *H&R Block*, 833 F. Supp. 2d at 89).

Response to Conclusion No. 100:

Respondent has no specific response, other than that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

101. Claimed efficiencies, even if verifiable, are not cognizable if they could be achieved without the merger. *See Sysco*, 113 F. Supp. 3d at 84 (holding that, despite the "rigor and scale of the analysis," defendants' efficiencies claims are inadequate because they are not

merger specific); *Cardinal Health*, 12 F. Supp. 2d at 62 ("In light of the anti-competitive concerns that mergers raise, efficiencies, no matter how great, should not be considered if they could also be accomplished without a merger."); *Merger Guidelines* § 10.

Response to Conclusion No. 101:

Respondent has no specific response, other than that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

102. To be cognizable, efficiencies claims cannot "arise from anticompetitive reductions in output or service." *Merger Guidelines* §10. *see also Penn State Hershey*, 838 F.3d at 348-49; *Heinz*, 246 F.3d at 722; *Univ. Health*, 938 F.2d at 1223. Raising price or discontinuing a product, which could result in cost savings for a merged firm, are not cognizable. *See Merger Guidelines* § 10.

Response to Conclusion No. 102:

This proposed conclusion of law is inaccurate to the extent it suggests that *any* decrease in output cannot contribute to an efficiency. The merger guidelines speak specifically of "*anticompetitive* reductions in output or service."

103. To launch successful efficiencies defense, in addition to establishing its claims are cognizable, Respondent must show that its claimed efficiencies would benefit customers. *See, e.g.*, *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 351 (3d Cir. 2016); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991). Price reductions to customers "are expected when efficiencies reduce the merged firm's marginal costs," but "reductions in fixed costs . . . typically are not expected to lead to immediate price effects and hence to benefit consumers in the short term." FED. TRADE COMM'N AND U.S. DEP'T OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006).

Response to Conclusion No. 103:

Respondent has no specific response, other than to note that the DOJ's commentary on its *Merger Guidelines* is not binding.

104. Respondent failed to establish their efficiencies claims are cognizable because it failed to provide the kind of substantiation needed to allow for independent verification of their claims. *See* (CCFF § XII.B.1); *Merger Guidelines* § 10. Even if the requisite verifiability were possible, Respondent's efficiencies claims are not cognizable because much of the alleged savings could be achieved without the merger. *See* (CCFF § XII.B.2.); *Merger Guidelines* § 10.

Response to Conclusion No. 104:

This proposed conclusion of law is false because its underlying factual premise is unsupported by and inconsistent with the evidence. (*See* Response to CCFF § XII.B.1, XII.B.2). To the contrary, Ottobock has demonstrated cognizable efficiencies. (RFOF ¶¶ 1532-1571).

105. Respondent's efficiencies defense also fails because there is no evidence its expected cost savings are likely to "benefit competition and, hence, consumers." *Univ. Health*, 938 F.2d at 1223; s*ee* (CCFF § XII.C.); *Penn State Hershey*, 838 F.3d at 348-49; *Heinz*, 246 F.3d at 722.

Response to Conclusion No. 105:

This proposed conclusion of law is false because its underlying factual premise is unsupported by and inconsistent with the evidence. (*See* Response to CCFF § XII.B.1, XII.B.2). To the contrary, Ottobock has demonstrated cognizable efficiencies that are Acquisition-specific and likely to benefit consumers in the alleged market. (RFOF ¶¶ 1532-1571).

D. RESPONDENT FAILED TO MEET ITS BURDEN TO SHOW THAT FREEDOM IS A FAILING FIRM

106. The failing firm defense requires Respondent to meet strict standards. *See, e.g.*, *Mich. Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1288 (D.C. Cir. 1989) (explaining that the Supreme Court has "narrowly confined the scope of the doctrine") (citing *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 137-38 (1969)); *FTC v. Warner Commc'ns*, 742 F.2d 1156, 1164 (9th Cir. 1984) (noting that the defense has "strict limits"); *United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 445. Indeed, the "doctrine is 'narrow in scope' and it 'rarely succeeds.'" *Energy Sols., Inc.*, 265 F. Supp. 3d at 444 (internal citations omitted).

Response to Conclusion No. 106:

The proposed conclusion of law is inaccurate to the extent it suggests that the cited standard is any "strict[er]" than provided under Section 11 of the *Merger Guidelines*, which provide 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." *See also Dr. Pepper / Seven-Up Cos. v. FTC*, 991 F.2d 859, 864-65 (D.C. Cir. 1993) (*see also* RFOF ¶ 1704).

In addition, 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); RFOF ¶ 1703.

107. "The burden of proving that the requirements of the [failing company defense] are met is on those who seek refuge under it." *Citizen Publ'g*, 394 U.S. at 133.

Response to Conclusion No. 107:

Respondent has no specific response.

108. The failing firm defense requires more than a mere showing of financial weakness. *See Warner Commc'ns*, 742 F.2d at 1164 ("a 'weak company' defense would expand the failing company doctrine."). To qualify, "[a] company invoking the defense has the burden of showing that its 'resources [were] so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure' … and further that it tried and failed to merge with a company other than the acquiring one." *Gen. Dynamics*, 415 U.S. at 507 (quoting *Int'l Shoe Co. v. FTC*, 280 U.S 291, 302 (1930); citing *Citizen Publ'g*, 394 U.S. at 138); *see also Energy Sols.*, 265 F. Supp. 3d at 444.

Response to Conclusion No. 108:

The proposed conclusion of law is inaccurate to the extent that it suggests that the target actually have attempted to consummate a merger for the failing firm defense to apply. As described in the next proposed Conclusion of Law, the third element of the failing firm defense

is that the target "has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger." *Merger Guidelines* § 11.

109. Under the *Merger Guidelines*, a successful failing firm defense requires Respondent to prove: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; ***and*** (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger. *Merger Guidelines* §11. The defense cannot succeed if even one element is not satisfied. *See Merger Guidelines* §11; *Energy Sols.*, 265 F. Supp. 3d at 444-45 (rejecting failing firm defense on basis that defendants failed to show the acquirer was the only available purchaser without considering whether the firm being acquired was at risk of imminent failure).

Response to Conclusion No. 109:

Respondent has no specific response, other than that, while courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016).

110. To show that a company would be unable "to reorganize successfully under Chapter 11 of the Bankruptcy Act," *Merger Guidelines* § 11, "[t]he prospects of reorganization . . . would have had to be dim or nonexistent." *Citizen Pub. Co.*, 394 U.S. at 138.

Response to Conclusion No. 110:

While courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016). In fact, "[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); RFOF ¶ 1709.

111. Even where a firm is at risk of imminent failure and could not reorganize through bankruptcy, invocation of the defense requires a showing that the allegedly failing firm made unsuccessful "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.*,

265 F. Supp. 3d at 445 (quoting *Dr. Pepper/Seven–Up Co. v. FTC*, 991 F.2d 859, 865 (D.C. Cir. 1993)); *see also Merger Guidelines* § 11.

Response to Conclusion No. 111:

Respondent refers to its responses to Conclusions of Law ¶¶ 112-115.

112. "The failing company doctrine plainly cannot be applied in a merger . . . unless it is established that the company that acquires the failing company . . . is the only available purchaser." *Citizen Pub. Co.*, 394 U.S. at 131; *see also U.S. v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 445 (D. Del. 2017). Having a limited number of firm offers to purchase a company, even in an industry where "there may be few (if any) potential buyers that would not raise some anti-trust concerns," is not in and of itself proof that there were no other possible acquirers for the business. *See Energy Sols.*, 265 F.Supp. 3d at 445 (rejecting failing firm defense where only one firm offer was made when "[t]here was no clear 'for sale' sign until [defendants] announced its transaction").

Response to Conclusion No. 112:

This proposed conclusion of law is incorrect to the extent that it omits that 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) (*see also* RFOF ¶ 1711). Offers that are unreasonably low are not reasonable alternative offers. (RFOF ¶ 1712). In addition, an available purchaser is only a reasonable alternative purchaser if it would remain in the market and if it is "significantly more attractive from a competitive standpoint than the proposed acquirer." Areeda & Hovenkamp ¶ 954c. (*see also* RFOF ¶ 1713).

113. When a firm fails to respond to expressions of interest by other firms in its own industry, it cannot be said to have conducted the search for the alternative available purchaser that the failing company defense requires. *FTC v. Harbour Group Investments*, 1990 WL 198819, *5 (D.D.C. 1990).

Response to Conclusion No. 113:

This proposed conclusion of law is inaccurate to the extent it suggests that anything greater than good faith efforts to obtain a reasonable alternative offer is required, as described above in response to proposed Conclusion of Law ¶ 112.

114. In *Harbour Group*, the court rejected a failing firm defense based on defendants' failure to prove that the acquiring company was the "only available purchaser." 1990 WL 198819, at *2. Defendants asserted that the failing company's creditor "intend[ed] to call in its loan at any moment" while the government argued defendants "produced no evidence directly from the [creditor] that the loan would be called immediately." *Harbour Grp.*, 1990 WL 198819 at *2. Although the court acknowledged the company's "sales [were] down, it [held] considerable debt, and its future [was] uncertain," it could not avail itself of the failing company defense due to an inadequate sales process that did not include outreach to several smaller firms in the industry. *Harbour Grp.*, 1990 WL 198819 at *2. The court rejected defendants' argument that, "it is unreasonable to require it to approach smaller companies in the industry," recognizing that, "at least in some cases, approaching smaller companies in a given industry might be exactly what is required of a company seeking the protection of the failing company defense." *Harbour Grp.*, 1990 WL 198819, at *4.

Response to Conclusion No. 114:

This proposed conclusion of law is of limited probative value because it is simply a recitation of how the law applied to the facts in *Harbour Group*. The elements of the failing firm defense and the standard for determining a reasonable alternative purchaser are described above in response to Conclusions of Law ¶¶ 106 and 112.

115. A "reasonable alternative offer" is "any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets." *Merger Guidelines* § 11, n. 6; *Energy Sols., Inc.*, 265 F.Supp 3d at 446. The strict limits of the failing firm defense require that a firm show that it searched for such an alternative offer even though an offer at liquidation value is likely to be less than the fair value of the company. *See Energy Sols., Inc.*, 265 F. Supp. 3d at 446.

Response to Conclusion No. 115:

While courts may cite the *Merger Guidelines*, they are not binding. *See Promedica*, 749 F.3d at 565; *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016). This proposed conclusion of law is also incorrect to the extent that it omits that 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) (*see also* RFOF ¶ 1711). Offers that are unreasonably low are not reasonable alternative offers. (RFOF ¶ 1712). In addition, an available purchaser is only a reasonable alternative purchaser if it would remain in the market and if it is "significantly more attractive from a competitive standpoint than the proposed acquirer." Areeda & Hovenkamp ¶ 954c. (*see also* RFOF ¶ 1713). Finally, the correct cite to the *Merger Guidelines* (which are not binding) is to footnote 16, not footnote 6.

116. Respondent cannot seek protection under the failing firm defense because it failed to demonstrate that, at the time of the Merger, Freedom was unable to meet its financial obligations. *Merger Guidelines* § 11. Improvements to Freedom's financial conditions, (CCFF § XIII.A.3-4), the clean audit of its financial statements by independent auditors, (CCFF § XIII.B.1), and Freedom's own actions in the months leading up to the merger, (CCFF § XIII.B.2), are inconsistent with a company whose "assets would otherwise exit the market." *See Merger Guidelines* § 11.

Response to Conclusion No. 116:

This proposed conclusion of law is false because there is significant record evidence that Freedom was a failing firm that was unable to meet its financial obligations at the time of the merger, (RFOF ¶¶ 1291-1413), and Freedom's auditors had substantial doubt that Freedom could continue as a going concern, (RFOF ¶¶ 1414-1448; *see also* Response to CCFF §§ XIII.A.3-4, XIII.B.1, XIII.B.2).

117. Having presented no testimony from either of Freedom's creditors, Respondent failed to establish that Freedom's creditors would have forced it into bankruptcy or liquidation. *See* (CCFF § XIII.B.3.a). To the contrary, the evidence indicates that such actions by the creditors were unlikely. (CCFF § XIII.B.1.a). Thus, Respondent failed to show that Freedom faced "the grave probability of a business failure" because of its outstanding debt. *Gen. Dynamics*, 415 U.S. at 507 (internal quotations omitted); *see also Energy Sols.*, 265 F. Supp. 3d at 444.

Response to Conclusion No. 117:

This proposed conclusion of law is false because the record evidence establishes that Freedom would have been forced into liquidation absent the Acquisition. (RFOF ¶¶ 1506-1531). There was testimony from multiple witnesses that the lenders were unwilling to refinance or to extend the Term Loan Maturity Date again for any purpose other than to close a refinancing or sale transaction. (RFOF ¶¶ 1400-1405; *see also* Response to CCFF §§ XIII.B.3.a, XIII.B.1.a).

118. Respondent also failed to produce evidence that Freedom could not successfully reorganize under Chapter 11 of the Bankruptcy Act. (CCFF § XIII.C). As Ms. Hammer concluded, Freedom's seemingly successful reorganization outside of bankruptcy indicated that the company was a good candidate for reorganization in bankruptcy. (CCFF ¶¶ 2064-69, 2071; § XIII.A.2-4).

Response to Conclusion No. 118:

This proposed conclusion of law is false because it is contradictory to the record evidence. The evidence establishes that Freedom could not successfully reorganize under Chapter 11. (RFOF ¶¶ 1521-1528; Response to CCFF § XIII.C; XIII.A.2-4). The evidence further established that Hammer's analysis was not credible or reliable. (Response to CCFF ¶¶ 2064-69).

119. Even if Freedom were facing "imminent failure" and could not reorganize through bankruptcy, Respondent cannot immunize its otherwise unlawful transaction because Freedom did not conduct "good-faith efforts to elicit reasonable alternative offers." *See* (CCFF § XIII.D.); *Energy Sols*, 265 F. Supp. 3d at 444-45*; Harbour Group*, 1990 WL 198819 at *2-3. Freedom and its banker made "minimal efforts . . . to contact obvious companies in its own industry that appear to be willing to at least entertain the notion of purchasing" Freedom. *See* (CCFF § XIII.D.2); *Harbour Group*, 1990 WL 198819 at *6. Freedom did not attempt to solicit interest from firms in the lower limb prosthetics industry because they were deemed too small to participate in the process (CCFF § XIII.D.2) and interest from another potential buyer was ignored. (CCFF § XIII.D.2.b.1). Freedom was instead "focused on obtaining what it perceived to be [its] fair value, not an offer above liquidation value." *See* (CCFF §§ XIII.E.1-2, XIII.D); *Energy Sols.*, F. Supp. 3d at 446.

Response to Conclusion No. 119:

This proposed conclusion of law is false because it is not supported by the evidence. The evidence establishes that Freedom exhausted good faith efforts to obtain reasonable alternatives to the Acquisition. (RFOF ¶¶ 1449-1531; Response to CCFF §§ XIII.D, XIII.E.1-2).

120. Respondent also failed to meet its burden to establish that the alternative offer from Össur, (CCFF § XIII), would have resulted in an acquisition of Freedom that would pose the same or more a severe danger to competition as the Merger. *See Energy Sols.*, 265 F. Supp. 3d at 445; *Merger Guidelines* § 11.

Response to Conclusion No. 120:

This proposed conclusion of law is false, first, because the expression of interest from Össur was not an "offer." [redacted] (RFOF ¶¶ 1498-1499). Further, the evidence establishes that [redacted] (RFOF ¶¶ 1499-1505; Response to CCFF § XIII.E.3).

E. RESPONDENT FAILED TO DEMONSTRATE THAT FREEDOM IS A "FLAILING FIRM"

121. "Financial weakness … is probably the weakest ground of all for justifying a merger" and "certainly cannot be the primary justification." *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1339, 1341 (7th Cir. 1981); *see also Univ. Health*, 938 F.2d at 1221; *Warner Commc'ns*, 742 F.2d at 1164; *ProMedica*, 2012 WL 1155392, at *25. "[C]ourts have imposed an extremely heavy burden on defendants seeking to rebut the structural presumption on this ground." *ProMedica*, 2012 WL 1155392, at *25.

Response to Conclusion No. 121:

This proposed conclusion of law is incorrect to the extent it denies that an acquisition does not reduce competition where the acquired entity's weakened position makes it of little competitive significance. *See FTC v. Nat'l Tea Co.*, 603 F.2d 694, 699-700 (8th Cir. 1979) (citing *General Dynamics*, 415 U.S. at 486, and affirming district court's consideration of

acquired firm's probable exit from the market.) 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.

122. The fact that a company "faced financial obstacles to going forward as an independent" entity is not sufficient to satisfy Respondent's burden. *ProMedica*, 2012 WL 1155392, at *25. To rebut the strong presumption established by Complaint Counsel, Respondent must "'make[] a *substantial showing* that [Freedom's] weakness, which cannot be resolved by any competitive means, would cause [Freedom's] market share to reduce to a level that would undermine the government's prima facie case.'" *ProMedica*, 2012 WL 1155392, at *25 (quoting *Univ. Health*, 938 F.2d at 1221) (emphasis added).

Response to Conclusion No. 122:

Respondent has no specific response other than that, for the reasons stated above in response to proposed Conclusions of Law ¶¶ 116-119, Freedom [redacted] As such, this standard is satisfied.

123. In *ProMedica*, the Commission blocked a transaction between two competing hospitals after rejecting Respondents' argument that the acquired hospital's weak financial condition rebutted the presumption of competitive harm. Much like Freedom was here, the acquired firm in *ProMedica*, under the leadership of a new CEO, "was making significant improvements in its performance, and was *growing* prior to the Joinder." 2012 WL 1155392, at *25. Although the acquired company "was struggling financially as a stand-alone entity during the years leading up to the Joinder and faced significant financial obstacles to going forward as an independent" company, the Commission held that it was "not one of those 'rare cases' where . . . financial weakness rebuts the presumption of illegality." 2012 WL 1155392, at *25, *30.

Response to Conclusion No. 123:

This proposed conclusion of law should be rejected because it is contradictory to the evidence in this case, which is distinguishable from *ProMedica*. For the reasons stated above in response to proposed Conclusions of Law ¶¶ 116-119, Freedom [redacted] Further, the evidence shows that Freedom's turnaround plan had run out of time and could not be successful. (RFOF ¶¶ 1330-1368).

124. Rather than rebutting the presumption, there is substantial evidence showing that both Freedom and Otto Bock expected Freedom to *gain* market share with the introduction of the Quattro. *See* (CCFF ¶¶ 1178, 1230-37, 1272, 1275); *ProMedica*, 2012 WL 1155392, at *25, 30 (stating that financial difficulties "are relevant only where they indicate that market shares would decline in the future and by enough to bring the merger below the threshold of presumptive illegality") (internal quotations omitted). Indeed, Freedom's current market share likely understates its future competitive significance. (CCFF ¶¶ 1338-83, 1405-1411); *ProMedica*, 2012 WL 1155392, at *25, 30.

Response to Conclusion No. 124:

This proposed conclusion of law should be rejected because it is contradictory to the evidence in this case, which is distinguishable from *ProMedica*. For the reasons stated above in response to proposed Conclusions of Law ¶¶ 116-119, Freedom [redacted] In addition, the contention that Freedom and Ottobock expected Freedom to gain market share is based on misleading evidence and/or misconstrues the evidence. (Response to CCFF ¶¶ 1178, 1230-37, 1272, 1275, 1338-83, 1405-1411).

125. Even if Freedom's financial weakness were such that its market share was expected to decline, the Court must assess whether Respondent demonstrated "there was no other competitive means by which [Freedom] could have addressed its financial difficulties." *See ProMedica*, WL 1155392, at *30. Given Freedom's inadequate sales process, (CCFF § XIII.D.2), Respondent cannot meet its burden of showing that such Freedom's weakness "'cannot be resolved through … acquisition by [someone] other than a leading competitor.'" *ProMedica*, 2012 WL 1155392, at *26 (quoting *Univ. Health*, 938 F.2d at 1221). Although Freedom's outstanding debt certainly raised the specter of uncertainty for the company, this "weakness" could have been resolved through its acquisition by another company. *See* (CCFF ¶¶ 113, 2121-2163, 2166-2193); *ProMedica*, 2012 WL 1155392, at *26.

Response to Conclusion No. 125:

This proposed conclusion of law should be rejected because it is contradictory to the evidence. As described above in response to proposed Conclusion of Law ¶ 119, the evidence establishes that Freedom exhausted good faith efforts to obtain reasonable alternatives to the Acquisition. (RFOF ¶¶ 1449-1531; *see also* Response to CCFF ¶¶ 113, 2121-2163, 2166-2193).

F. RESPONDENT FAILED TO SHOW THAT HANGER IS A "POWER BUYER" THAT WILL PREVENT POST-MERGER MPK PRICE INCREASES

126. "[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 *Cardinal Health*, 12 F. Supp. 2d at 58). 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 (citations omitted).

Response to Conclusion No. 126:

This proposed conclusion of law is false to the extent it suggests that a power buyer defense is not available or that courts have never found that powerful buyers mitigate any anticompetitive effects from 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 United States v. Archer-Daniels-Midland*, 781 F. Supp. 1400, 1416 (S.D. Iowa 1991) ("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 aggressive response 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.

127. 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"); *Merger Guidelines* § 8.

Response to Conclusion No. 127:

This proposed conclusion of law is not supported by the evidence, because the evidence in this case does not support that the Acquisition reduced any buyer's negotiating leverage. In particular, Hanger was and remains a power buyer that constrains manufacturers, and [redacted] (RFOF ¶¶ 967-1003).

128. Combining the two largest and closest competitors of MPKs eliminates even the most powerful buyers' ability to "resist [Otto Bock's] pricing demands" post-Merger. *ProMedica*, 2012 WL 1155392 at *45. While large customers like Hanger may have negotiating leverage today, the elimination of Freedom as an independent competitor will enable Otto Bock to extract higher prices than it would have been able to absent the merger. *See ProMedica*, 2012 WL 1155392 at *45 (finding that, even though managed care organizations had leverage of their own in negotiations with hospitals, they would find it harder to resist the merged hospital's price demands post-merger).

Response to Conclusion No. 128:

This proposed conclusion of law should be rejected because it is contradictory to the evidence. As described above in response to proposed Conclusion of Law ¶ 127, Hanger was and remains a power buyer, and as described above in response to proposed Conclusion of Law ¶ 67, Ottobock and Freedom are not close competitors, (*see* RFOF ¶¶ 577-746). To the contrary, among prosthetic knees that contain a microprocessor, the Plié 3 is most functionally distant from the C-Leg 4. (RFOF ¶ 577).

129. Even if power buyers in a market could "avoid price increases as a result of their size and sophistication, there is no reason to believe that other [] customers would fare as well." *Polypore*, 150 F.T.C. at 637; *Merger Guidelines* § 8 (explaining that "even if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers"). Where prices are individually negotiated, as is the case here, (CCFF ¶¶ 563-86), "smaller buyers would not be protected by [any] resistance offered by larger, more powerful customers." *Polypore*, 150 F.T.C. at 637-38

(citing *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1085 (D. Del. 1991) (large customers that could protect themselves would not shelter smaller buyers from increased prices); *Bass Bros.*, 1984 WL 355 at *16 (large buyers could not protect remainder of purchasers)). Thus, whether Hanger has the ability to resist anticompetitive price increases post-Merger is irrelevant to the assessment of whether "smaller buyers," of MPKs, [redacted], (CCFF ¶¶ 3109-10) (*in camera*), could resist such price increase. *See Polypore*, 150 F.T.C. at 637-38.

Response to Conclusion No. 129:

The proposed conclusion is inapplicable because the nature of the prosthetics industry provides all clinics with significant price negotiation leverage. For that reason, the majority of clinics either do not have any concerns about the Acquisition, or they believe it will be affirmatively beneficial to patients. (Response to CCFF ¶¶ 1416-1417).

G. RESPONDENT'S [redacted] [redacted] FAIL TO CURE ITS ANTICOMPETITIVE MERGER

1. MATERIALITY OF EVIDENCE RELATED TO RESPONDENT'S PROPOSED [redacted]

130. When presenting evidence of a "planned divestiture" as rebuttal to a *prima facie* case a respondent bears the burden of showing that (1) "the divestiture . . . replace[s] the competitive intensity lost as a result of the merger;" and (2) its proposal is "sufficiently non-speculative for the court to evaluate its effects on future competition." *Aetna*, 240 F. Supp. 3d at 60 (internal quotation marks omitted); *see FTC v. Staples*, 190 F.Supp.3d 100, 137 n.5 (2016).

Response to Conclusion No. 130:

Respondent has no specific response.

131. Like any aspect of Respondent's rebuttal, the more "compelling the [FTC's] prima facie case, the more evidence the defendant must present [regarding the divestiture] to rebut successfully." *Baker Hughes*, 908 F.2d at 991.

Response to Conclusion No. 131:

Respondent has no specific response, other than that, as described above in response to proposed Conclusions of Law ¶¶ 16-79, Complaint Counsel has failed to make out a *prima facie* case, much less a "compelling" *prima facie* case because, *inter alia*, Complaint Counsel has failed to prove anticompetitive effects in a properly defined market, *see* Responses to Proposed

Conclusions of Law ¶¶ 16-79, and in light of the planned MPK Divestiture, *see* Responses to Proposed Conclusions of Law ¶¶ 132-151.

2. PLANNED DIVESTITURE DOES NOT AFFECT LEGALITY OF A CONSUMMATED MERGER

132. Courts have been willing to consider the impact of remedial divestitures in assessing whether an unconsummated merger would have an anticompetitive effect. *See, e.g.*, *FTC v. Libbey*, 211 F. Supp. 2d 34, 46 (D.D.C. 2002). In consummated mergers, however, it is not feasible to modify the offending transaction with a planned divestiture of assets because it has already occurred. Instead, the Court must assess the legality of the transaction without regard to any proposed divestiture. A planned divestiture can only "impact . . . the existence or magnitude of likely post-divestiture competitive harms." Opinion and Order of the Commission, *Otto Bock HealthCare North America*, Docket No. 9378 (April 4, 2018) ("Commission Order") at 6.

Response to Conclusion No. 132:

This proposed conclusion of law is false because a planned divestiture is relevant to a consummated merger, both as a modification of the transaction at issue and as a potential remedy.

Complaint Counsel cites no authority to support its position that a planned divestiture is irrelevant to a consummated merger, other than the Commission's order, which it misinterprets. The FTC's April 18, 2018 Order concluded that the MPK Divestiture does not constitute an affirmative defense only because "the planned [MPK Divestiture] cannot eliminate the potential for demonstrating likely anticompetitive effects during the intervening period" before the divestiture. FTC Order at 4. However, Ottobock entered the Hold Separate Agreement as of December 19, 2017. The record was undisputed at trial that the parties have faithfully abided by their respective obligations under the Hold Separate Agreement. (RFOF ¶¶ 1042, 1084, 1111-15, 1160, 1686). Complaint Counsel has introduced no evidence of anticompetitive effects from the Acquisition either before or after the date of the Hold Separate Agreement. To the contrary, the evidence establishes that Freedom has continued to operate independently, price its products

independently and run its R&D operations independently, albeit with substantial financial assistance from Ottobock, including by satisfying all of Freedom's debt. (RFOF ¶¶ 1042, 1084, 1111-15, 1160, 1686). As such, despite the FTC's refusal to characterize the MPK Divestiture as an "affirmative defense" – a distinction that may have been appropriate *before* trial – at this point, it is clear that because the Acquisition, subject to the MPK Divestiture, is not likely to result in a substantially adverse effect on competition in any relevant market, it is effectively a complete defense to Complaint Counsel's Claims.

133. A firm's decision to refrain from engaging in anticompetitive behavior does not legalize an otherwise unlawful transaction. *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965) ("the force of § 7 is still in probabilities, not in what later transpired"). Giving such post-acquisition evidence "conclusive weight or allow[ing it] to override all probabilities" would allow "acquisitions [to] go forward willy-nilly, [while] parties bid[e] their time." *Consol. Foods Corp.*, 380 U.S. at 598. As the Supreme Court cautioned, "If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 505 (1974). Refraining from price increases in the wake of a transaction, does not preclude a determination that an acquisition violated Section 7. Commission Order at 4 n.3.

Response to Conclusion No. 133:

This proposed conclusion of law is misleading and inapposite in the context of this case. Complaint Counsel's concern that "violators could stave off [enforcement] actions merely by refraining from aggressive or anticompetitive behavior" is inapposite to this case. Even if that were true in a typical case, where no divestiture was planned, it is not true here. The result of an MPK Divestiture is that Ottobock will no longer control any of the Freedom MPK assets. Thus, the point of the MPK Divestiture and the Hold Separate Agreement is not merely to "stave off" an enforcement action; it is to guarantee that anticompetitive effects will not occur in the future. While it is true that antitrust deals "in probabilities," the probability that Ottobock will be able to use Freedom's MPK assets to achieve anticompetitive harm is zero if, as the MPK Divestiture

would necessitate, Ottobock no longer controls those assets. *General Dynamics*, cited by Complaint Counsel, is distinguishable on this issue. There, the court *affirmed* consideration of post-merger evidence showing that future lessening of competition was unlikely. *General Dynamics*, 415 U.S. at 505.

3. RESPONDENT FAILS TO SHOW ITS [redacted] WOULD PREVENT ANTICOMPETITIVE EFFECTS AND FULLY RESTORE COMPETITION

134. The [redacted] are insufficient to replace the competition between Otto Bock and Freedom lost because of the Merger.

Response to Conclusion No. 134:

This proposed conclusion of law is false because it is inconsistent with the evidence, which shows that the proposed MPK Divestiture [redacted] sufficient to replace any competition alleged to be harmed by the Acquisition. (RFOF ¶¶ 1081-1290; Response to CCFF ¶¶ 2242-2936).

135. With a *prima facie* case established, Respondent bears the burden of producing evidence that the proposed divestiture negates the anticompetitive effects of the transaction. *U.S. v. Franklin Electric Co*. 130 F. Supp. 2d 1025, 1033 (2000); *Staples 2016*, 190 F. Supp. 3d at 137 n.5 (2016); *Aetna*, 240 F. Supp. 3d at 60. "[A] defendant may introduce evidence that a proposed divestiture would 'restore [the] competition' lost by the merger counteracting the anticompetitive effects of the merger." *Aetna*, 240 F. Supp. 3d at 60 (citing *Sysco*, 113 F. Supp. 3d at 72). The more "compelling the [FTC's] prima facie case, the more evidence the defendant must present [regarding the divestiture] to rebut successfully." *Baker Hughes*, 908 F.2d at 991.

Response to Conclusion No. 135:

This proposed conclusion of law is inaccurate to the extent that a divestiture should be considered part of the Acquisition itself, so it therefore must be considered when determining whether Complaint Counsel has established a *prima facie* case. Here, the entire transaction, the Acquisition coupled with the MPK Divestiture, must be considered in assessing competitive

effects. *See FTC v. Arch Coal, Inc.*, No. 1:04-cv-00534, ECF No. 67 at 7 (D.D.C. July 7, 2004); *General Dynamics*; RFOF ¶¶ 1681-82.

136. Restoring competition is the "key to the whole question of an antitrust remedy." *U.S. v. du Pont & Co.*, 366 U.S. 316, 326 (1961). In all Section 7 cases, "relief . . . must be 'effective to redress the violations.'" *FTC v. Ford Motor Co.*, 405 U.S. 562, 573 (1972).

Response to Conclusion No. 136:

Respondent has no specific response.

a) Respondent's [redacted] Are Too Speculative to Evaluate Effects on Future Competition

137. Before it is possible to consider whether a proposed divestiture would effectively restore competition, Respondent must "produc[e] evidence that the divestiture will actually occur." *Aetna*, 240 F. Supp. 3d at 60. The divestiture must be "sufficiently non-speculative for the court to evaluate its effects on future competition." *Aetna*, 240 F. Supp. 3d at 60. Indeed, as the court in *Aetna* noted a "defendant cannot produce evidence showing that [a] divestiture would create an effective competitor unless they first produce evidence that the divestiture is likely to occur." *Aetna*, 240 F. Supp. 3d at 60.

Response to Conclusion No. 137:

This proposed conclusion of law is misleading to the extent it omits important reasoning from *Aetna*. The court in *Aetna* actually held that the divestiture in that case was *not* too speculative to be considered. It stated that "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 60. Thus, it found that the divestiture "is sufficiently likely to occur for the Court to at least consider evidence of the effect of the merger." *Id.* at 63.

138. Defendants in both *Aetna* and *Sysco* presented evidence of executed asset purchase *and* transition services agreements. [redacted] *See Aetna*, 240 F. Supp. 3d at 60; Commission Order at 3 [redacted]

[redacted] (CCFF ¶¶ 2271, 2273-76, 2286, 2377-2412, 2440-47, 2729-62, 2821-59) (*in camera*); *see also Aetna* 240 F. Supp. 3d at 60.

Response to Conclusion No. 138:

This proposed conclusion of law is false because it contradicts the evidence. The [redacted] (*See* Response to CCFF ¶¶ 2271, 2273-76, 2286, 2377-2412, 2440-47, 2729-62, 2821-59). Complaint Counsel's citation to the FTC's Order is unavailing, because that order was issued before the evidence came in at trial.

b) Respondent's [redacted] are Insufficient to Restore Competitive Intensity

139. To successfully rebut a *prima facie* case, Respondent must demonstrate that "the divestiture [] 'replace[s] 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) (emphasis in original); *see also* Antitrust Division Policy Guide to Merger Remedies (October 2004) (hereinafter, "2004 DOJ Merger Remedies Guide"). Replacing "competitive intensity" is not merely an exercise in "returning [the market] to premerger HHI levels. . .[and] attributing to the [divestiture buyer] past sales associated with those assets." *See* 2004 DOJ Merger Remedies Guide.

Response to Conclusion No. 139:

Respondent has no specific response other than that, as stated in response to Conclusion of Law ¶ 135, the MPK Divestiture should be considered as part of the entire transaction for purposes of determining if Complaint Counsel established a *prima facie* case.

140. In determining whether a proposed divestiture is capable of "replacing the competitive intensity lost as a result of the merger," the Court must consider whether "the divestiture assets [are] substantial enough to enable the purchaser to maintain the premerger level of competition." *Sysco*, 113 F. Supp. 3d at 73 (quoting 2004 DOJ Remedies Guide) (emphasis in original).

Response to Conclusion No. 140:

Respondent has no specific response.

141. The "natural remedy" for a Section 7 violation is to undo the acquisition by divesting the existing business entity, *U.S. v. DuPont*, 366 U.S. at 329; *see Ford Motor Co.*, 405 U.S. at 573 (stating that "[c]omplete divestiture is particularly appropriate where . . . acquisitions violate the antitrust laws); *RSR Corp. v. FTC*, 602 F.2d 1317 (stating that "complete divestiture of all pre-merger assets is the usual remedy for a Section 7 violation"). The Commission has held that "complete divestiture is generally the most appropriate way to restore competition lost through an unlawful acquisition." *Polypore*, 150 F.T.C. at *33 (citing *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 329 (1961); *Chi. Bridge*, 534 F.3d at 441).

Response to Conclusion No. 141:

This proposed conclusion of law is false to the extent it suggests that complete divestiture is an appropriate remedy where it goes beyond what is necessary to restore competition and would be punitive. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961) ("Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive."); *see also Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-30 (1962); *Reed Roller Bit*, 274 F. Supp. at 589-90 ("[S]ince this is a situation where divestiture of part of the assets is at least as effective as a divestiture of all of the assets it is appropriate to take into consideration at least to some degree the hardship imposed on the defendants."). As the FTC has recognized, "[i]nclusion of assets used to produce items not included in the" relevant market "would not aid in restoring competition in that line of commerce. In fact, ordering such divestiture could be construed as a punishment, and civil proceedings to punish antitrust violators are not authorized. The relief must not be punitive." *In re Jim Walter Corp.*, 90 F.T.C. 671 (F.T.C. 1974) (citation omitted). Thus, "total divestiture is not an automatic remedy which must be applied in all cases." *Id.* (quoting *Union Carbide Corp.*, 59 F.T.C. 614, 659 (1961)); *see also Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404 (S.D.N.Y. 1978) (holding divestiture not appropriate), *rev'd in part on other grounds*, 603 F.2d 263 (2d Cir. 1979).

Partial divestitures are frequently approved as settlements. *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).

Partial divestitures have also been held appropriate in litigated matters. *See, e.g., United States v. Reed Roller Bit Co.,* 274 F. Supp. 573, 585-90 (W.D. Okla. 1967); *Federal Trade Commission v. PepsiCo, Inc.*, 477 F.2d 24, 29 n.8 (2d Cir. 1973); *In re Warner-Lambert Co.*, 88 F.T.C. 503 (F.T.C. 1976); *United States v. Waste Management, Inc.*, 588 F. Supp. 498 (S.D.N.Y. 1983).

142. Divestiture of an ongoing business is more likely to restore competition than a divestiture of selected assets. *See e.g.,* The FTC's Merger Remedies 2006-2012, A Report of the Bureaus of Competition and Economics (January 2017) at 11, 32 (hereinafter FTC Remedy Study) (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). In Aetna, the court recognized that "[d]ivestiture of an 'existing business entity' is more likely to 'effectively preserv[e] the competition that would have been lost through the merger,' because it would have the 'personnel, customer lists, information systems, intangible assets, and management infrastructure' necessary to completion." 240 F. Supp. 3d at 60 (citation omitted).

Response to Conclusion No. 142:

As described above in response to proposed Conclusion of Law ¶ 141, a partial divestiture is often sufficient to remedy any lost competition, and in such a case, a complete divestiture is inappropriate.

FTC's in-house Remedy Study is of limited probative value. The Remedy Study's methodology has been criticized:

> It did not report and apparently did not conduct a single retrospective analysis of divestiture cases. Its judgments about remedy outcomes were not based on actual pre and post-remedy price data for analyzing outcomes. It did not use difference-in-difference methodology now common in the literature . . . . It did not put on the record any new statistical evidence with respect to its cases, or even report which divestitures they believed were successful and which not.
>
> ***Rather, the FTC study reports that for a little over half the cases, it relied on interviews and some data (not including price) that it had secured from the parties to arrive a[t] its own judgment as to whether its remedy had preserved competition***. Inadequate as that process and evidence may be, ***for another quarter of the remedy cases the FTC study did not use any data at all, but simply relied on responses to questionnaires to some market participants***. And for the remaining cases, ***it failed even to solicit any outside information, much less data, but instead decided whether its own remedies were successful based entirely on its internal records and views of its own staff that oversaw certain industry sectors***.
>
> Compounding this, for almost half the cases the FTC declared divestiture remedies to be successful even if they did not necessarily preserve or restore competition – which is, of course, the objective of a remedy. For some cases, the FTC assessed the remedies based only on whether the divested assets were still in operation in the industry, and for others the criterion was weaker

> yet – simply whether the assets that were ordered to be divested were in fact divested. Both of these latter criteria do not answer the question of whether the remedies preserved competition.
>
> ***Thus, the FTC study appears to be more of a missed opportunity than a sound study that truly advances our understanding***.

John Kwoka, *Comment on 'Are Merger Enforcement and Remedies Too Permissive? A Look at Two Current Merger Studies' By John Harkrider*, 32-SPG Antitrust 101 (Spring 2018) (emphasis added). In short, the Remedy Study is an analytically weak advocacy piece intended to bolster the FTC's merger remedies agenda. It should be given no more weight than the unsupported declarations of Complaint Counsel. Indeed, around ten of the eighteen FTC lawyers prosecuting this case are listed as co-authors of the Remedy Study. As such, citing the Remedy Study is tantamount to allowing Complaint Counsel to provide expert testimony on the effectiveness of a remedy.

143. The court must assess whether a divestiture of discrete assets, as opposed to an "existing business entity," is sufficient to restore the competitive intensity that existed before the merger. *See, e.g.*, *Aetna*, 240 F. Supp. 3d at 60. It may be necessary to require "divestiture of assets outside the relevant market where divestiture of those assets is necessary to restore competition within the relevant market." *Polypore*, 150 F.T.C. at *33, FTC Remedy Study at 32 ("[A] proposal to divest selected assets as a remedy may need to include, for example, assets relating to complementary products outside of the relevant market[.]"); *Chi. Bridge* 138 F.T.C. at 1163-64 (ordering a divestiture of water tank business to support the cryogenic tanks business of concern to ensure viability).

Response to Conclusion No. 143:

This proposed conclusion of law is incomplete to the extent that it omits the fact that a remedy that is greater than necessary to restore any lost competition is punitive and therefore inappropriate, as described above in response to proposed Conclusion of Law ¶ 141. Further, the Remedy Study is not probative for the reasons stated in response to proposed Conclusion of Law ¶ 142.

144. A key component of successful divestitures is sufficient "access to employees who understood the relevant products." FTC Remedy Study at 25. Where the asset package

is too limited, however, and "employees . . . did not transfer with the selected assets," the divestitures "did not maintain competition." FTC Remedy Study at 23-24. An ongoing business, however, has the personnel necessary for competition. *Aetna*, 240 F. Supp. 3d at 60.

Response to Conclusion No. 144:

Respondent has no specific response, other than that the Remedy Study is not probative for the reasons stated in response to proposed Conclusion of Law ¶ 142, and that this proposed conclusion of law is inapposite because the divestiture [redacted] in this case ensure that the divestiture partner will have all necessary employees. (RFOF ¶¶ 1252-1256; Response to CCFF ¶¶ 2725 – 2872).

145. Representations from divestiture buyers about the sufficiency of divestiture assets to restore competition should not be relied on too heavily because buyers lack sufficient information themselves to make a reliable assessment. *See Fed'l Trade Comm'n, The Evolving Approach to Merger Remedies*, 2000 WL 739461 at *6 (May 1, 2000) ("buyers sometimes—too often, in fact—have a serious informational disadvantage. They may not fully know what assets they need to succeed in the business, or whether the assets offered by respondents are up to the task."); *Chi. Bridge*, 138 F.T.C. at *1162. Much of what the proposed buyers know about the divestiture assets is based upon information and representations from Respondent. (CCFF ¶¶ 2440-2500) (all four potential buyers have conducted very limited due diligence). However, "common sense tells us that Respondents' self-interests will be best served by creating less rather than more competition from the divested assets." *Chi. Bridge*, 138 F.T.C. at 1162. Here, [redacted] (CCFF ¶¶ 2440-2500) (in camera).

Response to Conclusion No. 145:

This proposed conclusion of law is false because its premise – that the proposed MPK Divestiture [redacted] – is unsupported by and contradictory to the record. (Response to CCFF ¶¶ 2438-2500).

146. As this Court observed, the risk that a proposed divestiture negotiated by Respondent is inadequate is significant because "a seller has the incentive to create a weak competitor with its divestiture package, [and] buyers may lack the necessary information to assess properly the asset package." *Chi. Bridge*, 138 F.T.C. at *1162.

Response to Conclusion No. 146:

This proposed conclusion of law is inapposite to this case because the proposed MPK Divestiture [redacted] (Response to CCFF ¶¶ 2438-2500).

147. [redacted] (CCFF ¶¶ 1090-91, 2501-23, 2556-57, 2561-62 2639-40, 2645-46) (*in camera*); *see Aetna*, 240 F. Supp. 3d at 60. Respondent failed to demonstrate that [redacted]

Response to Conclusion No. 147:

This conclusion of law is false because it contradicts and is unsupported by the evidence in the record. The evidence establishes that [redacted] which is the only market in which Complaint Counsel alleges anticompetitive effects. (RFOF ¶¶ 1249-1282; Response to CCFF ¶¶ 1090-91, 2501-23, 2556-57, 2561-62, 2639-40, 2645-46).

c) Entanglements Prevent [redacted] from Being Independent Competitors

148. The court must also evaluate whether a divestiture buyer can be "considered a truly independent competitor" when assessing the divestiture's ability to cure competitive harm. *See CCC Holdings*, 605 F. Supp. 2d at 59 ("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'") (citations omitted) (emphasis in original).

Response to Conclusion No. 148:

Respondent has no specific response.

149. The court in *Aetna* recognized that ongoing entanglements between the seller and buyer of divested assets "leave[] the buyer susceptible to the seller's actions—which are not aligned with ensuring that the buyer is an effective competitor. 240 F. Supp. 3d at 60, 71 (citations omitted); *see also Sysco*, 113 F. Supp. 3d at 77. Here, regardless of the identity

of the divestiture buyer, the proposed divestiture would require ongoing contractual entanglements between competitors. (CCFF ¶¶ 2309-11, 2404-06). For example, [redacted] ((CCFF ¶¶ 2405-12) (*in camera*)).

Response to Conclusion No. 149:

This proposed conclusion of law is false because it is unsupported by the record. What Complaint Counsel characterizes as "entanglements" are transition services intended to make the MPK Divestiture successful. (Response to CCFF ¶¶ 2405-2412). Complaint Counsel's criticism rings particularly hollow given that their own Remedy Study provides that "the respondent should be prepared to provide back-office and other functions for a limited period until the buyer can provide them itself. The respondent will be required to provide those services pursuant to an agreement between the respondent and the buyer that the Commission has approved and that the Commission will monitor." Remedy Study at 35. Indeed, [redacted] – even though, as the FTC claims in its Remedy Study, "buyers seek to end their reliance on respondents' transition services quickly." Remedy Study at 36.

d) Respondent Failed to Show that a Divestiture to [redacted] Would Not Create Harm in the U.S. MPK Market

150. The purpose of a divestiture "is to restore competition lost through the unlawful acquisition," not to create a new competitive problem. *Polypore*, 150 F.T.C. at *33 (citing *Evanston Northwestern*, Comm'n Op. on Remedy at 3 (Apr. 28, 2008); *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972)). [redacted]

Response to Conclusion No. 150:

This proposed conclusion of law is false to the extent that it states that an MPK Divestiture to [redacted] would significantly increase concentration, because that is contradictory to the evidence. (RFOF ¶¶ 1287, 1290; Response to CCFF ¶¶ 2925-2935).

151. **Because the MPK market is already highly concentrated, the increase in HHI resulting from a divestiture to Endolite, "potentially raise[s] significant competitive concerns and often warrant[s] scrutiny."}** *United States v. Bazaarvoice, Inc.*, 2014 U.S. Dist. LEXIS 3284, 238 (N.D. Cal. 2014) (quoting *Merger Guidelines* at §5.3)); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 124 (D.D.C. 2004).

Response to Conclusion No. 151:

This proposed conclusion of law is false, first, because Complaint Counsel's market definition is incorrect for the reasons described above in response to proposed Conclusions of Law ¶¶ 16-46, and because a divestiture to [redacted] would not significantly increase concentration, for the reasons described above in response to proposed Conclusion of Law ¶ 150.

VI. REMEDY

152. Divestiture of Freedom's ongoing business is the necessary and appropriate remedy to "restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger." *In re B.F. Goodrich Co.*, 110 F.T.C. 207 at 345 (1988) (quoting *In re RSR Corp.*, 88 F.T.C. 800, 893 (1976)).

Response to Conclusion No. 152:

This proposed conclusion of law is incorrect because, as described above in response to proposed Conclusion of Law ¶ 141, where a partial divestiture is sufficient to remedy any lost competition, a complete divestiture is inappropriate. In this case, a divestiture of 100% of Freedom's MPK assets would fully eliminate any alleged harm to competition. (RFOF ¶¶ 1081-1290; Response to CCFF ¶¶ 2241-2935).

153. "[U]ndoing of the acquisition" is the "natural remedy" to cure the anticompetitive harms of an unlawful acquisition. *U.S. v. DuPont*, 366 U.S. at 329; *see Ford Motor Co.*, 405 U.S. at 573 (stating that "[c]omplete divestiture is particularly appropriate where . . . acquisitions violate the antitrust laws); *RSR Corp. v. FTC*, 602 F.2d 1317 (stating that

"complete divestiture of all pre-merger assets is the usual remedy for a Section 7 violation").

Response to Conclusion No. 153:

This proposed conclusion of law is incorrect because, as described above in response to proposed Conclusion of Law ¶ 141, where a partial divestiture is sufficient to remedy any lost competition, a complete divestiture is inappropriate. In this case, a divestiture of 100% Freedom's MPK assets would fully eliminate any alleged harm to competition. (RFOF ¶¶ 1081-1290; Response to CCFF ¶¶ 2241-2935). Respondent also notes that in *RSR Corp.*, the FTC actually ordered a limited divestiture. 602 F.2d at 1325-26.

154. Where, as here, the government has established a strong case of liability "all doubts as to the remedy are to be resolved in its favor." *E.I. du Pont*, 366 U.S. at 334; *see also Polypore*, 150 F.T.C. at 639. "The manner and scope of divestiture are subject to the Commission's broad discretion. *ProMedica*, 2012 WL 1155392 at *48 (citing *Jacob Siegal Co. v. FTC*, 327 U.S. 608, 611-13 (1946); *Chi. Bridge*, 534 F.3d at 440-42). In exercising its discretion, the Commission may select a remedy that bears a "reasonable relation to the unlawful practice found to exist." *Jacob Siegal Co.*, 327 U.S. at 611-13.

Response to Conclusion No. 154:

This proposed conclusion of law should not be accepted, first, because its underlying premise – that Complaint Counsel has established a strong case of liability – is contradictory to and unsupported by the evidence. Further, this proposed conclusion of law is false to the extent that it suggests that Complaint Counsel's discretion to dictate a remedy is unfettered, or that it has the discretion to order a remedy that is punitive. As described above in response to proposed Conclusion of Law ¶ 141, where a partial divestiture is sufficient to remedy any lost competition, a complete divestiture is inappropriate. In this case, a divestiture of 100% of Freedom's MPK assets would eliminate any alleged harm to competition. (RFOF ¶¶ 1081-1290; Response to CCFF ¶¶ 2241-2935).

155. 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 *E. I. du Pont*, 366 U.S. at 329; *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972)).

Response to Conclusion No. 155:

This proposed conclusion of law is incomplete to the extent that it omits that, as described above in response to proposed Conclusion of Law ¶ 141, where a partial divestiture is sufficient to remedy any lost competition, a complete divestiture is inappropriate. In this case, a divestiture of 100% of Freedom's MPK assets would eliminate any alleged harm to competition. (RFOF ¶¶ 1081-1290; Response to CCFF ¶¶ 2241-2935).

156. "Complete divestiture is generally the most appropriate way to restore competition lost through an unlawful acquisition." *Polypore*, 150 F.T.C. at 639 (citing *E. I. du Pont*, 366 U.S. at 329; *Chi. Bridge*, 534 F.3d at 441). Indeed, as this Court recognized, "complete divestiture is the appropriate remedy to most effectively 'pry open to competition [the] market[s] that [have been closed by [Respondent's] illegal restraints.'" *Polypore*, 2010 WL9434806 at *256 (quoting *E. I. du Pont*, 366 U.S. at 323).

Response to Conclusion No. 156:

This proposed conclusion of law is incomplete to the extent that it omits that, as described above in response to proposed Conclusion of Law ¶ 141, where a partial divestiture is sufficient to remedy any lost competition, a complete divestiture is inappropriate. In this case, a divestiture of 100% of Freedom's MPK assets would eliminate any alleged harm to competition. (RFOF ¶¶ 1081-1290; Response to CCFF ¶¶ 2241-2935).

157. The Commission "may order divestiture of assets outside the relevant market where divestiture of those assets is necessary to restore competition within the relevant market." *Polypore*, 150 F.T.C. at 639 (citing *Chi. Bridge*, 138 F.T.C. at 1163-64); *see also* FTC Remedy Study at 32 ("[A] proposal to divest selected assets as a remedy may need to include, for example, assets relating to complementary products outside of the relevant market[.]").

Response to Conclusion No. 157:

This proposed conclusion of law is incomplete to the extent that it omits that, as described above in response to proposed Conclusion of Law ¶ 141, a divestiture may not be

punitive. In this case, a divestiture of 100% of Freedom's MPK assets would eliminate any alleged harm to competition. RFOF ¶¶ 1081-1290; Response to CCFF ¶¶ 2241-2935. As such, a divestiture that included any assets outside the relative market would be punitive and inappropriate. Complaint Counsel's reliance on the FTC's Remedy Study is unavailing for the reasons described above in response to proposed Conclusion of Law ¶ 142.

158. Divestiture of an entire ongoing business is "simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." *E.I. du Pont*, 366 U.S. at 330-31. Divestiture of an ongoing business entity has the highest likelihood of restoring competition to premerger levels. *See* FTC Remedy Study at 5 ("all remedies involving divestitures of assets comprising ongoing businesses succeeded, confirming that such divestitures are most likely to maintain or restore competition.").

Response to Conclusion No. 158:

This proposed conclusion of law is incomplete to the extent that it omits that, as described above in response to proposed Conclusion of Law ¶ 141, where a partial divestiture is sufficient to remedy any lost competition, a complete divestiture is inappropriate. In this case, a divestiture of 100% of Freedom's MPK assets would eliminate any alleged harm to competition. (RFOF ¶¶ 1081-1290; Response to CCFF ¶¶ 2241-2935). Complaint Counsel's reliance on the FTC's Remedy Study is unavailing for the reasons described above in response to proposed Conclusion of Law ¶ 142.

159. Divestiture of Freedom's ongoing business is the necessary and appropriate remedy to "restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger." *In re B.F. Goodrich Co.*, 110 F.T.C. 207 at 345 (1988) (quoting *In re RSR Corp.*, 88 F.T.C. 800, 893 (1976)). The limited divestiture of assets proposed by Respondent fails to restore competition because it would deprive the buyer of critical assets, rights, and personnel necessary to match the competitive vigor of the pre-acquisition Freedom in the MPK market. *See Sysco*, 113 F. Supp. 3d at 73; FTC Remedy Study at 23.

Response to Conclusion No. 159:

This proposed conclusion of law is false because, as described above in response to proposed Conclusion of Law ¶ 141, where a partial divestiture is sufficient to remedy any lost competition, a complete divestiture is inappropriate. In this case, a divestiture of 100% of Freedom's MPK assets would eliminate any alleged competition. (RFOF ¶¶ 1081-1290; Response to CCFF ¶¶ 2241-2935). Complaint Counsel's reliance on the FTC's Remedy Study is unavailing for the reasons described above in response to proposed Conclusion of Law ¶ 142.

Dated: December 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 20, 2018, I caused a true and correct copy of the foregoing Respondent's Reply to Complaint Counsel's Post-Trial Proposed Findings of Fact and Conclusions of Law to be served via the FTC E-Filing System and e-mail upon the following:

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Notice of Electronic Service

I hereby certify that on December 20, 2018, I filed an electronic copy of the foregoing Public - Respondent's Reply to CC's Post-Trial Proposed Findings of Fact and Conclusions of Law, with:

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I hereby certify that on December 20, 2018, I served via E-Service an electronic copy of the foregoing Public - Respondent's Reply to CC's Post-Trial Proposed Findings of Fact and Conclusions of Law, upon:

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