



# Oral Argument Before the Federal Trade Commission

**July 25, 2019**

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

**ottobock.**

Quality for life

# Ottobock Legally Acquired Freedom Innovations

## There is no Clayton Act violation

- Ottobock's September 2017 Acquisition of Freedom did not enhance Ottobock's market power in any relevant market
  - The ALJ failed to consider the relative “closeness” in product space of Ottobock's MPKs and numerous MPKs offered by Össur, Endolite, and Proteor
  - The ALJ ignored substantial evidence about the distance in product space between Ottobock's MPKs and Freedom's Plié 3
  - No matter how the market is defined, existing MPK rivals have the ability to timely, likely, and sufficiently replace the roughly 800 MPKs sold annually by Freedom in the United States
  - Testimony from clinicians confirmed that they could and would switch to rival MPKs if Ottobock attempted to raise prices post-Acquisition

# Ottobock Legally Acquired Freedom Innovations

## There is no Clayton Act violation

- With the divestiture, there is no increase in market share or HHI
- The Acquisition and divestiture provided a bridge to carry the MPK assets of the insolvent Freedom to one of the top U.S. prosthetics suppliers
- There is no evidence of harm to competition in the interim with Freedom operating independently instead of going into ruin

# HHI Statistics Alone Do Not Warrant A Strong Presumption of Unilateral Harm

No evidence of a correlation between market concentration and bargaining power

“[A] strong presumption of anticompetitive effects based on market concentration is especially problematic in a differentiated products unilateral effects context.” *United States v. Oracle*, 331 F. Supp. 2d 1098, 1122 (N.D. Ca. 2004)

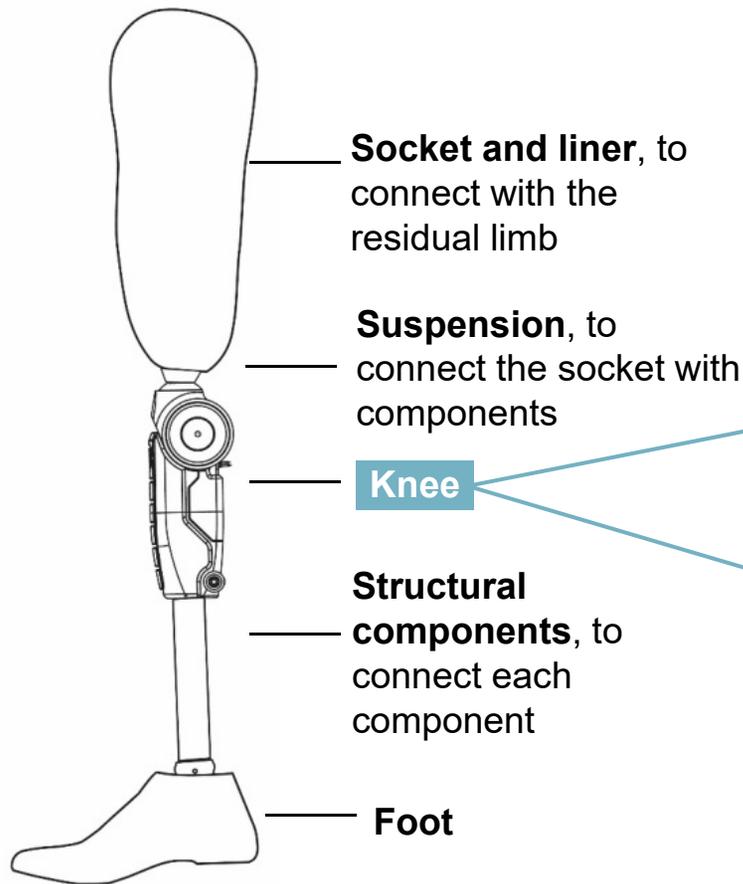
“These two aspects of this case—the strong correlation between market share and price, and the degree to which this merger would further concentrate markets that are already highly concentrated—converge in a manner that fully supports the Commission's application of a presumption of illegality.” *ProMedica Health System v. FTC*, 749 F.3d 559, 569-70 (6th Cir 2014)

Here, there is no evidence that Ottobock ever had bargaining power, even several years ago when it had a virtual monopoly in MPK segment;

Accordingly, application of a presumption of unilateral harm is inapt

# The Acquisition Will NOT Facilitate Unilateral Harm

## Lower-Limb Prosthesis Overview



Six U.S. MPK Suppliers

The box contains the following logos:

- ottobock.**
- ÖSSUR** LIFE WITHOUT LIMITATIONS
- endolite** get busy living
- PROTEOR USA**
- FREEDOM INNOVATIONS**
- DAW**

## Effects on Competition Are Forward-Looking

*United States v. General Dynamics Corp.*, 415 U.S. 486, 504-06 (1974)

- Supreme Court held that merger’s probable anticompetitive effect must consider market’s “structure, history and probable future.”
- Post-acquisition evidence was admissible to evaluate future anticompetitive effects.

## Effects Analysis Requires Totality-of-the-Circumstances Approach

*United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (1990)

- “The Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition. That the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this analysis. Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness.”

## The Acquisition Will NOT Facilitate Unilateral Harm

*United States v. H&R Block, Inc.* 833 F. Supp. 2d 50, 81 (D.D.C. 2011)  
(quoting *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 68 (D.D.C. 2009))

Unilateral harm in a differentiated product market is unlikely unless the following conditions are established:

(1) the products controlled by the merging firms must be close substitutes, i.e., “a substantial number of the customers of one firm would **turn to the other in response to a price increase**”;

(2) other products must be **sufficiently different** from the products offered by the merging firms that a merger would make a small but significant and non-transitory price increase profitable for the merging firm; and

(3) repositioning **must** be unlikely.



## The Acquisition Will NOT Facilitate Unilateral Harm

MPK:	Ottobock C-Leg	Össur Rheo	Endolite Orion & Linx	Freedom Plié	Proteor Allux
Marketed as L5856	✓	✓	✓	✓	✓
MPK-Controlled Swing & Stance	✓	✓	✓	✗	✓
Battery Life (Days)	1.5	3	3	1	4
Max User Weight (Kg)	136	136	125	125	125
Different Modes	✓	✓	✓	✗	✓
U.S. Sales Force	75	50	20	17	9
Clinical Evidence	✓	✓	✓	✗	✗
New MPKs post-2014	✓	✓	✓	✗	✓

**ottobock.**

# Ottobock's MPKs Are the "Gold Standard" & Össur's MPKs Are Its Closest Competitors

## Current MPK Segmentation

	Ottobock	Össur	Endolite	Freedom	Proteor
Premium MPK (K-3/K-4)	Genium X3	Rheo XC PowerKnee			
Mainstream MPK (K-3/K-4)	C-Leg 4	Rheo	Orion 3 Linx		Allux
MP-Switch (K-3/K-4)				Plié	
MP-Stance (K-2)	Kenevo Compact				

# The Acquisition Will NOT Facilitate Unilateral Harm

## Össur Rheo is many prosthetists “next-best choice” after C-Leg

I promise this – Plie is NOT the competition. Reho IS. This is according to all the purchase data from OPIE. Reho is killing us – not Plie. Plie is a fly and Reho is a vulture.

Walt,  
These are good notes below. Good message. The question next time will be are things improving from this time last year – same or worse? In the field and from corporate.

Curious on the office days comment – what to do? stop emails? Seriously, this is possible.  
Not sure what benefit senior management calling a customer that doesn't believe Medicare will be will do. Do you think they believe senior management so they now change? Is there another solution more impactful?

I promise this – Plie is NOT the competition. Reho IS. This is according to all the purchase data from OPIE. Reho is killing us – not Plie. Plie is a fly and Reho is a vulture.

Nice job Walter.

Matt Swiggum

Executive Vice President of Sales  
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Ottobock  
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**From:** Governor, Walter  
**Sent:** Friday, April 03, 2015 3:14 PM  
**To:** McIntyre, Wendy; Swiggum, Matt; Hines, Jeremy; Howard, John; Smith, John; Fregger, Eric; Sethna, Fram; Baran, Joe; Bridgford, Monique; Leikam, Paul; Rankin, Tom; Schultz, Andreas; Ruhl, Brad; Lundquist, Karen; McCrimmon, Rodney; Edwards, Mark  
**Subject:** RE: Comments from Senior Rep Call

Team,  
A good note and a testament to your efforts.  
We discussed the challenges you face with customers that are hesitant to fit MPKs.  
We sold 78 more MPKs in the first quarter than we did a year ago. Wohooo!!!!!!  
Keep fighting!!!!

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### — Ottobock’s Executive VP of Sales in 2015

Q. *What MPKs are you aware of that were fit on the subjects of the clinical outcome studies that were relied upon in the RAND project?*

A. **Certainly predominantly the C-Leg and the generations of C-Legs, as well as the Rheo knee.**

Q. *Are you aware of any published clinical outcome studies addressing the benefits of microprocessor knees that used subjects fit with the Plié manufactured by Freedom?*

A. **No.**

Michael Oros (Tr. 4808)  
Certified Prosthetist, Scheck & Siress

# The Acquisition Will NOT Facilitate Unilateral Harm

The ALJ ignored that Endolite's MPK reputation improved with the releases of Orion 3 and Linx in 2016 and that its MPK sales have skyrocketed since

**MPC Knees**

Message

From: Maxford Cirkuff [mailto:FC4K@YORKCH2.25POLTY.ON.CA]

Sent: 11/20/2016 10:51:21 PM

To: Jeremy Mathews [mailto:JM@ExchangeLabz.NA.Exch.YORKCH2.25POLTY.ON.CA]; Sam Brouillette [mailto:SB@ExchangeLabz.NA.Exch.YORKCH2.25POLTY.ON.CA]; David Smith [mailto:DS@ExchangeLabz.NA.Exch.YORKCH2.25POLTY.ON.CA]; Sam Brouillette [mailto:SB@ExchangeLabz.NA.Exch.YORKCH2.25POLTY.ON.CA]

Subject: MPC Knees

Sam Brouillette, CP and member of SPS today to meet with Corin regarding the Sam to catch up on each other's activities

- MPC Knees
  - Believes the Orion 3, or taking business from all
    - Deep Angle Resistance feature which can be adjusted to increase resistance when sitting...most decrease resistance.
    - Standing mode feature similar to C-Leg 4
    - Fixed Angle Lock: can set so won't go past a fixed angle which is ideal for golfers (approx.. 30 degrees). Extreme example is a softball batter who rocks back on their leg when batting...other legs would collapse.
    - Separated stair and ramp modes...benefit unclear
  - C-Leg 4
    - Have experienced occasional quality issues due to the switch from strain gauge in pylon to being incorporated in knee itself although he is sure this issue will eventually be resolved
  - Plié 3
    - Due to Sam's position, he has fit more Plié's than almost anyone in the country. Until recently he has been an avid supporter of the product but feels in many ways the P3 hasn't changed much since the Plié 2 and is less competitive today
    - Advised him we would get him involved with the Quattro product design

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- o Believes the Orion 3, which was introduced at the AOPA meeting, is enjoying excellent sales success and taking business from all brands including the C-Leg 4 due to:
  - Deep Angle Resistance feature which can be adjusted to increase resistance when sitting...most decrease resistance.
  - Standing mode feature similar to C-Leg 4
  - Fixed Angle Lock: can set so won't go past a fixed angle which is ideal for golfers (approx.. 30 degrees). Extreme example is a softball batter who rocks back on their leg when batting...other legs would collapse.
  - Separated stair and ramp modes...benefit unclear

— Hanger rep to Freedom's CEO in 2016

**Q:** *Why, if at all, would you choose to fit a patient with an Orion over a Plié?*

**A:** *It's also easier for swing, and price is better, and I get -- I get good support from both, so that's not an issue. Yeah, I think it's easier to initiate, to teach a new patient an Endolite, Orion, and it's less expensive.*

James Patton  
 Certified Prosthetist  
 Prosthetic Solutions  
 (PX05151, Dep. Tr. 29)

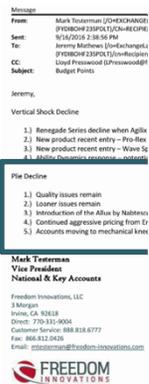
# The Acquisition Will NOT Facilitate Unilateral Harm

Allux has gone “mainstream” and is giving rival MPK suppliers “heartbreak”

Q: *What [MPKs] does the Plié 3 try to compete against?*

A: *Well, you know, we go after the **Endolite**, obviously, **Össur**, the **Allux** – they’re making some progress in the market – and then the **C-Leg**.”*

— Freedom’s VP of Marketing, Customer Service & Client Development (Tr., 2466)



## Plie Decline

- 1.) Quality issues remain
- 2.) Loaner issues remain
- 3.) Introduction of the Allux by Nabtesco
- 4.) Continued aggressive pricing from Endolite with the ORION (11k /knee)
- 5.) Accounts moving to mechanical knees based on reimbursement and audit pressures

— Freedom’s VP of National and Key Accounts, September 2016

# The Acquisition Will NOT Facilitate Unilateral Harm

## U.S. Reimbursement Facilitates Interbrand Substitution Constraining Prices

- MPK suppliers rely on reimbursement and clinic profit margins when setting prices
- Reimbursement is based on “L-Codes” developed by CMS
- Reimbursement is manufacturer agnostic, *i.e.*, no brand loyalty and no switching costs (F 120, 320-21)
- Clinicians testified at trial that U.S. reimbursement system constrains MPK suppliers’ pricing ability

*Q: As a major customer for prosthetic knees in the United States, do you have **any concern** that Otto Bock’s acquisition of Freedom would **harm competition** in the United States specifically with respect to the sale of microprocessor knees?*

*A. Again, **Medicare sets the price**, which just makes me want to sort of stand up and scream why are we all here. If Medicare is setting the price, then **manufacturers can’t change the price of a knee**. If they wanted to buy Freedom and raise the price of a knee, all they’re doing is cutting out my profit margin, which **makes me not want to use them**.*

— Scott Sabolich, Certified Prosthetist, SSPR Clinic  
(Tr. 5866)

## The Acquisition Will NOT Facilitate Unilateral Harm

All O&P clinics credibly play MPK rivals against each other for lower pricing

- “The ability of large buyers to keep prices down ... depends on the alternatives these large buyers have available to them.”
  - *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 48 (D.D.C. 2015)
  
- All O&P clinics earn volume-based discounts and/or rebates from MPK suppliers
  - Discounts incentivize clinics to use as few different MPK brands as possible to earn the biggest discounts with MPK suppliers
  - Clinics earn larger discounts as they shift volume to particular MPKs
  
- Complaint Counsel claims that the Acquisition will substantially lessen clinics’ ability to obtain lower prices

**WRONG**

## The Acquisition Will NOT Facilitate Unilateral Harm

### Interbrand MPK switching is EASY

- There is no evidence tending to show significant barriers to repositioning/expansion
- There is no evidence that the Acquisition would eliminate an MPK supplier whose presence contributed significantly to any clinic's negotiating leverage
- Testimony from Freedom's largest MPK customers corroborate the point that they could and would turn to non-merging, rival MPKs in the face of a small but significant price increase on Plié 3

## Structural Presumption MUST Consider Planned Divestiture

*United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1067-69 (S.D.N.Y. 1969).

- Agreement was modified to provide for divestiture following merger
- Court considered divestiture in determining market concentration
- Court denied presumption of competitive harm in planned divestiture market

## HHI Calculations **MUST** Consider Divestiture As Part Of Transaction

*FTC v. Arch Coal, Inc.*, No. 1:04-cv-534 (ECF No. 67) (D.D.C. July 7, 2004)

- Evidence of planned divestiture was admissible at trial – Ignoring the divestiture “would be tantamount to turning a blind eye to the elephant in the room.” (Slip. op. at 8)
- Planned divestiture was good faith response to the Commission’s investigation and concerns
- The “transaction . . . is properly viewed as the set of two transactions” – *i.e.*, the acquisition and the planned divestiture
- After trial, District Court considered planned divestiture in performing HHI calculations

## Divestiture Prevents Complaint Counsel's *Prima Facie* Case

Acquisition + Divestiture = No Change in HHI = No Presumption

- MPK Divestiture transfers Respondent's entire MPK business. (RPF 1086-89, 1118-20)
- Ottobock retains no Freedom MPK assets with good faith MPK Divestiture resulting in ***zero increase in market concentration***
- Complaint Counsel cannot make out *prima facie* case when MPK Divestiture is considered as part of entire transaction

## *Atlantic Richfield and Arch Coal Apply Here*

- Acquisition transaction similar to unconsummated merger for purposes of considering planned divestiture
- Ottobock proposed the divestiture in good faith prior to the filing of the Complaint
- No evidence of post-Acquisition harm
- Freedom operated independently and competed against Ottobock since closing
- Voluntary separation at first, then by Hold Separate Agreement entered on December 19, 2017

## Complaint Counsel's Criticisms of the Divestiture Are Not Supported by the Record

- Buyer can employ whomever it wants, and plans to hire from all areas of expertise
- Buyer gets all IP ownership and paid up license to two shared patents
- Buyer has a full line of lower-limb prosthetics except for MPKs and long history of success in the industry
- APA includes warranty that Buyer can conduct Freedom MPK business as currently conducted
- Buyer has all the assets it needs to bundle MPKs with its full line of prosthetic products and services, including carbon fiber feet
- Buyer does not want and does not need the assets it excluded

## Planned Divestiture Is Not Speculative

*United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017)

- A divestiture should be considered as long as it is “sufficiently non speculative.” It “need not be iron clad for a court to consider it”
- MPK Divestiture exceeds this standard
- ALJ’s standard is unreasonable, effectively requiring planned divestiture to be closed before termination of litigation

## ALJ's Product Market Is Predicated On Unreliable Expert Opinion

- ALJ erred in adopting Complaint Counsel's economist's product market
  
- Complaint Counsel's economist used:
  - Unreliable and cherry-picked data (Tr. 4043-4035; RCCPF 467)
  - Highly-criticized empirical methods (RBR 51-52; RAB 38-39)
  
- As a result, arrived at a product market that is internally inconsistent and illogical - which was recognized by the ALJ at trial but not grappled with in the Initial Decision

## ALJ's Product Market Is Not Supported By *Brown Shoe*

### Practical Indicia Support Broader Market For K-3/K-4 Patients

- Complaint Counsel's relevant product market, as a result of the flawed analysis by their economist, is not supported by *Brown Shoe* indicia
- Complaint Counsel hides behind the undefined and malleable term "MPK" to obscure the fact that it *remains* unclear which knees are intended to be included and which are intended to be excluded from their relevant product market and why

## Freedom Was A Failing Firm

- The ALJ ignored overwhelming and un rebutted evidence that Freedom could not meet its financial obligations in the near future
- The ALJ failed to address the evidence that Freedom would not have been able to reorganize successfully under Chapter 11 of the Bankruptcy Act
- The ALJ erred in failing to find that Freedom exhausted good faith efforts to obtain reasonable alternatives to the Acquisition

Thank You For Your Consideration



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 18, 2019, I caused a true and correct copy of the foregoing document to be filed via the FTC E-Filing System and served via regular mail and/or e-mail upon the following:

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