



Argument Before the Commission:
Otto Bock's Acquisition of Freedom Violates Section 7



Docket No. 9378

July 25, 2019



The Illegal Consummated Merger

Otto Bock, the dominant U.S. MPK supplier, acquired its closest rival, Freedom, in a non-reportable transaction on September 22, 2017.

The logo for Otto Bock, consisting of the word "ottobock." in a bold, blue, lowercase sans-serif font.

The logo for Freedom Innovations, featuring a stylized red and white circular graphic to the left of the text "FREEDOM INNOVATIONS" in a bold, uppercase sans-serif font.

The merger violated Section 7 on the day it was consummated.

It has harmed and will continue to harm consumers unless the Commission orders a remedy that fully restores competition.



Overwhelming Evidence of Section 7 Violation

- Extremely strong *prima facie* case
 - U.S. MPK market supported by voluminous documentary, testimonial, and economic evidence
 - Undisputed market shares and concentration levels
- ALJ found head-to-head competition benefitted customers
- Merger presumptively illegal even using Respondent's erroneous market definition



Brown Shoe Evidence Proves MPK Market

- Respondent, other MPK and mechanical knee manufacturers, clinics, and insurers all view MPKs as a distinct market
- MPKs function and perform very differently than mechanical knees
- Peer-reviewed research shows increased safety benefits for MPKs
- MPK prices are much higher and MPKs are reimbursed differently
- MPK prices are not sensitive to mechanical knee prices—the choice between these different products is a clinical decision



MPK Market Easily Passes HMT

- Qualitative economic evidence proves a hypothetical monopolist of MPKs could profitably impose a SSNIP
 - Customers do not switch from MPKs to mechanical knees based on price
 - Mechanical knees play no role in MPK negotiations with clinics
 - Post-merger, Otto Bock top execs planned to discontinue or raise the price of Plié knowing customer switching would not make their plan unprofitable
- Critical loss analysis confirms MPK market passes HMT
 - Analysis shows hypothetical monopolist of only Respondent's MPKs could profitably impose SSNIP
 - Clearly a firm controlling all MPKs also passes HMT



Additional Direct Effects Evidence

- After establishing strong presumption, Complaint Counsel proved consumers have been and will continue to be harmed
 - Otto Bock’s core deal rationale was to eliminate Freedom and its “C-Leg 4 Killer” (CCFF ¶¶ 1230-1318, 1325-1383; CC Post-Tr. Br. 80-86)
 - Otto Bock had post-merger plans to raise Plié’s price and eliminate Quattro/C-Leg competition (CCFF ¶¶ 1175-1324, 1384-1411; CC Post-Tr. Br. 87-91)
 - Merger has already kept Plié 3 Fast Fit out of the market, delayed the Quattro launch, and eliminated incentives to compete (CCFF ¶¶ 1446-1479; CC Post-Tr. Br. 92-94)
- ALJ did not need to weigh this direct effects evidence because Respondent failed to rebut Complaint Counsel’s *prima facie* case (Initial Decision 49 n.25)



Respondent's Appeal

- Initial Decision is amply supported and well reasoned
- Respondent falsely claims the ALJ ignored evidence
- Respondent repeatedly misrepresents facts
- Respondent's arguments were rejected by the ALJ because they lacked factual and legal support
- On appeal, all of Respondent's old arguments still fail and those it raises for the first time lack merit



Respondent's Meritless Arguments

- Respondent's product market claims are incorrect and unsupported
- Respondent failed to meet its burden because evidence shows:
 - Repositioning will not fill the competitive void and prevent additional harm
 - No element of failing firm defense satisfied
 - Power buyers will not prevent additional harm
 - Reimbursement system will not prevent additional harm
 - No cognizable efficiencies
 - Speculative and incomplete divestiture proposals will not restore competition
 - Narrower order would not restore competition
- Respondent's constitutional claims are waived and meritless



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Constitutional Claims Are Waived

- “By waiting until this late date, Respondent has waived th[ese] claim[s].” *In re 1-800 Contacts, Inc.*, Docket No. 9372, Opinion of the Commission at 58 (Nov. 7, 2018).
- Respondent has “failed to present a complete showing of constitutional harm,” resulting in waiver of its claims. *Id.* (citing *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1392-93 (7th Cir. 1986)).



Appointment Clause Claim is Meritless

- ALJ is properly appointed under the Constitution.
- “[U]nlike in *Lucia v. SEC*, where the Court found that the ALJ was unconstitutionally appointed by SEC staff members, the FTC’s ALJ was appointed by the Commission, which is a ‘Head[] of Department[].’”
In re 1-800 Contacts, Inc., Docket No. 9372, Opinion of the Commission at 58 (Nov. 7, 2018) (quoting *Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018)).



Appointment Clause Claim is Meritless

- ALJ removal process is proper under the Constitution.
- “[I]f the Administrative Procedure Act’s ‘good cause’ standard for removal is properly construed—*i.e.*, to allow removal of an ALJ for failure to perform adequately or to follow agency policies, and to limit the Merit Systems Protection Board’s role to determining whether a factual basis exists for the agency’s proffered grounds for removal—the APA gives the President a constitutionally adequate degree of control over ALJs.”
In re 1-800 Contacts, Inc., Docket No. 9372, Opinion of the Commission at 58-59 (Nov. 7, 2018).



Other Claims Also Lack Merit

Due Process and Equal Protection claims insufficiently alleged and argued:

- Respondent's allegation does not explain how it meets its burden to prove a Due Process violation. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976).
- Respondent failed to even attempt to meet its burden to “negative every conceivable basis which might support” the classification it alleges violates the Equal Protection Clause. *See, e.g., Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012).



Commission Should Issue ALJ's Order

- The merger violates Section 7.
- It has already harmed consumers.
- It will continue to harm consumers without an effective remedy.
- The ALJ's Order will fully restore competition.
- Each Order provision is supported by the record and case law.

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2019, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

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Dated: July 18, 2019

By: /s/ Daniel Zach
Daniel Zach

Counsel Supporting the Complaint

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

July 18, 2019

By: /s/ Daniel Zach