

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



In the Matter of

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

Docket No. 9378

**RESPONDENT'S MOTION TO ADMIT CONTESTED EXHIBITS INTO EVIDENCE**

Respondent Otto Bock HealthCare North America, Inc. ("Ottobock") moves to admit RX-869, RX-1037, RX-1038, RX-1039, RX-1040, RX-1041, RX-1045, and RX-1046 into evidence.

**I. INTRODUCTION**

Respondent and Complaint Counsel have reached an agreement as to the admissibility of all proposed exhibits, with the exception of eight documents offered by Respondent - RX-869, RX-1037, RX-1038, RX-1039, RX-1040, RX-1041, RX-1045, and RX-1046 (collectively referred to as the "contested exhibits"). These eight contested exhibits, attached to this Motion, are all signed declarations made under penalty of perjury by prosthetists providing material information relevant to this case. For the reasons outlined below, the contested exhibits are admissible under 16 C.F.R. § 3.43(b) and there is no legitimate basis to exclude them from evidence.

**II. ARGUMENT**

Respondent moves to admit RX-869, RX-1037, RX-1038, RX-1039, RX-1040, RX-1041, RX-1045, and RX-1046 under 16 C.F.R. § 3.43(b) which provides for the admissibility of "relevant, material, and reliable" evidence. Complaint Counsel does not dispute the exhibits relevance or materiality. Instead, Complaint Counsel has lodged the following objections:

Hearsay; Authenticity; Reliability; Prejudiced; For Settlement Purposes Only. None of these objections should preclude the admission of the contested exhibits – at most these objections go to the weight that the Court affords when analyzing the body of evidence presented at trial. Respondent addresses each of these objections in turn.

**Hearsay.** Respondent recognizes that the contested exhibits constitute Hearsay, but under Part 3 rules, that is not a reason to exclude them from evidence. *See* 16 C.F.R. § 3.43(b) (“Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair”). Complaint Counsel has not disputed the relevance or materiality of the contested exhibits, and as the contested exhibits are declarations made under penalty of perjury, they “bear satisfactory indicia of reliability so that its use is fair.”

**Authenticity.** Each of the contested exhibits are declarations made under penalty of perjury which comply with 28 U.S.C. § 1746, which provides that such declaration has the same force and effect as a sworn, verified, document. As a result, the contested exhibits are self-authenticating. *See* Federal Rule of Evidence 902(8). Complaint Counsel recognizes this, as several declarations, similarly made under penalty of perjury, are included on Complaint Counsel’s exhibit list.

**Reliability.** Respondent submits that given that the declarations are made under penalty of perjury they bear sufficient indicia of reliability to be admitted into evidence. To the extent that the Court deems any of the contested exhibits unreliable in some manner, the Court can afford less weight to that exhibit.

**Prejudiced.** It is Respondent’s understanding that Complaint Counsel’s prejudice objection is timing-based – specifically, that the contested exhibits were provided to Complaint Counsel after the discovery period was over. This is disingenuous, as Complaint Counsel has

been in possession of seven of the contested exhibits since April, and the remaining one since May. Furthermore, there is nothing in the Part 3 evidentiary rules limiting Respondent to introducing only evidence that was produced during the discovery period. Importantly, Respondent did not withhold these documents – they were obtained after discovery had ended, and were promptly provided to Complaint Counsel, each within days of being executed. Furthermore, Respondent timely disclosed the contested exhibits on its Exhibit List and provided copies to Complaint Counsel at that time. That is the only applicable disclosure requirement in the Scheduling Order in this case, and Respondent has met its obligations.

**For Settlement Purposes Only.** Seven of the contested exhibits (RX-1037, RX-1038, RX-1039, RX-1040, RX-1041, RX-1045, and RX-1046) were submitted to Complaint Counsel in support of a settlement proposal. Complaint Counsel seems to argue that Respondent is therefore not permitted to use those declarations at trial. However, the mere fact that otherwise admissible evidence is also relevant in the context of settlement discussions does not somehow render that evidence inadmissible at trial for other purposes. None of the declarations reveals or discusses confidential settlement proposals. This objection has no basis.

### **III. CONCLUSION**

For the foregoing reasons, Respondent respectfully requests that the Court admit RX-869, RX-1037, RX-1038, RX-1039, RX-1040, RX-1041, RX-1045, and RX-1046 into evidence over the objections of Complaint Counsel.

Respectfully submitted,

Date: July 20, 2018

/s/ William Shotzbarger

Wayne A. Mack

Edward G. Biester III

Sean S. Zabaneh

Sean P. McConnell

Sarah Kulik

William Shotzbarger

**DUANE MORRIS LLP**

30 S. 17th Street

Philadelphia, PA 19103

Telephone: (215) 979-1000

Fax: (215) 979-1020

WAMack@duanemorris.com

EGBiester@duanemorris.com

SSZabaneh@duanemorris.com

SPMcConnell@duanemorris.com

SCKulik@duanemorris.com

WShotzbarger@duanemorris.com

*Counsel for Respondent Otto Bock HealthCare  
North America, Inc.*

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DECLARATION OF SARAH KULIK IN SUPPORT OF  
RESPONDENT'S MOTION TO ADMIT CONTESTED EXHIBITS INTO EVIDENCE

I, Sarah Kulik, pursuant to 28 U.S.C. § 1746, state and declare as follows:

1. I am an attorney at Duane Morris LLP. I am licensed to practice law in the Commonwealth of Pennsylvania. I am over the age of 18, am capable of making this Declaration, know all of the following facts of my own personal knowledge, and, if called and sworn as a witness, could and would testify competently thereto.

2. Attached as **Exhibit A** is a true and correct copy of Respondent, Otto Bock HealthCare North America, Inc.'s Exhibit RX-869, Confidential Declaration of [REDACTED] dated May 21, 2018.

3. Attached as **Exhibit B** is a true and correct copy of Respondent's Exhibit RX-1037, Confidential Declaration of [REDACTED] dated April 4, 2018.

4. Attached as **Exhibit C** is a true and correct copy of Respondent's Exhibit RX-1038, Declaration of [REDACTED] dated April 4, 2018.

5. Attached as **Exhibit D** is a true and correct copy of Respondent's Exhibit RX-1039, Declaration of [REDACTED] dated April 2, 2018.

6. Attached as **Exhibit E** is a true and correct copy of Respondent's Exhibit RX-1040, Declaration of [REDACTED] dated April 4, 2018.

7. Attached as **Exhibit F** is a true and correct copy of Respondent's Exhibit RX-1041, Confidential Declaration of [REDACTED] dated April 4, 2018.

8. Attached as **Exhibit G** is a true and correct copy of Respondent's Exhibit RX-1045, Confidential Declaration of [REDACTED] dated April 4, 2018.

9. Attached as **Exhibit H** is a true and correct copy of Respondent's Exhibit RX-1046, Confidential Declaration of [REDACTED] dated April 4, 2018.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 20th day of July, 2018 in Washington, District of Columbia.

/s/ Sarah Kulik  
Sarah Kulik

# EXHIBIT A

**REDACTED IN ENTIRETY**

# EXHIBIT B

REDACTED IN ENTIRETY

# EXHIBIT C

**REDACTED IN ENTIRETY**

# EXHIBIT D

REDACTED IN ENTIRETY

# EXHIBIT E

REDACTED IN ENTIRETY

# EXHIBIT F

REDACTED IN ENTIRETY

# EXHIBIT G

**REDACTED IN ENTIRETY**

# EXHIBIT H

**REDACTED IN ENTIRETY**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 20, 2018, I caused a true and correct copy of the foregoing Respondent's Motion to Admit Contested Exhibits into Evidence to be served via the FTC E-Filing System and e-mail upon the following:

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
Rm. H-110  
Washington, DC, 20580

Donald S. Clark  
Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Washington, DC 20580

Meghan Iorianni  
Jonathan Ripa  
Steven Lavender  
William Cooke  
Yan Gao  
Lynda Lao  
Stephen Mohr  
Michael Moiseyev  
James Weiss  
Daniel Zach  
Amy Posner  
Lisa De Marchi Sleigh  
Catherine Sanchez  
Sarah Wohl  
Joseph Neely  
Dylan Brown  
Betty McNeil  
Stephen Rodger  
Jordan Andrew

Federal Trade Commission  
600 Pennsylvania Ave., NW  
Washington, DC, 20580

/s/ William Shotzberger  
William Shotzberger

Notice of Electronic Service

**I hereby certify that on July 20, 2018, I filed an electronic copy of the foregoing Respondent's Motion to Admit Contested Exhibits into Evidence, with:**

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
Suite 110  
Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC, 20580

**I hereby certify that on July 20, 2018, I served via E-Service an electronic copy of the foregoing Respondent's Motion to Admit Contested Exhibits into Evidence, upon:**

Steven Lavender  
Attorney  
Federal Trade Commission  
slavender@ftc.gov  
Complaint

William Cooke  
Attorney  
Federal Trade Commission  
wcooke@ftc.gov  
Complaint

Yan Gao  
Attorney  
Federal Trade Commission  
ygao@ftc.gov  
Complaint

Lynda Lao  
Attorney  
Federal Trade Commission  
llao1@ftc.gov  
Complaint

Stephen Mohr  
Attorney  
Federal Trade Commission  
smohr@ftc.gov  
Complaint

Michael Moiseyev  
Attorney  
Federal Trade Commission  
mmoiseyev@ftc.gov  
Complaint

James Weiss  
Attorney  
Federal Trade Commission  
jweiss@ftc.gov

Complaint

Daniel Zach  
Attorney  
Federal Trade Commission  
dzach@ftc.gov  
Complaint

Amy Posner  
Attorney  
Federal Trade Commission  
aposner@ftc.gov  
Complaint

Meghan Iorianni  
Attorney  
Federal Trade Commission  
miorianni@ftc.gov  
Complaint

Jonathan Ripa  
Attorney  
Federal Trade Commission  
jripa@ftc.gov  
Complaint

Wayne A. Mack  
Duane Morris LLP  
wamack@duanemorris.com  
Respondent

Edward G. Biester III  
Duane Morris LLP  
egbiester@duanemorris.com  
Respondent

Sean P. McConnell  
Duane Morris LLP  
spmccconnell@duanemorris.com  
Respondent

Sarah Kulik  
Duane Morris LLP  
skulik@duanemorris.com  
Respondent

William Shotzbarger  
Duane Morris LLP  
wshotzbarger@duanemorris.com  
Respondent

Lisa De Marchi Sleigh  
Attorney  
Federal Trade Commission  
ldemarchisleigh@ftc.gov  
Complaint

Catherine Sanchez  
Attorney

Federal Trade Commission  
csanchez@ftc.gov  
Complaint

Sarah Wohl  
Attorney  
Federal Trade Commission  
swohl@ftc.gov  
Complaint

Joseph Neely  
Attorney  
Federal Trade Commission  
jneely@ftc.gov  
Complaint

Sean Zabaneh  
Duane Morris LLP  
SSZabaneh@duanemorris.com  
Respondent

Dylan Brown  
Attorney  
Federal Trade Commission  
dbrown4@ftc.gov  
Complaint

Betty McNeil  
Attorney  
Federal Trade Commission  
bmcneil@ftc.gov  
Complaint

Stephen Rodger  
Attorney  
Federal Trade Commission  
srodger@ftc.gov  
Complaint

Christopher H. Casey  
Partner  
Duane Morris LLP  
chcasey@duanemorris.com  
Respondent

Simeon Poles  
Duane Morris LLP  
sspoles@duanemorris.com  
Respondent

Andrew Rudowitz  
Duane Morris LLP  
ajrudowitz@duanemorris.com  
Respondent

J. Manly Parks  
Attorney  
Duane Morris LLP  
JMParks@duanemorris.com

Respondent

Jordan Andrew  
Attorney  
Federal Trade Commission  
jandrew@ftc.gov  
Complaint

Kelly Eckel  
Duane Morris LLP  
KDEckel@duanemorris.com  
Respondent

Theresa A. Langschultz  
Duane Morris LLP  
TLangschultz@duanemorris.com  
Respondent

William Shotzberger  
Attorney