

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: Joseph J. Simons, Chairman  
Noah Joshua Phillips  
Rohit Chopra  
Rebecca Kelly Slaughter  
Christine S. Wilson

In the Matter of

Otto Bock HealthCare North  
America, Inc.,

a corporation,

Respondent.

Docket No. 9378

**COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION FOR  
EXTENSION OF TIME AND INCREASE IN WORD LIMITS**

Michael Moiseyev  
Assistant Director

Daniel Zach  
Deputy Assistant Director

James Weiss  
Deputy Assistant Director

Stephen Mohr  
Dylan Brown  
William Cooke  
Lisa DeMarchi Sleight  
Yan Gao  
Meghan Iorianni  
Lynda Lao  
Joe Neely  
Amy Posner  
Jonathan Ripa  
Stephen Rodger  
Catherine Sanchez  
Sarah Wohl

Federal Trade Commission  
Bureau of Competition  
600 Pennsylvania Ave., NW  
Washington, DC 20580  
Telephone: (202) 326-2118  
Email: [dzach@ftc.gov](mailto:dzach@ftc.gov)

*Counsel Supporting the Complaint*

Dated: May 15, 2019

Respondent Otto Bock Healthcare North America, Inc. (“Otto Bock”) requests the Commission grant it an additional twenty-one (21) days in which to file its opening Appeal Brief and an additional seven (7) days to file its Reply Brief, and to increase the respective word limits for its Appeal Brief and Reply Brief. (Mot. at 1). As the Commission has held previously, “in any litigation involving a consummated merger, unnecessary delay at any step along the way to final resolution may increase the risk of ongoing injury to consumers and competition.” *In re Chicago Bridge & Iron Company N.V.*, Docket No. 9300, Order Granting Extensions of Time to File Appeal and Answering Briefs, at 2 (July 17, 2003) (“reluctant[ly]” granting extension more limited in duration than requested by both parties in case involving four relevant markets). Respondent needs neither the extra twenty-eight (28) days nor the extra words it seeks. Respondent counsel has deep knowledge of the trial record, having served as counsel throughout the investigation, discovery, and trial, and needed only a month to file its post-trial reply brief and findings, which addressed, in great detail, every issue in this case. There is no reason for the Commission to deviate from its rules here.

**I. Background**

On September 22, 2017, Otto Bock acquired FIH Group Holdings, LLC (“Freedom”). Initial Decision, F. 11. Upon consummation of the acquisition, Freedom became a wholly owned subsidiary of Otto Bock. Initial Decision, F. 12. Before that, Otto Bock and Freedom were “direct competitors in the MPK market” and “such competition ha[d] helped clinic customers negotiate lower prices and [] spurred MPK innovation.” Initial Decision at 49. The Administrative Law Judge (“ALJ”) found that Otto Bock’s acquisition of Freedom “may substantially lessen competition in the relevant market for the manufacture and sale of MPKs in the United States in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act” and Respondent’s “rebuttal arguments and defenses are without merit.” Initial Decision at 87. The

ALJ ordered that the Freedom business—which is currently subject to a voluntary Hold Separate and Asset Maintenance Agreement, *see* Initial Decision, F. 15—be divested as provided in a detailed Order. Initial Decision at 87-94, Order.

**II. Argument**

On its face, Respondent’s request significantly extends the length of this proceeding as well as the verbiage in the record. If the Commission treats the parties equally, the cumulative effect of granting Respondent’s request would be to push the briefing schedule back by an additional seven weeks and to more than double the length of the parties’ briefs. The Commission should deny Respondent’s motion for an extension of time and increase in word limits because it is not supported by good cause.

First, public interest considerations weigh heavily against finding good cause exists to grant Respondent’s motion. The public interest would likely be harmed by extending the length of the appeal in this matter because doing so would further, and unnecessarily, delay the divestiture of the illegally acquired Freedom business. As the Commission has previously emphasized, in a consummated merger “unnecessary delay at any step along the way to final resolution may increase the risk of ongoing injury to consumers and competition.” *In re Chicago Bridge & Iron Company N.V.*, Docket No. 9300, Order Granting Extensions of Time to File Appeal and Answering Briefs, at 2 (July 17, 2003). Although Freedom is currently held-separate from Otto Bock, it remains a wholly owned subsidiary, and evidence developed at trial shows that there has been a significant reduction in competitive intensity between Otto Bock and Freedom since the merger that has undoubtedly led to less favorable outcomes for customers.

See Complaint Counsel’s Proposed Findings of Fact ¶¶ 1446-1479.<sup>1</sup> Maintaining the briefing schedule prescribed by the rules is important to minimize harm until a divestiture of the Freedom business can restore competition lost through the merger.

Second, Otto Bock fails to show why any extension is necessary for Respondent or beneficial to the Commission. As the Commission has previously explained, “[t]he time periods and word limits prescribed by the Commission Rules of Practice should afford parties to FTC proceedings sufficient time and space to file pleadings and briefs of sufficient quality and detail to aid in the preparation of Commission opinions and orders.” *In re Rambus, Inc., Order Granting Extensions of Time to File Appellate Briefs and Increases in Word Count Limits*, Docket No. 9302, at 1 (Mar. 18, 2004) (“reluctant[ly]” granting *joint* motion). Therefore, the Commission is generally “reluctant either to extend the briefing periods or to increase the word limits beyond those prescribed by the Rules of Practice.”<sup>2</sup> *Id.*; see also *In re Chicago Bridge & Iron Company N.V.*, Docket No. 9300, Order Granting Extensions of Time to File Appeal and Answering Briefs, at 2 (July 17, 2003).

Respondent has not demonstrated that good cause exists to add *at least* four weeks to the briefing schedule and more than double the word limit. The rulings subject to appeal in this case are not complex. As described in the Initial Decision, this case involves a single product, in a single geography, in a market that is highly concentrated. Initial Decision at 35-38. This case raises issues similar to those addressed in the last consummated merger decision appealed to the Commission, and no time extensions or word count increases were required in that case. See *In*

---

<sup>1</sup> The Initial Decision recognizes that interim harm may have occurred, but the ALJ found that “determin[ing] whether additional evidence strengthens the inference of likely competitive effects” is not necessary because “the prima facie proof of market structure and direct competition between Ottobock and Freedom is sufficient to raise an inference of likely anticompetitive effects.” Initial Decision at 49 n.25.

<sup>2</sup> When revising the Part 3 rules, the Commission explained that, “public concern about Part 3 delay is not limited to the proceedings before the ALJ, but extends to the delay occasionally incurred by Commission resolution of appeals of initial decisions. The Commission intends to expedite all phases of the Part 3 process.” Federal Register, Vol. 73, No. 195, October 7, 2008, Proposed Rules at 58834.

*re ProMedica Health System, Inc.*, Opinion of the Commission, Docket No. 9346 (June 25, 2012) (involving an appeal over issues including product market definition, a weakened competitor defense, buyer power by managed care organizations, and repositioning by competitors). Respondent has not changed counsel for this appeal, so its lawyers are intimately familiar with the record. In 30 days, Respondent counsel drafted a comprehensive post-trial reply brief and findings that addressed every significant issue in the case, *see* Order on Post-Trial Briefs at 2 (providing 30 days for filing of reply brief and replies to proposed findings of fact), thus proving it has the ability to effectively brief any issue it seeks to appeal in the 30 days provided by Commission Rule 3.52(b)(2), *see* Rule 3.52(b)(2) (providing 30 days for filing of opening appeal brief).

The only two cases Respondent cites in support of its motion—*Tronox* and *Rambus*—are inapposite. Unlike this case, both *Tronox* and *Rambus* involved joint requests for additional briefing time. *In re Tronox Limited*, Order Extending Briefing Schedule, Docket No. 9377, at 1 (Feb. 15, 2019); *In re Rambus, Inc.*, Order Granting Extensions of Time to File Appellate Briefs and Increase Word Count Limits, Docket No. 9302, at 1 (Mar. 18, 2004). Both *Tronox* and *Rambus* also involved completely different justifications for an extension of time than Respondent raises here. An extension was granted in *Tronox* to accommodate then-ongoing settlement discussions. *See In re Tronox Limited*, Order Extending Briefing Schedule, Docket No. 9377, at 1 (Feb. 15, 2019) (finding “good cause exists to extend briefing schedule” where the parties jointly stated that “the requested extension would facilitate further settlement discussion and avoid wasting resources”). In contrast to *Otto Bock*, which is an important but analytically straightforward merger case, *Rambus* involved the first litigated FTC case involving the use of a standard-setting organization to acquire monopoly power. *In re Rambus, Inc.*, Opinion of the

Commission, Docket No. 9302 (Aug. 2, 2006). The extension of time in *Rambus* reflected, in part, the novel legal, technological, and patent issues present in that case, none of which are present here. *See In re Rambus, Inc.*, Order Granting Extensions of Time to File Appellate Briefs and Increase Word Count Limits, Docket No. 9302, at 2 (Mar. 18, 2004).

Importantly, neither *Rambus* nor *Tronox* involved a consummated merger. Thus, neither implicated the need to weigh the public interest in preventing delay or deterioration of the Commission's ability to fully restore competition through a divestiture of illegally acquired assets. In this case, the risk of additional harm to consumers caused by unnecessary delay of a final decision is present, and weighs heavily against Respondent.

**III. Conclusion**

Otto Bock's acquisition of Freedom "may substantially lessen competition in the relevant market for the manufacture and sale of MPKs in the United States in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act" and Respondent's "rebuttal arguments and defenses are without merit." Initial Decision at 87. The public deserves a complete and quick remedy to restore competition and prevent further harm. Accordingly, Complaint Counsel requests that the Commission deny Respondent's Motion for an Extension of Time and Increase in Word Limits.

Dated: May 15, 2019

Respectfully submitted,

/s/ Daniel Zach

Daniel Zach

Stephen Mohr

Dylan Brown

William Cooke

Yan Gao

Meghan Iorianni

Lynda Lao

Joseph Neely

Amy Posner

Jonathan Ripa

Stephen Rodger

Catherine Sanchez

Lisa DeMarchi Sleigh

Sarah Wohl

Federal Trade Commission

Bureau of Competition

600 Pennsylvania Ave., NW

Washington, DC 20580

Telephone: (202) 326-2118

Email: dzach@ftc.gov

*Counsel Supporting the Complaint*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2019, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April J. Tabor  
Acting Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580  
[ElectronicFilings@ftc.gov](mailto:ElectronicFilings@ftc.gov)

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-110  
Washington, DC 20580

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

Edward G. Biester III  
Sean P. McConnell  
Wayne A. Mack  
Kelly Eckel  
Sarah Kulik  
William Shotzbarger  
Duane Morris LLP  
30 South 17<sup>th</sup> Street  
Philadelphia, PA 19103  
[egbiester@duanemorris.com](mailto:egbiester@duanemorris.com)  
[spmccconnell@duanemorris.com](mailto:spmccconnell@duanemorris.com)  
[WAMack@duanemorris.com](mailto:WAMack@duanemorris.com)  
[KDEckel@duanemorris.com](mailto:KDEckel@duanemorris.com)  
[skulik@duanemorris.com](mailto:skulik@duanemorris.com)  
[wshotzbarger@duanemorris.com](mailto:wshotzbarger@duanemorris.com)

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

By: /s/ Daniel Zach

Daniel Zach  
Complaint Counsel  
Bureau of Competition  
Federal Trade Commission  
Washington, DC 20580

**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.

May 15, 2019

By: /s/ Daniel Zach