



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

In the Matter of _____

Otto Bock HealthCare North America, Inc., _____

a corporation, _____

Respondent. _____

Docket No. 9378

**ORDER GRANTING RESPONDENT’S MOTION
FOR LEAVE TO AMEND EXHIBIT LIST
AND TO ADMIT CERTAIN EXHIBITS**

I.

On August 29, 2018, Respondent Otto Bock HealthCare North America, Inc. (“OttoBock” or “Respondent”) filed a motion requesting leave to amend its Final Proposed Exhibit List and to admit certain documents into evidence (“Motion”). The documents consist of

_____. Federal Trade Commission (“FTC”) Complaint Counsel filed an opposition to the Motion on September 6, 2018 (“Opposition”). On September 10, 2018, Respondent filed a reply, pursuant to an order from the bench during trial on September 6, 2018 (“Reply”).

Based on full consideration of the Motion, the Opposition, the Reply, the exhibits submitted in support thereof, and the entire record in the case, the Motion is GRANTED, as further explained below.

II.

The Complaint in this matter, issued on December 20, 2017, alleges that the transaction pursuant to which Respondent purchased Freedom, consummated on September 22, 2017 (the “Merger”), violated Section 7 of the Clayton Act and Section 5 of the FTC Act. Complaint ¶ 1. According to the Complaint, the Merger may substantially lessen competition in an alleged market for microprocessor controlled prosthetic knees (“MPKs”) sold to prosthetic clinics in the United States. Complaint ¶¶ 1, 64-67.

Respondent’s Answer to the Complaint, filed January 10, 2018, as amended by a filing on February 15, 2018, denied, among other allegations, that the Merger harms consumers or competition and further asserted that the Merger enhances competition, consumer choice, and innovation, and will further improve quality of life for amputees. Amended Answer ¶ 57. Respondent’s Answer also included affirmative defenses, including that [REDACTED]
[REDACTED]
[REDACTED] Amended Answer at 30
(Respondent’s Seventh Affirmative Defense) [REDACTED].

On February 13, 2018, Complaint Counsel moved to strike Respondent’s Seventh Affirmative Defense, which the Commission denied on April 18, 2018. The Commission construed the Seventh Affirmative Defense as a denial and held that [REDACTED], while insufficient by itself to defeat all potential liability:

could potentially be relevant to rebut a showing of likely anticompetitive effects for the period after a [REDACTED] is completed, and [REDACTED]
[REDACTED]
[REDACTED]. Moreover, in support of its denial, Respondent may develop and present relevant evidence regarding the adequacy of the [REDACTED]. Those factual issues are properly addressed in the hearing before Chief Administrative Law Judge Chappell.

Opinion and Order, April 18, 2018 (Slip. Op. at 6).

On May 29, 2018, Respondent submitted its Final Proposed Exhibit List, pursuant to the Scheduling Order issued in this case on January 18, 2018 (“Scheduling Order”). At the Final Prehearing Conference on July 10, 2018, Respondent and Complaint Counsel submitted Joint Stipulations on Admissibility of Exhibits for exhibits listed on their respective exhibit lists (JX-002). Trial in this matter commenced on July 10, 2018. JX-002 was entered into evidence on July 18, 2018.

¹ On December 13, 2017, prior to the issuance of the Complaint, [REDACTED]
[REDACTED]
[REDACTED].

On [REDACTED], after JX-002 was initially submitted, Respondent [REDACTED]
[REDACTED]. On [REDACTED], Respondent
[REDACTED]
[REDACTED].

Respondent now seeks to amend its Final Exhibit List and have [REDACTED]
admitted into evidence. Complaint Counsel opposes the requested amendment and admission of
[REDACTED].

III.

A.

Provision 16 of the Scheduling Order provides: “Additional exhibits may be added after the submission of the final [exhibit] lists only by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.” Scheduling Order ¶ 16. “Good cause is demonstrated if a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met despite the diligence of the party seeking the extension.” *In re Chicago Bridge*, 2002 FTC LEXIS 69, at *5 (Oct. 23, 2002).

Respondent argues that because [REDACTED] were not in existence at the time Respondent submitted its Final Proposed Exhibit List, it could not have added them at that time and, therefore, good cause exists to amend Respondent’s Final Proposed Exhibit List. Respondent further states that it promptly provided Complaint Counsel with [REDACTED] shortly after [REDACTED] and that Respondent’s counsel discussed the details of [REDACTED] at length with Complaint Counsel.

Complaint Counsel argues that Respondent has not explained why it failed to procure [REDACTED] prior to the April 6, 2018 cutoff for fact discovery or the May 29, 2018 deadline for submitting final exhibit lists. Complaint Counsel further argues that Respondent failed to show that it was diligent in seeking to obtain [REDACTED] earlier and failed to show that the deadline could not reasonably have been met. Therefore, according to Complaint Counsel, Respondent has failed to demonstrate good cause.

Respondent replies that it presented [REDACTED]
[REDACTED], but that Complaint Counsel rejected [REDACTED] on April 9, 2018, after the close of fact discovery.² Respondent states that it then [REDACTED]

² In addition, on June 19, 2018, Respondent filed a motion to withdraw this matter from adjudication for consideration of a proposed settlement and submitted to the Commission a consent proposal, [REDACTED]. The Commission, by Order dated July 9, 2018, denied the motion, stating “[n]egotiations between Complaint Counsel and Respondent appear to be ongoing” and that “the appropriate next step is further negotiation between Respondent and Complaint Counsel[.]” Subsequent to that denial, [REDACTED].

[REDACTED]

Respondent has demonstrated that it could not have included [REDACTED] on its Final Proposed Exhibit List by the May 29, 2018 exhibit list deadline despite its diligence, and thus has established “good cause” for adding these exhibits.

B.

Pursuant to Rule 3.43(b) of the Commission’s Rules of Practice, “[r]elevant, material, and reliable evidence shall be admitted. . . . Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .” 16 C.F.R. § 3.43(b). Complaint Counsel does not challenge the relevancy, materiality, or reliability of [REDACTED]. Instead, Complaint Counsel argues that [REDACTED] should be excluded because the probative value is substantially outweighed by unfair prejudice to Complaint Counsel.

Complaint Counsel claims that it will be prejudiced if [REDACTED] are admitted after the close of its case-in-chief because [REDACTED] were not produced until after discovery ended and Complaint Counsel did not have the opportunity to develop evidence to demonstrate that [REDACTED].

Complaint Counsel has failed to demonstrate that it will be prejudiced by admission of [REDACTED]. First, Complaint Counsel overstates the evidentiary effect of admitting [REDACTED]. As recited above, Respondent’s intention to [REDACTED] is already part of the record in this case. The proposed exhibits demonstrate only that Respondent has [REDACTED] – nothing more and nothing less. Second, it is not apparent that any additional discovery is required in order to avoid undue prejudice. According to Respondent, Complaint Counsel has met with, or plans to meet with, [REDACTED]. In addition, Complaint Counsel has elicited testimony at trial from multiple Freedom employees [REDACTED]. Moreover, Complaint Counsel has elicited testimony from Ottobock’s Scott Schneider specifically regarding [REDACTED], thereby opening the door to their admission.³ On this record, the argument that admission of [REDACTED] is prejudicial is unconvincing.

³ E.g., Schneider Tr. 198 (rough, September 6, 2018) ([REDACTED]). Respondent objected to Complaint Counsel’s questioning regarding [REDACTED], stating that Respondent had avoided such questioning on its direct examination of Mr. Schneider because Complaint Counsel had objected to Respondent’s Motion to admit [REDACTED], and a ruling was pending. Respondent’s objection was overruled and the testimony was allowed.

IV.

For all the foregoing reasons, the Motion is GRANTED. [REDACTED] will be admitted into evidence.

ORDERED:

Dm Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: September 18, 2018

Notice of Electronic Service

I hereby certify that on September 18, 2018, I filed an electronic copy of the foregoing Order Granting Respondent's Motion for Leave to Amend Exhibit List , with:

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I hereby certify that on September 18, 2018, I served via E-Service an electronic copy of the foregoing Order Granting Respondent's Motion for Leave to Amend Exhibit List , upon:

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