

PUBLIC

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,  
  
Respondent.

Docket No. 9378

**COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONDENT TO  
PRODUCE DOCUMENTS REQUESTED BY COMPLAINT COUNSEL'S FIRST  
SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to Rule 3.38(a) of the Federal Trade Commission's Rules of Adjudicative Practice, Complaint Counsel respectfully submits this Motion to Compel Respondent to produce certain documents in response to Complaint Counsel's First Set of Requests for Production of Documents issued to Respondent on January 19, 2018, and other relief as requested.

Dated: March 13, 2018

Respectfully Submitted,

/s/ Daniel Zach  
Daniel Zach  
Stephen Mohr  
Steven Lavender  
Lisa DeMarchi Sleigh  
Catherine Sanchez  
Amy Posner  
Lynda Lao  
Jonathan Ripa  
Sarah Wohl

Meghan Iorianni  
Joseph Neely  
Yan Gao  
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*Counsel Supporting the Complaint*

UNITED STATES OF AMERICA  
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In the Matter of

Otto Bock HealthCare North  
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Respondent.

Docket No. 9378

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION TO  
COMPEL RESPONDENT TO PRODUCE DOCUMENTS REQUESTED BY  
COMPLAINT COUNSEL'S FIRST SET OF REQUESTS FOR PRODUCTION OF  
DOCUMENTS**

**Introduction**

Pursuant to Rule 3.38(a) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings (the "Rules"), Complaint Counsel respectfully moves the Court to compel Respondent to produce documents in response to Complaint Counsel's First Set of Requests for Production Issued to Respondent on January 19, 2018 (the "RFP"). (Exhibit A). Specifically, Complaint Counsel requests that this Court compel Respondent to produce documents requested from the files of its identified Otto Bock HealthCare GmbH employees. Because time is of the essence and fact discovery closes on April 6, 2018, Complaint Counsel requests the Court order Respondent to produce these documents immediately and issue such other remedial relief as is appropriate. 16 C.F.R. §§ 3.38 (a), (b).

### Factual Background

Pursuant to Rule 3.37(a) of the Rules, on January 19, 2018, Complaint Counsel served on Respondent its RFP to obtain documents and information relevant to the Commission's administrative Complaint regarding Respondent's acquisition of FIH Group Holdings, LLC ("Freedom"). The RFP seeks documents from the files of several of Respondent's custodians, including employees from Otto Bock HealthCare North America and its parent company, Otto Bock HealthCare GmbH. (Exhibit A, Req. 4).

Respondent submitted its responses and objections to the RFP on February 20, 2018 ("Response"). (Exhibit B). Respondent "specifically object[ed] to searching for or producing documents from the custodial files" of certain employees from Otto Bock HealthCare GmbH, including Professor Hans Georg Näder, President and Managing Director of Otto Bock HealthCare GmbH, and other Otto Bock HealthCare GmbH executives, many of whom appear on Respondent's preliminary witness list, including Alexander Gück, Sönke Rössing, and Helmut Pfuhl. (Exhibit C).

In the meet and confer on February 20, 2018 about the deficient production, Respondent counsel was unable to commit to timely production of the outstanding documents.<sup>1</sup> In a subsequent e-mail exchange, (Exhibits D and E), Respondent's counsel stated that Otto Bock HealthCare GmbH is a "foreign non-party" and that "the custodial documents of Professor Näder and other executives of Otto Bock HealthCare GmbH . . . are not within Otto Bock HealthCare

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<sup>1</sup> Apart from production of responsive documents from Otto Bock HealthCare GmbH custodians addressed in this Motion, Respondent still has not produced complete document productions for Otto Bock HealthCare North America custodians as well. During a call with Complaint Counsel on March 6, 2018, Respondent Counsel was unable to state when it intended to produce these documents. Given that only four weeks of fact discovery remain and many of the unproduced Otto Bock HealthCare North America documents are from the custodial files of individuals on Respondent's preliminary witness list, Complaint Counsel reserves the right to move separately to compel the timely production of documents from those custodians.

North America's possession, custody, or control." On March 6, 2018, following a meet and confer, Respondent's counsel stated in an e-mail that Respondent would "attempt to produce certain documents in the possession of Otto Bock HealthCare GmbH" but that it "maintains its objection to producing custodial documents of Professor Näder and executives of Otto Bock GmbH, including Harry Wertz, Christin Gunkel, and Thorsten Schmitt." (Exhibit F).

Respondent did not commit to a timeframe to produce documents from its hand-selected subset of Otto Bock HealthCare GmbH employees and did not commit to produce complete productions of responsive documents for any of these custodians.

Because little time remains before the close of fact discovery, and the deadline to depose individuals from Otto Bock HealthCare GmbH who are listed on Respondent's preliminary witness list is near, Complaint Counsel moves the Court to compel Respondent to produce immediately the requested documents from the custodial files of Otto Bock HealthCare GmbH, from January 1, 2015 to the present, and issue such other remedial relief as is appropriate.

### **Argument**

Pursuant to Rule 3.31(c)(1) of the Rules, "Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). "The burden of showing that the request is unreasonable is on the subpoenaed party." *Polypore Int'l, Inc.*, 2009 FTC LEXIS 41, at \*9 (Jan. 15, 2009) (quoting *FTC v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at \*13 (D.D.C. 1977)). The burden is "not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the documents are relevant to that purpose." *Id.*

**I. Documents from the Files of Otto Bock HealthCare GmbH Executives are Within the Custody and Control of Respondent and are Highly Relevant**

Despite Respondent's argument that the parent company of Otto Bock HealthCare North America is a non-party, a party that has custody and control of its parent company's documents can be compelled to produce them. "Documents need not be in the possession of a party to be discoverable; they need only be in its custody or control." *Polypore Int'l, Inc.*, No. 9327, at 8 (Fed. Trade Comm'n Feb. 3, 2009). To determine whether a party has custody and control over certain documents, the test "is not limited to whether the corporation has the legal right to those documents. Rather, the test focuses on whether the corporation has 'access to the documents' and 'ability to obtain the documents,'" which Respondent does. *Polypore Int'l, Inc.*, No. 9327, at 8 (quoting *Rambus, Inc.*, 2002 FTC LEXIS 90, at \*12 (Nov. 18, 2002) (requiring the production of documents in possession of a foreign parent company)).

It does not matter that Otto Bock HealthCare GmbH is located outside of the United States. "Courts have frequently required persons within their jurisdiction to produce books and papers which were beyond the territorial limits of the court, even in cases where the documents were located in a foreign country." *Polypore Int'l, Inc.*, No. 9327, at 7 (quoting *Securities and Exchange Comm'n v. Minas de Artemisia, S.A.*, 150 F.2d 215, 217 (9th Cir. 1945)).

The Court analyzes five factors to assess custody and control: "(a) commonality of ownership, (b) exchange or intermingling of directors, officers or employees of the two corporations, (c) exchange of documents between the corporations in the ordinary course of business, (d) any benefit or involvement by the non-party corporation in the transaction, and (e) involvement of the non-party corporation in the litigation." *Rambus, Inc.*, 2002 FTC LEXIS 90, at \*13 (Nov. 18, 2002) (quoting *Uniden America Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306

(M.D.N.C. 1998)). Each of these factors shows that Otto Bock HealthCare North America exercises custody and control over Otto Bock HealthCare GmbH's documents.

First, the two corporations have shared ownership. Respondent admits that Otto Bock HealthCare GmbH is the parent company of Otto Bock HealthCare North America. Am. Answer at 8. Likewise, Scott Schneider, Chief Future Development Officer and President of Medical Care of Otto Bock HealthCare North America, testified in deposition that { [REDACTED]

[REDACTED]  
[REDACTED] }

Second, there is significant intermingling of each firm's directors, officers, and employees. Schneider testified that { [REDACTED]

[REDACTED]  
[REDACTED] } Under this reporting

structure, Otto Bock HealthCare North America's { [REDACTED]  
[REDACTED]

[REDACTED] }. For certain  
business decisions, Otto Bock HealthCare North America { [REDACTED]

[REDACTED]  
[REDACTED] } Moreover, teams comprised of { [REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED] }

Third, there is a { [REDACTED]

[REDACTED] } In a letter, Respondent counsel explained that the { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] .”  
[REDACTED]  
[REDACTED] }

Fourth, Otto Bock HealthCare GmbH { [REDACTED]

[REDACTED] } For

example:

- { [REDACTED] }
- { [REDACTED] }
- { [REDACTED] }
- { [REDACTED] }
- [REDACTED] and [REDACTED]
- [REDACTED] }

Fifth, Otto Bock HealthCare North America has involved Otto Bock Healthcare GmbH in every aspect of this litigation, making it an inextricable party to this matter. For example:

- In response to Complaint Counsel’s Notice of Deposition to Respondent pursuant to 16 C.F.R. §§ 3.33(a) and 3.33(c)(1), requesting that Respondent designate a person “who shall testify on behalf of Respondent,” (Exhibit Q), Respondent designated Rössing, an employee of Otto Bock HealthCare GmbH, to testify on its behalf;
- Respondent included several executives from Otto Bock HealthCare GmbH on its preliminary witness list, including Gück, Rössing, and Helmut Pfuhl, whose documents Complaint Counsel requested in its RFP. Respondent referred to each of these individuals as “Respondent” witnesses (Exhibit B); and
- [REDACTED]

Documents from Otto Bock HealthCare GmbH are highly relevant to this proceeding.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } In addition, in a letter to Complaint Counsel, Respondent counsel wrote that [REDACTED]

[REDACTED]

Professor Näder’s documents are particularly relevant and important to this proceeding. Näder is the President of Otto Bock HealthCare GmbH and [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Respondent's documents

highlight the significance of { [REDACTED]

[REDACTED] }

Complaint Counsel will be extremely prejudiced if Respondent does not produce the documents of the requested Otto Bock HealthCare GmbH custodians for whom it has custody and control. For example, three of the Otto Bock HealthCare GmbH custodians (Gück, Rössing, and Pfuhl) are identified on Respondent's preliminary witness list. Complaint Counsel would be prejudiced if forced to cross-examine these witnesses without their documents. Similarly, Respondent is asserting defenses relating to subject matters in which Näder and other Otto Bock HealthCare GmbH employees { [REDACTED]

 } Absent documents from these Otto Bock HealthCare GmbH custodians, it will be much more difficult for Respondent to evaluate and test these claims.

**Conclusion**

For the foregoing reasons, Complaint Counsel respectfully requests that the Court order Respondent to produce documents from the identified executives of Otto Bock HealthCare GmbH.

Dated: March 13, 2018

Respectfully Submitted,

/s/ Daniel Zach  
Daniel Zach  
Stephen Mohr  
Steven Lavender  
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UNITED STATES OF AMERICA  
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**In the Matter of**

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

**Docket No. 9378**

**[PROPOSED] ORDER**

Upon consideration of Complaint Counsel’s Motion to Compel Respondent Otto Bock HealthCare North America Inc. (“Respondent”) to Produce Documents Requested by Complaint Counsel’s First Set of Requests for Production of Documents (the “RFP”), and any opposition thereto,

IT IS HEREBY ORDERED that Complaint Counsel’s Motion is GRANTED.

IT IS FURTHER ORDERED that Respondent shall immediately take all necessary steps towards producing to Complaint Counsel all documents from the custodial files of employees from Otto Bock HealthCare GmbH, from January 1, 2015 to the present, as requested in Complaint Counsel’s RFP, within \_\_ days from the issuance of this Order.

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D. Michael Chappell  
Chief Administrative Law Judge

DATED this \_\_\_\_ day of March, 2018

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

**In the Matter of**

**Otto Bock HealthCare North  
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Respondent.**

**Docket No. 9378**

**STATEMENT REGARDING MEET AND CONFER PURSUANT  
TO 16 C.F.R. § 3.22(g)**

Complaint Counsel respectfully submits this Statement, pursuant to Rule 3.22(g) of the Federal Trade Commission's Rules of Adjudicative Practice.

Complaint Counsel has attempted to confer in good faith with counsel for Respondent in an effort to obtain the requested documents on a timely basis without the Court's intervention.

On January 19, 2018, Complaint Counsel issued the First Set of Requests for Production to Respondent ("RFP"). (Exhibit A).

On February 6, 2018, counsel met and conferred via phone to discuss the RFP. Respondent counsel requested to narrow the scope of Requests 4 and 5 of the RFP to exclude certain Otto Bock and Freedom employees, including certain sales representatives. Respondent counsel also indicated that certain European Union or other country-specific privacy laws might impact the production of documents located outside the United States. Respondent counsel represented, however, that the only impact these laws might have on the production is a delay of the production of documents located outside of the United States. On February 7, 2018,

Complaint Counsel sent Respondent counsel an e-mail memorializing the February 6, 2018 phone call. (Exhibit Y).

On February 9, 2018, Respondent counsel sent a letter in response to Complaint Counsel's February 7, 2018 e-mail. Respondent counsel stated that it "currently believes that the only impact EU or country-specific laws may have on Respondent's production of documents responsive to the RFP is a delay in production of documents solely located outside the United States. Respondent will produce as many responsive, non-privileged documents as possible by February 19, 2018, and will make rolling productions of remaining documents as soon as possible thereafter." (Exhibit Z).

On February 16, 2018, Respondent counsel sent a letter to Complaint Counsel providing information regarding the scope of responsibilities of each Freedom sales representative. (Exhibit AA). Complaint Counsel agreed to narrow the scope of Request 5 of the RFP to exclude certain Freedom sales representatives in an e-mail that same day. (Exhibit BB).

On February 20, 2018, counsel met and conferred by phone at 3:30pm to discuss Respondent's production in response to the RFP. During that call, Respondent counsel stated that Respondent had not produced a full set of documents from any custodian, did not produce documents from any sales representatives of Respondent, and did not produce documents from any Otto Bock HealthCare GmbH employees. Respondent did not indicate when it would produce such documents, only that it would produce additional documents by the end of the week of February 20, 2018, or the beginning of the week of February 26, 2018.

On February 20, 2018, Respondent delivered to Complaint Counsel Respondent's Responses to Complaint Counsel's First Set of Requests for Production ("Response"). (Exhibit B). Respondent objected to providing information "that is not in Respondent's possession,

custody, or control, including, but not limited to, documents within the possession of Respondent's parent company or affiliate(s)."

On February 22, 2018, Complaint Counsel memorialized the February 20, 2018 call in an e-mail to Respondent counsel. (Exhibit D).

On February 23, 2018, Respondent counsel responded to Complaint Counsel's February 22, 2018 e-mail. (Exhibit E). In the e-mail, Respondent counsel indicated that custodial documents of Otto Bock HealthCare GmbH employees "are not within Otto Bock Healthcare North America's possession, custody, or control." Respondent counsel agreed to produce the remaining documents for custodians from Freedom by 10 a.m. on February 27, 2018.

On February 26 and 27, 2018, counsel met and conferred via phone regarding the production of additional documents in response to the RFP. Respondent counsel indicated that Respondent would complete its production of documents from Freedom custodians by March 6, 2018. Respondent counsel also indicated that it would produce documents from U.S.-based Otto Bock HealthCare North America custodians early in the week of March 12. Complaint Counsel conveyed that Complaint Counsel needs these documents sufficiently in advance of the depositions Complaint Counsel has noticed.

On February 27, 2018, Respondent produced additional documents from the custodial files of current and former Respondent employees. On February 27, 2018, Respondent counsel confirmed that Respondent still had not produced a full set of documents from any custodian, but represented that it would produce a full production for two U.S. custodians by March 1. Complaint Counsel received full productions from these two custodians on March 2.

On February 26, 2018, Respondent counsel sent a letter to Complaint Counsel providing information regarding the scope of responsibilities of Otto Bock's HealthCare North America

sales representatives. On February 28, 2018, Complaint Counsel sent an e-mail to Respondent counsel, agreeing to narrow the scope of Request 4 of the RFP to exclude certain Otto Bock sales representatives, and reiterating Complaint Counsel's need for the complete productions of documents from Respondent's employees as soon as possible and, in any event, sufficiently in advance of their depositions. (Exhibit CC).

On March 5, 2018, counsel met and conferred via phone regarding the production of all outstanding documents in response to the RFP. Regarding the custodial files of employees from Otto Bock HealthCare GmbH, Respondent counsel indicated, again, that those files are outside of Respondent's custody and control. On March 6, 2018, Respondent counsel sent an email to Complaint Counsel reaffirming Respondent's "objection to producing custodial documents of Professor Näder and executives of Otto Bock GmbH, including Harry Wertz, Christin Gunkel, and Thorsten Schmitt on the basis that, among other things, these custodial files are not within Otto Bock HealthCare North America's possession, custody, or control." (Exhibit F). In the end, counsel could not agree to a proposal on the production of documents from custodians at Otto Bock GmbH.

Dated: March 13, 2018

Respectfully Submitted,

/s/ Daniel Zach  
Daniel Zach  
Stephen Mohr  
Steven Lavender  
Lisa DeMarchi Sleight  
Catherine Sanchez  
Amy Posner  
Lynda Lao  
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**In the Matter of**

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**Respondent.**

**Docket No. 9378**

**DECLARATION OF DANIEL ZACH IN SUPPORT OF COMPLAINT COUNSEL'S  
MOTION TO COMPEL RESPONDENT TO PRODUCE DOCUMENTS REQUESTED  
BY COMPLAINT COUNSEL'S FIRST SET OF REQUESTS FOR PRODUCTION OF  
DOCUMENTS**

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

1. I am a Deputy Assistant Director at the Federal Trade Commission. I am licensed to practice law in the State of New York. 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 Complaint Counsel's First Set of Requests for Production Issued to Respondent, January 19, 2018.

3. Attached as Exhibit B is a true and correct copy of Respondent's Responses to Complaint Counsel's First Set of Requests for Production, February 20, 2018.

4. Attached as Exhibits C, L, R, Z, and AA are true and correct copies of letters from counsel for Respondent to Complaint Counsel.

5. Attached as Exhibits D, E, F, Y, BB, and CC are true and correct copies of e-mail correspondence between Complaint Counsel and counsel for Respondent.

6. Attached as Exhibit G is a true and correct copy of excerpts of the deposition transcript of Respondent (Scott Schneider), January 31, 2018.

7. Attached as Exhibit H is a true and correct copy of excerpts of the investigational hearing transcript of Respondent (Maynard Carkhuff), December 5, 2017.

8. Attached as Exhibits I, K, N, and P are true and correct copies of documents produced by Respondent to Complaint Counsel.

9. Attached as Exhibit J is a true and correct copy of excerpts of the deposition transcript of Respondent (Sönke Rössing), February 8, 2018.

10. Attached as Exhibit M is a true and correct copy of excerpts of the investigational hearing transcript of Respondent (David Smith), December 1, 2017.

11. Attached as Exhibit O is a true and correct copy of the Agreement and Plan of Merger between FIH Group Holding, LLC; Otto Bock HealthCare North America, Inc.; OB Roosevelt Acquisition, LLC; and Health Evolution Partners Fund I (AIV I), LP, September 22, 2017.

12. Attached as Exhibit Q is a true and correct copy of Complaint Counsel's Notice of Deposition of Respondent, January 19, 2018.

13. Attached as Exhibits S, T, U, V, and W are true and correct copies of documents produced by { [REDACTED] } to Complaint Counsel.

14. Attached as Exhibit X is a true and correct copy of excerpts of the draft deposition transcript of { [REDACTED] }, March 6, 2018.

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

Executed this 8th day of March 2018 in the District of Columbia.

/s/ Daniel Zach  
Daniel Zach

# **EXHIBIT A**

**Confidential - Redacted in Entirety**

# **EXHIBIT B**

**Confidential - Redacted in Entirety**

# **EXHIBIT C**

**Confidential - Redacted in Entirety**

# **EXHIBIT D**

**Confidential - Redacted in Entirety**

# **EXHIBIT E**

**Confidential - Redacted in Entirety**

# **EXHIBIT F**

**Confidential - Redacted in Entirety**

# **EXHIBIT G**

**Confidential - Redacted in Entirety**

# **EXHIBIT H**

**Confidential - Redacted in Entirety**

# **EXHIBIT I**

**Confidential - Redacted in Entirety**

# **EXHIBIT J**

**Confidential - Redacted in Entirety**

# **EXHIBIT K**

**Confidential - Redacted in Entirety**

# **EXHIBIT L**

**Confidential - Redacted in Entirety**

# **EXHIBIT M**

**Confidential - Redacted in Entirety**

# **EXHIBIT N**

**Confidential - Redacted in Entirety**

# **EXHIBIT O**

**Confidential - Redacted in Entirety**

# **EXHIBIT P**

**Confidential - Redacted in Entirety**

# **EXHIBIT Q**

**Confidential - Redacted in Entirety**

# **EXHIBIT R**

**Confidential - Redacted in Entirety**

# **EXHIBIT S**

**Confidential - Redacted in Entirety**

# **EXHIBIT T**

**Confidential - Redacted in Entirety**

# **EXHIBIT U**

**Confidential - Redacted in Entirety**

# **EXHIBIT V**

**Confidential - Redacted in Entirety**

# **EXHIBIT W**

**Confidential - Redacted in Entirety**

# **EXHIBIT X**

**Confidential - Redacted in Entirety**

# **EXHIBIT Y**

**Confidential - Redacted in Entirety**

# **EXHIBIT Z**

**Confidential - Redacted in Entirety**

# **EXHIBIT AA**

**Confidential - Redacted in Entirety**

# **EXHIBIT BB**

**Confidential - Redacted in Entirety**

# **EXHIBIT CC**

**Confidential - Redacted in Entirety**

**CERTIFICATE OF SERVICE**

I hereby certify that on March 13, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

Dated: March 13, 2018

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.

March 13, 2018

By: /s/ Daniel Zach