

Interlocutory Orders, Etc.

IN THE MATTER OF

OTTO BOCK HEALTHCARE NORTH AMERICA, INC.*Docket No. 9378. Order, May 22, 2019*

Order denying respondent's motion to disqualify Commissioner Rosch with respect to any adjudicative proceeding against Intel."]

ORDER DENYING RESPONDENT'S MOTION FOR EXTENSION OF TIME AND INCREASE IN WORD LIMITS

On April 29, 2019, Chief Administrative Law Judge D. Michael Chappell (the "ALJ") issued an Initial Decision finding that the consummated acquisition of FIH Group Holdings, LLC ("Freedom") by Otto Bock HealthCare North America, Inc. ("Respondent" or "Otto Bock") may substantially lessen competition in the relevant market for the sale of microprocessor knees to prosthetic clinics in the United States. ID at 3, 35. The ALJ found that the acquisition violated Section 7 of the Clayton Act and Section 5 of the FTC Act. ID at 3. He issued an order that requires Respondent to divest the Freedom business, with potential exemptions for certain assets, within 90 days of when the order becomes final. *Id.* at 238-39.

On May 8, 2019, Respondent filed a Notice of Appeal stating that it would appeal the entirety of the ALJ's Initial Decision and Order. Respondent also filed an expedited Motion for Extension of Time and Increase in Word Limits for its appeal briefs (the "Motion"). Respondent requests that, "due to the unique complexity and extensiveness of the legal and factual issues in this case and also the unusually large size of the hearing record evidence," the deadline for its opening appeal brief be extended by twenty-one days (to June 19, 2019) and its reply brief by an additional seven days. Motion at 3. For similar reasons, Respondent requests that the word limit for its opening and reply briefs be expanded to 32,750 and 21,000 words, respectively, from 14,000 and 7,000 words, respectively, as set forth in Commission Rule 3.52(c) and (e), 16 C.F.R. § 3.52(c) and (e). Complaint Counsel oppose the Motion.

Request for Extension of Time

Commission Rule 3.52(b), 16 C.F.R. § 3.52(b), provides the relevant timetable for briefing appeals from an ALJ's Initial Decision. The appealing party files its opening brief within 30 days of issuance of the Initial Decision; the answering brief, if any, is filed within 30 days of service of the opening brief; and the reply brief, if any, is filed within seven days after service of the answering brief. An additional day is allowed when service of the immediately preceding brief has been electronic. 16 C.F.R. § 4.3(c). These time periods ordinarily should provide parties enough time to file briefs of sufficient quality and detail to present their case and to inform the Commission's decision making. Thus, the Commission will extend these deadlines only for good cause shown. Commission Rule 4.3(b), 16 C.F.R. § 4.3(b).

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The Commission has determined to deny the instant Motion because Respondent has failed to demonstrate good cause to revise the presumptive filing deadlines. Respondent has not shown that this merger case presents unusually extensive or complex factual issues. It involves only a single alleged relevant antitrust market in a single, unified geography. Nor has Respondent pointed to any novel legal issues. Further, Respondent has not shown that compliance with the standard deadlines will cause it prejudice. Although the trial record is large, Respondent's counsel is undoubtedly well familiar with it, having represented the Respondent at trial below and having prepared a pre-trial brief, proposed findings of fact, conclusions of law, and post-trial briefs. Finally, the Commission is mindful of the potential harm to consumers from unnecessary delay in resolving this appeal. Freedom's operations are currently being held separate from Respondent Otto Bock pursuant to a December 19, 2017 agreement between Respondent and Complaint Counsel. ID at 8. We do not prejudice whether Freedom's assets will ultimately reside in the hands of Otto Bock or a divestiture buyer, but in either event, consumers are best served by those assets promptly finding their permanent home. This will maximize the opportunity and incentive for their owner to put them to their best competitive use.

Request for Increase in Word Limits

The Commission has also determined to deny Respondent's request to increase by more than two-fold the word count of its appeal briefs. "Extensions of word count limitations are disfavored," and are only granted based upon a "strong showing that undue prejudice would result from complying with the existing limit." 16 C.F.R. § 3.52(k). Here, Respondent has not shown that the issues that the parties need to address are more numerous or complex than in other competition cases reviewed by the Commission. The size of the trial record alone does not justify a need for prolix briefs in this case. The Commission's standard word limits are sufficient for parties to address the allegations, defenses, and remedies presented here.

Accordingly,

IT IS HEREBY ORDERED THAT Respondent's Motion is **DENIED**, and

IT IS FURTHER ORDERED THAT the parties' briefing shall proceed according to the schedule and with the word limits prescribed in Commission Rules 3.52(b) - (e) and pursuant to the provision of Rule 4.3.

By the Commission.

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IN THE MATTER OF

OTTO BOCK HEALTHCARE NORTH AMERICA, INC.*Docket No. 9378. Order, June 4, 2019*

Order scheduling oral argument on respondent's appeal of the Initial Decision.

ORDER SCHEDULING ORAL ARGUMENT

The Respondent has filed an Appeal Brief perfecting its appeal from the Initial Decision in this matter. The Commission has determined to conduct the Oral Argument in this matter on Thursday, July 25, 2019, at 2:00 p.m. in Hearing Room 532 of the Headquarters Building of the Federal Trade Commission, located at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Each side will be allotted forty-five minutes to present its argument. Respondent will have the opportunity to open the argument and will be permitted to reserve time for rebuttal. If either side wishes to provide the Commission with a short written or electronic compilation of material to facilitate its presentation during the Oral Argument, any such compilation may contain only public information that is already in the record of the proceeding, and copies must be filed with the Secretary or Acting Secretary of the Commission and provided to opposing counsel no later than July 18, 2019, at 5:00 p.m. Eastern Time.

By the Commission.