

PUBLIC

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



ORIGINAL

In the Matter of

Axon Enterprise, Inc.
a corporation.

DOCKET NO. 9389

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S AMENDED MOTION
TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO RESPONDENT'S
SECOND SET OF REQUESTS FOR PRODUCTION**

Complaint Counsel submits this Opposition to Respondent Axon Enterprise Inc.'s ("Axon") Amended Motion to Compel Production ("Motion"). In its Motion, Axon seeks to compel production of: (i) any FTC legal analysis or work product comparing the FTC's administrative rules with those that apply in federal district courts; (ii) documents "relating" to the FTC's "decision-making" concerning clearance; and (iii) "all communications" between any Commission employee and any other federal government agency regarding Axon. *See* Axon Second Set of Requests for Production of Documents (Nos. 23-26) (Mar. 3, 2020) (attached hereto as Appendix A) ("RFPs").

A motion to compel should be denied when "the Administrative Law Judge determines that the objection is justified." Rule 3.38(a). Complaint Counsel objected to Axon's RFPs on the grounds that the requests (1) exceed the limitations on discovery imposed by Rule 3.31(c); (2) seek privileged information; (3) seek materials that are not relevant; and (4) are overbroad. *See* Motion Ex. B. Complaint Counsel also objected to the definition of the "FTC" to the extent the requests are directed to the Federal Trade Commission rather than Complaint Counsel. These objections are justified. Axon's Motion should be denied.

1. Axon's RFPs Exceed the Limitations of Rule 3.31 without Good Cause

Discovery in adjudicative proceedings is limited in two relevant respects. First, Rule 3.31(c)(2) provides that Complaint Counsel "need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter." Second, Rule 3.31(c)(2) provides that no party "is required to search for materials generated and transmitted between an entity's counsel (including counsel's legal staff or in-house counsel) and not shared with anyone else, or between complaint counsel and non-testifying

Commission employees.” *See* Rule 3.31(c)(2). The requesting party must show “good cause” to overcome these rules. *Id.*

Axon does not – and *cannot* – argue that its requested materials were collected or reviewed in the course of the investigation, or that they are in the custody or control of Commission personnel who investigated the Axon/VieVu merger, given that its requests are untethered to any issue raised in the investigation or ensuing Complaint. *See* Rule 3.31(c)(2). Instead, Axon relies on its anemic argument that “good cause” supports discovery of such materials. *See* Motion at 1 (“Good cause supports this Motion, and it should be granted.”).

Axon is mistaken. To show good cause, Axon must show that (1) the material is relevant, (2) the request is “reasonable in scope and stated with reasonable particularity,” and (3) the request seeks information “not obtainable through other means.” *In re 1-800 Contacts, Inc.*, 2016 WL 7634657, at *3 (Dec. 20, 2016). Good cause is unlikely to exist where the documents sought are “duplicative, privileged or work product.” *See id.* at *3 n.4. Here, Axon fails to demonstrate good cause to burden Complaint Counsel with broad requests for privileged materials unrelated to any disputed issue in this case.

a. The Requested Materials are Irrelevant

Axon’s good-cause argument fails the first prong of the analysis because none of its RFPs are “reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” *See* Rule 3.31(c)(1). Axon claims that its requests seek “to defend against the allegations of the Complaint” and “relate directly to those contentions” raised in Axon’s defenses to the Complaint. Mot. at 2. But such “conclusory, unsupported assertions do not demonstrate relevance.” *In re LabMD*, 2014 WL 492351, at *4

(Jan. 30, 2014) (granting motion to quash where respondents argued that testimony was relevant to “certain essential elements of Complaint Counsel’s case”).

To salvage its relevance argument, Axon recasts its Eighteenth Affirmative Defense as a claim that Axon has been denied equal protection of the laws “because *the clearance process* forces some parties, like Axon here, to defend antitrust actions in an administrative proceeding without the procedures and rights available in federal court.” Mot. at 1 (emphasis added).¹ But Axon’s Eighteenth Affirmative Defense says no such thing. The defense states that “[t]hese Proceedings violate the right to due process of law . . . because the federal government seeks to enforce antitrust laws against other parties by bringing civil actions in federal district courts.” Respondent Amended Answer and Defenses (Mar. 2, 2020) (attached hereto as Appendix B).

Axon’s defense is thus based on the FTC’s statutory authority to sue in federal *and* administrative court, not clearance or any other pre-complaint process. Requests 24 and 25 are therefore irrelevant because they seek documents relating to clearance, which has nothing to do with Axon’s Eighteenth Affirmative Defense.

Moreover, this Court has consistently held that requests seeking pre-complaint decision-making are irrelevant and outside the scope of Rule 3.31(c). *See In re LabMD*, 2014 WL 492351, at *6 (matters concerning pre-complaint investigation and the Commission’s decision making in issuing the Complaint are “not relevant for purposes of discovery in an administrative adjudication.”); *In re Exxon Corp.*, 1981 FTC LEXIS 113, at *5-6 (1981) (“[T]he issue to be litigated is not the adequacy of the Commission’s pre-complaint information or the diligence of its

¹ Axon’s entire premise, that this enforcement action was brought by the FTC instead of by DOJ because of a clearance decision, is conclusory and unsupported. Axon is not entitled to go fishing through the privileged decision-making of law enforcement agencies in search of a theory to support its vague due process claim.

study of the material in question but whether the alleged violation . . . occurred.”) (internal citation omitted); *In re Basic Research LLC*, 2004 FTC LEXIS 210 (Nov. 4, 2004).

Axon thus is not entitled to discovery about the Commission’s decision to investigate or to bring a complaint in this matter. *See In re LabMD*, 2014 FTC LEXIS 35, at *8-9 (Feb. 21, 2014) (denying discovery on the Commissioners’ pre-complaint decision making); *In re Metagenics, Inc.*, 1995 FTC LEXIS 23, at * 1 (Feb. 2, 1995) (denying as irrelevant discovery on respondent’s unfair prosecution claim); *Basic Research*, 2004 FTC LEXIS 210, at *10-11 (“[T]he issue to be tried is whether Respondent disseminated false and misleading advertising, not the Commission’s decision to file the Complaint.”).

Axon also cannot establish that the FTC’s internal analyses of procedural and evidentiary rules are relevant. Axon has not—in this Motion, in its Amended Answer, or in any meet and confer—identified a single material difference between the rules applicable in this proceeding and the federal rules and has failed to articulate any harm traceable to a discrepancy in the rules. *See In re Otto Bock*, 2019 WL 5957363, at *52 (“Respondent fails to articulate any harm to it from the Commission’s purportedly unfair rules.”). To the extent that Axon wants to make a legal argument about the rules, it is free to do so. The FTC’s internal analyses are irrelevant to the meaning or operation of the rules, which are interpreted and applied by this Court and other courts without any deference to Complaint Counsel’s interpretation.

Similarly, Axon cannot establish the relevance of any “statistics” or “summaries” maintained by the FTC regarding the outcome of merger challenges brought by the FTC and DOJ. Axon can read merger cases and determine their outcome on its own. Any “statistics” or “summaries” prepared by FTC attorneys would not change the holding or resolution of any case.

Instead of seeking relevant information that is unobtainable from another source, Axon is trying to avoid doing its own legal research.

b. Respondent's Requests Are Not Reasonable in Scope

Axon's RFPs direct "the FTC" to produce responsive documents. The Requests define the "FTC" to mean "the Federal Trade Commission, including without limitation all of its employees, agents, representatives, attorneys, or anyone else acting or who has acted on its behalf." App. A at 2. By defining the term "FTC" in such a broad manner, Axon's discovery requests would require searching the files of every single Commission employee, many of whom are unlikely to have responsive documents. On this ground alone, Axon's Motion should be denied as unreasonable in scope. *See 1-800 Contacts*, 2016 WL 6609774, at *6 (Oct. 28, 2016) (denying discovery requests directed to "the Federal Trade Commission," as such requests would "require searching the Bureau of Consumer Protection, the Offices of the Administrative Law Judges, General Counsel, Policy Planning, and Public Affairs, and other offices that are not likely to possess responsive documents.").

Requests 23-26 are also overbroad as to time and substance. Request 23 seeks "all documents from 2010 to the present" discussing, analyzing, or comparing the FTC's Part 3 rules and procedures with the rules and procedures applicable in federal district court. Similarly, Requests 24 and 25 seek "all documents regarding or relating in any way" to the clearance process or other process for allocating matters between the FTC and DOJ, including documents illustrating "the FTC's win rate in Part 3 enforcement actions since 1995." Request 26 requests "all communications" that *any* FTC employee or representative has had with "any other Federal agency or department relating to Respondents," with no timeframe specified. The court should deny these requests as unduly burdensome and unreasonable in scope. *See 1-800 Contacts, Inc.*, 2016 WL

6609774, at *6; *see also In re OSF Healthcare Sys.*, 2012 FTC LEXIS 31, at *4-5 (Feb. 14, 2012) (“[S]ubpoena requests that seek documents ‘concerning’ or ‘relating to’ have been found to lack the ‘reasonable particularity’ required.”); *In re N. Tex. Specialty Physicians*, 2004 FTC LEXIS 19, at *12 (Feb. 4, 2004) (limiting request seeking “[a]ll internal and external correspondence, memoranda, and messages concerning or relating to” the respondent).²

c. The Information Sought Can Be Obtained Through Other Means

Requests 23 and 25(b)-(c) seek information that Axon is fully capable of obtaining from public databases. The similarities and differences between the rules identified in Request 23 are apparent on their face, and the meaning of the rules have been addressed by courts, academics, and practitioners. Axon has no need of any work-product “assessment” by FTC employees. Similarly, Request 25 seeks analysis of a specific report published in 2007 regarding the merger clearance process and “[s]tatistics, summaries, or reports regarding the FTC’s win rate” in Part 3 enforcement actions and in federal court. Axon can easily conduct this analysis itself, hire counsel to do so, or gather publicly available sources that have already conducted this analysis. Axon’s requests should, therefore, be denied because the information can be obtained through other means. *See 1-800 Contacts*, 2016 WL 7634657, at *3.

d. Respondent Seeks Privileged Materials

Because the materials requested by Axon are irrelevant, it is unnecessary to determine whether they are privileged. *In re LabMD*, 2014 WL 492351, at *6 (“Because Respondent has

² Axon notes that it offered to narrow the timeframe of its requests. Mot. at 4. However, these requests are so fundamentally flawed that even narrowing the timeframe will not save them. It still requires searching for documents from all Commission employees, which – even if done for one year – would be untenable. Moreover, as discussed throughout, the requested material is irrelevant and outside of the investigative file, and no request for such material, however narrow, is justified.

failed to demonstrate relevance, it is not necessary to determine whether Respondent has also demonstrated that the requested information is nonprivileged.”). Nevertheless, most, if not all, of the documents sought by Axon are privileged or attorney work product, and discovery of those documents should be denied. *See* Rule 3.31(c)(4) (“Discovery shall be denied or limited . . . to preserve the privilege of a . . . governmental agency.”); Rule 3.31(c)(5) (discovery of documents prepared in anticipation of litigation permissible only upon a showing of substantial need); *In re LabCorp.*, 2011 WL 822928, at *3-4 (Feb. 24, 2011) (attorney work-product doctrine limits discovery of materials prepared in anticipation of litigation under Rule 3.31(c)(5)); *see also* Fed. R. Civ. P. 26(b)(3).

Requests 24 and 25 seek documents relating to clearance that are inextricably intertwined with the Commission’s decision-making as to pre-complaint matters. Such materials are protected from disclosure under the deliberative process privilege. *See United States v. Farley*, 11 F.3d 1385, 1388-89 (7th Cir. 1993) (deliberative process privilege protects information leading up to FTC’s decision to sue a defendant). To the extent Request 23 seeks documents relating to the FTC’s assessment of rules and procedures applicable to Part 3 administrative and federal court proceedings, any such assessments are protected from disclosure under the attorney-client privilege and work product doctrine. *See* Rules 3.31(c)(4)-(5). And to the extent Request 26 seeks communications between the FTC and other federal agencies regarding its investigation of Axon, such materials are shielded by the law enforcement privilege and deliberative process privilege. *See Farley*, 11 F.3d at 1388-89 (deliberative process privilege precludes pre-complaint decision-making and communications between FTC and DOJ); *FTC v. AMG Servs. Inc.*, 291 F.R.D. 544, 559-60 (D. Nev. 2013) (law enforcement privilege upheld as to FTC investigatory files, including communications with other agencies); *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421

U.S. 168, 188 (1975) (Congress “plainly intended” advice from one agency to another to be no more disclosable than similar advice from within an agency).³ Complaint Counsel reserves the right to assert any and all applicable privileges in the event it is ordered to respond to any of Axon’s RFPs.

Complaint Counsel does not, and need not, formally assert any applicable privileges at this time because Rule 3.31(c)(2) relieves Complaint Counsel of the obligation to search for responsive materials absent a showing of good cause, which Axon has not made.

CONCLUSION

For the foregoing reasons, Axon’s Motion to Compel Production of Documents Responsive to Respondent’s Second Set of Requests for Production should be denied.

Dated: July 15, 2020

By: s/ Mika Ikeda

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³ Responsive communications would also be protected by attorney-client privilege because DOJ represents the FTC in federal proceedings brought by Axon.

APPENDIX A

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

In the Matter of

**Axon Enterprise, Inc.
a corporation;**

and

**Safariland, LLC
a corporation.**

Docket No. D9389

**RESPONDENT AXON ENTERPRISE, INC.’S
SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS (NOS. 23–26)**

In accordance with the Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.1 *et seq.*), Respondent Axon Enterprise, Inc. (“Axon”) requests that the Federal Trade Commission (“FTC”) produce to Axon the documents and things identified below. In accordance with 16 C.F.R. § 3.31 *et seq.*, the requested documents and things must be produced to counsel of record at the offices of Jones Day, 51 Louisiana Ave., N.W., Washington, DC 20001, in accordance with the Definitions and Instructions below within thirty (30) days of service of these requests, or at such other time and place as the FTC and counsel for Axon shall mutually agree.

DEFINITIONS

These requests incorporate, without limiting the scope of the Federal Trade Commission Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.1 *et seq.*), the following definitions and instructions whether upper or lower case letters are used:

1. “FTC,” “you,” and “your” shall mean and refer to the Federal Trade Commission, including without limitation all of its employees, agents, representatives, attorneys, or anyone else acting or who has acted on its behalf.

2. “Axon” shall mean Axon Enterprise, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any person in which there is partial (25 percent or more) or total ownership or control between Axon and any other person.

3. “Viewu” shall mean Viewu, LLC, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any person in which there is partial (25 percent or more) or total ownership or control between Viewu and any other person.

4. “Motorola” shall mean Motorola Solutions, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any person in which there is partial (25 percent or more) or total ownership or control between Motorola and any other person.

5. “WatchGuard” shall mean WatchGuard, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any person in which there is partial (25 percent or more) or total ownership or control between WatchGuard and any other person.

6. “DOJ” shall mean and refer to the Department of Justice, including without limitation all of its employees, agents, representatives, attorneys, or anyone else acting or who has acted on its behalf.

7. “Person” or “Persons” shall mean any natural person or any business, proprietorship, firm, partnership, corporation, association, organization, or other entity. The acts of a person shall include the acts of directors, officers, owners, members, employees, agents, attorneys or other representatives acting on the person’s behalf.

8. “Action” or “Litigation” shall mean the above-referenced action, Docket No. 9389, currently pending before the Federal Trade Commission Office of Administrative Law Judges.

9. The term “Complaint” shall mean the Complaint filed by the FTC in this Litigation and any subsequent amendment of the Complaint.

10. As used herein, “and” and “or” shall be construed conjunctively and disjunctively so as to acquire the broadest meaning possible.

11. As used herein, “any” and “all” shall each be construed to mean “each and every,” so as to acquire the broadest meaning possible.

12. “Communication” (or “communication”), as used herein, means all modes of conveying information, including but not limited to telephone calls, e-mails and all other forms of electronic communication and electronic messaging, letters, conversations, interviews, meetings, hearings, and other written, electronic or spoken language or graphics between two or more persons, however transmitted or stored.

13. “Concerning” (or “concerning”), “Relating to” (or “relating to”), and “Regarding” (or “regarding”), as used herein, mean analyzing, alluding to, concerning, considering, commenting on, consulting, comprising, containing, describing, dealing with, evidencing,

identifying, involving, reporting on, relating to, reflecting, referring to, studying, mentioning, or pertaining to, in whole or in part.

14. “Document” (or “documents”) is defined as broadly as that term is construed under Rule 34 of the Federal Rules of Civil Procedure, and is meant to include, but is not limited to, all tangible and intangible modes of communicating, conveying or providing any information such as writings, correspondence, communications, notes, letters, memoranda, drawings, graphs, charts, photographs, discs, computer recordings, electronic mail, spreadsheets, data, databases, and any other data compilations from which information can be obtained.

15. Where an instruction or request below names a corporation or other legal entity, the instruction or request includes within its scope any parent, predecessors-in-interest, subsidiaries, affiliates, directors, officers, employees, agents, and representatives thereof, including attorneys, consultants, accountants, and investment bankers.

INSTRUCTIONS

1. Provide all responsive documents in your possession, custody, or control or in the possession, custody or control of your representatives and agents.

2. For each request, you are to produce entire documents including all attachments, enclosures, cover letters, memoranda and appendices. Copies that differ in any respect from an original (because, by way of example only, handwritten or printed notations have been added) shall be treated as separate documents and produced separately. Each draft of a document is a separate document. A request for a document shall be deemed to include a request for any and all transmittal sheets, cover letters, exhibits, enclosures or attachments to the document, in addition to the document itself. For those documents written in a language other than English, please

translate the document into English and produce the foreign language document with the English translation attached thereto.

3. Provide all electronically stored information (“ESI”) in standard, single-page Group IV TIFF format with searchable text and metadata in a Concordance or similar load file. Also, provide any spreadsheet or presentation files, including Microsoft Access, Excel, and PowerPoint files, as well as audio, audiovisual, and video files, in their native formats. Provide all hard copy documents as image files with searchable OCR text and unitize the hard copy documents to the extent possible (i.e., multi-page documents shall be produced as a single document and not as several single-page documents). Hard copy documents shall be produced as they are kept, reflecting attachment relationships between documents and information about the file folders within which the document is found. Produce the metadata for any responsive ESI with the responsive data, including the following fields: custodian, author(s), recipient(s), copy recipient(s), blind copy recipient(s), subject, file sent date/time, file creation date/time, file modification date/time, file last accessed data/time, beginning bates, ending bates, parent beginning bates, attachment(s) beginning bates, hash value, application type, file type, file name, file size, file path, and folder path. Documents produced in native format shall be accompanied by a native link field.

4. Where a claim of privilege or other protection from discovery is asserted in objecting to any request or sub-part thereof, and any document is withheld (in whole or in part) on the basis of such assertion, you shall provide a categorical privilege log in Microsoft Excel format that identifies:

- (a) Categories of documents that you are withholding, including a description of each category containing sufficient information to identify the general subject matter of the documents in the category and to enable Axon to assess the applicability of the privilege or protection claimed;

- (b) The nature of the privilege or protection from discovery (including but not limited to attorney-client, work product, and deliberative process) that is being claimed with respect to each category of documents;
- (c) The types of documents (i.e., letters, memoranda, presentations) in each category;
- (d) The date range for each category of documents;
- (e) The total number of documents withheld, and the total number of documents withheld in each category.

Submit all non-privileged portions of any responsive document (including non-privileged or redactable attachments, enclosures, cover letters, and cover emails) for which a claim of privilege is asserted, noting where redactions to the document have been made. Axon reserves the right to seek a privilege log identifying and describing each document withheld from production on grounds of a privilege or other protection from discovery or disclosure.

5. If you assert that part of the request is objectionable, respond to the remaining parts of the request to which you do not object. For those portions of any document request to which you object, please state the reasons for such objection and describe the documents or categories of documents that are not being produced.

6. These document requests shall not be deemed to call for identical copies of documents. "Identical" means precisely the same in all respects; for example, a document with handwritten notes or editing marks shall not be deemed identical to one without such notes or marks.

7. The documents responsive to these requests are to be produced as they were kept in the ordinary course of business and are to be labeled in such a way as to show which files and offices they came from.

8. The specificity of any single request shall not limit the generality of any other request.

9. Unless clearly indicated otherwise: (a) the use of a verb in any tense shall be construed as the use of that verb in all other tenses; (b) the use of the feminine, masculine, or neuter genders shall include all genders; and (c) the singular form of a word shall include the plural and vice versa.

10. If, after responding, you obtain or become aware of any further information responsive to these Requests for Production, you are required to supplement the responses and provide Axon with such additional information as required under 16 C.F.R. § 3.31.

REQUESTS FOR PRODUCTION**REQUEST NO. 23:**

All documents from 2010 to the present containing any discussion or analysis comparing, contrasting, or considering the similarities or differences between: (1) the FTC's Part 3 rules and procedures, including, without limitation, the Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.1 *et seq.*); and (2) the rules and procedures applicable in federal district court, including, without limitation, the Federal Rules of Evidence and the Federal Rules of Civil Procedure.

REQUEST NO. 24:

All documents regarding or relating in any way to the clearance process or other decision-making as to whether the FTC or DOJ would exercise authority over the Axon/Viewu merger and the Motorola/WatchGuard merger.

REQUEST NO. 25:

All documents and communications regarding or relating in any way to the clearance or other decision-making process of allocating matters between the FTC and the DOJ following the Antitrust Division's withdrawal from the 2002 Clearance Agreement, including, without limitation:

- a) Internal memos, informal agreements, guidance, analyses of each agency's expertise, proposals, or other documents providing any justification or basis for which agency will assume responsibility for a particular merger category or industry;
- b) Analysis, comment, or objections to the Report and Recommendations of the Antitrust Modernization Commission (April 2007) regarding the merger clearance process; and
- c) Statistics, summaries, or reports regarding the FTC's win rate or success in Part 3 enforcement actions from 1995 to the present, and any documents reporting, analyzing, or comparing such statistics to the outcome of merger challenges by the FTC or DOJ in federal district court during the same period.

REQUEST NO. 26:

All communications you have had with any other Federal agency or department relating to Respondents.

Dated: March 3, 2020

Respectfully submitted,

s/ Aaron M. Healey

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2020, I served the foregoing document via electronic mail on the following individuals:

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Dated: March 3, 2020

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APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

<p>In the Matter of</p> <p>Axon Enterprise, Inc., a corporation,</p> <p>and</p> <p>Safariland, LLC, a partnership.</p>	<p>Docket No. D9389</p> <p>PUBLIC VERSION</p>
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**AMENDED ANSWER AND DEFENSES OF RESPONDENT
AXON ENTERPRISE, INC.**

Pursuant to Rule 3.12 of the Federal Trade Commission’s (the “Commission”) Rules of Practice for Adjudicative Proceedings (“Proceedings”), Respondent Axon Enterprise, Inc. (“Axon”), by and through its attorneys, responds to the Commission’s complaint (“Complaint”) concerning the transaction (“Transaction”) between Axon and Respondent Safariland, LLC (“Safariland”) as follows.

Axon is appearing in the Proceedings subject to the constitutional arguments and objections it has asserted in the litigation captioned *Axon Enterprise, Inc. v. FTC*, No. 2:20-cv-00014-PHX-DWL (D. Ariz.) (Jan. 3, 2020), filed before the Commission instituted the Proceedings. Consequently, Axon is responding to the Complaint solely to avoid a default and is participating in the Proceedings under protest.

Axon additionally objects to being forced to respond to allegations in the Complaint that have been redacted in whole or in part. Through its outside counsel Axon has answered these and all of the other allegations in the Complaint to the best of its ability, and Axon explicitly reserves its right to amend this Answer as and if additional facts become known to it.

Axon denies each and every allegation in the Complaint to the extent they are not specifically admitted in the following paragraphs.

I. NATURE OF THE CASE¹

1. Respondent Axon is the leading manufacturer and supplier of body-worn cameras (“BWCs”) and digital evidence management systems (“DEMS”) (collectively “BWC Systems”). BWCs are cameras specifically designed to withstand the rigorous

¹ For ease of reference, Axon’s Answer tracks the section headings and restates the allegations in the Complaint. In so doing, Axon does not admit or concede the factual bases or legal conclusions averred in the Complaint or its headings and denies them unless otherwise expressly admitted.

demands of police usage and capture video and audio of police actions. BWCs operate in conjunction with DEMS, the software component. DEMS enable police departments to store BWC data in a central location, redact non-relevant images such as the faces of bystanders, share pertinent evidence with prosecutors, and maintain chain of custody of the video for evidentiary use.

Response: Axon admits that it manufactures and supplies BWCs and DEMS to a variety of customers, including police departments. Axon denies that it is appropriate to describe these products as inseparable “systems” because they are sold with separate product SKUs and customers can (and do) purchase the products separately. Consequently, Axon objects to the term “BWC Systems” as used throughout the Complaint. Axon admits the allegations in sentence two of Paragraph 1 as to its own BWCs. Axon admits that BWCs may operate in conjunction with DEMS, the software component, and that (among other things) its own DEMS enable police departments to store BWC data in a central location, redact non-relevant images such as the faces of bystanders, share pertinent evidence with prosecutors, and maintain chain of custody of the video for evidentiary use. Axon otherwise denies the allegations in sentences three and four of Paragraph 1.

2. On May 3, 2018, Respondent Axon acquired Viewu (the “Merger”), its closest competitor in the market for BWC Systems sold to large, metropolitan police departments. The Merger eliminated direct and substantial competition between Respondent Axon and the “#2 competitor,” further entrenching Respondent Axon’s position as the dominant supplier of BWC Systems to large, metropolitan police departments.

Response: Axon admits that on May 3, 2018, it acquired Viewu, one of a multitude of companies with which Axon competes for the supply of BWCs and DEMS, including (among others) Motorola, Panasonic, WatchGuard, Utility, Getac, Coban, Visual Labs, and Intrensic/GoPro. Moreover, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon denies the characterization “dominant” because it constitutes a legal conclusion and is based on an improper market definition. Axon denies any allegations resting on the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without attribution or context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies the remaining allegations in Paragraph 2.

3. Prior to the Merger, Viewu aggressively challenged Respondent Axon for the sale of BWC Systems to large, metropolitan police departments in the United States. This competition resulted in substantially lower prices for these customers, and provided customers with robust features and significant improvements. For example, Respondent Axon told its Board in May 2018 that the “Viewu business strategy [was to] [u]ndercut on price: Typically [REDACTED] less than Axon.” Viewu also focused on improving its products in part because Axon “is aggressively pushing feature set and existing customers are demanding those features.”

Response: Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments in the United States,” and both objects to and denies any allegations relating thereto. Axon further lacks sufficient knowledge or information to admit or deny allegations with respect to Viewu’s state of mind or corporate objectives prior to the Transaction. Axon denies any allegations resting on the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without attribution or context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies the remaining allegations in Paragraph 3.

4. Viewu was successful in winning accounts at prices substantially below Respondent Axon’s for several large, metropolitan police departments, including

Respondent Axon’s CEO admitted that it acquired Viewu to obtain the New York City Police Department (“NYPD”) account.

Response: Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon also lacks sufficient knowledge or information to admit or deny the allegations with respect to Viewu’s accounts and pricing prior to the Transaction. Axon denies any allegations resting on the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without attribution or context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies the remaining allegations in Paragraph 4.

5. The competition between Respondent Axon and Viewu was intense, especially after Viewu won New York City with a substantially lower bid. Viewu’s former General Manager acknowledged that, “[w]e started a price war. . . .” Respondent Axon’s CEO testified that after losing the contract Respondent Axon made a free offer of 1,000 body-worn cameras to New York City. Respondent Axon eventually expanded its promotion, on or around April 5, 2017, when it offered free BWC Systems for one year to every police agency in the United States.

Response: Axon denies any allegations resting on the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without attribution or context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies that its competition with Viewu was any more intense than its competition with any other manufacturer or supplier of BWCs or DEMS. Axon admits it offered every police agency in the United States a free one-year trial to allow adequate field testing of its BWCs and/or DEMS products. Axon denies the remaining allegations in Paragraph 5.

6. Post-merger, customers lost the benefit of this head-to-head competition, and Respondent Axon began to tout its pricing power, enacting “substantial price increases of [REDACTED] - including on body cameras and on the TASER weapon.” This is exactly what Respondent Safariland predicted after the parties signed the Letter of

Intent leading to the Merger: “I believe this will greatly improve their ability to increase price in the BWC market and I can easily see the stock lifting by 20% or more.” The stock actually increased by more than 40% in the month following the acquisition.

Response: Axon denies any allegations resting on the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without attribution or context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies the remaining allegations in Paragraph 6.

7. In addition to increasing price on BWCs, Respondent Axon limited the availability of Viewu BWC Systems to customers and stopped developing new generations of Viewu hardware and software. [REDACTED]

Response: Axon objects to the term “BWC Systems” because BWCs and DEMS are sold with separate product SKUs and customers can (and do) purchase the products separately. Further, Axon avers that it has honored all Viewu contracts and invested millions of dollars post-Transaction to improve Viewu products, service Viewu’s customer base, and remedy pre-existing design defects, benefitting Viewu customers and preventing disruption of their BWC programs. Despite these improvements, Viewu customers choosing to transition to Axon’s BWCs or DEMS have been allowed to do so. Axon denies the remaining allegations in Paragraph 7.

8. The Merger will likely entrench Respondent Axon’s already dominant share of the relevant market and would significantly increase market concentration. Pre-Merger, Respondent Axon held over [REDACTED] share and Viewu held over a [REDACTED] share of sales by officer count of BWC Systems to large, metropolitan police departments in the United States.

Response: The allegations in sentence one of Paragraph 8 constitute legal conclusions and therefore require no response. To the extent a response is required, the allegations are denied. Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon additionally denies the allegations in Paragraph 8 because they rest on an improper market definition.

9. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”), a post-merger market-concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index (“HHI”), and an increase in market concentration of more than 200 points renders a merger presumptively unlawful. Post-Merger market concentration would be more than 2,500, and the Merger would increase HHIs in an already concentrated market by well over 200 points. Thus, the Merger is presumptively unlawful.

Response: The allegations in Paragraph 9 constitute legal conclusions and therefore require no response. To the extent a response is required, the allegations are denied. Axon additionally denies the allegations in Paragraph 9 because they rest on an improper market definition.

10. New entry or repositioning by existing producers would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Merger. Barriers to entry are high because of the substantial up-front capital investment required, switching costs, and the need for large, metropolitan police department references.

Response: The allegations in Paragraph 10 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

11. Respondent Axon cannot show that the Merger resulted in merger-specific efficiencies sufficient to outweigh the competitive harm caused by the Merger. Respondent Axon did not analyze or anticipate efficiencies when deciding to acquire Viewu.

Response: The allegations in sentence one of Paragraph 11 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Axon denies the remaining allegations of Paragraph 11.

12. As part of the Merger, Respondent Safariland entered several non-compete and customer non-solicitation agreements covering products and services not related to the Merger, and both Respondents entered company-wide non-solicitation agreements that all run for 10 or more years (together, “Non-Competes”). The Non-Competes are not reasonably limited to protect a legitimate business interest. The Non-Competes are contained in the Membership Interest Purchase Agreement (“Merger Agreement”) itself and in Exhibit E, the Product Development and Supplier Agreement (“Holster Agreement”).

Response: With respect to sentences one and three of Paragraph 12 Axon avers that the Complaint’s selective characterization of the cited agreements is misleading and the documents speak for themselves. Axon denies the allegations in sentences one and three of Paragraph 12 to the extent inconsistent therewith. The allegations in sentence two of Paragraph 12 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

13. The Holster Agreement is a decade-long supply agreement whereby Respondent Safariland would develop and exclusively supply conducted electrical weapons (“CEW”) holsters to Respondent Axon for its Taser-branded CEW. Respondent Axon is the dominant supplier of CEWs, and its Taser brand is synonymous with the category. Respondents Axon and Safariland executed the Holster Agreement as additional consideration for the Merger.

Response: Axon avers that the Membership Interest Purchase Agreement and Product Development Supplier Agreement speak for themselves and Axon denies the allegations in sentences one and three of Paragraph 13 to the extent inconsistent therewith. Axon admits it manufactures CEWs under the brand name TASER[®] and denies the remaining allegations in sentence two of Paragraph 13.²

II. JURISDICTION

14. Respondents are, and at all relevant times have been, engaged in commerce or in activities affecting “commerce” as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

Response: The allegations in Paragraph 14 are legal conclusions to which no response is required.

15. The Merger constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

Response: The allegations in Paragraph 15 are legal conclusions to which no response is required.

III. RESPONDENTS

16. Respondent Axon is the dominant provider of BWC Systems. The majority of the largest metropolitan police departments in the United States use Respondent Axon’s BWC System solution. Respondent Axon’s newest model BWC is the “Axon Body 3,” and its DEMS is known as “Evidence.com.” Respondent Axon changed its name in 2017 from TASER International, Inc.

Response: Axon admits that it manufactures BWCs and DEMS but denies that it is appropriate to describe these products as inseparable “systems” because they are sold with separate product SKUs and customers can (and do) purchase the products separately. Axon denies the characterization “dominant” because it constitutes a legal conclusion and is based on an improper market definition. Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “majority of large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon admits the allegations in sentences three and four of Paragraph 16.

17. Respondent Axon is also the dominant supplier of CEWs under the “Taser” brand, which is Respondent Axon’s flagship product and is employed by more than [REDACTED] of all police departments. In 2018, Respondent Axon had annual revenues of \$420 million.

² As an acronym, TASER is always written in all capital letters, including in the company’s former name, TASER International, Inc.

Response: Axon admits that it manufactures CEWs under the “TASER” brand. Axon lacks sufficient knowledge or information to admit or deny whether its “product is employed by more than [REDACTED] of ‘all police departments’” because the phrase “all police departments” is vague and undefined. Axon denies the remaining allegations in sentence one of Paragraph 17. Axon admits the allegations in sentence two of Paragraph 17.

18. Respondent Safariland manufactures and sells holsters (including for use with CEWs and other weapons), body armor, armor systems, and other safety and forensics equipment for the law enforcement, military, and recreational markets. Respondent Safariland purchased Viewu in 2015.

Response: Axon admits that Safariland manufactures and sells holsters for use with CEWs and various other types of equipment for law enforcement, military, and recreational use. Axon otherwise lacks sufficient knowledge or information to respond to the remaining allegations in sentence one of Paragraph 18 and therefore denies them. Axon admits the allegations in sentence two of Paragraph 18.

IV. THE MERGER AND ASSOCIATED AGREEMENTS

19. Pursuant to the Merger Agreement, Respondent Axon consummated the purchase of Viewu from Respondent Safariland on May 3, 2018 for approximately [REDACTED] million in cash, stock, earn-outs, and the Holster Agreement, which is included as Exhibit E in the Merger Agreement and was executed as additional consideration for the Merger. Pursuant to the Holster Agreement, Respondent Safariland agreed for 10 years, *inter alia*, to develop a new CEW holster for Respondent Axon’s next-generation CEW and to supply CEW holsters exclusively to Respondent Axon. Respondent Axon agreed, *inter alia*, to make Respondent Safariland its preferred supplier of CEW holsters. Respondents Axon and Safariland also agreed, as part of the Merger Agreement and Holster Agreement, to Non-Competes related for products and services, customers, and employees.

Response: Axon avers that the Membership Interest Purchase Agreement and the Product Development and Supplier Agreement speak for themselves and denies the allegations of Paragraph 19 to the extent inconsistent therewith.

V. RELEVANT MARKET

20. The relevant market in which to analyze the effects of the Merger is the sale of BWC Systems, comprising BWCs and DEMS, to large, metropolitan police departments in the United States. A hypothetical monopolist in this relevant market would find it profit-maximizing to impose at least a small but significant and non-transitory increase in price (“SSNIP”).

Response: The allegations regarding the relevant market in Paragraph 20 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

A. RELEVANT PRODUCT MARKET

21. The relevant product market in which to assess the effects of the Merger is the sale of BWC Systems to large, metropolitan police departments. BWCs are the hardware component, and DEMS are the software component, of an integrated BWC System.

Response: Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Moreover, the allegations in sentence one of Paragraph 21 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Axon admits that BWCs are hardware and DEMS are software but denies that they constitute a “system” that must be integrated in order to function effectively. The remaining allegations in Paragraph 21 are denied.

22. Large, metropolitan police departments frequently issue requests for proposals seeking to purchase BWCs and DEMS together as an integrated BWC System. The products are closely related, and it is important for the hardware and software to interoperate effectively.

Response: Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments” as it is used in sentence one of Paragraph 22 and both objects to and denies any allegations relating thereto. With respect to sentence two, Axon admits that BWCs and DEMS may interoperate, and when they do, it is important that they do so effectively. Axon denies the remaining allegations in Paragraph 22.

23. Both Respondent Axon and Viewu focused on selling their products to large, metropolitan police departments, which have distinct requirements for BWC Systems that differ from the needs and preferences of other law enforcement organizations. Due to their particular needs, large, metropolitan police departments may require or prefer elements such as feature-rich and cloud-based DEMS, scalability for the BWC Systems deployment, references from other large metropolitan police departments, secured layers for authorized personnel access, automatic population of metadata for a video (e.g., officer, location, etc.), and tools that enable faster redaction of bystanders’ faces when a video is being prepared for public disclosure or use in court. Viewu recognized this. According to Viewu’s former General Manager, “VIEVU played in the large agency market, cloud, tech forward agencies, which is the same spot where Axon played.”

Response: Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments” and “other law enforcement organizations,” and both objects to and denies any allegations relating thereto. Axon lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 23 regarding Viewu’s business or mindset prior to the Transaction, but avers that the Complaint’s

selective characterization and quotation of unidentified documents and/or transcripts, asserted without attribution or context, is misleading as framed. The documents and/or transcripts, if and once identified, speak for themselves and Axon denies any allegations in Paragraph 23 to the extent inconsistent therewith. Axon denies the remaining allegations in Paragraph 23.

24. There are no reasonably interchangeable substitutes for BWC Systems, and large, metropolitan police departments could not realistically switch to other products in the face of a SSNIP for BWC Systems.

Response: The allegations in Paragraph 24 constitute legal conclusions to which no response is required. To the extent a response is required, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Moreover, Axon denies that it is appropriate to describe these products as inseparable “systems” because they are sold with separate product SKUs and customers can (and do) purchase the products separately, and both objects to and denies any allegations relating thereto. Axon denies the remaining allegations of Paragraph 24.

25. In-car camera systems are not substitutes for BWC Systems for large, metropolitan police departments. In-car camera systems are mounted in the vehicle, usually a front-facing camera to record what takes place in front of the vehicle, and a rear-facing camera to record what takes place inside the vehicle. In-car systems are more often used by highway patrol officers, or other officers who spend most of their time working in or directly outside of their patrol vehicles. Most officers in large, metropolitan police departments, however, are rarely in patrol cars and generally conduct their policing by other means, such as on foot, horse, and bike. Given the nature of policing in metropolitan areas, these officers need cameras that can capture video when a police officer is not near a police vehicle, but is instead on the street or in a building. In-car systems are also significantly more expensive than BWC Systems. Respondent Axon’s Chief Revenue Officer testified that in-car systems and BWC Systems are not good substitutes.

Response: The allegations in sentence one of Paragraph 25 are legal conclusions to which no response is required. To the extent a response is required, the allegations in sentence one of Paragraph 25 are denied. Moreover, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon admits that some in-car camera systems are mounted as described in sentence two. Axon denies that in-car systems are unique to highway patrol officers and that officers working in metropolitan areas “are rarely in patrol cars.” With respect to the allegations in sentence seven of Paragraph 25, the testimony speaks for itself and Axon denies any allegations inconsistent therewith. Axon denies the remaining allegations in Paragraph 25.

26. Records Management Systems (“RMS”) are not substitutes for DEMS for large, metropolitan police departments. RMS collect and centralize in one source, in digital format, the many types of written reports generated by police agencies, including

arrest, probation, and crime scene reports, whereas DEMS are designed principally to record video and audio evidence captured by BWCs. Industry participants do not view RMS as a substitute for BWC Systems or for the DEMS component of those systems.

Response: The allegations in sentence one of Paragraph 26 constitute legal conclusions to which no response is required. To the extent a response is required, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. The allegations in sentence two of Paragraph 26 are denied to the extent that RMS capabilities vary by provider. Axon admits that its own DEMS are designed in part to store video and audio evidence captured by BWCs. Axon lacks sufficient knowledge or information to admit or deny the allegations in sentence three of Paragraph 26 regarding the “view” of unidentified, non-party “[i]ndustry participants.” Axon denies the remaining allegations in Paragraph 26.

B. RELEVANT GEOGRAPHIC MARKET

27. The relevant geographic market in which to assess the competitive effects of the Merger is customers in the United States. The relevant market is a bid market in which it is possible to price discriminate to specific customers. Customers based in the United States cannot arbitrage or substitute based on different prices offered to customers outside the United States.

Response: The allegations in Paragraph 27 are legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

28. Many police departments also are required to comply with the FBI’s Criminal Justice Information Service (“CJIS”) standards. CJIS compliance requires storing BWC-generated data in the United States. Additionally, U.S.-based police departments look mostly to other U.S.-based police departments to vet potential BWC System vendors.

Response: The allegations in sentences one and two of Paragraph 28 constitute legal conclusions to which no response is required. Axon lacks sufficient knowledge or information to admit or deny the allegations of sentence three of Paragraph 28 because they relate to the actions or behavior of persons or entities other than Axon, and Axon therefore denies them.

29. A hypothetical monopolist in the market for BWC Systems sold to large, metropolitan police departments in the United States would find it profit-maximizing to impose at least a small but significant and non-transitory increase in price (“SSNIP”).

Response: The allegations in Paragraph 29 constitute legal conclusions to which no response is required. To the extent a response is required, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon denies the remaining allegations in Paragraph 29.

VI. MARKET STRUCTURE AND THE MERGER'S PRESUMPTIVE ILLEGALITY

30. The market for the sale of BWC Systems to large, metropolitan police departments based in the United States is highly concentrated. Prior to the Merger, Respondent Axon was already the dominant BWC System provider to these customers, with over [REDACTED] of the relevant market by officer count. Respondent Axon acknowledges this dominance—in a company presentation, it implored its salespeople to “embrace being the gorilla”—and Respondent Axon’s CEO confirmed that Respondent Axon is a “really strong market leader.” Viewu was the next largest competitor with over [REDACTED] of the relevant market by officer count. Post-Merger, the relevant market is even more highly concentrated, with Respondent Axon controlling over [REDACTED] of the relevant market by officer count.

Response: The allegations in Paragraph 30 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Moreover, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and “officer count,” and both objects to and denies any allegations relating thereto. Axon further objects to and denies any allegations that rest on an improper market definition. Axon avers that the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, asserted without attribution or context, is misleading as framed, and further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies any allegations in Paragraph 30 to the extent inconsistent therewith.

31. Motorola, Panasonic, WatchGuard and Utility largely make up the rest of the relevant market. None of these other competitors pose the same competitive constraint on Respondent Axon as did Viewu. In particular, the other competitors’ BWC Systems [REDACTED]

[REDACTED] Consequently, these other competitors rarely provided significant competition to Respondent Axon in RFP processes conducted by large, metropolitan police departments.

Response: The allegations in Paragraph 31 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Moreover, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon further objects to and denies any allegations that rest on an improper market definition, and any allegations that refer to “BWC Systems.” Although BWCs and DEMS may be used together, Axon denies that it is appropriate to describe these products as inseparable “systems” because they are sold with separate product SKUs and customers can (and do) purchase the products separately.

32. Even when considering all customers (i.e., not just large, metropolitan police departments), Respondent Axon believed that post-Merger it had “about [REDACTED] of the US market.”

Response: Axon avers that the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, offered without attribution or context, is misleading as framed, and further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies any allegations in Paragraph 32 to the extent inconsistent therewith. Further, the parenthetical “(i.e., not just large, metropolitan police departments)” is vague and undefined, and Axon both objects to and denies any allegations relating thereto.

33. The Merger Guidelines and courts often measure concentration using HHIs. HHIs are calculated by totaling the squares of the market shares of every firm in the relevant market. Under the Merger Guidelines, a merger is presumed likely to create or enhance market power and is presumptively illegal when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

Response: The allegations in Paragraph 33 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Axon further objects to and denies any allegations that rest on an improper market definition.

34. The Merger significantly increased concentration in the relevant market, as one firm now controls more than [REDACTED] of the relevant market by officer count. Motorola/WatchGuard, the next largest competitor, controls less than [REDACTED] of the relevant market by officer count. The Merger resulted in a post-Merger HHI in excess of 2,500, and increased concentration by more than 200 points. Therefore, the Merger is presumptively anticompetitive under the Merger Guidelines and applicable case law.

Response: The allegations in Paragraph 34 constitute legal conclusions to which no response is required. To the extent the response is required, the allegations are denied. Moreover, Axon objects to and denies any allegations that rest on an improper market definition. Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “officer count,” and both objects to and denies any allegations relating thereto.

VII. ANTICOMPETITIVE EFFECTS

A. The Merger Eliminated Vital Competition Between Viewu and Respondent Axon

35. The Merger eliminated intense price and innovation competition between Respondent Axon and Viewu in the relevant market. The result is likely to be higher prices, inferior service, and reduced quality and innovation.

Response: The allegations in sentence one of Paragraph 35 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Moreover, Axon objects to and denies any allegations that rest on an improper market definition. The allegations in sentence two of Paragraph 35 are denied as speculative and

vague.

36. Respondent Axon and Viewu were each other's closest competitors. For example, Respondent Safariland acknowledged: "We own the #2 player in the market, and to date we have seen no other credible market entrant," and "Viewu and Taser are consistently the finalists in major opportunities." Respondent Axon's Vice President of Investor Relations touted that by purchasing Viewu, Respondent Axon had "acquired #2 competitor."

Response: Axon lacks sufficient information to admit or deny the allegations in sentence one of Paragraph 36. To the extent a response is required, the allegation is denied as the phrase "closest competitors" is vague, undefined, and based on an improper market definition. Axon avers that the selective characterization and quotation of unidentified documents or transcripts, asserted without attribution or context, is misleading as framed in sentences two and three of Paragraph 36. The documents and/or transcripts, if and once identified, speak for themselves and Axon denies any allegations inconsistent therewith. Axon denies the remaining allegations in Paragraph 36.

37. Stock analysts and the financial press also recognize that Viewu was Respondent Axon's most significant competitor. A Raymond James stock report states: "In May 2018, Axon closed the \$7.1 million strategic tuck-in acquisition of its most formidable body cam competitor, Viewu." A Bloomberg article dated May 4, 2018, entitled "The Biggest Police Body Cam Company Is Buying Its Main Competitor," declares that "[t]he combination of the two largest providers of the recording devices will create a dominant force in police surveillance." A May 18, 2018 article from the Motley Fool, entitled "Axon Enterprise Now Owns the Police Body Cam Market," asserts that "[t]here is going to be no stopping Axon Enterprise (NASDAQ:AAXN) now that it has acquired its main body camera rival VIEVU."

Response: Axon lacks sufficient information to admit or deny the allegations in sentence one of Paragraph 37. To the extent a response is required, the allegation is denied as the phrase "most significant competitor" is vague, undefined, and based on an improper market definition. Axon is aware that various media and stock analysts commented on the transaction and avers that the selective characterization of a handful of such comments is misleading as framed. The reports and articles speak for themselves and Axon denies any allegations in Paragraph 37 inconsistent with the actual contents thereof.

38. Prior to the Merger, Viewu and Respondent Axon were the competitors that could best satisfy the RFP requirements, from both a technical and price perspective, for many of the largest metropolitan police agencies in the United States. For example, [REDACTED] all found that, of multiple bidders, Respondent Axon and Viewu had the best offerings by a significant margin.

Response: Axon objects to and denies the allegations in Paragraph 38 because it lacks sufficient knowledge or information regarding the vague and undefined phrase "largest

metropolitan police agencies.” Moreover, Axon lacks sufficient knowledge or information about what particular agencies may have “found” or the criteria by which they judged particular bids, and denies the allegations in sentence two of Paragraph 38 for this additional reason.

39. Respondent Axon and Viewu vigorously and consistently competed on price in an effort to win large, metropolitan police department contracts. After Respondent Safariland acquired Viewu in 2015, Viewu lowered its pricing in an explicit effort to take market share from Respondent Axon. Viewu’s former General Manager confirmed that in early 2016, Viewu “made a relatively deliberate decision to take price down in the market considerably,” and Viewu admittedly “took [Axon] by surprise with disruptive pricing and nearly comparable technology.” As late as 2018, Viewu’s strategy was to “win on price typically [REDACTED] less than Axon.”

Response: Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police department” and both objects to and denies any allegations in Paragraph 39 relating thereto. Moreover, Axon lacks sufficient knowledge or information regarding Viewu’s strategy and pricing prior to the Transaction, and therefore denies any allegations relating thereto. Further, Axon avers that the selective characterization and quotation of partially or wholly unidentified communications, documents, or testimony asserted without context, is misleading as framed. The communications, documents, or transcripts, if and once identified, speak for themselves and Axon denies any allegations in Paragraph 39 to the extent inconsistent therewith.

40. Competition between Respondent Axon and Viewu resulted in substantially lower prices for police departments. For example, [REDACTED] all received substantially lower bids from Viewu as compared to Respondent Axon. Viewu’s lower pricing for [REDACTED] caused Respondent Axon to reduce its own bids. Viewu at times responded to Respondent Axon’s competing bids by offering better terms.

Response: Axon lacks sufficient knowledge or information about the bids that particular agencies may have received or how they compared one to another, and denies the allegations in Paragraph 40 for this reason. Axon lacks sufficient knowledge or information regarding Viewu’s strategy and pricing prior to the Transaction, and therefore denies any allegations relating thereto. Axon denies the remaining allegations in Paragraph 40.

41. Respondent Axon and Viewu also competed vigorously on non-price aspects of BWC Systems, including the development of various innovative features such as auto-activation of BWCs in the event of an officer unholstering a gun or Taser, and computer-assisted facial redaction tools for DEMS videos. Consumers benefited from this innovation competition.

Response: Axon denies that it is appropriate to describe BWCs and DEMS as inseparable “BWC Systems” because they are sold with separate product SKUs and customers

can (and do) purchase the products separately. Axon denies the allegations in sentence one of Paragraph 41 for this reason and for the additional reason that Viewu was one of a multitude of companies with which Axon competes for the supply of BWCs and DEMS, including (among others) Motorola, Panasonic, WatchGuard, Utility, Getac, Coban, Visual Labs, and Intrensic/GoPro. The last sentence of Paragraph 41 contains a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

42. Post-merger, customers lost the benefit of this head-to-head price and innovation competition, and Respondent Axon began to tout its pricing power, enacting “substantial price increases of [REDACTED] - including on body cameras and on the Taser weapon.” Respondent Axon has acknowledged the negative consequence of price increases on budget constrained law enforcement officers: “It’s no secret that budget constraints are a constant inconvenience for law enforcement agencies. Long needs lists + short funds = under equipped officers and potentially underserved communities.”

Response: The first sentence of Paragraph 42 contains a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied. Moreover, Axon denies any allegations resting on the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without attribution or context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies the remaining allegations in Paragraph 42.

43. Existing BWC System providers are unlikely to replace the competition that was lost as a result of the Merger between Respondents, the two closest competitors in the relevant market. While each remaining competitor has different strengths and weaknesses, each competitor faces real and significant challenges in replacing competition lost through Respondent Axon’s merger with Viewu. These challenges include, but are not limited to, reputation or lack of references from large, metropolitan police department customers, service levels that are inadequate for such customers, and software with limited functionality. Moreover, some of the other BWC System providers price significantly higher than Viewu and would not sufficiently replace Viewu’s aggressive pricing. The remaining firms in the relevant market are not likely to replace the competitive constraint of Viewu’s lower-priced offerings in a timely and sufficient way.

Response: The first and last sentences of Paragraph 43 contain legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Axon additionally denies all of the allegations in Paragraph 43 to the extent they rest on an improper market definition. Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “closest competitors,” “remaining competitors,” and “existing BWC System providers” and therefore denies any allegations relating thereto. Further, Axon denies that it is appropriate to describe BWCs and DEMS as inseparable “BWC Systems” because they are sold with separate product SKUs and customers can (and do) purchase the products separately. Axon denies the remaining allegations in Paragraph 43.

B. As part of the merger, respondents agreed to additional provisions that substantially lessen competition

44. As part of the Merger Agreement, Respondents Axon and Safariland entered into the Non-Competes: Respondent Safariland agreed not to compete (i) for products and services that Respondent Axon supplies and in industries where Respondent Axon is active, irrespective of their relation to the Merger and (ii) for Respondent Axon's customers; and both Respondents agreed not to affirmatively solicit each other's employees. These agreements each last 10 or more years. The Non-Competes prevent actual and potential competition between Respondents Axon and Safariland. The Non-Competes are contained in the Merger Agreement itself and in Exhibit E, the Holster Agreement.

Response: Axon avers that the Membership Interest Purchase Agreement and Product Development Supplier Agreement speak for themselves and Axon denies the allegations in Paragraph 44 to the extent inconsistent therewith. Axon further avers that it and Safariland informed Commission staff prior to this litigation that they were willing to amend the Membership Interest Purchase Agreement and Product Development Supplier Agreement to eliminate the provisions that are the subject of Paragraph 44, and in fact amended the agreements to eliminate those provisions on January 16, 2020.

Non-Compete Agreements for Respondent Axon's Products/Services and Industries

45. In Section 5.03(a) of the Merger Agreement, Respondent Safariland agreed not to engage in "(a) body worn video products and services, (b) in-car video products and services, (c) digital evidence management products and services provided to third parties that ingest digital evidence audio and video files, and (d) enterprise records management systems provided to third parties," anywhere in the world for 10 years.

Response: Axon avers that the Membership Interest Purchase Agreement speaks for itself and Axon denies the allegations in Paragraph 45 to the extent inconsistent therewith. Axon further avers that it and Safariland informed Commission staff prior to this litigation that they were willing to amend the Membership Interest Purchase Agreement to eliminate the provision that is the subject of Paragraph 45, and in fact amended the agreement to eliminate that provision on January 16, 2020.

46. In Section 15.1 of the Holster Agreement, Respondent Safariland agreed not to compete in the "CEW industry, BWC industry, fleet or vehicle camera industry, surveillance room camera industry, and digital evidence management system and storage industry, with regard to law enforcement, military, security or consumers," anywhere in the world for 12 years. Respondent Axon was concerned about Respondent Safariland potentially entering into competition with Respondent Axon's lucrative CEW business. Respondent Axon's CEO called the 12-year CEW non-compete a "hidden jewel in the deal."

Response: Axon avers that the Product Development Supplier Agreement speaks for

itself and Axon denies the allegations in Paragraph 46 to the extent inconsistent therewith. Axon further avers that it and Safariland informed Commission staff prior to this litigation that they were willing to amend the Product Development Supplier Agreement to eliminate the provision that is the subject of Paragraph 46, and in fact amended the agreement to eliminate that provision on January 16, 2020. Axon denies any allegations resting on the Complaint's selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves.

Non-Compete Agreements for Respondent Axon's Customers

47. In Section 5.03(c) of the Merger Agreement, Respondent Safariland agreed not to solicit or entice any of Respondent Axon's customers or potential customers for purposes of diverting business or services away from Respondent Axon, for 10 years.

Response: Axon avers that the Membership Interest Purchase Agreement speaks for itself and Axon denies the allegations in Paragraph 47 to the extent inconsistent therewith. Axon further avers that it and Safariland informed Commission staff prior to this litigation that they were willing to amend the Membership Interest Purchase Agreement to eliminate the provision that is the subject of Paragraph 47, and in fact amended the agreement to eliminate that provision on January 16, 2020.

48. In Section 15.3 of the Holster Agreement, Respondent Safariland agreed not to solicit or entice any of Respondent Axon's customers or potential customers for purposes of diverting CEW, CEW holster, or CEW accessory business or purchases away from Respondent Axon, for 11 years.

Response: Axon avers that the Product Development Supplier Agreement speaks for itself and Axon denies the allegations in Paragraph 48 to the extent inconsistent therewith. Axon further avers that it and Safariland informed Commission staff prior to this litigation that they were willing to amend the Product Development Supplier Agreement to eliminate the provision that is the subject of Paragraph 48, and in fact amended the agreement to eliminate that provision on January 16, 2020.

Employee Non-Solicitation Agreements

49. In Section 5.03(b) of the Merger Agreement, Respondent Safariland agreed not to hire or solicit any of Respondent Axon's employees, or encourage any employees to leave Respondent Axon, or hire certain former employees of Respondent Axon, except pursuant to a general solicitation. Respondent Safariland agreed to refrain from this activity for 10 years.

Response: Axon avers that the Membership Interest Purchase Agreement speaks for itself and Axon denies the allegations in Paragraph 49 to the extent inconsistent therewith. Axon further avers that it and Safariland informed Commission staff prior to this litigation that they were willing to amend the Membership Interest Purchase Agreement to eliminate the provision that is the subject of Paragraph 49, and in fact amended the agreement

to eliminate that provision on January 16, 2020.

50. In Section 5.06(a) of the Merger Agreement, Respondent Axon agreed not to hire or solicit any of Respondent Safariland's employees, or encourage any employees to leave Respondent Safariland, or hire certain former employees of Respondent Safariland, except pursuant to a general solicitation. Respondent Axon agreed to refrain from this activity for 10 years.

Response: Axon avers that the Membership Interest Purchase Agreement speaks for itself and Axon denies the allegations in Paragraph 50 to the extent inconsistent therewith. Axon further avers that it and Safariland informed Commission staff prior to this litigation that they were willing to amend the Membership Interest Purchase Agreement to eliminate the provision that is the subject of Paragraph 50, and in fact amended the agreement to eliminate that provision on January 16, 2020.

51. In Section 15.4 of the Holster Agreement, Respondents Axon and Safariland agreed not to solicit each other's employees for the purpose of inducing the employees to leave their respective employers, except pursuant to a general solicitation. Respondents Axon and Safariland agreed to refrain from this activity for 11 years.

Response: Axon avers that the Product Development Supplier Agreement speaks for itself and Axon denies the allegations in Paragraph 51 to the extent inconsistent therewith. Axon further avers that it and Safariland informed Commission staff prior to this litigation that they were willing to amend the Product Development Supplier Agreement to eliminate the provision that is the subject of Paragraph 51, and in fact amended the agreement to eliminate that provision on January 16, 2020.

52. By prohibiting Respondent Safariland from competing against Respondent Axon--in terms of products and services Respondent Safariland can offer as well as customers Respondent Safariland can solicit--these provisions harm customers who would otherwise benefit from potential or actual competition by Respondent Safariland. By prohibiting Respondents Axon and Safariland from affirmatively soliciting each other's employees, these provisions eliminate a form of competition to attract skilled labor and deny employees and former employees of Respondents Axon and Safariland access to better job opportunities. They restrict workers' mobility, and deprive them of competitively significant information that they could use to negotiate better terms of employment.

Response: The allegations in Paragraph 52 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Axon further avers that it and Safariland informed Commission staff prior to this litigation that they were willing to amend the Membership Interest Purchase Agreement and Product Development Supplier Agreement to eliminate the provisions that are the subject of Paragraph 52, and in fact amended the agreements to eliminate those provisions on January 16, 2020.

53. The Non-Competes are not reasonably limited in scope to protect a legitimate business interest. A mere general desire to be free from competition is not a legitimate business interest. The Non-Competes go far beyond any intellectual property, goodwill, or customer relationship necessary to protect Respondent Axon's investment in Viewu. Moreover, even if a legitimate interest existed, the lengths of the Non-Competes are longer than reasonably necessary, because they prevent Respondent Safariland from competing for products and services, customers, and employees for 10 years or longer.

Response: The allegations in Paragraph 53 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Axon further avers that it and Safariland informed Commission staff prior to this litigation that they were willing to amend the Membership Interest Purchase Agreement and Product Development Supplier Agreement to eliminate the provisions that are the subject of Paragraph 53, and in fact amended the agreements to eliminate those provisions on January 16, 2020.

VIII. LACK OF COUNTERVAILING FACTORS

A. High Barriers to Entry and Expansion

54. Respondents cannot demonstrate that new entry or expansion by existing firms would be timely, likely, or sufficient to offset the anticompetitive effects of the Merger. *De novo* entrants into this market would face considerable barriers in replicating the competition that the Merger has eliminated. Effective entry into this market would require substantial, costly upfront investments in creating a new BWC System offering. The system also must be designed for use by law enforcement agencies, with features such as secured layers for authorized personnel access and strict recordation of file access history for chain of custody purposes. There are high switching costs related to the transfer of metadata for video files, and customers are sticky because moving data to a new provider and training officers on a new platform is challenging and expensive.

Response: The allegations in Paragraph 54 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

B. Efficiencies

55. Respondent Axon cannot show that merger-specific efficiencies would result from the Merger that will offset the anticompetitive effects. Respondent Axon's President admitted that potential efficiencies played no role in Respondent Axon's analysis of the Merger.

Response: The allegations in sentence one of Paragraph 55 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. With respect to sentence two of Paragraph 55, Axon avers that the Complaint's selective characterization and quotation of unidentified communications, offered without attribution or context, is misleading as framed. Axon further avers that the communications, if and once identified, speak for themselves and denies any allegations inconsistent therewith.

C. Failing Firm

56. Respondents cannot demonstrate that Respondent Safariland was a failing firm under the criteria set out in the Horizontal Merger Guidelines

Response: The allegations in Paragraph 56 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

IX. VIOLATIONS

Count I – Illegal Agreement

57. The allegations of Paragraphs 1 through 56 above are incorporated by reference as though fully set forth herein.

Response: Except where specifically admitted above, the allegations in Paragraphs 1 through 56 of the Complaint are denied.

58. The Merger Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Response: The allegations in Paragraph 58 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

Count II – Illegal Merger

59. The allegations of Paragraphs 1 through 56 above are incorporated by reference as though fully set forth herein.

Response: Except where specifically admitted above, the allegations in Paragraphs 1 through 56 of the Complaint are denied.

60. The Merger, including the Non-Competes, constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Response: The allegation in Paragraph 60 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

AFFIRMATIVE AND OTHER DEFENSES

Axon asserts the following defenses, without assuming the burden of proof on such defenses that would otherwise rest with the Commission.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Granting the relief sought is contrary to the public interest.

THIRD DEFENSE

Granting the relief sought would constitute a taking of Axon's property in violation of the Fifth Amendment to the Constitution.

FOURTH DEFENSE

The alleged product market definition fails as a matter of both fact and law.

FIFTH DEFENSE

The alleged geographic market definition fails as a matter of both fact and law.

SIXTH DEFENSE

The Complaint fails to allege harm to competition.

SEVENTH DEFENSE

The Complaint fails to allege harm to consumers.

EIGHTH DEFENSE

The Complaint fails to allege harm to consumer welfare.

NINTH DEFENSE

Any alleged harm to potential competition is not actionable.

TENTH DEFENSE

Any presumption of anticompetitive effects is rebutted by the lack of meaningful barriers to entry. Entry into a properly defined market for BWCs and/or DEMS is, and would have been, timely, likely and sufficient to counter any alleged anticompetitive effects of the transaction. In just the last two years, a number of competitors have expanded their sales and presence in the BWC and DEMS industries. For example, Getac has expanded its operations, and in 2018 formed Getac Video Solutions to focus on the BWC, DEMS, and other law enforcement solutions. In addition, Motorola, through its recent acquisition of Watchguard, and Safe Fleet, through its recent acquisition of Mobile-Vision, have expanded their presence and made significant investments in the purported relevant market. Moreover, there are new and disruptive entrants such as CentralSquare Technologies, which has partnered with Genetec to offer Genetec's DEMS as part of CentralSquare's records management and computer-aided dispatch services. These examples demonstrate that expansion and competitor growth will continue to ensure robust competition in a properly-defined market for BWCs and/or DEMS.

ELEVENTH DEFENSE

Efficiencies and other procompetitive benefits resulting from the acquisition outweigh any and all proffered anticompetitive effects. The acquisition resulted in significant cognizable, merger-specific efficiencies. For example, [REDACTED] Axon receives favorable rates on Microsoft's Azure cloud storage platform. Axon's more favorable pricing resulted in post-acquisition verifiable and merger-specific savings relating to Viewu's data storage costs. In addition, Axon's acquisition of Viewu resulted in a number of procompetitive quality benefits that flowed to former Viewu customers, including improved customer and better and more reliable technology—all of which would not have achieved but for the transaction.

TWELFTH DEFENSE

Axon asserts that at the time of the acquisition, Viewu was a failing division of Safariland and/or a failing firm. Viewu had persistently negative cash flows, and [REDACTED].

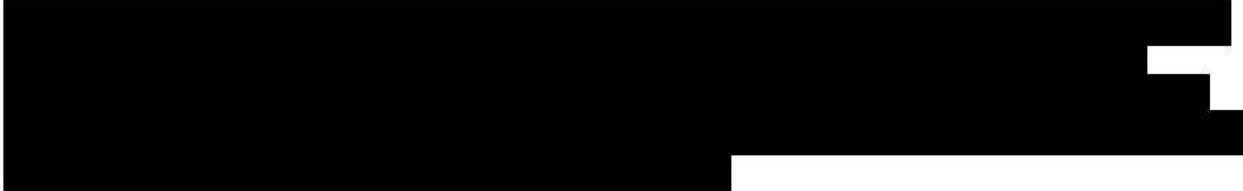
Viewu was losing nearly \$1 million per month at the time Axon acquired it. In addition to losing money, Viewu was in debt. As of the date of the transaction, Viewu had more than \$19 million in debt [REDACTED] another \$8 million in off-balance-sheet purchase commitments, and the cash equivalent of less than three days' operating expenses. Viewu's dire financial condition [REDACTED].

Safariland had been engaged in good faith efforts to sell Viewu for some time before [REDACTED]. It had already engaged Evercore, an investment bank, to solicit potential purchasers with no minimum price. As of early 2018, that effort had not borne fruit. [REDACTED] Safariland turned to Axon, the buyer of last resort. At that point, selling to Axon was the only means of preventing Viewu's assets from leaving the marketplace and causing significant disruption to Viewu's customers. Thus, Viewu qualifies as a failing division under applicable law.

Viewu also meets the requirements of a failing firm. As set forth above, at the time of the transaction, Viewu was unable to meet its near-term financial obligations. [REDACTED].

THIRTEENTH DEFENSE

In addition to being a failing division or firm, Viewu was a flailing firm. Even if Viewu would have been able to meet its financial obligations or was a financially viable entity in the near term (which it was not), the Complaint's market share statistics overstate Viewu's ability to compete post-acquisition. The Complaint relies on the single NYPD contract from 2016 that dramatically skews Viewu's competitive significance and ignores competitive reality. [REDACTED].



Further, design defects in Viewu’s BWCs and DEMS—including a widely-publicized fire involving a BWC issued to a NYPD officer—would have further strained Viewu’s limited resources, diminished its standing with customers, and reduced its ability to compete even further. Thus, Viewu’s competitive significance would have continued to decline and it would not have constrained Axon or spurred meaningful innovation absent the transaction. In addition to being a failing division or firm, Viewu was a flailing firm. Even if Viewu would have been able to meet its financial obligations or was a financially viable entity in the near term (which it was not), the Complaint’s market share statistics overstate Viewu’s ability to compete post-acquisition.

FOURTEENTH DEFENSE

These Proceedings are invalid because the constraints on removal of the Commissioners violate Article II of the Constitution and the separation of powers.

FIFTEENTH DEFENSE

These Proceedings are invalid because the constraints on removal of the Administrative Law Judge violate Article II of the Constitution and the separation of powers.

SIXTEENTH DEFENSE

These Proceedings are invalid because adjudication of the Complaint by the Administrative Law Judge and the Commission in turn violates Article III of the Constitution and the separation of powers.

SEVENTEENTH DEFENSE

These Proceedings are invalid because adjudication of the Complaint by the Administrative Law Judge and the Commission in turn violates the right to due process of law under the Fifth Amendment to the Constitution, which requires a neutral decision-maker.

EIGHTEENTH DEFENSE

These Proceedings violate the right to due process of law under the Fifth Amendment to the Constitution, which requires equal protection of the laws, because the federal government seeks to enforce antitrust laws against other parties by bringing civil actions in federal district courts.

RESERVATION OF RIGHTS TO AMEND OR ASSERT ADDITIONAL DEFENSES

Axon has not knowingly or intentionally waived any applicable defenses, and it reserves the right to assert and rely upon other applicable defenses that may become available or apparent throughout the course of the action. Pursuant to Rule 3.15, Axon reserves the right to seek to amend its Answer, including its affirmative and other defenses.

NOTICE OF CONTEMPLATED RELIEF

WHEREFORE, Axon requests that the Commission enter judgment in its favor as follows:

- A. That the Complaint be dismissed with prejudice;
- B. That none of the requested relief issue to the Commission;
- C. That costs incurred in defending this action be awarded to Axon; and
- D. That the Commission grant Axon any and all further relief that is just and proper.

Dated: March 2, 2020

/s/ Aaron M. Healey

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Counsel for Respondent Axon Enterprise, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2020, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Acting Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

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

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

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*Counsel for Respondent
Safariland LLC*

Counsel for the Federal Trade Commission

Dated: March 2, 2020

s/ Julie McEvoy

Julie E. McEvoy

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 documents that is available for review by the parties and the adjudicator.

Dated: March 2, 2020

s/ Julie McEvoy

Julie E. McEvoy

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2020, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Acting Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
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 caused the foregoing document to be served via email to:

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Counsel for Respondent Axon Enterprises, Inc.

By: s/ Jennifer Milici
Jennifer Milici

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.

July 15, 2020

By: s/ Jennifer Milici
Jennifer Milici