PUBLIC

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

In the Matter of **Axon Enterprise, Inc.** **a corporation**	**DOCKET NO. 9389**

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR ISSUANCE OF DEPOSITION SUBPOENA *AD TESTIFICANDUM* TO THE DEPARTMENT OF JUSTICE UNDER RULE OF PRACTICE 3.36

Complaint Counsel submits this Opposition to Respondent Axon Enterprise Inc.'s ("Axon") Motion for a Rule 3.36 Subpoena ("Motion") to the Department of Justice ("DOJ"). Axon seeks to depose DOJ about its investigation and enforcement decisions, including—but not limited to—its decision-making concerning whether to investigate Axon's acquisition of its closest competitor, VieVu. This Court has repeatedly held that information about an agency's investigation and enforcement decisions are outside the scope of permissible discovery and a substantial body of case law establishes that such information is privileged. To the extent that any information sought by Axon through its subpoena is not privileged, it is readily available in the public domain. Moreover, Axon's proposed subpoena is sweepingly broad and its expansive topics are wholly untethered to any disputed issue in this case. Axon's subpoena would impose excessive and unnecessary burdens on DOJ, including motion practice, without any likelihood of gaining admissible evidence unobtainable from other sources. Axon's Motion fails to satisfy Rule 3.36 and should be denied.

ARGUMENT

To protect government agencies from burdensome discovery requests, the Federal Trade Commission ("Commission" or "FTC") requires that a party seeking to serve a subpoena on a government agency first meet Rule 3.36's stringent requirements. Rule 3.36 requires the Respondent to show that the information it seeks: (1) is reasonable in scope; (2) falls within the limits of Rule 3.31(c)(1); and (3) cannot reasonably be obtained by other means. 16 CFR § 3.36(b). Because Axon has not made these showings, its Motion must be denied.

A. Axon's Subpoena is Not Reasonable in Scope

A party seeking a subpoena under Rule 3.36 must affirmatively establish that its subpoena is reasonable in scope. 16 CFR § 3.36 (b)(1). The requisite showing cannot be made if a subpoena seeks testimony on a topic that is wholly privileged. The burden placed on the government agency in responding to a subpoena seeking privileged information is necessarily disproportionate to any benefit that could accrue to the party. The government agency is burdened with motion practice and other responses while the requesting party is unlikely to obtain any admissible evidence. *See* 16 CFR § 3.31(c)(2) (" [D]iscovery methods otherwise permitted under these rules shall be limited by the Administrative Law Judge if he or she determines that:… The burden and expense of the proposed discovery on a party or third party outweigh its likely benefit."); *see also* 16 CFR § 3.31(c)(4) ("Discovery shall be denied or limited . . . to preserve the privilege of a … governmental agency.") Here, Axon's Topics 1-3 seek privileged information and Axon cannot show that its subpoena on these topics is reasonable in scope. Axon also fails to establish an adequate nexus between any of its excessively broad topics and the issues actually in dispute in this matter.

In particular, Topics 1 and 2 of Axon's proposed subpoena seek testimony about DOJ's decision-making in determining whether to pursue particular investigations falling within the

scope of its concurrent jurisdiction with the FTC.[1] This information is clearly protected from disclosure by governmental privileges, including the deliberative process privilege.[2] *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). The deliberative process privilege applies to information that is (1) "pre-decisional," meaning generated before the agency reached its final decision and (2) "deliberative" in nature, meaning that it contains opinions, recommendations, or advice relevant to the agency decision at issue. *FTC v. Warner Commc'ns*, 742 F.2d 1156, 1161 (1984). It is well-established that governmental privileges apply to both intra-agency and inter-agency communications, like those between DOJ and FTC. *See United States v. Farley*, 11 F.3d 1385, 1388-89 (7th Cir. 1993) (holding that deliberative process privilege protects information leading up to FTC's decision to sue a defendant and communications between FTC and DOJ); *see also 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.).

"[T]he ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." *NLRB*, 421 U.S. at 151. As the Seventh Circuit explained, because "frank

[1] The Commission and DOJ have shared concurrent enforcement of the Clayton Act for over a century. 15 U.S.C. § 21 (vesting authority in the FTC to enforce Section 7); 15 U.S.C. § 25 (granting district courts jurisdiction to hear Clayton Act injunction actions brought by the United States); *see also FTC v. AT&T Mobility LLC*, 883 F.3d 848, 862 (9th Cir. 2018) (en banc) ("In the administrative context, two cops on the beat is nothing unusual.") The FTC or DOJ may decline to investigate a potential violation of the Clayton Act for myriad reasons, including that its sister agency is conducting an investigation. Axon appears to misunderstand the meaning of concurrent jurisdiction, and wrongly assumes that a matter must be investigated by only one agency, never both, and that an affirmative decision is made about which agency will investigate in every case.

[2] The information is also covered by the law enforcement privilege, which aims to protect both the civil and criminal law enforcement processes. *See e.g.*, *In re Sealed Case*, 856 F.2d 268, 271-72 (D.C. Cir. 1988). The privilege has been upheld as to FTC investigatory files, including communications with other agencies. *See F.T.C. v. AMG Servs. Inc.*, 291 F.R.D. 544, 559-60 (D. Nev. 2013).

discussion of legal and policy matters is essential to the decision-making process of a governmental agency, communications made prior to and as a part of an agency determination are protected from disclosure." *Farley*, 11 F.3d at 1389 (citing *Sears*, 421 U.S. at 151); *see also Warner Commc'ns*, 742 F.2d, at 1161.

Axon's Motion clearly seeks information about the deliberative process of law enforcement agencies: "Axon seeks evidence of *how* the agencies make their clearance decisions…to show that the agencies' decision-making *process* lacks a rational basis." Respondent's Mar. 16 Motion at 2-3 (emphasis added). The request also clearly encompasses "communications made prior to and as a part of an agency determination" to investigate or not, and opinions relevant to the agency decision on that issue, which are protected from disclosure under the deliberative process doctrine. *See In re School Services*, 71 F.T.C. 1703, at *5 (1967) (citation omitted) (denying depositions of agency personnel and noting that attempts to probe the mental processes of agencies in investigating and making enforcement decisions is privileged, as such information relates to an integral part of agency decision-making.).

Topic 3 requests DOJ's "assessments" of similarities and differences in the FTC's Part 3 Rules and Federal Civil Rules. This Topic plainly pertains to the mental processes of DOJ employees and the "frank discussion of legal and policy matters" within agencies that the privilege is meant to protect. *See Farley*, 11 F.3d at 1389 (*citing Sears*, 421 U.S. at 151). Thus, the testimony sought in Topic 3 is also privileged.

Because its subpoena seeks only privileged information, Axon cannot establish that its scope is reasonable. Even leaving aside privilege, Axon's Motion fails because Axon does not and could not justify the scope of its proposed topics. *See* 16 CFR § 3.36(b)(1) ("The motion shall make a showing that…The material sought is reasonable in scope."). In Topic 1, Axon broadly

seeks information regarding *all* "decision-making" employed by DOJ in determining whether to pursue *any* investigation falling within the scope of its concurrent jurisdiction with the FTC over the last *25 years*, but provides no argument supporting the breadth of the topic or the time period specified. Likewise, in Topic 2 Axon seeks information specifically about the Motorola/WatchGuard merger, but does not articulate any plausible connection between decision-making relating to that matter and any issue presented in this case.[3] Topic 3 extends to DOJ's "assessments" of unspecified rules, but Axon provides no basis for its assumption that DOJ has ever conducted such an assessment nor does it explain how DOJ's assessment of any rules would be relevant to issues in this case. If Axon's position is that the Rules of Practice are in some particular respect different from the rules applicable in federal court, DOJ's concurrence or disagreement with that legal position would make no difference to its argument.[4] Finally, Axon makes no attempt to justify its request to depose DOJ about the outcome of *every* litigated merger challenge in the last *25 years*. *See* Topics 4-5.

Axon's proposed subpoena stands in stark contrast to the subpoena authorized by this Court in *In the Matter of Intel Corp.*, 2010 WL 2544424, at *2 (FTC June 9, 2010), cited by Axon, which was unopposed.[5] In *Intel*, the respondent sought a deposition of a government agency for "two hours or less," on "six narrow topics" regarding prices of a single series of microprocessors. *Id.* at

[3] For example, Axon makes no argument that the parties to the Motorola/WatchGuard merger were similarly situated to Axon in its non-reportable, consummated acquisition of VieVu or that Axon was subject to disparate treatment in a "clearance" decision, or any other pre-investigation decision-making relative to the parties to that transaction. *See* Complaint at 4, FN1, Axon Enterprise v. FTC et. al, No. CV-20-00014-PHX-DWL (D. Ariz. Jan. 3, 2020) (alleging that the Motorola/WatchGuard merger was investigated by the FTC).

[4] As Axon itself argues, DOJ only brings cases in federal court and has no expertise in administrative proceedings.

[5] Axon also cites *In re Cabell Huntington Hospital*, 2016 WL 232552 (FTC Jan. 14, 2016), in which the Court granted an unopposed Rule 3.36 motion for the testimony of fact witnesses that appeared on a party's witness list.

*1-3. The respondent in *Intel* did not seek to inquire about privileged agency decision-making or broad and ill-defined topics like "assessments" of unspecified rules, or information about unrelated cases spanning decades.

B. The Material Sought is Outside the Scope of Rule 3.31(c)

A party cannot obtain a subpoena under Rule 3.36 unless it can show that the information sought is within the scope of Rule 3.31(c). 16 CFR § 3.36(b)(2). Rule 3.31(c)(1) permits parties to obtain discovery "to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 CFR § 3.31(c)(1). The information sought must "appear[] reasonably calculated to lead to the discovery of admissible evidence." *Id.*

Under well-established precedent, the Commission's pre-complaint decision-making is outside the scope of Rule 3.31(c). *See In re Exxon Corp.*, 1981 FTC LEXIS 113, at *5-6 (1981) (quoting *Exxon Corp.*, 83 FTC 1759, 1760 (1974)) ("[T]he issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation . . . occurred."); *In re Basic Research LLC*, 2004 FTC LEXIS 210 (Nov. 4, 2004).

Axon thus is not entitled to discovery about its 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 FTC 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 claim that it was unfairly prosecuted); *Basic Research*, 2004 FTC LEXIS 210, at *10-11 ("the issue to be tried is whether Respondent disseminated false and misleading advertising, not the Commission's decision to file the Complaint.").

Discovery about the Commission's other investigatory decisions, including decisions about other matters, are likewise outside the scope of Rule 3.31(c). *In re Sterling Drug, Inc.*, 1976 FTC LEXIS 460, at *8 (Mar. 17, 1976) ("[d]iscovery directed to the Commission's prior proceedings, including formal proceedings, investigations, compliance proceedings and proposed rulemaking proceedings,… is improper since the reasons for the Commission's disposition of these matters, or the reasons for any staff recommendations related thereto, are irrelevant to . . . this proceeding."); *In re Kroger Co.*, 1977 FTC LEXIS 55, at *4 (Oct. 27, 1977) ("prior proceedings ... are beyond the scope of legitimate discovery."). The Commission's internal assessment of applicable rules in relation to investigatory and enforcement decisions is also not discoverable under Rule 3.31(c). *In re LabMD Inc.*, 2014 FTC LEXIS 22 at *14-15 (Jan. 30, 2014) (denying discovery on the Commission's standards for bringing a complaint).

There is no plausible basis to treat DOJ's decision-making differently than the Commission's under Rule 3.31(c). On the contrary: DOJ's decisions to investigate some matters, and not others, are certainly no *more* relevant to the issues to be decided by this Court than the Commission's own decisions to investigate some matters and not others.[6] Axon does not even attempt to argue otherwise. Thus, because the FTC's own pre-complaint decision-making is out of bounds, so is DOJ's. Topics 1-3 are therefore clearly outside the scope of Rule 3.31(c).

[6] Axon's assertion of a vague constitutional defense, which on its face does not challenge any investigatory decision made by DOJ or FTC, including any clearance decision, does not change the contours of Rule 3.31(c). The assertion, in an affirmative defense, of the uncontested fact that the government brings some merger challenges in federal court and others in administrative proceedings cannot expand the scope of permissible discovery under Rule 3.31(c) to encompass every investigatory decision made by an enforcement agency. 16 CFR § 3.31.

C. The Material Sought in Topics 3-5 Can Be Obtained Through Other Means

To satisfy Rule 3.36, Axon must also show that the information it seeks from a government agency cannot reasonably be obtained by other means. 16 CFR. § 3.36(b)(3). But here, Axon has not shown that it is unable to discern the similarities and differences in published procedural rules without a deposition of DOJ. *See* Topic 3. Axon also has not shown that information about the outcome of merger challenges cannot reasonably be obtained through means other than a deposition of DOJ. *See* Topics 4 and 5. Axon's Motion includes the conclusory statement that testimony from DOJ "is the only reasonable way to discover … complete information about the different outcomes in the two forums" but Axon failed to explain why Westlaw, Lexis, or public dockets are not reasonable means to obtain all of this information. Respondent's Mar. 16 Motion at 5. Counsel for Axon is more than capable of conducting legal research using these sources and does not need to depose DOJ to determine the disposition of cases or the meaning of procedural and evidentiary rules.

CONCLUSION

For the foregoing reasons, Axon's Motion to issue a subpoena *ad testificandum* to DOJ should be denied.

Dated: July 13, 2020

By: /s/ Merrick Pastore

Merrick Pastore
Jennifer Milici
Peggy Bayer Femenella
Bureau of Competition
Federal Trade Commission
400 7th Street, S.W.
Washington, D.C. 20024

Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 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:

Julia E. McEvoy
Michael H. Knight
Jeremy P. Morrison
Debra R. Belott
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001
Tel: 202-879-3751
Email: jmorrison@jonesday.com
Email: mhknight@jonesday.com
Email: jmcevoy@jonesday.com
Email: dbelott@jonesday.com

Aaron M. Healey
Jones Day
250 Vesey Street
New York, NY 10281-1047
ahealey@jonesday.com

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 13, 2020

By: /s/ Jennifer Milici
Jennifer Milici