

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.

ORIGINAL

Docket No. D9389

PUBLIC DOCUMENT

RESPONDENT'S MOTION FOR ISSUANCE OF DEPOSITION SUBPOENA *AD TESTIFICANDUM* TO THE DEPARTMENT OF JUSTICE UNDER RULE OF PRACTICE 3.36 AND REQUEST FOR EXPEDITED TREATMENT

Respondent Axon Enterprise, Inc. moves under Practice Rule 3.36 for the issuance of a subpoena *ad testificandum* to a representative from the Department of Justice. Testimony from an agency representative is necessary to shed light on the process by which the Department of Justice and the FTC divide antitrust enforcement activity, which in turn determines whether a merger challenge must proceed in federal court as opposed to an administrative hearing. That process—known as “clearance”—forms the basis of Axon’s affirmative defense that it has been denied equal protection of the laws by being forced, without any rational basis, into an adjudicative proceeding that does not provide the same rights and protections available in federal court. To develop this defense, Axon must have an opportunity to question agency officials about how the clearance process works as there is no applicable statute or regulation that guides it. This motion meets the requirements of Rule 3.36, and should be granted.

ARGUMENT

1. Rule 3.36 is Satisfied. A party seeking the issuance of a subpoena for the appearance of “an official of any Bureau or Office not involved in” an adjudicative proceeding or of “an official or employee of another governmental agency” must show that:

- (1) the information sought is reasonable in scope;
- (2) if for the purposes of discovery, the material falls within the limits of discovery under § 3.31(b)(1), or if for an adjudicative hearing, the material is reasonably relevant; and
- (3) the material cannot reasonably be obtained by other means. 16 C.F.R. § 3.36(a), (b).

All the requirements of Rule 3.36 are met here, so the Motion should be granted. *See In the Matter of Cabell Huntington Hosp., Inc.*, Docket No. 9366, 2016 WL 232552 (F.T.C. Jan. 14, 2016) (granting Motion for Issuance of Subpoenas *Ad Testificandum*); *In the Matter of Intel Corp.*, Docket No. 9341, 2010 WL 2544424, at *1-4 (F.T.C. June 9, 2010) (same).

First, the scope of the testimony Axon requests is reasonable: It relates directly to Axon’s affirmative defense that it was denied equal protection because (1) the FTC and DOJ allocate merger challenges through a “clearance” process that lacks any rational basis, and which (2) grants the FTC in merger cases (like this one) an option for enforcement through its in-house administrative proceeding, where the Commission has consistently found liability in merger cases for the past 25 years, while similarly situated merger cases are heard in federal court with essential structural and procedural protections. *See* Amended Answer, Eighteenth Defense.

Specifically, Axon seeks evidence of how the agencies make their clearance decisions, including in this case, to show that those decisions circumvent constitutional, statutory, and regulatory requirements, as well as typical methods of congressional oversight and judicial review. Axon seeks evidence to show that the agencies’ decision-making process lacks a rational basis and

often rests on a mere coin flip, denying Axon (and other parties) equal protection. The subpoena seeks testimony on precise topics: “[t]he clearance process or other decision-making used to determine whether the FTC or DOJ will investigate a particular proposed merger or consummated merger, including the criteria, procedures, and identity of decision-makers over the past 25 years (and any changes over time)”; and “[t]he clearance process or other decision-making as to whether the FTC or DOJ would exercise authority over the Axon/Vievu merger and the Motorola/WatchGuard merger.” *See* Exhibit A, Attachment 1.

Axon also seeks information regarding the differences between FTC enforcement through administrative adjudication versus federal court proceedings, to demonstrate the substantially different treatment that results from the clearance process. The subpoena’s specific topics include “assessments regarding 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”; and information about “instances when a defendant was found liable”—or “not liable”—in merger challenges brought by the DOJ in federal court in the last 25 years. *See* Exhibit A, Attachment 1.

Representatives from the Department necessarily will have information relating to these narrow and specific topics, which bear directly on a key Axon defense raised in this action. Just recently in this proceeding, the Chief Administrative Law Judge granted Axon’s motion for subpoenas *ad testificandum* where Axon sought “testimony from officials who have personal knowledge regarding” products “at issue in this proceeding.” *See* Order Granting Unopposed Amended Motion for Issuance of Subpoenas *Ad Testificandum* Under Rule 3.36 (Mar. 2, 2020). Here, Axon seeks testimony from a designated agency representative regarding facts “at issue in

this proceeding”—namely, the clearance process and the consequences of decisions made in that process. The testimony sought is reasonable in scope.

Second, the testimony sought is “reasonably expected to yield information relevant to the . . . defense of any respondent,” 16 C.F.R. § 3.31(c)(1). Axon maintains that this proceeding is unconstitutional because, among other reasons, the clearance process violates equal protection guarantees, which require the government to have at least a rational basis for treating similarly situated individuals differently. *See Zobel v. Williams*, 457 U.S. 55, 60 (1982). Federal court and agency proceedings afford parties radically different rights, rules, and protections. And the Commission has regularly ruled against merging parties in administrative proceedings for the past 25 years. Thus, by definition, agreements by the Department and the FTC to allocate merger reviews between themselves treats similarly situated companies very differently. A representative of the Department is expected to testify about the differences between proceedings. This testimony will show that companies are treated differently depending on the nature of the proceeding—judicial or administrative. The testimony will also address whether the government has a rational basis (or any reason at all) for its clearance decisions in general and specifically in this case. *Id.* This information “relate[s] directly” to Axon’s defenses, and thus is relevant. *In the Matter of Intel Corp.*, No. 9341, 2010 WL 2544424, at *3-*4 (F.T.C. June 9, 2010).

Third, Axon cannot reasonably obtain the information by other means. Indeed, because the clearance decision is made informally and not in any public forum, the agencies themselves likely are the *only* source of information about those decisions. There is some information in the public record suggesting that the clearance decision at times comes down to a flip of a coin—literally. *See* Exhibit B, Sen. Mike Lee, Op.-Ed., Just One Agency Should Enforce Antitrust Law, Wash. Examiner (June 17, 2019). Testimony from the Department itself is necessary to lift the

veil on the clearance process and confirm and flesh out this information, which is central to Axon's development of its defense regarding the constitutionality of this proceeding. Similarly, testimony from the Department itself is the only reasonable way to discover its own assessment of differences between federal court and agency administrative proceedings, as well as complete information about the different outcomes in the two forums.

2. This Motion Should Receive Expedited Treatment. The Commission has entered an order rescheduling the hearing date in this matter. The parties have also jointly filed a proposed schedule reflecting a five-week extension of the current discovery schedule. Unless and until that motion is granted, discovery is set to close on April 3.¹ Out of an abundance of caution, Axon requests that this Motion be given expedited treatment. *See In the Matter of Pom Wonderful LLC and Roll Int'l Corp.*, 2011 WL 668512 (F.T.C. Feb. 17, 2011) (approving expedited treatment of motion to allow "sufficient time . . . to prepare for the deposition and finalize the scheduling of the deposition."). Specifically, Axon requests that a response to this Motion be due on March 20, 2020, and that a decision be issued as soon as reasonably possible thereafter to permit Axon to complete this deposition by the close of discovery.

CONCLUSION

For the reasons stated above, Axon respectfully requests that its Motion for Issuance of Subpoena *Ad Testificandum* be granted.

¹ The subpoena attached to the proposed order sets April 3 as the date of the deposition. If this motion is granted and the jointly proposed amended schedule is adopted, Axon would change this to a later placeholder date and would seek to reach agreement with DOJ and Complaint Counsel as to a mutually convenient date.

Dated: March 16, 2020

Respectfully submitted,

s/ Louis K. Fisher

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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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Axon Enterprise, Inc.,

a corporation,

and

Safariland, LLC,

a corporation.

Docket No. D9389

PUBLIC DOCUMENT

RESPONDENT'S MEET AND CONFER STATEMENT

Pursuant to the Scheduling Order issued on January 30, 2020, Respondent submits this statement in support of its motion brought under Rule of Practice 3.36 requesting the issuance of a subpoena directed towards the Department of Justice. Respondent Axon's counsel has conferred with Complaint Counsel in an effort to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. Complaint Counsel has advised Respondent Axon's counsel that it opposes the motion.

Dated: March 16, 2020

Respectfully submitted,

s/ Louis K. Fisher

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EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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In the Matter of

Axon Enterprise, Inc.
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**[PROPOSED] ORDER GRANTING RESPONDENT'S MOTION FOR ISSUANCE OF
DEPOSITION SUBPOENA *AD TESTIFICANDUM* TO THE DEPARTMENT OF
JUSTICE UNDER RULE OF PRACTICE 3.36 AND
REQUEST FOR EXPEDITED TREATMENT**

Respondent Axon Enterprise, Inc. has filed a Motion for Issuance of Subpoena *Ad Testificandum* Under Rule of Practice 3.36. Having considered the Motion, it is hereby ORDERED that the Motion is GRANTED. The unsigned Subpoena *Ad Testificandum* is attached hereto as Attachment 1. The deposition date on the Subpoena may be changed to a later date, as appropriate, before it is issued.

SO ORDERED.

D. Michael Chappell
Chief Administrative Law Judge

Date:

ATTACHMENT 1



SUBPOENA AD TESTIFICANDUM

Issued Pursuant to Rule 3.34(a)(1), 16 C.F.R. § 3.34(a)(1) (1997)

<p>1. TO</p> <p>Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001</p>	<p>2. FROM</p> <p style="text-align: center;">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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This subpoena requires you to appear and give testimony, at the date and time specified in Item 5, at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

<p>3. PLACE OF HEARING</p> <p>Jones Day 51 Louisiana Ave NW Washington, DC 20001 (Or any other location agreed to by the Parties and Deponent)</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Julie McEvoy, Esq. or designee</p>
<p>5. DATE AND TIME OF HEARING OR DEPOSITION</p> <p>April 3, 2020, at 9:00 a.m.</p>	

6. SUBJECT OF PROCEEDING

In the Matter of Axon Enterprise, Inc. and Safariland, LLC, Docket No. 9389

<p>7. ADMINISTRATIVE LAW JUDGE</p> <p>The Honorable D. Michael Chappell</p> <p style="text-align: center;">Federal Trade Commission Washington, D.C. 20580</p>	<p>8. COUNSEL REQUESTING SUBPOENA</p> <p>Julie E. McEvoy Jones Day 51 Louisiana Ave NW Washington, DC 20001 Telephone: (202) 879-3867 Counsel for Respondent Axon Enterprise, Inc.</p>
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DATE ISSUED

SECRETARY'S SIGNATURE

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

via FedEx

on the person named herein on:

(Month, day, and year)

Aaron M. Healey, Esq.

(Name of person making service)

Attorney

(Official title)

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a corporation.**

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**ATTACHMENT TO RESPONDENT AXON ENTERPRISE INC.'S
SUBPOENA AD TESTIFICANDUM TO THE DOJ**

Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 3.33(a), (c)(1), and 3.36, Respondent Axon Enterprise, Inc. ("Axon") seeks the deposition of the DOJ or its designee(s), who shall testify on behalf of the DOJ about matters known or reasonably available to the DOJ, specifically, the topics listed below.

DEPOSITION TOPICS

The DOJ is advised that it must designate one or more employees, officers, directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. The persons so designated shall testify as to matters known or reasonably available to the DOJ relating to the following deposition topics:

1. The clearance process or other decision-making used to determine whether the FTC or DOJ will investigate a particular proposed merger or consummated merger, including the criteria, procedures, and identity of decision-makers over the past 25 years (and any changes over time).

2. 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.
3. The DOJ's assessments regarding 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.
4. The number of, and identifying information about, instances when a defendant was found liable, without appeal or after the exhaustion of any appeals, in a merger challenge brought by the DOJ in federal court in the last 25 years.
5. The number of, and identifying information about, instances when a defendant was found not liable, without appeal or after the exhaustion of any appeals, in a merger challenge brought by the DOJ in federal court in the last 25 years.

DEFINITIONS

1. "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.

2. "FTC" shall mean and refer to the Bureau of Competition within 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.

3. "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.

4. "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.

5. “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.

6. “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.

7. As used herein, “include” and “including” shall be construed to mean “without limitation,” so as to give the broadest possible meaning to requests and definitions containing those words.

8. “Relate to,” “related to,” and “relating to” shall mean in whole or in part concerning, reflecting, alluding to, mentioning, regarding, discussing, bearing upon, commenting on, constituting, pertaining to, demonstrating, describing, depicting, directly or indirectly relating to, summarizing, containing, embodying, showing, comprising, evidencing, refuting, contradicting, analyzing, identifying, stating, dealing with, and/or supporting.

9. Where a topic names a corporation or other legal entity, the topic 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.

EXHIBIT B

Just one agency should enforce antitrust law

by Sen. Mike Lee | June 17, 2019 11:35 AM

Anonymous individuals at the Department of Justice's Antitrust Division and the Federal Trade Commission have recently taken it upon themselves to leak to the media that their respective agencies will soon open investigations of the largest U.S. tech companies. Policing markets with the antitrust laws is key to ensuring that competition benefits consumers.

No industry should be free from antitrust scrutiny, including big tech. But the splitting of this tech antitrust review across two federal agencies, despite the many similar competition issues that will be investigated, illustrates the absurdity of having two federal agencies handling civil antitrust enforcement. It also shows why these investigations are likely to be less effective and coherent than they should be.

According to reports, the FTC will investigate certain conduct by Facebook and Amazon, while the Antitrust Division will look into whether Google and Apple have acted anti-competitively. These investigations will clearly cover much of the same ground. For example, Facebook and Google are both alleged to have used their market power to monopolize digital advertising. Splitting antitrust investigations of these firms between two agencies is just analytically inefficient.

Dividing review of the tech industry also invites conflicts between the agencies on how they analyze competition issues. We already are seeing this kind of dysfunction in how the agencies handle matters relating to intellectual property licensing. With their divvying up the various tech companies between themselves, we're likely to see further divergence in enforcement.

Having two agencies police the same beat also invites bureaucratic pettiness as civil servants place their own agency's interests over those of American consumers and taxpayers. This is perhaps best evidenced by the arcane and ad hoc clearance process used to determine which agency will lead which investigation. In some cases, the Department of Justice and FTC decide which agency will handle a case by a coin flip. Seriously.

The problem here is having two federal agencies responsible for civil antitrust enforcement. This creates a duplication of resources that could be better used on actual antitrust enforcement. Moreover, given the different policies and procedures each agency follows, some industries are subject to a different standard of review just due to an accident of history that determined which agency would have jurisdiction. This is particularly evident in merger

review, where the FTC has the ability to litigate a challenged merger before its in-house^{PUBLIC} administrative court, and then potentially overturn an adverse decision on an appeal that is decided by the very commissioners who voted out the original complaint.

In contrast, the DOJ has to litigate its merger challenges in federal court. The SMARTER Act, introduced during the last Congress, sought to remedy this issue, but that really just addresses a symptom and not the cause of the underlying problem.

Enforcement of the antitrust laws is critical to safeguarding competitive markets that benefit consumers. Congress should focus on ensuring that antitrust enforcement efforts are backed by appropriate resources. One way to further that goal would be to reorganize civil antitrust enforcement so that it is done under one roof. Doing so would result in more coherent, efficient, and effective antitrust enforcement.

Mike Lee is Utah's senior U.S. senator.

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 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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J. Alexander Ansaldo
Peggy Bayer Femenella
Mika Ikeda
Nicole Lindquist
Lincoln Mayer
Merrick Pastore
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*Counsel for Respondent
Safariland LLC*

Counsel for the Federal Trade Commission

Dated: March 16, 2020

s/ Louis K. Fisher

Louis K. Fisher

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 16, 2020

s/ Louis K. Fisher

Louis K. Fisher

Notice of Electronic Service

I hereby certify that on March 16, 2020, I filed an electronic copy of the foregoing Respondent's Motion for Issuance of Deposition Subpoena Ad Testificandum to the Department of Justice Under Rule of Practice 3.36 and Request For Expedited Treatment, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on March 16, 2020, I served via E-Service an electronic copy of the foregoing Respondent's Motion for Issuance of Deposition Subpoena Ad Testificandum to the Department of Justice Under Rule of Practice 3.36 and Request For Expedited Treatment, upon:

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