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dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the opposing party or futility of the amendment,” motions to amend have been granted, even when long periods of time have elapsed between the pleading and motion to amend. *LabMD, Inc.*, 2015 WL 4651650, at \*2 (approving amendment to add new affirmative defense at end of administrative hearing).

Here, allowing Axon’s amendment would “facilitate[]” a “determination of [the] controversy on the merits” by, among other things, focusing the issues and avoiding protracted motion practice over the adequacy of Axon’s original Answer. Axon continues to believe that its as-filed Answer more than meets the Commission’s pleading requirements. But Axon recognizes that avoiding burdensome and wasteful disputes best narrows the issues in this proceeding. In doing so, the parties, and this tribunal, can focus on the merits of the underlying case. Axon’s proposed amendments thus facilitate a determination on the merits.

Permitting an amendment is particularly appropriate where, as here, a respondent moves to amend its Answer in response to Complaint Counsel’s request. *See Otto Bock*, 2018 WL 1028991, at \*2. Axon makes this Motion after discussions with Complaint Counsel who asked for the amendment and who does not oppose the Motion. Axon has no bad faith or dilatory motive. *LabMd, Inc.*, 2015 WL 4651650, at \*2.

Nor does Axon make this Motion after “undue delay.” *Id.* To the contrary, Axon has diligently engaged with Complaint Counsel to resolve this issue expeditiously. Only days after receiving Complaint Counsel’s letter, Axon responded to Complaint Counsel’s concerns and suggested a meet and confer conference to resolve the dispute. Thereafter, Axon and Complaint Counsel continued to communicate and the parties came to an agreement that Axon would amend

its Answer as to these affirmative defenses. This collaborative effort further demonstrates that no undue delay occurred.

Other factors, too, favor granting Axon's Motion: Discovery does not close for several



# EXHIBIT 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

**[PROPOSED] ORDER GRANTING RESPONDENT'S UNOPPOSED MOTION FOR  
LEAVE TO AMEND ITS ANSWER AND AFFIRMATIVE DEFENSES**

Respondent Axon Enterprise, Inc. has filed an

# **EXHIBIT B**



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

<p><b>In the Matter of</b></p> <p><b>Axon Enterprise, Inc., a corporation,</b></p> <p><b>and</b></p> <p><b>Safariland, LLC, a partnership.</b></p>	<p><b>Docket No. D9389</b></p> <p><b>PUBLIC VERSION</b></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  
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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 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 BWCs and DEMS to a variety of customers, including police departments. Axon denies that it is appropriate to describe these products as separate systems because they are sold with separate product BWCs and customers can (and do) purchase the products separately. Consequently, Axon objects to the term "BWC System" as used throughout the Complaint. Axon admits the allegations in paragraphs 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 BWCs enable police departments to store BWC data in a central location, redact non-relevant images of bystanders, share pertinent evidence with prosecutors, and maintain chain of custody of the video for evidentiary use. Axon otherwise denies the allegations in sentence two 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 indirect 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 in the market for BWC Systems sold to large metropolitan police departments (others) Motorola, Panasonic, Watchdog, Uninvo, Metac, Cobanet, Intronis/GoPro, etc. Axon lacks sufficient knowledge or information regarding the vague and undefined phrase "large metropolitan police departments," and thus objects to and denies any allegations relating thereto. Axon denies the characterization because it constitutes a legal conclusion and is based on an improper characterization. Axon denies any allegations resting on the Complaint's selective characterization and quotation of unidentified documents and/or transcripts, and is not leading as it is not identified, speak for themselves. Axon denies the remaining allegations in Paragraph 2.

3. Prior to the Merger, Viewu aggressively competed for the sale of BWC Systems to large, metropolitan police departments in the United States. This competition resulted in substantial price reductions for customers. Axon told its Board in May 2018 that the Viewu business strategy was largely focused on price competition. Axon part because Axon "is not leading as it is not identified, speak for themselves." Axon denies the remaining allegations in Paragraph 3.



Intent leading to the Merger: "I believe this will greatly improve their ability to increase stock actually increased by more than 40% in the month following the announcement."

Response: Axon denies any allegations of selective characterization and quotation of unidentified documents and transcripts, which were used to identify documents and/or transcripts, if and once identified, speak to the remaining allegations in Paragraph 7.

7. The merger will likely entrench the availability of Viewu BWC Systems to customers and will significantly reduce the generation of Viewu hardware and software.

Response: Axon objects to the term "BWC Systems" because BWCs and E-LMS are sold with separate products of Skous and customers can (and do) purchase the products separately. Further, Axon avers that it has renewed all Viewu contracts and invested millions of dollars post-Transaction to improve Viewu's customer base and retention. In addition, Axon has implemented various measures to facilitate the transition to Axon's BWCs and E-LMS, and to ensure that Axon denies the remaining allegations in Paragraph 7.

8. The merger will likely entrench the share of the Federal market and would significantly increase the share of sales by officer count of BWC Systems to large, metropolitan areas 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 specific phrase "large, metropolitan areas" and "share of sales by officer count of BWC Systems to large, metropolitan areas in the United States" relating thereto. Axon's denial is based on the fact that the allegations are an improper matter of speculation.

9. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, the merger would be more than 500 points concentrated market by well over 200 points.



**Response:**

**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-**

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







## VI. MARKET STRUCTURE AND THE MERGER'S PRESUMPTIVE ILLEGALITY

30. The market for police body-worn video systems to large departments based in the United States is highly concentrated. Prior to the Merger, Respondent Axon was already the dominant force in this market, with over [REDACTED] of the relevant market share. In light of this dominance—in a company presentation, it implored its salespeople to “embrace being the gorilla” and Respondent Axon described the market as a “really strong, highly concentrated, with Respondent Axon being the gorilla” market by officer count.

Respondent Axon's response to the complaint is highly evasive and lacks sufficient detail. Axon lacks sufficient evidence regarding the vague and undefined phrase “large, metropolitan police departments” and denies any allegations that rest on an improper market definition. Axon avers that its quotation of unidentified documents and/or transcripts, asserted without attribution or context, is misleading as named, “after further analysis of 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. Metropolitan, regional, 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. [REDACTED] Systems [REDACTED]

Consequently, these other competitors rarely provided significant competitive constraint on RFP processes conducted by large, metropolitan [REDACTED]

response is required. To the extent a response is required, the answer is no. Moreover, Axon lacks sufficient evidence regarding the market definition. [REDACTED] “large, metropolitan” relative to the market. [REDACTED] market definition, and any allegations that refer to BWCS 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 [REDACTED] (and do) purchase the products separately.

32. [REDACTED] customers (i.e., not just large, metropolitan police departments). [REDACTED] 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.**

vague

36. **Response:** Axon lacks sufficient information to admit or deny the allegation in sentence one of Paragraph 36. To the extent a response is required, the phrase "closest competitors" 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 in Paragraph 36. The comments and/or transcripts, if and once identified, speak for themselves and Axon denies the allegations inconsistent with. Axon denies the

**Response:** Axon lacks sufficient information to admit or deny the allegation in sentence one of Paragraph 36. To the extent a response is required, the phrase "closest competitors" 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 in Paragraph 36. The comments and/or transcripts, if and once identified, speak for themselves and Axon denies the allegations inconsistent with. Axon denies the

37. **Response:** Axon lacks sufficient information to admit or deny the allegation in sentence one of Paragraph 37. To the extent a response is required, 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 in Paragraph 37. The comments and/or transcripts, if and once identified, speak for themselves and Axon denies the allegations inconsistent with. Axon denies the

**Response:** Axon lacks sufficient information to admit or deny the allegation in sentence one of Paragraph 37. To the extent a response is required, 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 in Paragraph 37. The comments and/or transcripts, if and once identified, speak for themselves and Axon denies the allegations inconsistent with the actual contents thereof.

38. **Response:** Axon lacks sufficient information to admit or deny the allegation in sentence one of Paragraph 38. To the extent a response is required, the phrase "best offerings" 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 in Paragraph 38. The comments and/or transcripts, if and once identified, speak for themselves and Axon denies the allegations inconsistent with. Axon denies the

**Response:** Axon objects to and denies the allegations in Paragraph 38 because it lacks sufficient knowledge regarding the market and undefined phrase "best offerings by a significant margin."

metropolitan police agencies.” Moreover, Axon lacks sufficient knowledge or information about the bidding process, the criteria by which bids are evaluated, or the criteria by which bids are selected, and denies the allegations in sentence two of Paragraph 38 for this additional reason.

Respondent Axon and Viewu vigorously and consistently competed on an equal basis in an effort to win large, metropolitan police agencies. Respondent Sairiland 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 cuts in the market considered disruptive pricing and new pricing strategy was to “win on price typically less than Axon.”

Response: Axon’s response is insufficient to rebut the above allegations. Axon’s response is an undefined phrase “larger metropolitan police departments” and does not rebut the above allegations in Paragraph 39 relating thereto. Moreover, Axon lacks sufficient knowledge or information regarding Viewu’s strategy and pricing prior to the Transaction. Axon’s denial of the allegations relating thereto, further, Axon’s aver’s that the selective use and quotation of partially or wholly identified communications, documents, or testimony asserted without context, is misleading as framed. The communications, documents, or transcripts, if and once identified, speak for themselves and do not rebut the allegations in Paragraph 39 to the extent inconsistent therewith.

40. Competition between Respondent Axon and Respondent Viewu, and Respondent Sairiland, substantially lower prices for police agencies. Respondent Viewu, Respondent Sairiland, and Respondent Axon all received substantially lower prices for police agencies. Respondent Viewu’s lower pricing for police agencies caused Respondent Axon’s prices to be higher than Respondent Viewu’s prices for police agencies, and Respondent Axon’s offering better terms.

Response: Axon lacks sufficient knowledge or information about the bids that particular agencies received or how they compared one to another, and denies the allegations in Paragraph 40 relating thereto. Axon denies the remaining allegations in Paragraph 40.

41. Respondent Axon’s development of various innovative features such as auto-activation of BWCs is the result of an officer authorizing a gun or Taser, or a computer-assisted facial redaction tools for police agencies, and Respondent Axon’s development of these features is a result of this innovation competition.

Response: Axon denies that it is appropriate to describe BWCs and DEIMS as inseparable “BWC Systems” because they are sold with separate products.











**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.**

**C. Failing Firm**

**56.**

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 ~~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 ~~essence~~ 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 ~~Walt~~ and Safe Fleet, through its recent acquisition of ~~Mobilis~~ision, 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

### ELEVENTH DEFENSE

Efficiencies and other procompetitive benefits, and all proffered anticompetitive effects. The acquisition of Viewu merger-specific efficiencies. 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, the acquisition of Viewu provides procompetitive quality benefits that flowed to former Viewu customers, including improved customer and better and more reliable service, which Viewu could 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

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 \$15 million in debt on its balance sheet, purchase commitments, and other obligations, including days operating expenses. Viewu's dire financial condition

Safariland had been engaged in good faith efforts to sell Viewu for some time before. It had already engaged Evercore, an investment bank, to solicit potential purchasers with no minimum price. As of early 2018, Safariland had not been able to sell Viewu. When Safariland turned to Axon, the buyer of last resort. At that point, 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 fails to meet the requirements of a financially viable firm. As of the date of the transaction, Viewu was unable to meet its near-term financial obligations.

### THIRTEENTH DEFENSE

In addition to being a failing division or firm, Viewu was not a financially viable firm. 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. The Complaint's market share statistics dramatically skew Viewu's competitive significance and ignores competitors' reality.



Further, design defects in Viewu's BWC and DELM3—including a widely publicized fire involving a BWC issued to a NYPD officer—could have further strained Viewu's resources, diminished its ability to compete with customers, and further harmed its reputation. Thus, Viewu's financial performance since its acquisition would have continued to decline and, in addition to not having constrained Axon or spurred meaningful innovation or self-insurance, Viewu's status as a failing division or firm, Viewu was a failing firm. Even if Viewu would have been able to meet its financial obligations or was not a failing firm (not), the Complaint's market share statistics overstate Viewu's ability to compete post-acquisition.

**FOURTEENTH DEFENSE**

These Proceedings violate the separation of powers and the 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 the adjudication of the Complaint by the Administrative Law Judge and the removal of the Commissioners violate the separation of powers.

**SEVENTEENTH DEFENSE**

These Proceedings are invalid because adjudication of the Complaint by the Administrative Law Judge and the removal of the Commissioners violate the Fifth Amendment to the Constitution, which requires a neutral decision-maker.

**EIGHTEENTH DEFENSE**

These Proceedings violate the right to due process under the Constitution, which requires procedural protection of the right to sue. The Complaint 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: February 27, 2020

*/s/ Aaron M. Healey*

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*Counsel for Respondent Axon Enterprise, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 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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J. Alexander Ansaldo  
Peggy Bayer Femenella  
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*Counsel for Respondent  
Safariland LLC*

*Counsel for the Federal Trade Commission*

Dated: February 2 , 2020

*s/ Julie McEvoy*

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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: February 2 , 2020

*s/ Julie McEvoy*

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Julie E. McEvoy

Notice of Electronic Service

I hereby certify that on February 27, 2020, I filed an electronic copy of the foregoing Respondent's Unopposed Motion for Leave to Amend Its Answer and Affirmative Defenses, 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 February 27, 2020, I served via E-Service an electronic copy of the foregoing Respondent's Unopposed Motion for Leave to Amend Its Answer and Affirmative Defenses, upon:

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## Complaint

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