

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Noah Joshua Phillips
Rohit Chugh
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of

Axon Enterprise, Inc.,
a corporation,

and

Safariland, LLC,
a corporation.

DOCKET NO. 9389

PUBLIC VERSION

ORDER DENYING RESPONDENT'S MOTION FOR A STAY

On January 10, 2020, Respondent Axon Enterprise, Inc. (“Axon”) filed a motion to stay this administrative proceeding pending judgment on Axon’s complaint seeking declaratory and injunctive relief in federal district court, or in the alternative, entry of an order in that court on Axon’s motion for a preliminary injunction. Complainant’s counsel oppose the motion. For the reasons stated below, we deny Axon’s motion to stay.

I. BACKGROUND

On January 3, 2020, the Respondents Axon and Safariland, LLC (“Safariland”) challenging Axon’s acquisition of VieVu LLC (“VieVu”) from Safariland, a manufacturer of body-worn camera (“BWC”) hardware and software, and supplier of body-worn camera and digital evidence management systems (collectively, “BWC Systems”), and VieVu is its closest competitor. 17 Comp. ¶¶ 1-2, 30. Axon purchased VieVu from Safariland in May 2018. *Id.* ¶ 2. The Complaint asserts that, after Axon enacted substantial changes to its BWC Systems, it has lost many of its customers, and stopped developing new generations of VieVu hardware and software. *Id.* ¶¶ 6-7. The Complaint asserts that Axon plans

Id. ¶ 7

allowing the administrative action to continue would waste resources and subject Axon to the very proceeding it asserts is unconstitutional, *id.*, while intruding on the district court's decision-making. *Id.* at 5. At the same time, Axon argues, a stay would cause no harm to the Commission. *Id.* at 3-4. These arguments fail on all counts.

Proceeding administratively is unlikely to waste resources because Axon's federal action is likely to fail for lack of subject-matter jurisdiction. In attempting to convince the district court to upend a century-old administrative system, Axon seeks to bypass a comprehensive, statutorily-established process for judicial review. The FTC Act expressly lays out a process pursuant to which the Commission may bring

protection and due process guarantees by giving the SEC “unguided” authority to choose which respondents would receive the procedural protections of a federal district court); *see also Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 496 (D.C. Cir. 2018) (holding that a “comprehensive scheme of administrative review, followed by judicial review in a court of appeals, makes it clear that Congress implicitly precluded district court jurisdiction”). Because the district court likely lacks jurisdiction to adjudicate Axon’s claims, there is no good cause to stay this proceeding.³

2020, even more compelling reasons to move quickly where, as here, a competitor has sought to cause ongoing harm. The Complaint alleges that, after the acquisition, Axon implemented substantial price increases, limited the availability of ViewDBC systems to customers, and stopped developing new generations of ViewDBC hardware and software. FTC Compl. ¶¶ 61-63. The Complaint also alleges that Axon's actions have caused significant harm to its customers.

Id. ¶ 7. If, as the complaint alleges, Axon's actions have caused significant harm to its customers, and if Axon's actions are likely to cause ongoing harm to its customers, and if Axon's actions are likely to cause ongoing harm to its customers, it is urgent that the Commission move quickly to remedy the violation. There is a strong public interest in the prompt resolution of this matter.

Axon argues that we should nevertheless stay this proceeding because it could still be resolved through antitrust claims in Axon's declaratory judgment action. Motion ¶¶ 3-4. In effect, Axon asks us to cede this administrative proceeding in favor of litigation in the forum of its own choosing. But we have previously explained that “[t]o allow respondents to stay FTC proceedings based on the pendency of collateral federal actions that they themselves have initiated would encourage duplicative proceedings, and would place respondents, rather than the Commission, in control of the administrative proceedings schedule.” *N.C. Bd. of Dental Examiners v. FTC*, 775 F.3d 820, 843 (D.C. 2015). As the D.C. Circuit recognized, “Congress granted the Commission the authority to resolve disputes, and that authority would be undermined if respondents could countermand the Commission’s choice by filing a declaratory judgment action.” *Id.*, 775 F.3d at 17 (discussing *FTC v. Actavis*, 755 F.3d 1103 (D.C. 2014)).

The fact that Axon has filed a declaratory judgment action in federal court does not change the analysis. As courts have repeatedly held, when a party files a declaratory judgment action in order to preempt an imminent complaint and deprive the complainant of his choice of forum, the party should not be rewarded with a stay of the courthouse. See, e.g., *United Tech. Corp. v. IBM Corp.*, 2002 WL 773007, at *2 (S.D.N.Y. June 13, 2002) (“Courts may ignore the timing of a suit to avoid rewarding parties attempting to use the declaratory judgment action in a race to the courthouse”); (citation and quotation omitted); *Solvay Int’l Pharm. v. PF Corp. v. PSI, Inc.*, 121 F. Supp. 1060, 1063 (D.C. 1989) (denying motion to dismiss or stay pending an earlier-filed declaratory judgment action because the earlier action was filed in a “clearly obvious attempt to deprive the potential plaintiff of its choice of forum”); see also *AmSouth Bank v. Dale*, 386 F.3d 763, 768 (6th Cir. 2004) (“Courts take a dim view of declaratory plaintiff who seems to have done so for the purpose of acquiring a favorable forum.”); *Hyatt Int’l Corp. v. Hyatt Corp.*, 302 F.3d 707, 718 (7th Cir. 2002) (“We have expressed wariness of the prospect of a suit for declaratory judgment filed solely at wresting the choice of forum from the natural plaintiff.”) (citation and quotation omitted); cf. *Hill*, 825 F.3d at 1248-49 (“It makes no sense to allow the Gray respondents to file their complaint in the face of an impending, rather than extant, enforcement action”).

In light of the low likelihood of a favorable ruling for Axon in federal court, the absence of cognizable harm to Axon, and the significant public interest in expeditious

adjudication and stopping any ongoing competitive harm, we find no good cause to stay this proceeding.

Accordingly,

IT IS ORDERED THAT the Motion of Respondent Axon Enterprise, Inc., to Stay the Administrative Proceeding is **DENIED**.

By the Commission.

April Tabor
Acting Secretary

SEAL:
ISSUED: February 27, 2020