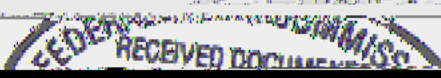


UNITED STATES OF AMERICA



case that the clearance policy violates its Fifth Amendment right to due process and protection of the laws by forcing some parties, like Axon here, to defend antitrust actions in an administrative proceeding without the procedures and rights available in federal court. *Id.* Eighteenth Affirmative Defense.

On March 3, Axon served Complaint Counsel with its First Set of Interrogatories. Complaint Counsel responded on July 20. *Ex. B*, Complaint Counsel's Responses & Objections to Axon's First Set of Interrogatories. Complaint Counsel objected to Axon's interrogatories relating to the clearance policy and its consequences (Interrogatory Nos. 18-23) chiefly on three grounds, arguing that they (1) fall outside the scope of discovery under Rule 3.31(c)(2), (2) are irrelevant, or (3) seek privileged information. But the information Axon seeks is within the scope of discovery under Rule 3.31(c)(2), relevant to Axon's defense of this matter and not privileged. This Motion should be granted.

ARGUMENT

The ALJ "shall order" responses to discovery requests "unless the Administrative Judge determines that the objection is justified." 16 C.F.R. § 3.38(a). Complaint Counsel's objections are not justified. Good cause justifies these interrogatories. The information sought is relevant to Axon's defense of this matter and not protected by any privilege.

1. Good cause supports Axon's interrogatories relating to the clearance process.

Rule 3.31(c)(2) allows discovery in addition to discovery collected during an investigation—from "Bureaus or Offices that investigated the matter upon a showing of good cause." *In the Matter of 1800 Contacts, Inc.*, No. 9372, 2016 WL 7634657, at *3 (F.T.C. Dec. 20, 2016). Good cause supports a discovery request for information that is relevant, reasonable in scope, and, if public, not available from another source. *Id.*

Interrogatories 1-23 are relevant to Axon's defense of this matter. These interrogatories seek "to defend against the allegations of the Complaint" and "relate directly to those contentions raised in Axon's defenses to the Complaint. *In the Matter of Intel Corp.*, No. 9341, 2010-2544424, at *1, 3-4 (F.T.C. June 9, 2010). Axon contends that it has been denied equal protection because the uncodified clearance process directs some parties to an administrative proceeding and some parties to federal court, without a rational basis for this differential treatment of similarly situated parties. *See* Eighteenth Affirmative Defense. Its interrogatories seek to prove up Axon's defense. They seek information about the process by which the government enters whether through the FTC or the Department of Justice leads an investigation and eventual enforcement action (Interrogatory 20), how the government has implemented that process (Interrogatories 21, 22) and the results of that process, including whether it has resulted in differential treatment of similarly situated parties (Interrogatories 19), and ultimately whether it has resulted in different remedies (Interrogatory 23). *See* Ex. B, Complaint Counsel's Objections and Responses to Axon's First Set of Interrogatories.

These requests are reasonable in scope and stated with reasonable particularity. Complaint Counsel objected that Interrogatories 20, 21, 22, and 23 propose an overbroad time scope. But the 25-year time scope set out in these requests is *reasonable* and tied to the FTC's long-running enforcement winning streak in its own forum. *See* Amended Motion to Compel Production of Documents Responsive to Respondent's Second Set of Requests for Production (July 14, 2020) ("Motion to Compel") at 34; Respondent's Opposition to Complaint Counsel's Motion to Quash Notice of Deposition (July 23, 2020) ("Opposition to Motion to Quash") at 7. And as in the parties' earlier discovery disputes concerning clearance, the time scope of the requests is beside the point. Complaint Counsel has not provided answers to these requests for a period of time. Indeed

Complaint Counsel appears to consider ~~time~~ scope for discovery on these topics to unreasonable. *See* Motion to Compel at 4.

Finally, Axon has good cause to seek this discovery because the information it seeks the clearance process is not otherwise available. Complaint Counsel objected that Interrogatories 18, 19, and 23 impose undue burden because they seek information available to the public. The completeness of available public records that may inform responses to these interrogatories is unclear, and in any event, it is implausible that information available to the public is the information responsive to these requests. ~~Opposition to~~ Motion to Quash at 7. Particularly given that Complaint Counsel has denied Axon's requests for admission seeking to establish the Commission's win/loss rate, Axon must be able to test these assertions through its interrogatories. ~~2.~~ Complaint Counsel's other objections are not justified.

Good cause aside, Complaint Counsel further objects that Interrogatories 23 seek information that is either irrelevant or privileged. The relevance of this information is part of the good cause analysis, and informat

(D.C. Cir. 1980) (ordering disclosure of memoranda reflecting “established policies decisions”). And even if it were, a blanket objection on privilege grounds does not shield Complaint Counsel’s obligations to respond to Axon’s discovery requests. *Motion to Compel* at 5.

CONCLUSION

For the reasons stated above, Axon respectfully requests that its Motion to Compel be granted.

Dated: August 11, 2020

Respectfully submitted,

s/ Julie E. McEvoy

Pamela B. Petersen
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Julie E. McEvoy
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LPivoF4 27. (i)-2 h-2 (e)4 7

*Counsel for Respondent
Axon Enterprise, Inc.*

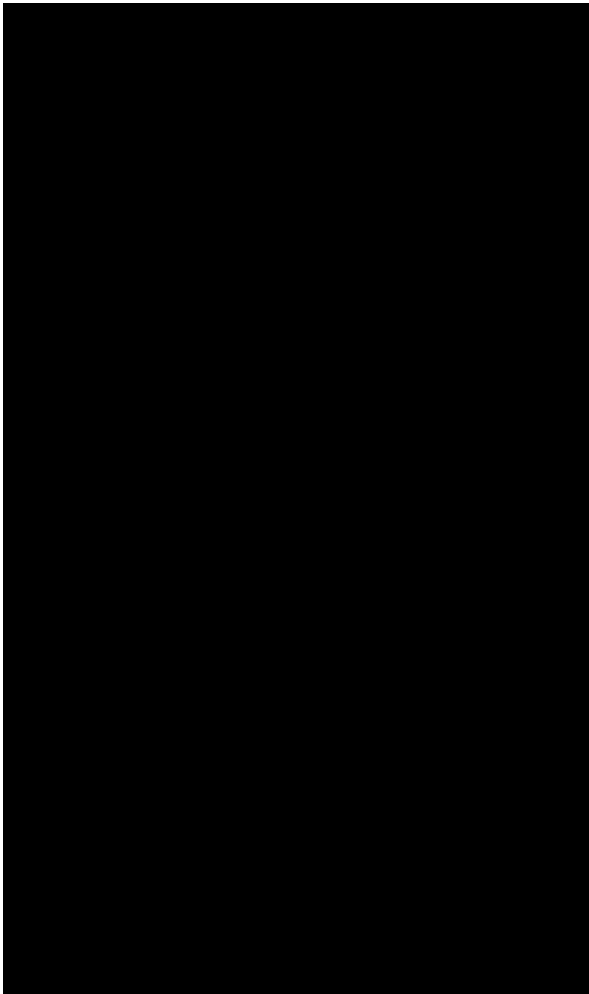
CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2020, I filed the foregoing document electronically using the FTC's eFiling 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



EMC /P <</MCID 22 >h

Dated: August 11, 2020

s/ Julie E. 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 document.

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 MOTION TO COMPEL
RESPONSES TO INTERROGATORY NOS. 18-23

Respondent Axon Enterprise, Inc. has filed a Motion to Compel Interrogatory Responses. Having considered the Motion, it is hereby ORDERED that the Motion is GRANTED. It is hereby ORDERED:

1. Complaint Counsel's objections to Axon's Interrogatory Nos. 18-23 are OVERRULED.
2. Complaint Counsel is hereby ORDERED to respond to Axon's Interrogatory 18-23.

SO ORDERED.

D. Michael Chappell
Chief Administrative Law Judge

Date:

EXHIBIT B

permissible discovery under Rule 3.31(c)(2). Complaint Counsel's responses will conform with the Commission's Rules of Practice for Adjudicative Proceedings

work product claim. Pursuant to Rule 3.31(g), the inadvertent production of any privileged information shall not constitute a waiver of the applicable privilege.

8. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories purport to require Complaint Counsel to conduct a search beyond that required by Rule 3.31(c)(2) or Rule 3.35(a)(1).
9. Complaint Counsel objects to Respondent's Interrogatories to the extent they are overly broad, vague, ambiguous, unduly burdensome, oppressive, and are not reasonably calculated to yield information relevant to the allegations of the Complaint, to the proper defense of the defenses of Respondent.
10. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories call for information previously provided to Respondent.
11. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories seek information that may be less onerously obtained through other means.
12. Complaint Counsel objects to each interrogatory to the extent that it seeks information which the burden of deriving or ascertaining the answer is unduly the same for the party serving the interrogatory as for the party served.
13. Complaint Counsel objects to Respondent's Interrogatories to the extent that, as framed, they purport to obligate Complaint Counsel to conduct an extensive and complete investigation of detailed facts within the thirty (30) days allotted for its responses and objections where the facts are known to Respondent and/or contained in the hundreds of thousands of pages of documents already produced by Respondent Axor or produced by third parties.
14. Complaint Counsel's discovery and investigation in this matter are continuing. The responses and objections are made on the basis of information currently available to

21. Complaint Counsel objects to Respondent's Definition 6. Complaint Counsel does not have knowledge of all of the employees, agents, representatives, attorneys, or anyone else or who has acted on behalf of the Department of Justice.
22. Complaint Counsel objects to Respondent's Definition 11 to the extent the requests are directed to the Federal Trade Commission rather than to Complaint Counsel and to the extent that Complaint Counsel does not have knowledge of actions conducted by other government entities.
23. Complaint Counsel objects to Respondent's Definitions 12 and 13 of "BWC" and "DEN" to the extent Respondent has characterized these as separate products.
24. Complaint Counsel objects to Respondent's Definitions 17, 19, 24, 25, 26, 27, 28, and 29 because they are overly burdensome and seek to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings, including seeking information that is beyond the scope of permissible discovery under Rule 3.31(c)(2) or any applicable orders of Chief Administrative Law Judge Chair

26. Complaint Counsel objects to Respondent's instruction

RESPONSE:

INTERROGATORY NO. 10:

State the basis for your allegation that “[t]he result [of the Transaction] is likely to be higher prices, inferior services, and reduced quality and innovation” including describing how services will allegedly be inferior and how quality will be reduced. (See Complaint ¶ 35.)

RESPONSE:

In addition to its General Objections, Complaint Counsel objects to the interrogatory premature to the extent it seeks information relating to issues that may be the subject of e testimony in this case. Complaint Counsel also objects to this interrogatory as premature a unduly burdensome because it is a contention interrogatory and no response is required p the close of discovery pursuant to Rule 3.35(b)(2) the Court’s Scheduling Order. Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set for Rule 3.35(b)(2) and the Court’s Scheduling Order

INTERROGATORY NO. 11:

State the basis for your allegation that “[n]ew entry or repositioning by existing producers would not be timely, likely, or sufficient to counteract the anticompetitive effects of the [Transaction].” (See Complaint ¶¶ 10, 54.)

RESPONSE:

In addition to its General Objections, Complaint Counsel objects to the interrogatory premature to the extent it seeks information relating to issues that may be the subject of e

the close of discovery pursuant to Rule 3.35(b)(2) the Court's Scheduling Order. Complaint Counsel will supplement its answer, appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2) and the Court's Scheduling Order.

INTERROGATORY NO. 13:

Identify by Bates range all Documents produced to you during the course of your Investigation or this Litigation that support your allegation that "[t]here are high switching costs related to the transfer of metadata for video files, and customers are sticky because moving to a new provider and training officers on a new platform is challenging and expensive." (Complaint ¶ 54.)

RESPONSE:

In addition to its General Objections, Complaint Counsel objects to the interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required until the close of discovery pursuant to Rule 3.35(b)(2) the Court's Scheduling Order. Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2) and the Court's Scheduling Order.

INTERROGATORY NO. 14:

State the basis for your allegation that "[Axon] cannot show that ~~specific~~ efficiencies would result from the [Transaction] that will offset the anticompetitive effects." (Complaint ¶¶ 11, 55.)

RESPONSE:

In addition to its General Objections, Complaint Counsel objects to the interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required until the close of discovery pursuant to Rule 3.35(b)(2) and the Court's Scheduling Order. Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2) and the Court's Scheduling Order.

INTERROGATORY NO. 15:

State the basis for your allegation that "[Axon] cannot demonstrate that [Safariland] is a failing firm under the criteria set out in the Horizontal Merger Guidelines." (See Complaint ¶ 56.)

RESPONSE:

In addition to its General Objections, Complac Counsel objects to the interrogatory a

INTERROGATORY NO. 18:

Identify each proceeding initiated by the FTC pursuant to 16 C.F.R. § 3.1 et seq. in the last twenty-five years where the respondent was the prevailing party following appellate or other review by the FTC.

RESPONSE:

In addition to the General Objections, Complaint Counsel specifically objects to the interrogatory as irrelevant to the allegations of the Complaint, to the proposed relief, or to the defenses of Respondent. Complaint Counsel also objects to the interrogatory to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission of Practice for Adjudicative Proceedings, including seeking information that is beyond the scope of permissible discovery under Rule 3.31(c)(2). Complaint Counsel further objects to the interrogatory as vague and ambiguous as to the meaning of the terms "proceeding," "initiated by the FTC," "16 C.F.R. § 3.1 et seq.," "prevailing party," "appellate," "other review," and "by the FTC." Complaint Counsel further objects to the interrogatory on the grounds of overburden and overbreadth as to the length of time, as the interrogatory seeks information from the past twenty years. The information responsive to this Interrogatory is available through legal research databases and public records and the burden of identifying information responsive to this Interrogatory is no greater on the Respondent than on Complaint Counsel.

INTERROGATORY NO. 19:

Identify every merger challenge brought by the FTC in federal court in the last twenty-five years, and for each challenge identified, state whether a preliminary injunction was granted or denied, and whether the respondent was found liable or not liable after the exhaustion of appeals.

RESPONSE:

In addition to the General Objections, Complaint Counsel specifically objects to the interrogatory as irrelevant to the allegations of the Complaint, to the proposed relief, or to the defenses of Respondent. Complaint Counsel also objects to the interrogatory to the extent it seeks to impose duties and (t)28 (o)828 ()0.1(d(t)28I(d(t)28IR5 (r)-7.5 (o)-28 (g)34.5 (a)-{

Describe the criteria, procedures, and identity of decision makers over the past twenty-five years (including any changes over time) relating to the clearance process and decide whether the FTC or the DOJ will or would lead an investigation into a consummated or proposed merger, including, without limitation, a description of whether such procedures change depending on whether the merger meets the threshold requirements under Section 8 of the Act.

RESPONSE:

In addition to the General Objection, Complaint Counsel specifically objects to this information being withheld under the FOIA exemption of 5 U.S.C. § 552(b)(5) and (b)(7)(C) as it is protected by any privilege or other applicable law.

For each instance in the past ~~twenty~~ ^{fifty} years when a random selection mechanism was used in the decision as to whether the FTC or DOJ would lead an investigation into a consummated or proposed merger, identify ~~the year~~ ^{the year} and the parties to the transaction or propo

- x Investigational Hearing Transcript of Patrick Smith, September 20, 2019
- x Investigational Hearing Transcript of Joshua Isner, September 18, 2019
- x Investigational Hearing Transcript of Sean McCarthy, October 14, 2019
- x [https://s22.q4cdn.com/113350915/files/doc_presentations/2019/08/AXON-IR-PresentationAugust-26-2019-\(1\).pdf](https://s22.q4cdn.com/113350915/files/doc_presentations/2019/08/AXON-IR-PresentationAugust-26-2019-(1).pdf)
- x <https://www.bloomberg.com/news/articles/2018-04/the-biggest-police-body-cam-company-is-buying-its-main-competitor>
- x <https://www.fool.com/investing/2018/05/18/is-there-any-stopping-axon-enterprise-now.aspx>
- x <https://www.axon.com/news/cooperative-contracts-webinar>

I state under penalty of perjury that the above Complaint Court Responses And Objections
To Respondent Axon's First Set Of Interrogatories (Nos. 1-25) prepared and assembled

CERTIFICATE OF SERVICE

I hereby certify that on July 20,

Notice of Electronic Service

I hereby certify that on August 11, 2020, I filed an electronic copy of the foregoing Respondent's Motion to Compel Interrogatory Responses, with:

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

Donald Clark
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I hereby certify that on August 11, 2020, I served via E-Service an electronic copy of the foregoing Respondent's Motion to Compel Interrogatory Responses, upon:

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