

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



In the Matter of

Axon Enterprise, Inc.
a corporation;

and

Safariland, LLC,
a corporation.

DOCKET NO. 9389

ORIGINAL

COMPLAINT COUNSEL’S OPPOSITION TO
RESPONDENT’S MOTION TO ADJOURN HEARING
FROM MAY 21 UNTIL JUNE 15, 2020

Complaint Counsel respectfully asks this Court to deny Respondent Axon Enterprise, Inc.’s (“Axon”) motion seeking to adjourn the hearing right after opening statements for a 25-day period—from May 21 until June 15—to accommodate one individual’s vacation plans.

ARGUMENT

Respondent Axon is seeking to interrupt the evidentiary hearing in this matter for three-weeks merely to accommodate the vacation plans of Pam Petersen, who is one member of Axon’s in-house counsel. Assuming *arguendo* that Axon’s filing is sufficient to establish that Ms. Petersen’s planned vacation is a substantial and unresolvable conflict, Axon’s motion fails because Ms. Petersen’s presence at the entire hearing is not essential. Adjournments to accommodate the vacation plans of in-house attorneys like Ms. Petersen are not a normal part of judicial proceedings and the interruption of the hearing is therefore impermissible under Rule 3.41(b).

Pursuant to Rule 3.41(b), “[h]earings shall proceed with all reasonable expedition, and, insofar as practicable, . . . shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded.” The adjournment sought by Respondent is neither for a “brief interval” nor “of the sort normally involved in judicial proceedings.” In fact, Respondent has provided no instance, and Complaint Counsel is unaware of any, where this Court or the Commission has interrupted a scheduled hearing to accommodate an in-house attorney’s personal conflict. Ms. Petersen’s presence at the hearing may be helpful to Respondent, but if adjournments to accommodate the personal schedules of every attorney or executive whose presence is helpful but not necessary were “normally involved in judicial proceedings,” judicial proceedings would rarely conclude.¹

Here, Ms. Petersen’s presence is not necessary for the evidentiary hearing. The Respondents in this case are Axon and Safariland. Ms. Petersen is not a respondent, the complaint contains no allegations about her conduct, and her name is not on any witness list. Her absence from the hearing will not change the evidence submitted.

Ms. Petersen is also not lead counsel in this case.² *Cf In re Raging Wire*, Docket No. 9386, Jan. 6, 2020 (declining to delay the commencement of a hearing for a month due to *lead counsel’s* vacation plans but allowing a two-week delay instead under the “good cause” standard).³ Instead, Respondent has hired “well-qualified counsel” to represent it. *In re Axon*

¹ Given the number of attorneys involved in litigation, if the Court interrupts the hearing for Ms. Petersen’s vacation, it is reasonable to assume that the new hearing schedule will conflict with someone else’s long-planned vacation, wedding, or other immovable conflict.

² Respondent’s lead counsel also has a scheduling conflict and Complaint Counsel has no objection to a short two-day recess to accommodate that conflict.

³ Axon styles its motion as one to adjourn after opening statements rather than one to delay commencement of the hearing. Accordingly, Respondent’s motion and this opposition focus on

Enterprise and Safariland, LLC, Jan. 23, 2020 (Order Denying Respondent's Motion to Modify the Protective Order). Indeed, six partners from the international law firm Jones Day have made appearances in this matter and appear on the motion to adjourn.

Additionally, Ms. Petersen is not the only in-house litigator employed by Respondent. Speaking with Jim Cramer on CNBC's *Mad Money* about Axon's lawsuits with the FTC, Axon CEO Rick Smith stated: "Unlike most companies, at Axon we litigate a lot. Because we make police equipment. So we have a full-time litigation team and they are spectacular. And I'm excited to see the work they've done on this case, and we're excited to take it to court." *Mad Money with Jim Cramer*, "Taser-maker Axon CEO: It's too soon to say if forecast cuts are necessary in wake of anti-trust suit," 2:50-3:04, CNBC (Jan. 6, 2020), [available at https://www.cnbc.com/video/2020/01/07/axon-ceo-it-is-too-soon-to-say-if-anti-trust-suit-will-impact-profits.html](https://www.cnbc.com/video/2020/01/07/axon-ceo-it-is-too-soon-to-say-if-anti-trust-suit-will-impact-profits.html).

While Ms. Petersen is not a respondent, a witness, or lead counsel, Respondent argues that the hearing ought to be interrupted and rescheduled to accommodate her vacation plans. Respondent's argument is premised on conclusory assertions that do not withstand scrutiny.

First, Respondent asserts that Ms. Petersen has made an appearance in this case and is taking a leading hands-on role defending Axon. Axon Mot. at 2. But Respondent does not describe what exactly Ms. Petersen is doing or why no one else on its large team of in-house and outside counsel could step in and do that work during her vacation. Respondent states that "Ms.

the standard for interrupting hearings under the first sentence of Rule 3.41(b). Yet the relief sought by Respondent Axon may fairly be characterized as a delay in the commencement of the evidentiary hearing. Motions to change the date that an evidentiary hearing commences must be considered by the Commission. Rule 3.41(b). The Commission applies the "good cause" standard, which is stated in the third sentence of Rule 3.41(b), to such motions. *See In re Raging Wire*, Docket No. 9386, Jan. 6, 2020.

Petersen has the greatest knowledge and experience with respect to Axon's business and industry." *Id.* at 2-3. This conclusory statement does not support rescheduling the entire hearing around Ms. Petersen's vacation plans. Surely other employees within Axon, both inside and outside of the legal department, have knowledge regarding Axon's business, including in relation to this matter. In fact, Respondent's General Counsel, Isaiah Fields, as well as in-house counsel Bobby Driscoll, attended investigational hearings on those occasions where Respondent wanted representation in addition to outside counsel. Ms. Petersen attended none of the hearings. And assuming, *arguendo*, that outside counsel is not that knowledgeable about Axon's business today, certainly the well-qualified partners from Jones Day who have appeared in this matter are capable of learning the relevant facts prior to the hearing and, to the extent it is necessary, consulting with business people or other in-house counsel during the hearing. Even if Ms. Petersen did not have plans to be out of the country, outside counsel would have to learn the underlying facts because Ms. Petersen, who is unable to view confidential third party information, is necessarily limited both in her ability to aid outside counsel, and in her ability to examine or cross-examine witnesses in this evidentiary proceeding.

Second, Respondent asserts that Ms. Petersen will be Axon's corporate representative at the hearing and needs to be present every day. Axon Mot. at 3. But Respondent does not argue that Ms. Petersen is the *only* person qualified to be the corporate representative at trial. Axon has over 1,000 employees, including a large executive team and a robust legal department, and has three months to designate someone else to be its corporate representative. Moreover, Respondent provides no support for the proposition that it needs a corporate representative to attend every day of the hearing. Even if the hearing were delayed to accommodate her vacation, Ms. Petersen

could not attend *in camera* proceedings due to the protective order limitations on her access to third party information.

Third, Respondent argues that Ms. Petersen is “the only Axon attorney with the authority to engage in meaningful settlement negotiations for this matter.” Axon Mot. at 3. While that may be true, it is of no import because Axon could choose to authorize someone else, like its CEO or General Counsel, to engage in settlement negotiations during Ms. Petersen’s time abroad. Moreover, there is no basis for the assertion that critical settlement negotiations will take place during the few weeks that Ms. Petersen is on vacation. Complaint Counsel is willing to discuss settlement now – and to continue those discussions as the parties learn through depositions what the relevant witnesses are likely to testify to at trial.

While Respondent argues that a delay is necessary to promote “justice and fairness,” even Ms. Petersen concedes that “no one is irreplaceable.” Axon Mot. at 4, Mot. Ex. B (Petersen Decl. ¶ 5). Ms. Petersen asserts that “there simply is no other litigation attorney at Axon who can step into my role....” Mot. Ex. B (Petersen Decl. ¶ 5), but Axon and Ms. Petersen still have three months to prepare someone else on Axon’s full-time litigation team to step into Ms. Petersen’s role, or to reallocate her responsibilities among multiple team members, for the duration of her vacation.

The unnecessary three-week delay sought by Respondent would mean additional, on-going harm to police departments. Contrary to Axon’s argument regarding the urgency of unconsummated mergers, it is in fact *more important* for consummated mergers to be handled quickly because any harm to consumers is *on-going*. Even now, police departments are very interested in body-worn camera systems programs but are very concerned about the costs. Washington Post Article (PX90062) (noting that “concerns about funding” has impacted Prince

George's County in procuring body-worn camera systems and some departments stopped their programs entirely "because of cost"). These police departments are facing an industry today where Axon has created an uncompetitive dynamic and further delay will continue harming these law enforcement agencies.⁴

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny Respondent's Motion to Adjourn the Hearing.

Dated: February 19, 2020

Respectfully submitted,

s/ Jennifer Milici
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⁴ The length of time between Complaint and hearing in this case is not unique. In the Commission's most recent consummated merger challenge prior to the instant case, it issued the complaint on December 20, 2017 and set the hearing date for May 22, 2018—five months later. Complaint, *In re Otto Bock HealthCare North America, Inc.*, Docket No. 9378, at 14-15.

PX90062

The Washington Post

Democracy Dies in Darkness

Politics

Impeachment

Iowa Caucuses

White House

Live Iowa Results

Congress

Pressure grows for full deployment of body cameras in Prince George's after fatal shooting of handcuffed man

By **Rachel Chason**

Feb. 3, 2020 at 7:00 a.m. EST

Advocates in Prince George's County are pushing for answers after the killing of a handcuffed man by a police officer Jan. 27, asking why only a fraction of officers wear body cameras despite officials touting a pilot program five years ago.

Officer Michael Owen Jr. was not wearing a body camera when he fired seven shots at William Green, police said. And Green's family members say they have not received an explanation of what prompted the shooting inside Owen's cruiser.

County Executive Angela D. Alsobrooks (D), who put \$500,000 toward a body-camera program in her first year in office, announced last week that she had included \$1.2 million in this year's budget to fund hundreds more body cameras for patrol officers.

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Some advocates and officials say the measure is long overdue, noting that a bill last year to mandate that officers wear cameras died before it was introduced. There are 80 officers in the department of more than 1,500 who wear body cameras — a little more than 5 percent of the force — as part of a pilot program first discussed in late 2014.

“Five years in, there is no excuse,” said Rashawn Ray, a Brookings Institution fellow and University of Maryland professor who began working with the county in 2015 on a survey of what residents, civilians and police officers think about body-worn cameras. “It is inexcusable and at times even unexplainable that the department does not have body-worn cameras. It continues to erode public trust.”

Ray said it was clear over the course of more than 300 interviews that the “overwhelming majority” supported the use of cameras to increase transparency.

AD

Nationwide, about 80 percent of police departments with more than 1,000 officers have body cameras at least partially deployed, according to a 2018 report from the Justice Department.

Most major jurisdictions surrounding the county have body cameras to outfit a majority of their forces: 3,200 of about 3,800 officers in the District wear cameras, and 950 of 1,300 officers in Montgomery County wear them, according to the respective departments. Fairfax County will begin rolling out its program to equip 1,200 of its 1,400 officers with cameras over the course of three years, said spokesman Sgt. Greg Bedor.

Arlington County decided not to use body cameras after a pilot program showed the annual cost would be \$300,000. It is among a number of smaller departments that have dropped their programs in recent years because of cost.

AD

Prince George's County Council Chair Todd M. Turner (D-District 4) said funding for years has been the issue in Prince George's — noting that storage of the videos is especially costly. He said he asked council member Deni Taveras (D-District 2) last year not to introduce her bill that would legally mandate all officers to wear body cameras because of concerns about funding from Alsobrooks's office.

2/4/2020

Pressure for full deployment of body cameras in Prince George's after fatal shooting of handcuffed man - The Washington Post

Alsobrooks spokeswoman Gina Ford said the county executive allocated \$500,000 in her first budget toward storage costs for body cameras. This year's budget includes \$1.2 million to cover cameras for 1,000 officers in the patrol bureau, the portion of the department that interacts with the public, Ford said.

Taveras said she plans this year again to introduce her body-camera bill. More than 1,000 residents signed a letter of support for her bill last year, which was part of a package of proposed legislation supported by Casa de Maryland, the American Civil Liberties Union and other community groups.

AD

"The ball was dropped on this issue until the community started asking questions," Taveras said. "We need to reengage the conversation, and there is a desire on the council to do that, but to do it prudently, recognizing the financial needs of the county."

Ford declined to comment on Taveras's bill, saying Alsobrooks's office has not yet seen it.

2/4/2020

Pressure for full deployment of body cameras in Prince George's after fatal shooting of handcuffed man - The Washington Post

Rushern Baker, who served as county executive from 2010 through 2018, when the body-camera pilot was launched, did not respond to a request for comment about his administration's position on outfitting the force.

Prince George's County Police Chief Hank Stawinski, who said the charges against Owen were "unprecedented," has always supported the full adoption of body-worn cameras in the police department, spokeswoman Christina Cotterman said in a statement.

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She said the department has requested funding since fiscal 2017. The department received grant funding for 100 cameras that year, but their battery life was too short to be useful, Cotterman said. A new version of the camera was deployed to one squad in 2019. And the \$500,000 Alsobrooks allocated in the budget allowed for 80 cameras to be put into use that year, Cotterman said in the statement.

Today, each of the eight district stations has one patrol squad outfitted with cameras, she said, adding that a deadline for full deployment has not yet been set.

2/4/2020

Pressure for full deployment of body cameras in Prince George's after fatal shooting of handcuffed man - The Washington Post

In Baltimore City, 500 police officers began wearing body cameras in 2016, a year after the death of Freddie Gray, who suffered a spinal injury while in police custody. The program was expanded in 2018, and the department's 2,500 sworn officers are equipped with cameras, according to the Baltimore Sun. The city has spent \$18.5 million on the contract, which runs through 2023, the Sun reported.

AD

Emily Gunston, deputy legal director for the Washington Lawyers' Committee for Civil Rights and Urban Affairs, said that for body cameras to be effective, departments need to regularly monitor their footage to improve accountability — not just turn to them when issues arise.

“Body-worn cameras are not the panacea that people think they are,” she said. “But they can be a really important accountability tool — and I think they go a long way toward building public trust.”

2/4/2020

Pressure for full deployment of body cameras in Prince George's after fatal shooting of handcuffed man - The Washington Post

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2/4/2020

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2/4/2020

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I hereby certify that on February 19, 2020, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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February 19, 2020

By: s/ Jennifer Milici
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