

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

ORIGINAL

PUBLIC DOCUMENT

**RESPONDENT'S UNOPPOSED MOTION FOR LEAVE TO AMEND ITS ANSWER
AND AFFIRMATIVE DEFENSES**

In accordance with Federal Trade Commission Rule of Practice 3.15, and in response to discussions with Complaint Counsel, Respondent Axon Enterprise, Inc. brings this Unopposed Motion for Leave to Amend its Answer and Affirmative Defenses. Axon seeks to amend its affirmative defenses relating to (1) new entrants to the relevant product market that offset any alleged anticompetitive effects of the transaction, (2) the pro-competitive effects of the transaction, including efficiencies, cost-synergies, and product improvements, and (3) Viewu's status as a failing or flailing firm. Allowing the amendments will facilitate a determination on the merits in this proceeding, will not cause prejudice to any party, and is in the public interest. Axon acted promptly in bringing this Motion after negotiations with Complaint Counsel, who requested the proposed changes. No undue delay occurred, and the Motion is unopposed. It should be granted.

FACTUAL BACKGROUND

Complaint Counsel filed the Administrative Complaint on January 3, 2020. Later that month, Axon filed its Answer and Affirmative Defenses, which included, among others, three affirmative defenses relevant to this Motion. *First*, Axon asserted that the Complaint failed to state a claim because "new entrants to the relevant market were (and are) timely, likely, and

sufficient to offset any alleged anticompetitive effects of the Transaction.” Answer at 21, Tenth Defense. *Second*, Axon stated that “[t]he Transaction was procompetitive, having resulted in merger-specific efficiencies, cost-synergies, product-quality improvements, and other pro-competitive effects that benefit consumers. The benefits outweigh any alleged anticompetitive effects.” Answer at 21, Eleventh Defense. And *third*, Axon defended itself on the ground that “Viewu was a failing or flailing firm.” Answer at 21, Twelfth Defense.

Complaint Counsel subsequently requested that Axon file an amended answer with additional allegations of facts underlying each of these affirmative defenses. Axon stood by the sufficiency of its original Answer and Affirmative Defenses but, after meeting and conferring with Complaint Counsel, agreed to file a motion for leave to amend its Answer to reflect changes to its Tenth, Eleventh, and Twelfth Affirmative Defenses. Attached as Exhibit B is the proposed Amended Answer. Complaint Counsel does not oppose this Motion.

ARGUMENT

A motion for leave to amend may be granted “whenever determination of a controversy on the merits will be facilitated thereby.” 16 C.F.R. § 3.12(a). In allowing amendments, the adjudicator may place “such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties.” *Id.*

Similar motions have been granted. *See In the Matter of Otto Bock HealthCare N. Am., Inc.*, Docket No. 9378, 2018 WL 1028991, at *1 (F.T.C. Feb. 14, 2018) (granting respondent’s unopposed motion to amend answer and affirmative defenses after Complaint Counsel requested respondent supplement certain responses); *In the Matter of LabMD, Inc.*, Docket No. 9357, 2015 WL 4651650 (F.T.C. July 27, 2015) (allowing amendment of affirmative defense arguing FTC structure violates Constitution’s Appointments Clause). “[A]bsent undue delay, bad faith, or

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 weeks; Axon filed its original Answer only a month ago; trial remains nearly three months away; and there are no outstanding motions for summary decision. *Cf. In the Matter of DANIEL CHAPTER ONE*, Docket No 9329, 2009 WL 871702, at *1 (F.T.C. Mar. 9, 2009). The amendments pose no threat of prejudice to any party (and no party claims to be prejudiced), and the public interest will be served by granting the Motion.

If necessary, Axon is prepared to defend its original pleading. But since Complaint Counsel and Axon agree to the proposed amendment, that process can and should be avoided.

CONCLUSION

For the reasons stated above, Axon respectfully requests that its Unopposed Motion for Leave to Amend Its Answer and Affirmative Defenses be granted and that it be permitted to file the Amended Answer attached as Exhibit B.

Dated: February 27, 2020

Respectfully submitted,

s/ Julie E. McEvoy

Pamela B. Petersen
AXON ENTERPRISE, INC.
17800 N 85th St.
Scottsdale, AZ 85255-9603
Phone: (623) 326-6016
Facsimile: (480) 905-2027
Email: ppetersen@axon.com

*Counsel for Respondent
Axon Enterprise, Inc.*

Julie E. McEvoy
Michael H. Knight
Louis K. Fisher
Jeremy P. Morrison
Debra R. Belott
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Phone: (202) 879-3939
Facsimile: (202) 626-1700
Email: jmcevoy@jonesday.com
Email: mhknight@jonesday.com
Email: lkfisher@jonesday.com
Email: jmorrison@jonesday.com
Email: dbelott@jonesday.com

Aaron M. Healey
JONES DAY
250 Vesey Street
New York, NY 10281-1047
Phone: (212) 326-3939
Facsimile: (212) 755-7306
Email: ahealey@jonesday.com

*Counsel for Respondent
Axon Enterprise, Inc.*

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 Unopposed Motion for Leave to Amend its Answer and Affirmative Defenses. Having considered the Motion and the lack of opposition, it is hereby ORDERED that the Motion is GRANTED. Respondent may file with the Office of the Secretary of the FTC the public and confidential version of the Amended Answer and Affirmative Defenses attached as Exhibit B to Respondent's Motion no later than _____. This Order shall not impact any deadlines in the Scheduling Order.

SO ORDERED.

D. Michael Chappell
Chief Administrative Law Judge

Date:

EXHIBIT B

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

<p>In the Matter of</p> <p style="text-align:center">Axon Enterprise, Inc., a corporation,</p> <p style="text-align:center">and</p> <p style="text-align:center">Safariland, LLC, a partnership.</p>	<p style="text-align:center">Docket No. D9389</p> <p style="text-align:center">PUBLIC VERSION</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 Practice for Adjudicative Proceedings (“Proceedings”), Respondent Axon Enterprise, Inc. (“Axon”), by and through its attorneys, responds to the Commission’s complaint (“Complaint”) concerning the transaction (“Transaction”) between Axon and Respondent Safariland, LLC (“Safariland”) as follows.

Axon is appearing in the Proceedings subject to the constitutional arguments and objections it has asserted in the litigation captioned *Axon Enterprise, Inc. v. FTC*, No. 2:20-cv-00014-PHX-DWL (D. Ariz.) (Jan. 3, 2020), filed before the Commission instituted the Proceedings. Consequently, Axon is responding to the Complaint solely to avoid a default and is participating in the Proceedings under protest.

Axon additionally objects to being forced to respond to allegations in the Complaint that have been redacted in whole or in part. Through its outside counsel Axon has answered these and all of the other allegations in the Complaint to the best of its ability, and Axon explicitly reserves its right to amend this Answer as and if additional facts become known to it.

Axon denies each and every allegation in the Complaint to the extent they are not specifically admitted in the following paragraphs.

I. NATURE OF THE CASE¹

1. Respondent Axon is the leading manufacturer and supplier of body-worn cameras (“BWCs”) and digital evidence management systems (“DEMS”) (collectively “BWC Systems”). BWCs are cameras specifically designed to withstand the rigorous

¹ For ease of reference, Axon’s Answer tracks the section headings and restates the allegations in the Complaint. In so doing, Axon does not admit or concede the factual bases or legal conclusions averred in the Complaint or its headings and denies them unless otherwise expressly admitted.

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 the 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 and supplies BWCs and DEMS to a variety of customers, including police departments. Axon denies that it is appropriate to describe these products as inseparable “systems” because they are sold with separate product SKUs and customers can (and do) purchase the products separately. Consequently, Axon objects to the term “BWC Systems” as used throughout the Complaint. Axon admits the allegations in sentence 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 DEMS enable police departments to store BWC data in a central location, redact non-relevant images such as the faces of bystanders, share pertinent evidence with prosecutors, and maintain chain of custody of the video for evidentiary use. Axon otherwise denies the allegations in sentences three and four 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 substantial 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 for the supply of BWCs and DEMS, including (among others) Motorola, Panasonic, WatchGuard, Utility, Getac, Coban, Visual Labs, and Intrensic/GoPro. Moreover, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon denies the characterization “dominant” because it constitutes a legal conclusion and is based on an improper market definition. Axon denies any allegations resting on the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without attribution or context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies the remaining allegations in Paragraph 2.

3. Prior to the Merger, Viewu aggressively challenged Respondent Axon for the sale of BWC Systems to large, metropolitan police departments in the United States. This competition resulted in substantially lower prices for these customers, and provided customers with robust features and significant improvements. For example, Respondent Axon told its Board in May 2018 that the “Viewu business strategy [was to] [u]ndercut on price: Typically [REDACTED] less than Axon.” Viewu also focused on improving its products in part because Axon “is aggressively pushing feature set and existing customers are demanding those features.”

Response: Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments in the United States,” and both objects to and denies any allegations relating thereto. Axon further lacks sufficient knowledge or information to admit or deny allegations with respect to Viewu’s state of mind or corporate objectives prior to the Transaction. Axon denies any allegations resting on the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without attribution or context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies the remaining allegations in Paragraph 3.

4. Viewu was successful in winning accounts at prices substantially below Respondent Axon’s for several large, metropolitan police departments, including

Respondent Axon’s CEO admitted that it acquired Viewu to obtain the New York City Police Department (“NYPD”) account.

Response: Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon also lacks sufficient knowledge or information to admit or deny the allegations with respect to Viewu’s accounts and pricing prior to the Transaction. Axon denies any allegations resting on the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without attribution or context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies the remaining allegations in Paragraph 4.

5. The competition between Respondent Axon and Viewu was intense, especially after Viewu won New York City with a substantially lower bid. Viewu’s former General Manager acknowledged that, “[w]e started a price war. . . .” Respondent Axon’s CEO testified that after losing the contract Respondent Axon made a free offer of 1,000 body-worn cameras to New York City. Respondent Axon eventually expanded its promotion, on or around April 5, 2017, when it offered free BWC Systems for one year to every police agency in the United States.

Response: Axon denies any allegations resting on the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without attribution or context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies that its competition with Viewu was any more intense than its competition with any other manufacturer or supplier of BWCs or DEMS. Axon admits it offered every police agency in the United States a free one-year trial to allow adequate field testing of its BWCs and/or DEMS products. Axon denies the remaining allegations in Paragraph 5.

6. Post-merger, customers lost the benefit of this head-to-head competition, and Respondent Axon began to tout its pricing power, enacting “substantial price increases of [REDACTED] - including on body cameras and on the TASER weapon.” This is exactly what Respondent Safariland predicted after the parties signed the Letter of

Intent leading to the Merger: “I believe this will greatly improve their ability to increase price in the BWC market and I can easily see the stock lifting by 20% or more.” The stock actually increased by more than 40% in the month following the acquisition.

Response: Axon denies any allegations resting on the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without attribution or context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies the remaining allegations in Paragraph 6.

7. In addition to increasing price on BWCs, Respondent Axon limited the availability of Viewu BWC Systems to customers and stopped developing new generations of Viewu hardware and software. [REDACTED]

Response: Axon objects to the term “BWC Systems” because BWCs and DEMS are sold with separate product SKUs and customers can (and do) purchase the products separately. Further, Axon avers that it has honored all Viewu contracts and invested millions of dollars post-Transaction to improve Viewu products, service Viewu’s customer base, and remedy pre-existing design defects, benefitting Viewu customers and preventing disruption of their BWC programs. Despite these improvements, Viewu customers choosing to transition to Axon’s BWCs or DEMS have been allowed to do so. Axon denies the remaining allegations in Paragraph 7.

8. The Merger will likely entrench Respondent Axon’s already dominant share of the relevant market and would significantly increase market concentration. Pre-Merger, Respondent Axon held over [REDACTED] share and Viewu held over a [REDACTED] share of sales by officer count of BWC Systems to large, metropolitan police departments 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 vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon additionally denies the allegations in Paragraph 8 because they rest on an improper market definition.

9. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”), a post-merger market-concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index (“HHI”), and an increase in market concentration of more than 200 points renders a merger presumptively unlawful. Post-Merger market concentration would be more than 2,500, and the Merger would increase HHIs in an already concentrated market by well over 200 points. Thus, the Merger is presumptively unlawful.

Response: The allegations in Paragraph 9 constitute legal conclusions and therefore require no response. To the extent a response is required, the allegations are denied. Axon additionally denies the allegations in Paragraph 9 because they rest on an improper market definition.

10. New entry or repositioning by existing producers would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Merger. Barriers to entry are high because of the substantial up-front capital investment required, switching costs, and the need for large, metropolitan police department references.

Response: The allegations in Paragraph 10 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

11. Respondent Axon cannot show that the Merger resulted in merger-specific efficiencies sufficient to outweigh the competitive harm caused by the Merger. Respondent Axon did not analyze or anticipate efficiencies when deciding to acquire Viewu.

Response: The allegations in sentence one of Paragraph 11 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Axon denies the remaining allegations of Paragraph 11.

12. As part of the Merger, Respondent Safariland entered several non-compete and customer non-solicitation agreements covering products and services not related to the Merger, and both Respondents entered company-wide non-solicitation agreements that all run for 10 or more years (together, “Non-Competes”). The Non-Competes are not reasonably limited to protect a legitimate business interest. The Non-Competes are contained in the Membership Interest Purchase Agreement (“Merger Agreement”) itself and in Exhibit E, the Product Development and Supplier Agreement (“Holster Agreement”).

Response: With respect to sentences one and three of Paragraph 12 Axon avers that the Complaint’s selective characterization of the cited agreements is misleading and the documents speak for themselves. Axon denies the allegations in sentences one and three of Paragraph 12 to the extent inconsistent therewith. The allegations in sentence two of Paragraph 12 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

13. The Holster Agreement is a decade-long supply agreement whereby Respondent Safariland would develop and exclusively supply conducted electrical weapons (“CEW”) holsters to Respondent Axon for its Taser-branded CEW. Respondent Axon is the dominant supplier of CEWs, and its Taser brand is synonymous with the category. Respondents Axon and Safariland executed the Holster Agreement as additional consideration for the Merger.

Response: Axon avers that the Membership Interest Purchase Agreement and Product Development Supplier Agreement speak for themselves and Axon denies the allegations in sentences one and three of Paragraph 13 to the extent inconsistent therewith. Axon admits it manufactures CEWs under the brand name TASER[®] and denies the remaining allegations in sentence two of Paragraph 13.²

II. JURISDICTION

14. Respondents are, and at all relevant times have been, engaged in commerce or in activities affecting “commerce” as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

Response: The allegations in Paragraph 14 are legal conclusions to which no response is required.

15. The Merger constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

Response: The allegations in Paragraph 15 are legal conclusions to which no response is required.

III. RESPONDENTS

16. Respondent Axon is the dominant provider of BWC Systems. The majority of the largest metropolitan police departments in the United States use Respondent Axon’s BWC System solution. Respondent Axon’s newest model BWC is the “Axon Body 3,” and its DEMS is known as “Evidence.com.” Respondent Axon changed its name in 2017 from TASER International, Inc.

Response: Axon admits that it manufactures BWCs and DEMS but denies that it is appropriate to describe these products as inseparable “systems” because they are sold with separate product SKUs and customers can (and do) purchase the products separately. Axon denies the characterization “dominant” because it constitutes a legal conclusion and is based on an improper market definition. Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “majority of large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon admits the allegations in sentences three and four of Paragraph 16.

17. Respondent Axon is also the dominant supplier of CEWs under the “Taser” brand, which is Respondent Axon’s flagship product and is employed by more than [REDACTED] of all police departments. In 2018, Respondent Axon had annual revenues of \$420 million.

² As an acronym, TASER is always written in all capital letters, including in the company’s former name, TASER International, Inc.

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-outs, and the Holster Agreement, which is included as Exhibit E in the Merger Agreement and was executed as additional consideration for the Merger. Pursuant to the Holster Agreement, Respondent Safariland agreed for 10 years, *inter alia*, to develop a new CEW holster for Respondent Axon’s next-generation CEW and to supply CEW holsters exclusively to Respondent Axon. Respondent Axon agreed, *inter alia*, to make Respondent Safariland its preferred supplier of CEW holsters. Respondents Axon and Safariland also agreed, as part of the Merger Agreement and Holster Agreement, to Non-Competes related for products and services, customers, and employees.

Response: Axon avers that the Membership Interest Purchase Agreement and the Product Development and Supplier Agreement speak for themselves and denies the allegations of Paragraph 19 to the extent inconsistent therewith.

V. RELEVANT MARKET

20. The relevant market in which to analyze the effects of the Merger is the sale of BWC Systems, comprising BWCs and DEMS, to large, metropolitan police departments in the United States. A hypothetical monopolist in this relevant market would find it profit-maximizing to impose at least a small but significant and non-transitory increase in price (“SSNIP”).

Response: The allegations regarding the relevant market in Paragraph 20 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

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 any allegations relating thereto. Moreover, the allegations in sentence one of Paragraph 21 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Axon admits that BWCs are hardware and DEMS are software but denies that they constitute a “system” that must be integrated in order to function effectively. The remaining allegations in Paragraph 21 are denied.

22. Large, metropolitan police departments frequently issue requests for proposals seeking to purchase BWCs and DEMS together as an integrated BWC System. The products are closely related, and it is important for the hardware and software to interoperate effectively.

Response: Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments” as it is used in sentence one of Paragraph 22 and both objects to and denies any allegations relating thereto. With respect to sentence two, Axon admits that BWCs and DEMS may interoperate, and when they do, it is important that they do so effectively. Axon denies the remaining allegations in Paragraph 22.

23. Both Respondent Axon and Viewu focused on selling their products to large, metropolitan police departments, which have distinct requirements for BWC Systems that differ from the needs and preferences of other law enforcement organizations. Due to their particular needs, large, metropolitan police departments may require or prefer elements such as feature-rich and cloud-based DEMS, scalability for the BWC Systems deployment, references from other large metropolitan police departments, secured layers for authorized personnel access, automatic population of metadata for a video (e.g., officer, location, etc.), and tools that enable faster redaction of bystanders’ faces when a video is being prepared for public disclosure or use in court. Viewu recognized this. According to Viewu’s former General Manager, “VIEVU played in the large agency market, cloud, tech forward agencies, which is the same spot where Axon played.”

Response: Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments” and “other law enforcement organizations,” and both objects to and denies any allegations relating thereto. Axon lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 23 regarding Viewu’s business or mindset prior to the Transaction, but avers that the Complaint’s

selective characterization and quotation of unidentified documents and/or transcripts, asserted without attribution or context, is misleading as framed. The documents and/or transcripts, if and once identified, speak for themselves and Axon denies any allegations in Paragraph 23 to the extent inconsistent therewith. Axon denies the remaining allegations in Paragraph 23.

24. There are no reasonably interchangeable substitutes for BWC Systems, and large, metropolitan police departments could not realistically switch to other products in the face of a SSNIP for BWC Systems.

Response: The allegations in Paragraph 24 constitute legal conclusions to which no response is required. To the extent a response is required, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Moreover, Axon denies that it is appropriate to describe these products as inseparable “systems” because they are sold with separate product SKUs and customers can (and do) purchase the products separately, and both objects to and denies any allegations relating thereto. Axon denies the remaining allegations of Paragraph 24.

25. In-car camera systems are not substitutes for BWC Systems for large, metropolitan police departments. In-car camera systems are mounted in the vehicle, usually a front-facing camera to record what takes place in front of the vehicle, and a rear-facing camera to record what takes place inside the vehicle. In-car systems are more often used by highway patrol officers, or other officers who spend most of their time working in or directly outside of their patrol vehicles. Most officers in large, metropolitan police departments, however, are rarely in patrol cars and generally conduct their policing by other means, such as on foot, horse, and bike. Given the nature of policing in metropolitan areas, these officers need cameras that can capture video when a police officer is not near a police vehicle, but is instead on the street or in a building. In-car systems are also significantly more expensive than BWC Systems. Respondent Axon’s Chief Revenue Officer testified that in-car systems and BWC Systems are not good substitutes.

Response: The allegations in sentence one of Paragraph 25 are legal conclusions to which no response is required. To the extent a response is required, the allegations in sentence one of Paragraph 25 are denied. Moreover, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon admits that some in-car camera systems are mounted as described in sentence two. Axon denies that in-car systems are unique to highway patrol officers and that officers working in metropolitan areas “are rarely in patrol cars.” With respect to the allegations in sentence seven of Paragraph 25, the testimony speaks for itself and Axon denies any allegations inconsistent therewith. Axon denies the remaining allegations in Paragraph 25.

26. Records Management Systems (“RMS”) are not substitutes for DEMS for large, metropolitan police departments. RMS collect and centralize in one source, in digital format, the many types of written reports generated by police agencies, including

arrest, probation, and crime scene reports, whereas DEMS are designed principally to record video and audio evidence captured by BWCs. Industry participants do not view RMS as a substitute for BWC Systems or for the DEMS component of those systems.

Response: The allegations in sentence one of Paragraph 26 constitute legal conclusions to which no response is required. To the extent a response is required, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. The allegations in sentence two of Paragraph 26 are denied to the extent that RMS capabilities vary by provider. Axon admits that its own DEMS are designed in part to store video and audio evidence captured by BWCs. Axon lacks sufficient knowledge or information to admit or deny the allegations in sentence three of Paragraph 26 regarding the “view” of unidentified, non-party “[i]ndustry participants.” Axon denies the remaining allegations in Paragraph 26.

B. RELEVANT GEOGRAPHIC MARKET

27. The relevant geographic market in which to assess the competitive effects of the Merger is customers in the United States. The relevant market is a bid market in which it is possible to price discriminate to specific customers. Customers based in the United States cannot arbitrage or substitute based on different prices offered to customers outside the United States.

Response: The allegations in Paragraph 27 are legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

28. Many police departments also are required to comply with the FBI’s Criminal Justice Information Service (“CJIS”) standards. CJIS compliance requires storing BWC-generated data in the United States. Additionally, U.S.-based police departments look mostly to other U.S.-based police departments to vet potential BWC System vendors.

Response: The allegations in sentences one and two of Paragraph 28 constitute legal conclusions to which no response is required. Axon lacks sufficient knowledge or information to admit or deny the allegations of sentence three of Paragraph 28 because they relate to the actions or behavior of persons or entities other than Axon, and Axon therefore denies them.

29. A hypothetical monopolist in the market for BWC Systems sold to large, metropolitan police departments in the United States would find it profit-maximizing to impose at least a small but significant and non-transitory increase in price (“SSNIP”).

Response: The allegations in Paragraph 29 constitute legal conclusions to which no response is required. To the extent a response is required, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon denies the remaining allegations in Paragraph 29.

VI. MARKET STRUCTURE AND THE MERGER'S PRESUMPTIVE ILLEGALITY

30. The market for the sale of BWC Systems to large, metropolitan police departments based in the United States is highly concentrated. Prior to the Merger, Respondent Axon was already the dominant BWC System provider to these customers, with over [REDACTED] of the relevant market by officer count. Respondent Axon acknowledges this dominance—in a company presentation, it implored its salespeople to “embrace being the gorilla”—and Respondent Axon’s CEO confirmed that Respondent Axon is a “really strong market leader.” Viewu was the next largest competitor with over [REDACTED] of the relevant market by officer count. Post-Merger, the relevant market is even more highly concentrated, with Respondent Axon controlling over [REDACTED] of the relevant market by officer count.

Response: The allegations in Paragraph 30 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Moreover, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and “officer count,” and both objects to and denies any allegations relating thereto. Axon further objects to and denies any allegations that rest on an improper market definition. Axon avers that the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, asserted 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 30 to the extent inconsistent therewith.

31. Motorola, Panasonic, 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. In particular, the other competitors’ BWC Systems [REDACTED]

[REDACTED] Consequently, these other competitors rarely provided significant competition to Respondent Axon in RFP processes conducted by large, metropolitan police departments.

Response: The allegations in Paragraph 31 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Moreover, Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police departments,” and both objects to and denies any allegations relating thereto. Axon further objects to and denies any allegations that rest on an improper market definition, and any allegations that refer to “BWC 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 sold with separate product SKUs and customers can (and do) purchase the products separately.

32. Even when considering all customers (i.e., not just large, metropolitan police departments), Respondent Axon believed that post-Merger 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. The Merger Guidelines and courts often measure concentration using HHIs. HHIs are calculated by totaling the squares of the market shares of every firm in the relevant market. Under the Merger Guidelines, a merger is presumed likely to create or enhance market power and is presumptively illegal when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

Response: The allegations in Paragraph 33 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Axon further objects to and denies any allegations that rest on an improper market definition.

34. The Merger significantly increased concentration in the relevant market, as one firm now controls more than [REDACTED] of the relevant market by officer count. Motorola/WatchGuard, the next largest competitor, controls less than [REDACTED] of the relevant market by officer count. The Merger resulted in a post-Merger HHI in excess of 2,500, and increased concentration by more than 200 points. Therefore, the Merger is presumptively anticompetitive under the Merger Guidelines and applicable case law.

Response: The allegations in Paragraph 34 constitute legal conclusions to which no response is required. To the extent the response is required, the allegations are denied. Moreover, Axon objects to and denies any allegations that rest on an improper market definition. Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “officer count,” and both objects to and denies any allegations relating thereto.

VII. ANTICOMPETITIVE EFFECTS

A. The Merger Eliminated Vital Competition Between Viewu and Respondent Axon

35. The Merger eliminated intense price and innovation competition between Respondent Axon and Viewu in the relevant market. The result is likely to be higher prices, inferior service, and reduced quality and innovation.

Response: The allegations in sentence one of Paragraph 35 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Moreover, Axon objects to and denies any allegations that rest on an improper market definition. The allegations in sentence two of Paragraph 35 are denied as speculative and

vague.

36. Respondent Axon and Viewu were each other's closest competitors. For example, Respondent Safariland acknowledged: "We own the #2 player in the market, and to date we have seen no other credible market entrant," and "Viewu and Taser are consistently the finalists in major opportunities." Respondent Axon's Vice President of Investor Relations touted that by purchasing Viewu, Respondent Axon had "acquired #2 competitor."

Response: Axon lacks sufficient information to admit or deny the allegations in sentence one of Paragraph 36. To the extent a response is required, the allegation is denied as the phrase "closest competitors" is vague, undefined, and based on an improper market definition. Axon avers that the selective characterization and quotation of unidentified documents or transcripts, asserted without attribution or context, is misleading as framed in sentences two and three of Paragraph 36. The documents and/or transcripts, if and once identified, speak for themselves and Axon denies any allegations inconsistent therewith. Axon denies the remaining allegations in Paragraph 36.

37. Stock analysts and the financial press also recognize that Viewu was Respondent Axon's most significant competitor. A Raymond James stock report states: "In May 2018, Axon closed the \$7.1 million strategic tuck-in acquisition of its most formidable body cam competitor, Viewu." A Bloomberg article dated May 4, 2018, entitled "The Biggest Police Body Cam Company Is Buying Its Main Competitor," declares that "[t]he combination of the two largest providers of the recording devices will create a dominant force in police surveillance." A May 18, 2018 article from the Motley Fool, entitled "Axon Enterprise Now Owns the Police Body Cam Market," asserts that "[t]here is going to be no stopping Axon Enterprise (NASDAQ:AAXN) now that it has acquired its main body camera rival VIEVU."

Response: Axon lacks sufficient information to admit or deny the allegations in sentence one of Paragraph 37. To the extent a response is required, the allegation is denied as 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. The reports and articles speak for themselves and Axon denies any allegations in Paragraph 37 inconsistent with the actual contents thereof.

38. Prior to the Merger, Viewu and Respondent Axon were the competitors that could best satisfy the RFP requirements, from both a technical and price perspective, for many of the largest metropolitan police agencies in the United States. For example, [REDACTED] all found that, of multiple bidders, Respondent Axon and Viewu had the best offerings by a significant margin.

Response: Axon objects to and denies the allegations in Paragraph 38 because it lacks sufficient knowledge or information regarding the vague and undefined phrase "largest

metropolitan police agencies.” Moreover, Axon lacks sufficient knowledge or information about what particular agencies may have “found” or the criteria by which they judged particular bids, and denies the allegations in sentence two of Paragraph 38 for this additional reason.

39. Respondent Axon and Viewu vigorously and consistently competed on price in an effort to win large, metropolitan police department contracts. After Respondent Safariland 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 down in the market considerably,” and Viewu admittedly “took [Axon] by surprise with disruptive pricing and nearly comparable technology.” As late as 2018, Viewu’s strategy was to “win on price typically [REDACTED] less than Axon.”

Response: Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “large, metropolitan police department” and both objects to and denies any allegations in Paragraph 39 relating thereto. Moreover, Axon lacks sufficient knowledge or information regarding Viewu’s strategy and pricing prior to the Transaction, and therefore denies any allegations relating thereto. Further, Axon avers that the selective characterization and quotation of partially or wholly unidentified communications, documents, or testimony asserted without context, is misleading as framed. The communications, documents, or transcripts, if and once identified, speak for themselves and Axon denies any allegations in Paragraph 39 to the extent inconsistent therewith.

40. Competition between Respondent Axon and Viewu resulted in substantially lower prices for police departments. For example, [REDACTED] all received substantially lower bids from Viewu as compared to Respondent Axon. Viewu’s lower pricing for [REDACTED] caused Respondent Axon to reduce its own bids. Viewu at times responded to Respondent Axon’s competing bids by offering better terms.

Response: Axon lacks sufficient knowledge or information about the bids that particular agencies may have received or how they compared one to another, and denies the allegations in Paragraph 40 for this reason. Axon lacks sufficient knowledge or information regarding Viewu’s strategy and pricing prior to the Transaction, and therefore denies any allegations relating thereto. Axon denies the remaining allegations in Paragraph 40.

41. Respondent Axon and Viewu also competed vigorously on non-price aspects of BWC Systems, including the development of various innovative features such as auto-activation of BWCs in the event of an officer unholstering a gun or Taser, and computer-assisted facial redaction tools for DEMS videos. Consumers benefited from this innovation competition.

Response: Axon denies that it is appropriate to describe BWCs and DEMS as inseparable “BWC Systems” because they are sold with separate product SKUs and customers

can (and do) purchase the products separately. Axon denies the allegations in sentence one of Paragraph 41 for this reason and for the additional reason that Viewu was one of a multitude of companies with which Axon competes for the supply of BWCs and DEMS, including (among others) Motorola, Panasonic, WatchGuard, Utility, Getac, Coban, Visual Labs, and Intrensic/GoPro. The last sentence of Paragraph 41 contains a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

42. Post-merger, customers lost the benefit of this head-to-head price and innovation competition, and Respondent Axon began to tout its pricing power, enacting “substantial price increases of [REDACTED] - including on body cameras and on the Taser weapon.” Respondent Axon has acknowledged the negative consequence of price increases on budget constrained law enforcement officers: “It’s no secret that budget constraints are a constant inconvenience for law enforcement agencies. Long needs lists + short funds = under equipped officers and potentially underserved communities.”

Response: The first sentence of Paragraph 42 contains a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied. Moreover, Axon denies any allegations resting on the Complaint’s selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without attribution or context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves. Axon denies the remaining allegations in Paragraph 42.

43. Existing BWC System providers are unlikely to replace the competition that was lost as a result of the Merger between Respondents, the two closest competitors in the relevant market. While each remaining competitor has different strengths and weaknesses, each competitor faces real and significant challenges in replacing competition lost through Respondent Axon’s merger with Viewu. These challenges include, but are not limited to, reputation or lack of references from large, metropolitan police department customers, service levels that are inadequate for such customers, and software with limited functionality. Moreover, some of the other BWC System providers price significantly higher than Viewu and would not sufficiently replace Viewu’s aggressive pricing. The remaining firms in the relevant market are not likely to replace the competitive constraint of Viewu’s lower-priced offerings in a timely and sufficient way.

Response: The first and last sentences of Paragraph 43 contain legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. Axon additionally denies all of the allegations in Paragraph 43 to the extent they rest on an improper market definition. Axon lacks sufficient knowledge or information regarding the vague and undefined phrase “closest competitors,” “remaining competitors,” and “existing BWC System providers” and therefore denies any allegations relating thereto. Further, Axon denies that it is appropriate to describe BWCs and DEMS as inseparable “BWC Systems” because they are sold with separate product SKUs and customers can (and do) purchase the products separately. Axon denies the remaining allegations in Paragraph 43.

B. As part of the merger, respondents agreed to additional provisions that substantially lessen competition

44. As part of the Merger Agreement, Respondents Axon and Safariland entered into the Non-Competes: Respondent Safariland agreed not to compete (i) for products and services that Respondent Axon supplies and in industries where Respondent Axon is active, irrespective of their relation to the Merger and (ii) for Respondent Axon's customers; and both Respondents agreed not to affirmatively solicit each other's employees. These agreements each last 10 or more years. The Non-Competes prevent actual and potential competition between Respondents Axon and Safariland. The Non-Competes are contained in the Merger Agreement itself and in Exhibit E, the Holster Agreement.

Response: Axon avers that the Membership Interest Purchase Agreement and Product Development Supplier Agreement speak for themselves and Axon denies the allegations in Paragraph 44 to the extent inconsistent therewith. 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 44, and in fact amended the agreements to eliminate those provisions on January 16, 2020.

Non-Compete Agreements for Respondent Axon's Products/Services and Industries

45. In Section 5.03(a) of the Merger Agreement, Respondent Safariland agreed not to engage in "(a) body worn video products and services, (b) in-car video products and services, (c) digital evidence management products and services provided to third parties that ingest digital evidence audio and video files, and (d) enterprise records management systems provided to third parties," anywhere in the world for 10 years.

Response: Axon avers that the Membership Interest Purchase Agreement speaks for itself and Axon denies the allegations in Paragraph 45 to the extent inconsistent therewith. 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 to eliminate the provision that is the subject of Paragraph 45, and in fact amended the agreement to eliminate that provision on January 16, 2020.

46. In Section 15.1 of the Holster Agreement, Respondent Safariland agreed not to compete in the "CEW industry, BWC industry, fleet or vehicle camera industry, surveillance room camera industry, and digital evidence management system and storage industry, with regard to law enforcement, military, security or consumers," anywhere in the world for 12 years. Respondent Axon was concerned about Respondent Safariland potentially entering into competition with Respondent Axon's lucrative CEW business. Respondent Axon's CEO called the 12-year CEW non-compete a "hidden jewel in the deal."

Response: Axon avers that the Product Development Supplier Agreement speaks for

itself and Axon denies the allegations in Paragraph 46 to the extent inconsistent therewith. Axon further avers that it and Safariland informed Commission staff prior to this litigation that they were willing to amend the Product Development Supplier Agreement to eliminate the provision that is the subject of Paragraph 46, and in fact amended the agreement to eliminate that provision on January 16, 2020. Axon denies any allegations resting on the Complaint's selective characterization and quotation of unidentified documents and/or transcripts, which are asserted without context and misleading as framed. Axon further avers that the documents and/or transcripts, if and once identified, speak for themselves.

Non-Compete Agreements for Respondent Axon's Customers

47. In Section 5.03(c) of the Merger Agreement, Respondent Safariland agreed not to solicit or entice any of Respondent Axon's customers or potential customers for purposes of diverting business or services away from Respondent Axon, for 10 years.

Response: Axon avers that the Membership Interest Purchase Agreement speaks for itself and Axon denies the allegations in Paragraph 47 to the extent inconsistent therewith. 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 to eliminate the provision that is the subject of Paragraph 47, and in fact amended the agreement to eliminate that provision on January 16, 2020.

48. In Section 15.3 of the Holster Agreement, Respondent Safariland agreed not to solicit or entice any of Respondent Axon's customers or potential customers for purposes of diverting CEW, CEW holster, or CEW accessory business or purchases away from Respondent Axon, for 11 years.

Response: Axon avers that the Product Development Supplier Agreement speaks for itself and Axon denies the allegations in Paragraph 48 to the extent inconsistent therewith. Axon further avers that it and Safariland informed Commission staff prior to this litigation that they were willing to amend the Product Development Supplier Agreement to eliminate the provision that is the subject of Paragraph 48, and in fact amended the agreement to eliminate that provision on January 16, 2020.

Employee Non-Solicitation Agreements

49. In Section 5.03(b) of the Merger Agreement, Respondent Safariland agreed not to hire or solicit any of Respondent Axon's employees, or encourage any employees to leave Respondent Axon, or hire certain former employees of Respondent Axon, except pursuant to a general solicitation. Respondent Safariland agreed to refrain from this activity for 10 years.

Response: Axon avers that the Membership Interest Purchase Agreement speaks for itself and Axon denies the allegations in Paragraph 49 to the extent inconsistent therewith. 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 to eliminate the provision that is the subject of Paragraph 49, and in fact amended the agreement

to eliminate that provision on January 16, 2020.

50. In Section 5.06(a) of the Merger Agreement, Respondent Axon agreed not to hire or solicit any of Respondent Safariland's employees, or encourage any employees to leave Respondent Safariland, or hire certain former employees of Respondent Safariland, except pursuant to a general solicitation. Respondent Axon agreed to refrain from this activity for 10 years.

Response: Axon avers that the Membership Interest Purchase Agreement speaks for itself and Axon denies the allegations in Paragraph 50 to the extent inconsistent therewith. 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 to eliminate the provision that is the subject of Paragraph 50, and in fact amended the agreement to eliminate that provision on January 16, 2020.

51. In Section 15.4 of the Holster Agreement, Respondents Axon and Safariland agreed not to solicit each other's employees for the purpose of inducing the employees to leave their respective employers, except pursuant to a general solicitation. Respondents Axon and Safariland agreed to refrain from this activity for 11 years.

Response: Axon avers that the Product Development Supplier Agreement speaks for itself and Axon denies the allegations in Paragraph 51 to the extent inconsistent therewith. Axon further avers that it and Safariland informed Commission staff prior to this litigation that they were willing to amend the Product Development Supplier Agreement to eliminate the provision that is the subject of Paragraph 51, and in fact amended the agreement to eliminate that provision on January 16, 2020.

52. By prohibiting Respondent Safariland from competing against Respondent Axon--in terms of products and services Respondent Safariland can offer as well as customers Respondent Safariland can solicit--these provisions harm customers who would otherwise benefit from potential or actual competition by Respondent Safariland. By prohibiting Respondents Axon and Safariland from affirmatively soliciting each other's employees, these provisions eliminate a form of competition to attract skilled labor and deny employees and former employees of Respondents Axon and Safariland access to better job opportunities. They restrict workers' mobility, and deprive them of competitively significant information that they could use to negotiate better terms of employment.

Response: The allegations in Paragraph 52 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 52, and in fact amended the agreements to eliminate those provisions on January 16, 2020.

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.

Response: The allegations in Paragraph 54 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

B. Efficiencies

55. Respondent Axon cannot show that merger-specific efficiencies would result from the Merger that will offset the anticompetitive effects. Respondent Axon's President admitted that potential efficiencies played no role in Respondent Axon's analysis of the Merger.

Response: The allegations in sentence one of Paragraph 55 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied. With respect to sentence two of Paragraph 55, Axon avers that the Complaint's selective characterization and quotation of unidentified communications, offered without attribution or context, is misleading as framed. Axon further avers that the communications, if and once identified, speak for themselves and denies any allegations inconsistent therewith.

C. Failing Firm

56. Respondents cannot demonstrate that Respondent Safariland was a failing firm under the criteria set out in the Horizontal Merger Guidelines

Response: The allegations in Paragraph 56 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

IX. VIOLATIONS

Count I – Illegal Agreement

57. The allegations of Paragraphs 1 through 56 above are incorporated by reference as though fully set forth herein.

Response: Except where specifically admitted above, the allegations in Paragraphs 1 through 56 of the Complaint are denied.

58. The Merger Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Response: The allegations in Paragraph 58 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

Count II – Illegal Merger

59. The allegations of Paragraphs 1 through 56 above are incorporated by reference as though fully set forth herein.

Response: Except where specifically admitted above, the allegations in Paragraphs 1 through 56 of the Complaint are denied.

60. The Merger, including the Non-Competes, constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Response: The allegation in Paragraph 60 constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

AFFIRMATIVE AND OTHER DEFENSES

Axon asserts the following defenses, without assuming the burden of proof on such defenses that would otherwise rest with the Commission.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

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 both 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 and presence 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 Watchguard, and Safe Fleet, through its recent acquisition of Mobile-Vision, 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 ensure robust competition in a properly-defined market for BWCs and/or DEMS.

ELEVENTH DEFENSE

Efficiencies and other procompetitive benefits resulting from the acquisition outweigh any and all proffered anticompetitive effects. The acquisition resulted in significant cognizable, merger-specific efficiencies. For example, [REDACTED] 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, Axon's acquisition of Viewu resulted in a number of procompetitive quality benefits that flowed to former Viewu customers, including improved customer and better and more reliable technology—all of which would 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 cash flows, and [REDACTED].

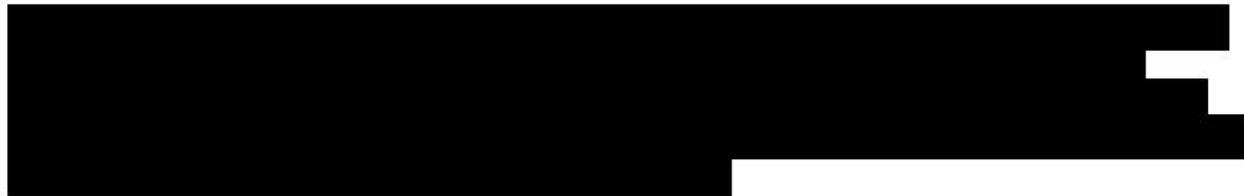
Viewu was losing nearly \$1 million per month at the time Axon acquired it. In addition to losing money, Viewu was in debt. As of the date of the transaction, Viewu had more than \$19 million in debt [REDACTED] another \$8 million in off-balance-sheet purchase commitments, and the cash equivalent of less than three days' operating expenses. Viewu's dire financial condition [REDACTED].

Safariland had been engaged in good faith efforts to sell Viewu for some time before [REDACTED]. It had already engaged Evercore, an investment bank, to solicit potential purchasers with no minimum price. As of early 2018, that effort had not borne fruit. [REDACTED] Safariland turned to Axon, the buyer of last resort. At that point, selling to 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 meets the requirements of a failing firm. As set forth above, at the time of the transaction, Viewu was unable to meet its near-term financial obligations. [REDACTED].

THIRTEENTH DEFENSE

In addition to being a failing division or firm, Viewu was a flailing firm. Even if 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 post-acquisition. The Complaint relies on the single NYPD contract from 2016 that dramatically skews Viewu's competitive significance and ignores competitive reality. [REDACTED].



Further, design defects in Viewu’s BWCs and DEMS—including a widely-publicized fire involving a BWC issued to a NYPD officer—would have further strained Viewu’s limited resources, diminished its standing with customers, and reduced its ability to compete even further. Thus, Viewu’s competitive significance would have continued to decline and it would not have constrained Axon or spurred meaningful innovation absent the transaction. In addition to being a failing division or firm, Viewu was a flailing firm. Even if 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 post-acquisition.

FOURTEENTH DEFENSE

These Proceedings are invalid because the constraints on 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 adjudication of the Complaint by the Administrative Law Judge and the Commission in turn violates Article III of the Constitution and the separation of powers.

SEVENTEENTH DEFENSE

These Proceedings are invalid because adjudication of the Complaint by the Administrative Law Judge and the Commission in turn violates the right to due process of law under the Fifth Amendment to the Constitution, which requires a neutral decision-maker.

EIGHTEENTH DEFENSE

These Proceedings violate the right to due process of law under the Fifth Amendment to the Constitution, which requires equal protection of the laws, because the federal government 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

Julie E. McEvoy
Michael H. Knight
Louis K. Fisher
Debra R. Belott
Jeremy P. Morrison
jmcevoy@jonesday.com
mhknight@jonesday.com
lffisher@jonesday.com
dbelott@jonesday.com
jmorrison@jonesday.com

JONES DAY
51 Louisiana Ave. N.W.
Washington, D.C. 20001-2113
Tel.: (202) 879-3939
Fax: (202) 879-626-1700

Aaron M. Healey
ahealey@jonesday.com
JONES DAY
250 Vesey Street
New York, New York 10281-1047

PUBLIC

Tel.:(212) 326-3811
Fax: (212) 755-7306

Pamela B. Petersen
ppetersen@axon.com
AXON ENTERPRISE, INC.
17800 N. 85th Street
Scottsdale, AZ 85255-9603

Tel: (623) 326-6016
Fax: (480) 905-2027

Counsel for Respondent Axon Enterprise, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 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:

Jennifer Milici
J. Alexander Ansaldo
Peggy Bayer Femenella
Mika Ikeda
Nicole Lindquist
Lincoln Mayer
Merrick Pastore
Z. Lily Rudy
Dominic Vote
Steven Wilensky
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, NW
Washington, DC 20580
Phone: (202) 326-2638
Facsimile: (202) 326-2071
Email: jmilici@ftc.gov
Email: jansaldo@ftc.gov
Email: pbayer@ftc.gov
Email: mikeda@ftc.gov
Email: nlindquist@ftc.gov
Email: lmayer@ftc.gov
Email: mpastore@ftc.gov
Email: zrudy@ftc.gov
Email: dvote@ftc.gov
Email: swilensky@ftc.gov

Joseph A. Ostoyich
BAKER BOTTS, LLP
The Warner Building
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone:: (202) 639-7905
Facsimile: (202) 639-1163
Email: joseph.ostoyich@bakerbotts.com

*Counsel for Respondent
Safariland LLC*

Counsel for the Federal Trade Commission

Dated: February 27, 2020

s/ Julie 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 documents that is available for review by the parties and the adjudicator.

Dated: February 27, 2020

s/ Julie McEvoy

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:

Julie E. McEvoy
Jones Day
jmcevoy@jonesday.com
Respondent

Michael H. Knight
Jones Day
mhknight@jonesday.com
Respondent

Louis K. Fisher
Jones Day
lkfisher@jonesday.com
Respondent

Debra R. Belott
Jones Day
dbelott@jonesday.com
Respondent

Jeremy P. Morrison
Jones Day
jmorrison@jonesday.com
Respondent

Aaron M. Healey
Jones Day
ahealey@jonesday.com
Respondent

Jennifer Milici
Attorney
Federal Trade Commission
jmilici@ftc.gov
Complaint

J. Alexander Ansaldo
Attorney
Federal Trade Commission
jansaldo@ftc.gov

Complaint

Peggy Bayer Femenella
Attorney
Federal Trade Commission
pbayer@ftc.gov
Complaint

Mika Ikeda
Attorney
Federal Trade Commission
mikeda@ftc.gov
Complaint

Nicole Lindquist
Attorney
Federal Trade Commission
nlindquist@ftc.gov
Complaint

Lincoln Mayer
Attorney
Federal Trade Commission
lmayer@ftc.gov
Complaint

Merrick Pastore
Attorney
Federal Trade Commission
mpastore@ftc.gov
Complaint

Z. Lily Rudy
Attorney
Federal Trade Commission
zrudy@ftc.gov
Complaint

Dominic Vote
Attorney
Federal Trade Commission
dvote@ftc.gov
Complaint

Steven Wilensky
Attorney
Federal Trade Commission
swilensky@ftc.gov
Complaint

Pamela B. Petersen
Director of Litigation
Axon Enterprise, Inc.
ppetersen@axon.com
Respondent

Joseph Ostoyich
Partner
Baker Botts LLP

joseph.ostoyich@bakerbotts.com
Respondent

Christine Ryu-Naya
Baker Botts LLP
christine.ryu-naya@bakerbotts.com
Respondent

Caroline Jones
Associate
Baker Botts LLP
caroline.jones@bakerbotts.com
Respondent

Llewellyn Davis
Attorney
U.S. Federal Trade Commission
ldavis@ftc.gov
Complaint

William Hine
Hine & Ogulluk LLP
wjhine@hineogulluk.com
Respondent

Sevan Ogulluk
Hine & Ogulluk LLP
sogulluk@hineogulluk.com
Respondent

Brian Hine
Hine & Ogulluk LLP
bwhine@hineogulluk.com
Respondent

Blake Risenmay
Attorney
U.S. Federal Trade Commission
brisenmay@ftc.gov
Complaint

Aaron Healey
Attorney