

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

In the Matter of: )  
AXON ENTERPRISE, INC., )  
a corporation, ) Docket No. 9389  
and )  
SAFARILAND, LLC, )  
a corporation. )  
-----)

Thursday, January 30, 2020  
2:00 p.m.  
PRETRIAL CONFERENCE  
PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C.

Reported by: Susanne Bergling, RMR-CRR

Pretrial Conference  
Axon Enterprises & Safariland

1/30/2020

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 JENNIFER MILICI, ESQ.

5 PEGGY BEHR FEMENELLA, ESQ.

6 LINCOLN MAYER, ESQ.

7 Federal Trade Commission

8 600 Pennsylvania Avenue, N.W.

9 Washington, D.C. 20580

10 (202) 326-3695

11 jmilici@ftc.gov

12

13

14 ON BEHALF OF AXON ENTERPRISE, INC.:

15 JULIA E. MCEVOY, ESQ.

16 LOUIS K. FISHER, ESQ.

17 AARON M. HEALEY, ESQ.

18 Jones Day

19 51 Louisiana Avenue, N.W.

20 Washington, D.C. 20001-2113

21 (202) 879-3939

22 jmcevoy@jonesday.com

23

24 and

25

For The Record, Inc.  
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Pretrial Conference  
Axon Enterprises & Safariland

1/30/2020

1 APPEARANCES (CONT.):

2 PAMELA B. PETERSEN, ESQ.

3 Director of Litigation

4 Axon Enterprise, Inc.

5 17800 N. 85th Street

6 Scottsdale, Arizona 85255

7 (623) 326-6016

8 ppetersen@axon.com

9

10

11 ON BEHALF OF SAFARILAND, LLC:

12 JOSEPH OSTOYICH, ESQ.

13 CAROLINE JONES, ESQ.

14 CHRISTINE RYU-NAYA, ESQ.

15 Baker Botts LLP

16 700 K Street, N.W.

17 Washington, D.C. 20001

18 (202) 639-7700

19 joseph.ostoyich@bakerbotts.com

20

21

22

23

24

25

For The Record, Inc.  
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Pretrial Conference

Axon Enterprises & Safariland

1/30/2020

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

ARGUMENT	PAGE
MS. MILICI	15, 45
MS. MCEVOY	27, 46
MR. OSTOYICH	41

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 P R O C E E D I N G S

2 - - - - -

3 JUDGE CHAPPELL: Let's go on the record, Docket  
4 Number 9389, Axon Enterprise, Inc. and Safariland.

5 I'll start with the appearances of the parties,  
6 the Government first.

7 MS. MILICI: Good afternoon, Your Honor,  
8 Jennifer Milici for Complaint Counsel, and I have with  
9 me at table Peggy Femenella and Lincoln Mayer.

10 JUDGE CHAPPELL: Thank you.

11 For Respondents?

12 MS. MCEVOY: Good afternoon, Your Honor. Julia  
13 McEvoy from Jones Day, and we're excited to see the  
14 updates aren't any quicker for the Federal Trade  
15 Commission. With me today is Pam Petersen, Axon  
16 Enterprise's director of litigation, and my colleagues  
17 from Jones Day, Aaron Healey at the end of the table  
18 and Lou Fisher behind me.

19 MR. OSTOYICH: Your Honor, I am going to stand  
20 right here if it's okay. Joe Ostoyich, with Baker  
21 Botts, for Respondent Safariland LLC, and Christine  
22 Ryu-Naya and Caroline Jones behind me, also from Baker  
23 Botts.

24 JUDGE CHAPPELL: Okay, thank you.

25 The complaint alleges the acquisition by Axon

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 of -- somebody tell me how to pronounce V-I-E-V-U --

2 MS. MCEVOY: "VieVu," Your Honor.

3 JUDGE CHAPPELL: -- VieVu from Safariland in  
4 May 2018. The notice of contemplated relief in this  
5 complaint seeks divestiture among numerous other  
6 things.

7 What is the status of the integration? Is it a  
8 done deal? Is it complete?

9 MS. MCEVOY: Yes, Your Honor. The transaction  
10 was consummated in May of 2018. So the parties have  
11 fully integrated their operations.

12 JUDGE CHAPPELL: Okay. It's one entity now?

13 MS. MCEVOY: Yes, sir. I'm sorry, perhaps I  
14 could let Ms. Petersen address the specifics of that,  
15 because I don't want the record to be confused.

16 MS. PETERSEN: VieVu is still a subsidiary, and  
17 Axon is honoring VieVu's subcontracts, as they were  
18 when we acquired the company, to the extent that those  
19 customers haven't made other choices about where they  
20 wanted to have their business.

21 JUDGE CHAPPELL: And VieVu, is that mostly  
22 software?

23 MS. PETERSEN: It's -- they have body-worn  
24 cameras and the digital evidence management systems as  
25 well.

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 JUDGE CHAPPELL: Okay. And Axon was just  
2 cameras?

3 MS. MCEVOY: No, Your Honor. Both.

4 JUDGE CHAPPELL: Both? Do the products that  
5 are being sold still have "Axon" on them and "VieVu" on  
6 them?

7 MS. PETERSEN: There are still both products in  
8 the field depending on the agency.

9 JUDGE CHAPPELL: Okay. And the plan is to  
10 leave it that way for now?

11 MS. PETERSEN: I'm sorry?

12 MS. MCEVOY: The plan is to leave it that way  
13 for now?

14 MS. PETERSEN: It's up to the customer's  
15 discretion in terms of what they want to do. If they  
16 want to stay on VieVu's platform and products, that is  
17 being honored pursuant to their contracts.

18 JUDGE CHAPPELL: And based on what I read in  
19 the pleadings, these are different products. Axon has  
20 products they make and which are different from VieVu's  
21 products or body cameras.

22 MS. PETERSEN: They certainly have different  
23 models, different features, different levels of  
24 sophistication for sure.

25 JUDGE CHAPPELL: All right, thank you.

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 I understand there is a pending or parallel  
2 district court case. Can someone give me the status of  
3 that?

4 MS. MILICI: Your Honor, there is a motion for  
5 a preliminary injunction pending in the District of  
6 Arizona. I believe that -- the FTC has filed an  
7 opposition, and I believe that the reply brief is due  
8 today, and the Court is expected to make a decision  
9 next week, in the next week or so.

10 JUDGE CHAPPELL: Do you agree?

11 MS. PETERSEN: I have no information about when  
12 the Court's expected to make a decision. We hope that  
13 they will act promptly, but, yes, we plan on filing  
14 that reply today and asking for expedited consideration  
15 of that motion.

16 JUDGE CHAPPELL: Has the case been submitted?  
17 Have you had any kind of hearing or anything?

18 MS. PETERSEN: No, Your Honor. The complaint  
19 was filed on January 3rd and followed the next week  
20 with the preliminary injunction motion. We have not  
21 been before the Court yet, simply given them briefing  
22 on the preliminary injunction motion.

23 JUDGE CHAPPELL: So what is the ruling you  
24 expect?

25 MS. MILICI: Your Honor, I apologize if I had

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 that wrong. The information that I had was that we  
2 were expecting a ruling, and I thought that was  
3 something that the Court had said, but perhaps I am  
4 incorrect on that.

5 My understanding is that the preliminary  
6 injunction will be fully briefed as of today, and the  
7 Court could hold a hearing or decide it on the papers.

8 JUDGE CHAPPELL: And didn't you say also  
9 declaratory judgment?

10 MS. PETERSEN: Yes, declaratory judgment and  
11 injunctive relief both in that complaint.

12 JUDGE CHAPPELL: And you expect a ruling on  
13 both of those?

14 MS. MILICI: No, Your Honor. To be clear, just  
15 on the motion for preliminary injunction that's  
16 currently pending.

17 JUDGE CHAPPELL: All right. I will need the  
18 parties to keep me updated on that case. Please send  
19 my office a courtesy copy of any public versions of  
20 dispositive or substantive orders and any briefs or  
21 motions you think I should see.

22 Now, let's talk about the scheduling order. I  
23 provided the parties a draft scheduling order, and I  
24 have a number of proposed changes, but they were  
25 submitted in joint form, so I will incorporate them

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 since evidently they're agreed to.

2 I do want to note the parties proposed to add a  
3 provision suggesting -- seeking leave to present  
4 witness testimony by video deposition. I will include  
5 that phrase, but the parties are discouraged from  
6 seeking to present video depositions. We don't like to  
7 sit here and watch TV. We like live witnesses.

8 There is a provision, additional provision 23  
9 in the scheduling order, if you want to present  
10 excerpts from video depositions. Before you attempt  
11 that, I expect the parties to have consulted and  
12 agreed. I don't want to hear live objections to  
13 deposition excerpts -- video excerpts that may be  
14 played in court.

15 Based on what I heard about a court in Arizona,  
16 I'm assuming no, but have the parties attempted to  
17 settle this matter?

18 MS. MILICI: Your Honor, the FTC is always  
19 happy to settle matters, and in this case where there  
20 is ongoing harm to police departments, we think  
21 restoring the lost competition is an urgent matter --

22 JUDGE CHAPPELL: Can we just have facts without  
23 argument?

24 MS. MILICI: Absolutely, Your Honor. There  
25 were discussions, and we hope to continue discussions.

Pretrial Conference

Axon Enterprises & Safariland

1/30/2020

1 There aren't any happening right this second.

2 JUDGE CHAPPELL: Okay, thank you. That kind of  
3 sounded like answers I heard in the Senate yesterday.

4 Go ahead.

5 MS. PETERSEN: There were discussions in  
6 December when we were meeting --

7 JUDGE CHAPPELL: I need you to speak up a  
8 little.

9 MS. PETERSEN: Yes. There were discussions --

10 JUDGE CHAPPELL: There is a microphone there.

11 MS. PETERSEN: There were discussions relating  
12 to settling in December when we met with the front  
13 office staff and the Commissioners, and at that time,  
14 before the enforcement action was filed, we submitted a  
15 substantial settlement proposal that was not accepted  
16 by the FTC.

17 JUDGE CHAPPELL: Well, we're in public session.  
18 Can you tell me anything about that proposal that is --  
19 can be public, or not?

20 MS. PETERSEN: I can tell you what is public is  
21 that we offered to divest completely VieVu, not only  
22 all of the assets that the company acquired but also  
23 our improvements to those products and those assets, as  
24 well as infuse the new company with \$5 million in cash.

25 JUDGE CHAPPELL: Okay. Let's say you bought a

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 pie with five slices. Did you agree to divest the  
2 whole pie that you bought?

3 MS. PETERSEN: Yes.

4 JUDGE CHAPPELL: You did?

5 MS. PETERSEN: We did.

6 JUDGE CHAPPELL: Why is that rejected?

7 MS. MILICI: Your Honor, this is a technology  
8 market where improvements -- the technology is changing  
9 all the time, and I think we have a factual  
10 disagreement about whether VieVu's technology has been  
11 updated. In fact, Axon has been moving its  
12 customers -- VieVu's customers from VieVu's platform to  
13 Axon. It has not been developing it in a way one would  
14 if it was going to keep a competitive product.

15 The relief that we are seeking, of course, is  
16 to restore the lost competition, competition that was  
17 lost by the transaction. What set of assets that would  
18 require would depend on the buyer and what the buyer's  
19 bringing to the table, but certainly taking the VieVu  
20 product as it existed a year and a half ago and  
21 divesting it would not replace the competition that was  
22 lost.

23 JUDGE CHAPPELL: And so the Government's  
24 position is that some company that the bureaucracy  
25 finds to take over these assets, should the Government

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 succeed, is going to help competition a lot better than  
2 something that could be worked out by the parties,  
3 where you name a master or somebody and they handle  
4 this whole thing? You understand that doesn't really  
5 work out if you look at history.

6 MS. MILICI: Understood, Your Honor, and I  
7 think that that's not our position. Our position is  
8 that we would hope to be able to work something out  
9 with Respondents, but it would have to be a solution  
10 that recreated the lost competition, and certainly just  
11 selling off the assets that had essentially been  
12 shelved for a while is not going to replace that lost  
13 competition.

14 JUDGE CHAPPELL: So if you were convinced that  
15 the Respondents presented a proposal and you were  
16 convinced that this is what they bought and they're  
17 willing to divest what they bought, that's not enough?

18 MS. MILICI: Your Honor, no, it wouldn't be in  
19 this case, and, again, it depends -- this is a  
20 technology market, and the technology has evolved over  
21 the last two years --

22 JUDGE CHAPPELL: Well, you understand that  
23 divestiture is something that, although drastic, it can  
24 happen. You bought this, it's gone, you can't have it.  
25 But restoring competition, as I keep referring to, you

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 understand how amorphous that is, how hard that is to  
2 get to, to put that --

3 MS. MILICI: I do, Your Honor.

4 JUDGE CHAPPELL: -- to put Humpty-Dumpty back  
5 together again.

6 MS. MILICI: I do understand that, Your Honor,  
7 and it is always a difficult and complicated process,  
8 but I think it's an important one to do. This lost  
9 competition is harming police departments, and our job  
10 is to make them whole again and to create -- recreate  
11 the lost competition, and that's what our aim will be.

12 JUDGE CHAPPELL: Well, I would advise the  
13 Government to seriously consider any proposal, because  
14 you may just get what you wished for if you succeed and  
15 find out that competition is in a much worse state than  
16 it is at the present.

17 MS. MILICI: Absolutely, Your Honor, and that  
18 would, of course, never be our goal.

19 JUDGE CHAPPELL: I understand it's not your  
20 goal. I'm talking about reality and history.

21 MS. MILICI: Absolutely, Your Honor.  
22 Understood.

23 JUDGE CHAPPELL: At this time, I will listen to  
24 the overview or summary of the case. Each side is  
25 limited to 15 minutes.

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1           Have Respondents worked out a plan for the 15  
2 minutes?

3           MS. MCEVOY: Roughly, Your Honor, yes.

4           JUDGE CHAPPELL: Okay. Am I going to have to  
5 hold a stopwatch here or -- because Mr. Ostoyich's  
6 there, and I know how he works.

7           All right. Government, go ahead.

8           MS. MILICI: Thank you, Your Honor.

9           Before I get started, I do have copies of the  
10 presentation that I would be happy to distribute to the  
11 court reporter and Your Honor and your attorney-advisor  
12 and Respondents.

13          JUDGE CHAPPELL: Please do that. I don't need  
14 it if it's on the screen.

15          MS. MILICI: Okay. Thank you, Your Honor.

16          THE REPORTER: And please keep your voice up.

17          MS. MILICI: Thank you, Your Honor.

18          Your Honor, because this is a public  
19 proceeding, this presentation -- these are materials  
20 from public sources, including analyst and press  
21 reports and presentations that Axon made to investors  
22 and the Government. At trial, the evidence -- which  
23 may be in camera -- will support the statements in  
24 these documents.

25          Your Honor, in May of 2018, Respondent Axon

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 acquired VieVu from Respondent Safariland. Axon had  
2 been the dominant supplier of body-worn camera systems  
3 to large metropolitan police departments. Axon is also  
4 a dominant supplier in conductive electrical weapons,  
5 which they sell under the brand name TASER. Until  
6 2017, the corporation's name was TASER International.

7 VieVu was the number two competitor in the sale  
8 of body-worn camera systems at the time of the  
9 acquisition. Respondent Safariland, in addition to  
10 selling body-worn camera systems through its VieVu  
11 division, also sold and still sells other equipment to  
12 law enforcement agencies, like holsters and body armor.

13 Now, body-worn cameras are, as the name  
14 suggests, cameras that are worn on the body of police  
15 officers to document encounters between the police and  
16 the public. Body-worn cameras serve important  
17 functions. As this slide here shows -- and this is  
18 from an Axon investor presentation -- body-worn cameras  
19 may be used in use of force by police officers, reduce  
20 and help resolve community complaints, and improve  
21 evidence collection, which can lead to increased guilty  
22 pleas and --

23 JUDGE CHAPPELL: You mean complaints by the  
24 people, not -- you're not talking about complaints by  
25 the police force that may or may not want to wear them.

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 MS. MILICI: I'm sorry, Your Honor. I'm not  
2 sure that I heard your whole question.

3 JUDGE CHAPPELL: I see you talking about  
4 complaints here. Complaints by whom?

5 MS. MILICI: Your Honor, again, this is a slide  
6 from an Axon investor presentation. I understand that  
7 body-worn camera evidence can be used both to resolve  
8 complaints from the community and also to resolve  
9 evidentiary disputes, evidence against people who are  
10 accused of crimes.

11 JUDGE CHAPPELL: I just assumed if you put a  
12 slide up there, you would be able to answer questions  
13 about the slide.

14 MS. MILICI: Understood, Your Honor. I do  
15 understand that in this context it's -- they are  
16 referring to community complaints, but at the same  
17 time, I think that they are also referring to an  
18 increase in guilty pleas, which is a common complaint  
19 by police officers.

20 Body-worn cameras are designed for law  
21 enforcement use. They need to have a long battery life  
22 to cover shifts that may last up to 12 hours; they need  
23 to be securely mounted to an officer's body, usually on  
24 the officer's uniform; and they need to be durable.

25 Other important features include things like

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 auto-activation, and that's a mechanism that prompts  
2 the camera to activate when, for example, an officer  
3 draws his or her weapon.

4 And a related feature that's also important to  
5 large metropolitan police departments is the pre-event  
6 buffer, and that's the ability to capture footage prior  
7 to the event that prompted that activation. That  
8 buffer is what allows the police department and the  
9 public to see what happened right before a weapon was  
10 pulled.

11 Now, as this slide -- which is also from an  
12 Axon investor presentation -- shows, a law enforcement  
13 body-worn camera program needs more than just the  
14 camera to be successful. It also requires the ability  
15 to transfer, store, and manage a tremendous amount of  
16 data and to do so in a way that makes the video easily  
17 accessible when necessary, all while maintaining  
18 security and the chain of custody.

19 The storage and management component, as we  
20 just discussed here, is called a digital evidence  
21 management system, or DEMS. Police departments  
22 frequently issue requests for proposals seeking to  
23 purchase body-worn cameras and DEMS together as an  
24 integrated body-worn camera system.

25 In fact, in a lawsuit it filed against VieVu

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 prior to the acquisition, Axon itself alleged that its  
2 cameras, software, and storage were sold together as a  
3 body-worn video system. This slide shows an allegation  
4 from that complaint.

5 Now, Axon uses a slightly different acronym.  
6 They refer to a BWV for body-worn video instead of a  
7 BWC for a body-worn camera. That's an immaterial  
8 distinction. Axon's complaint states that the camera  
9 is only one component of a complete system which  
10 requires software and storage.

11 As Axon alleges, given the complexity, most  
12 agencies turn to third-party vendors for an end-to-end  
13 solution, and this is exactly what the complaint  
14 alleges here.

15 JUDGE CHAPPELL: Hold on a second.

16 (Discussion off the record.)

17 JUDGE CHAPPELL: You are going to need to slow  
18 down.

19 MS. MILICI: Certainly, Your Honor. I  
20 certainly will.

21 The relevant market here is the sale of  
22 body-worn camera systems to large metropolitan police  
23 departments in the United States. Axon -- and before  
24 the acquisition, VieVu -- focused on selling body-worn  
25 camera systems to large metropolitan police

For The Record, Inc.

(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 departments. Why? Because those customers had  
2 technical requirements that very few suppliers could  
3 fill and often the only suppliers who could meet the  
4 technical requirements were Axon and VieVu.

5 JUDGE CHAPPELL: I noticed in the pleadings,  
6 one of the Respondents didn't really want to agree with  
7 whatever you mean by a "large metropolitan police  
8 department." Do you think the parties can come to some  
9 understanding on your terminology?

10 MS. MILICI: Your Honor, I hope that we can,  
11 and if we cannot, I would expect us both to be  
12 presenting evidence.

13 So what makes large departments different is  
14 that they have a lot of sworn officers who police on  
15 their feet --

16 JUDGE CHAPPELL: I have a question. What do  
17 you mean by "large"? Are you talking about population?  
18 Are you talking about square miles? How do you define  
19 it?

20 MS. MILICI: So, Your Honor, I was going to get  
21 to this next, but the parties certainly in their own  
22 documents recognize that large metropolitan police  
23 departments --

24 JUDGE CHAPPELL: So you are using their  
25 terminology?

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 MS. MILICI: We are using -- we are referring  
2 to a distinct customer segment that Axon and VieVu  
3 recognize, and if you like, I can just skip ahead to  
4 the next slide here.

5 JUDGE CHAPPELL: I'm just trying to find some  
6 benchmark. For example, you know, is Richmond a large  
7 metro PD? You know, what about Roanoke, Virginia?  
8 What about Charlottesville, Manassas?

9 MS. MILICI: Understood, Your Honor, and I  
10 don't have a list memorized at this moment, but I  
11 wanted to show you this slide, which is from -- another  
12 slide from an Axon investor presentation, and as this  
13 slide shows, Axon itself is -- considers large  
14 metropolitan police departments as a distinct group of  
15 customers.

16 And here, this is showing the number of  
17 contracts that Axon and VieVu had with members of the  
18 U.S. Major City Chiefs Association, and that agency or  
19 that organization, which is called the MCCA, is  
20 designed to include the largest metropolitan police  
21 departments in the country.

22 And membership in the MCCA is determined by  
23 both the combination of the number of sworn officers  
24 and the population. So I think that those are -- using  
25 both metrics to determine what's large and what's

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 medium and what's metropolitan versus what isn't, and  
2 those end up being the metrics that are used by the  
3 MCCA.

4 But ultimately, where exactly you draw the line  
5 between what's a large police department and what's a  
6 medium police department, it doesn't matter to this  
7 case. Whether it's a thousand officers or 900  
8 officers, whether it's a population of a million or  
9 800,000, it doesn't change the outcome here, which is  
10 that the transaction is presumptively unlawful and  
11 there's evidence of anticompetitive effects.

12 JUDGE CHAPPELL: So you're telling me you can  
13 do the math without definitively defining the customer?

14 MS. MILICI: Your Honor, I -- Your Honor, I  
15 think what I'm saying is that when you do the math with  
16 the different definitions, it comes out with the same  
17 result, which is that the market shares greatly exceed  
18 the thresholds set forth -- create HHIs that greatly  
19 exceed the thresholds set forth in the documents.

20 So as this slide shows, Axon supplied 42 MCCA  
21 agencies and VieVu supplied five, and there are four  
22 other competitors on this slide that each had five or  
23 fewer contracts each. Now, this is a market with very  
24 few competitors, and while you'll notice the names of  
25 big companies like Panasonic and Motorola here, the

For The Record, Inc.

(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 fact of the matter is that, despite years of being in  
2 this market, as this slide shows, they have not been  
3 successful.

4 But these numbers on this slide also understate  
5 VieVu's competitive significance, because in this  
6 representation, each large metro police department is  
7 counted equally, but VieVu, in fact, had a contract  
8 with the largest police department by far in this  
9 country, the NYPD. NYPD has more than 30,000 officers.  
10 Market shares calculated by number of officers showed  
11 VieVu with a significantly larger share of sales to  
12 large metropolitan police departments than any vendor  
13 on this page, other than Axon.

14 We included those market shares in the  
15 complaint, but given potential confidentiality  
16 concerns, I am not going to show them here, but I can  
17 say, without disclosing confidential information, that  
18 Axon and VieVu are clearly number one and number two by  
19 market share, and the number three company has a share  
20 significantly smaller than VieVu's.

21 At trial, Complaint Counsel will put on a  
22 substantial amount of direct evidence on competitive  
23 effects. That will be the core focus of our case, but  
24 we will also show that the merger is presumptively  
25 illegal no matter where you cut this difference between

For The Record, Inc.

(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 large and medium.

2 Now, direct evidence that the merger harms  
3 competition that we will introduce at trial includes  
4 evidence showing that VieVu and Axon competed  
5 aggressively to supply body-worn camera systems to  
6 large metropolitan police departments prior to the  
7 merger.

8 Now, as I mentioned, VieVu beat out Axon for  
9 the NYPD contract, which was a big deal in the industry  
10 and a big loss for Axon. This is an article -- on this  
11 slide is an article from a publication for investors  
12 that identified VieVu as Axon's -- which was then  
13 called Taser -- Axon's arch enemy because it won the  
14 NYPD contract.

15 In fact, in this article and elsewhere in the  
16 press, analysts predicted that competition from VieVu  
17 could lead to reduced margins, fewer contracts, and  
18 less revenue growth for Axon.

19 In addition to the NYPD, VieVu beat out Axon  
20 for contracts with Miami-Dade, Phoenix, and others. By  
21 the time of the merger, as this publication notes,  
22 VieVu was Axon's largest rival. Given Axon's already  
23 dominant position in the market for body-worn camera  
24 systems, the merger created, in the words of this  
25 author, a "near monopoly."

For The Record, Inc.

(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1           That VieVu was Axon's closest competitor at the  
2 time of the acquisition was widely reported. Here is a  
3 Bloomberg article identifying VieVu as Axon's main  
4 competitor and Axon and VieVu as the two largest  
5 providers of body-worn cameras. The evidence at trial  
6 will establish that this is true. And the evidence  
7 will also establish that for many large metropolitan  
8 police departments, Axon and VieVu were the number one  
9 and two choices and often the only two suppliers  
10 capable of meeting their technical requirements.

11           So the evidence will show that the effect of  
12 Axon purchasing its main competitor is to substantially  
13 lessen competition for the sale of body-worn camera  
14 systems to large metropolitan police departments.  
15 Prior to the acquisition, Axon and VieVu bid intensely,  
16 and that competition resulted in lower prices and  
17 better products for police departments.  
18 Competition for the sale of body-worn camera systems  
19 since the acquisition has suffered, which means police  
20 departments will pay more for body-worn cameras and get  
21 less in return.

22           In addition, the agreements Respondents entered  
23 into in connection with the merger restrained  
24 competition on other products and services sold to law  
25 enforcement. Remember, both of these companies sell

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 other products to law enforcement. By transferring  
2 ownership of VieVu from Safariland to Axon, Respondents  
3 agreed to broaden noncompete and nonsolicitation  
4 provisions. While the merger would be unlawful with or  
5 without these noncompete or nonsolicitation provisions,  
6 the noncompetes extended the scope of the competitive  
7 harm beyond the market for body-worn camera systems.

8 Finally, Respondents raise several arguments in  
9 their answer, but all of them fail. Because of high  
10 entry barriers, no company is likely to replace the  
11 competition lost by the acquisition. Respondents  
12 cannot establish merger-specific efficiencies  
13 sufficient to offset the harm. This merger did not  
14 significantly increase output or decrease costs.

15 Now, most likely my colleagues on the other  
16 side here will spend a lot of their time arguing that  
17 Safariland or VieVu were failing at the time of the  
18 acquisition. According to that argument, as far as I  
19 understand it, they contend that winning the NYPD  
20 contract somehow made VieVu less competitive, and that  
21 isn't true.

22 In fact, VieVu remained a formidable competitor  
23 up 'til the day that Axon bought it, and Respondents  
24 cannot meet the requirements -- the legal requirements  
25 for establishing a failing firm defense. Among other

For The Record, Inc.

(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 things, Safariland paid its bills on time, never  
2 seriously considered bankruptcy, and did not adequately  
3 shop new assets, but instead completely excluded  
4 financial buyers from consideration.

5 So, in sum, the evidence will clearly show that  
6 the merger is anticompetitive and will harm police  
7 departments and the communities that they serve. Thank  
8 you, Your Honor.

9 JUDGE CHAPPELL: All right, thank you.  
10 Go ahead.

11 MS. MCEVOY: Thank you, Your Honor. Your  
12 comments about divestiture and what it would mean for  
13 replacing lost competition are particularly apt. As  
14 you'll hear and as my colleague on the other side  
15 hinted, we're going to tell you about VieVu and that it  
16 was, in fact, a failing firm. It wasn't an effective  
17 competitor in 2018, and it certainly wouldn't be now.

18 The ultimate question in this case, of course,  
19 is whether the Commission can prove its claim that  
20 Axon's 2018 acquisition of VieVu substantially lessened  
21 competition for the sale of body-worn cameras and  
22 digital evidence management systems. Answering this  
23 question will require the Court to assess whether the  
24 proposed customer market -- ambiguously defined, as you  
25 noted, as large metropolitan police departments --

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 accurately captures the wide and increasingly varied  
2 range of agencies and businesses that employ these  
3 technologies.

4 JUDGE CHAPPELL: The screen that I saw,  
5 supposedly it was from one of the Respondents, what  
6 did -- what did "large metro PD" mean as used by the  
7 company?

8 MS. MCEVOY: Well, there is -- I don't know  
9 which document, Your Honor, that that comes from, and  
10 so I wouldn't want to speculate as to what a particular  
11 document might have meant.

12 JUDGE CHAPPELL: Well, let's talk about your  
13 client. Do they only sell to what they consider to be  
14 large police departments?

15 MS. MCEVOY: Absolutely not, Your Honor. I was  
16 struck by a statistic I saw the other day that by  
17 officer count, the members of the Major City Chiefs  
18 Association -- and I'd need to go back and double-check  
19 this -- but I believe it was less than 5 percent of all  
20 of the officers in the country, and Axon employees are  
21 responding to RFPs for as many as 1200 police agencies  
22 across the country.

23 And what you'll hear from us when we get to  
24 trial, Your Honor, should we not be able to resolve  
25 this short of trial, is that we are aggressively

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 competing for all of those, and, in fact, many of those  
2 customers do have the same needs. The police officer  
3 walking down the same street in -- excuse me, walking  
4 down the street in Topeka may well have the same needs  
5 as the officer walking down the street in Seattle. And  
6 so there is not a meaningful difference between those  
7 two agencies for purposes of its needs when it comes to  
8 putting out an RFP for body-worn cameras and/or digital  
9 evidence management systems.

10 JUDGE CHAPPELL: Do large metro PDs include  
11 sheriff's departments?

12 MS. MCEVOY: I would think --

13 JUDGE CHAPPELL: For example, in Houston, the  
14 City of Houston I'm sure would be in your category as a  
15 large metro PD, but Harris County includes and  
16 surrounds Houston, and that's going to be massive also,  
17 but they're sheriffs.

18 MS. MCEVOY: Correct, and there is a separate  
19 sheriffs association -- and Ms. Petersen will correct  
20 me if I'm wrong -- but there is a Major Cities or Major  
21 County Sheriffs Association -- I want to get the  
22 terminology right -- but they have their own separate  
23 trade association, which is effectively what this is,  
24 and I'm not sure that the membership criteria that --  
25 for the MCCA that my colleague cited for you are

For The Record, Inc.

(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 entirely accurate, but I think it -- suffice it to say  
2 for present purposes that we think the customer market  
3 is much broader here than "large departments" or  
4 membership in the Major City Chiefs Association.

5 JUDGE CHAPPELL: Do you foresee a problem in  
6 this litigation coming to some agreement with the  
7 Government on how to define terms like "large metro  
8 PD"?

9 MS. MCEVOY: We may be able to reach agreement  
10 about what that means. We certainly would argue the  
11 legal import of that, which, of course, would be the  
12 question that you would need to decide. Even if we  
13 agree with what the Government -- what the boundaries  
14 of the Government's proposed market are, we would  
15 certainly argue about whether that was an inappropriate  
16 line to draw.

17 JUDGE CHAPPELL: Well, right, and I'm not  
18 talking about relevant or geographic market. I'm  
19 talking about customers.

20 MS. MCEVOY: Um-hum.

21 JUDGE CHAPPELL: So we can have general terms  
22 with specific definitions so we all are in agreement on  
23 what we're talking about.

24 MS. MCEVOY: Your Honor, we have only recently  
25 become involved in the case, but I understand that

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 that's been a request that Axon and Safariland have  
2 been making for some time, please tell us what your  
3 proposed market is, FTC, please tell us what you mean  
4 by "large," and we have not gotten a definitive answer  
5 on that, and it would certainly help narrow the issues  
6 for trial.

7 JUDGE CHAPPELL: What do you propose as the  
8 margin?

9 MS. MCEVOY: Well, that's not our burden, Your  
10 Honor, with all due respect, and that would be  
11 certainly a matter of expert testimony --

12 JUDGE CHAPPELL: So your position will be  
13 whatever the Government says their position is, you're  
14 wrong, but you're not going to say this is what it is?

15 MS. MCEVOY: Your Honor, I would defer to my  
16 experts on that, as we are just starting to develop the  
17 record and the evidence here. You know, the Government  
18 has had 18 months to take discovery of lots of  
19 different agencies. We're just getting started.

20 JUDGE CHAPPELL: Eighteen months that you know  
21 of.

22 MS. MCEVOY: That's absolutely correct, Your  
23 Honor.

24 So I submit, Your Honor, that math does matter  
25 here, because obviously what that math tells you about

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1    how these companies competed, whether they were, in  
2    fact, competing one and two in a bid market and not a  
3    traditional sales market, what that means for purposes  
4    of analyzing the market.

5            We'll also need to know and for you to decide  
6    whether that proposed product market, which includes  
7    integrated body-worn camera and digital evidence  
8    management systems, reflects commercial reality. In  
9    fact, they are separate products, and customers can and  
10   do choose, even as the Government's slide indicates --

11           JUDGE CHAPPELL: So a company -- are you  
12   telling me a company can buy the camera from -- a  
13   customer can buy a camera from Company A and the  
14   digital management system from Company B and they work?

15           MS. MCEVOY: Yes, Your Honor. In fact, I can  
16   give you an example. The City of Las Vegas has such a  
17   setup. It has Axon's body-worn cameras and a Motorola  
18   digital evidence management system, and so they are  
19   interoperable.

20           JUDGE CHAPPELL: That evidence management  
21   system, does it include a server? Is there a server  
22   there or is it just a database?

23           MS. MCEVOY: I am going to defer to  
24   Ms. Petersen.

25           JUDGE CHAPPELL: I am just trying to understand

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 what we're talking about.

2 MS. PETERSEN: There are two different  
3 products. There is a -- our digital evidence  
4 management system, as is the system of about seven  
5 other competitors, is cloud-based, because of the --  
6 right, so it's cloud-based, but there are also what are  
7 called on-premises solutions for agencies that want to  
8 have their stuff on a local server, and most of the  
9 competitors out there also offer a solution that would  
10 allow them to do that if they chose to do that. The  
11 movement is certainly more to the cloud, but there are  
12 many competitors -- many agencies who have on-premises  
13 solutions.

14 JUDGE CHAPPELL: So probably for backup, at  
15 least.

16 MS. PETERSEN: Yeah, just concerns about, you  
17 know, letting their evidence -- there are people who  
18 don't trust the cloud, you know, there's a whole  
19 variety of reasons. It depends sometimes on the  
20 technical sophistication of the agency as well in terms  
21 of their in-house technical staff available to work  
22 with the system.

23 JUDGE CHAPPELL: So is it a -- is it a turnkey  
24 sale? When your client sells everything they want to  
25 to a customer, a police department, does that include

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 cloud storage?

2 MS. PETERSEN: Yes. Usually part of the  
3 contracts include the various options, whether you want  
4 unlimited storage or a certain, you know, size of  
5 storage, depending on the number of officers, depending  
6 on how they plan to use it.

7 JUDGE CHAPPELL: Okay, thank you.

8 Make no mistake, before the trial's over, the  
9 Judge will have a thorough understanding of what's  
10 being sold and what's being bought.

11 MS. MCEVOY: Understood, Your Honor.

12 JUDGE CHAPPELL: Go ahead.

13 MS. MCEVOY: So I think the evidence will show,  
14 to your point, that the Commission's market is far too  
15 narrow to account for these realities. There is not a  
16 plug-and-play, one-size-fits-all, and that customer  
17 choice and customer proposals really drive sales in  
18 this particular arena.

19 But even if the Government were right about the  
20 relevant customer and product markets within which to  
21 assess competitive effects, the Commission has  
22 hopelessly overstated VieVu's competitive significance  
23 in 2018 and, frankly, stubbornly ignored the reality  
24 that VieVu couldn't have survived on its own with this  
25 dynamic and rapidly evolving marketplace.

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1           So let me start by talking about VieVu's  
2 competitive significance in 2018. We don't dispute the  
3 fact that VieVu was among the first companies to market  
4 and sell body-worn cameras, but as the industry  
5 matured, demand grew, and new providers entered the  
6 field, VieVu couldn't keep up. By the end of 2016, the  
7 company was losing money, its body-worn cameras and  
8 digital evidence management systems suffered from a  
9 variety of defects that compromised evidence -- and,  
10 again, I'm not --

11           JUDGE CHAPPELL: Are you telling me there's no  
12 intellectual property rights that are restricting  
13 competition? For example, VieVu doesn't own a bunch of  
14 patents and -- so someone can't just reverse-engineer  
15 the product and compete?

16           MS. MCEVOY: Most of these solutions, Your  
17 Honor, at least when we're talking about body-worn  
18 cameras, are components that are assembled from other  
19 places. So the individual components might be covered  
20 by somebody else's intellectual property, but to my  
21 knowledge, certainly Axon has never asserted any  
22 patents with respect to either of its products.

23           JUDGE CHAPPELL: So it's not like an iPhone and  
24 a Samsung phone.

25           MS. MCEVOY: No. We're not talking about the

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 kind of situation where they're fighting about whether  
2 it's appropriate to patent the soft corner of a device.

3 So as I said, Your Honor, by 2016, VieVu was no  
4 longer investing in research and development, and  
5 that's what we find particularly interesting about the  
6 Government's demands about what Axon would have to  
7 divest. VieVu was not moving forward. It was stuck as  
8 a function of its own financial condition.

9 And so as it teetered on the edge both of  
10 financial implosion and, you know, falling far behind  
11 the rest of the industry technologically, VieVu took a  
12 chance. It doubled down, and it made an unsustainable  
13 bid to serve the New York Police Department. The  
14 resulting contract created a huge cash flow problem for  
15 VieVu and forced the company to reduce its engineering  
16 and research and development budgets even further.

17 There is a lot more to that story, Your Honor,  
18 including financial arrangements that made VieVu's sale  
19 imperative, but in light of the Court's direction not  
20 to disclose any confidential information, that part of  
21 the story will have to wait for another day.

22 JUDGE CHAPPELL: So you plan to present  
23 evidence to prove that VieVu was a failing or flailing  
24 firm?

25 MS. MCEVOY: Absolutely, Your Honor.

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 JUDGE CHAPPELL: You understand the odds of  
2 that succeeding, don't you?

3 MS. MCEVOY: I certainly do. Every case stands  
4 on its own facts, and the facts here, I think, lead to  
5 a compelling conclusion that, in fact, VieVu was not a  
6 competitive constraint in 2018, and it wouldn't have  
7 even survived to be a competitor today.

8 JUDGE CHAPPELL: It's true, they all stand on  
9 their own facts, yet history will show a tough hurdle  
10 on failing firm.

11 MS. MCEVOY: Understood. Understood, Your  
12 Honor.

13 So VieVu approached Axon in 2018 and only after  
14 VieVu had unsuccessfully courted numerous other  
15 suitors. By that point in time, VieVu was hemorrhaging  
16 cash and incurring substantial debt. When Axon  
17 acquired the company, VieVu had just three days' --  
18 three days' worth of operating cash, \$27 million in  
19 debt, and almost a million dollars a month in operating  
20 losses.

21 JUDGE CHAPPELL: I don't know if you can answer  
22 this or not, but are you telling me VieVu put  
23 themselves up for sale?

24 MS. MCEVOY: It was certainly -- the business  
25 was certainly shopped to a number of suitors, Your

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 Honor. VieVu couldn't keep pace with competition or  
2 innovation, it couldn't meet its obligations for the  
3 NYPD, it didn't have the resources to compete for new  
4 opportunities, and the National Association of State  
5 Procurement Officers dropped it from its list of  
6 approved body-worn camera contractors.

7 In short, VieVu was no longer an effective  
8 competitor, a conclusion reinforced just months after  
9 Axon acquired the company when one of its cameras  
10 caught fire while an NYPD officer was wearing it. This  
11 high-profile product failure -- and, again, this was  
12 still under the VieVu brand -- caused substantial  
13 damage to VieVu's reputation and cost Axon millions of  
14 dollars to fix.

15 That's money that VieVu did not have and could  
16 not have invested itself to right the ship and repair  
17 its reputation, and still the Commission contends that  
18 VieVu was an effective competitor then and would be an  
19 effective competitor now. That conclusion is not  
20 persuasive, nor plausible.

21 Standing alone, the acquisition didn't harm  
22 competition in 2018, and it has not affected the  
23 competitive landscape today. The body-worn camera and  
24 digital evidence management industry are highly  
25 competitive. Barriers to entry are low, and

For The Record, Inc.

(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 competition is thriving. At least six or seven  
2 manufacturers regularly bid and win against Axon for  
3 BWC and DEMS customers of all sizes, and many more  
4 compete for open requests for proposals.

5 You saw some of the names, Judge, on the chart  
6 that the Commission put before you, and I would note  
7 that this presentation appears to come from March of  
8 2019. This industry is so dynamic and there are so  
9 many agencies that have not yet adopted the technology  
10 that this information I believe is now out of date.

11 In fact, in just the -- not quite a year since  
12 this document appears to have been created, Motorola  
13 has acquired WatchGuard in a \$280 million transaction,  
14 and since then, the combined entity has obtained  
15 contracts from at least two other substantially sized  
16 police agencies.

17 Barriers to entry are low. Portable camera  
18 technologies are widely accessible and increasingly  
19 affordable, and companies can enter the marketplace by  
20 designing software using third-party hardware, through  
21 Samsung or your iPhone, for example.

22 I thought about that point yesterday. I was in  
23 LaGuardia. I haven't actually seen somebody use one of  
24 these machines, but I've seen these big vending  
25 machines now at the airports, right, with all kinds of

For The Record, Inc.

(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 electronic equipment. So I wandered over, and I  
2 counted at least three different kinds of personal  
3 recording devices, phones, GoPro type cameras, and that  
4 was in one vending machine alone.

5 The Kit Carson County Sheriff's Office in  
6 Colorado has begun using the Samsung Galaxy  
7 smartphones. It's partnered with a new entrant called  
8 Visual Labs to provide a body camera solution.  
9 Utility, another company on the chart, grew its  
10 business by repackaging a smartphone as a body camera  
11 and developing its own evidence management system.  
12 These innovations provide lower cost options to police  
13 departments, exert downward pressure on prices, and  
14 encourage additional innovation in this environment.

15 Finally, as I mentioned a moment ago, open  
16 opportunities in white space are ample. Many police  
17 departments have yet to adopt a program, and  
18 competition for their attention is intense. Providers  
19 have not yet meaningfully penetrated a number of other  
20 large sectors, such as private security, emergency  
21 services, and the military, that will make significant  
22 use of these products in the future. This white space  
23 invites a wealth of new entry and expansion.

24 Finally, Your Honor, I heard a car commercial  
25 the other night, and it ended with the tag line, "If

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 you're always looking in the rear-view mirror, you  
2 can't see what's ahead of you." That struck me as an  
3 interesting observation as applied to this case, and  
4 it's one that mirrors the Court's obligation to assess  
5 the transaction's impact on competition, both when the  
6 transaction was consummated and moving forward.

7 A holistic, forward-facing analysis of the BWC  
8 and DEMS industries shows that the acquisition of  
9 VieVu, a failing firm, did not and will not adversely  
10 affect competition in this highly competitive  
11 marketplace.

12 Thank you, Your Honor.

13 MR. OSTOYICH: Two minutes, Your Honor.

14 JUDGE CHAPPELL: Go ahead.

15 MR. OSTOYICH: So my client, Safariland, got  
16 caught up in this, but to be clear, we're the tail on  
17 this dog, and let me tell you what I mean by that.

18 There are two counts. One is for the merger,  
19 the acquisition by Axon of the business we used to  
20 own -- used to own -- and the complaint, on its face,  
21 paragraph 2, says we sold that business and it closed  
22 in May of 2018, 18-plus months ago. Their own  
23 presentation on the second page called it a consummated  
24 merger. It's done.

25 I haven't found a case in the history of

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 Clayton Act Section 7 or the history of FTC Act Section  
2 5 that granted an injunction to enjoin something that  
3 doesn't exist anymore. We have nothing that could be  
4 remedied here, and in prayerful relief, the requested  
5 prayerful relief in the complaint, all of the requested  
6 injunctions are things against Axon but have nothing to  
7 do with my client. So on Count One, there is nothing  
8 we can do that would be enjoined.

9 JUDGE CHAPPELL: These contracts and agreements  
10 that are referred to in the complaint, they're not with  
11 your client, Safariland?

12 MR. OSTOYICH: They are, but the business has  
13 been sold and it's been -- it's closed. It's been  
14 closed for a year and a half now.

15 JUDGE CHAPPELL: So your position is your  
16 client is, as a matter of fact and law, not a party to  
17 the agreements at issue?

18 MR. OSTOYICH: We're a party to the agreements,  
19 but we couldn't be enjoined, because the injunction  
20 would be to divest something, whatever they're trying  
21 to work out, and we have nothing to divest. We don't  
22 own anything anymore.

23 On the second count, which is a count that  
24 challenges ancillary agreements, ancillary provisions  
25 in that merger agreement, noncompetes and

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 nonsolicitations, the parties modified the contract,  
2 the merger agreement, to void those provisions  
3 entirely. They are not in effect. So, again, I don't  
4 know how we can be enjoined.

5           During the period when they were in effect,  
6 from May of 2018 when the contract was struck until  
7 they were voided about a month ago, there is no  
8 allegation in the complaint that, but for those  
9 provisions, Safariland would have competed against Axon  
10 in some product that was subject to those provisions or  
11 would have hired or solicited some employee. There's  
12 nothing in the complaint. It's dead silent on that.

13           So an ancillary restraint in a merger agreement  
14 historically has been judged under the rule of reason,  
15 which requires some effect on competition, but there's  
16 nothing in the complaint. It's silent on any effect on  
17 competition.

18           And as far as I know, for the last 18 months  
19 plus during the investigation, we haven't seen a single  
20 fact that suggests that my client would otherwise have  
21 competed in some product against Axon and it chose not  
22 to because of those provisions or would have hired  
23 somebody from Axon and it chose not to because of those  
24 provisions. So there is no allegation, and we can't  
25 find any facts either.

For The Record, Inc.

(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 All right. With that, I'm done.

2 JUDGE CHAPPELL: All right.

3 MS. MCEVOY: Your Honor, if I may just for a  
4 moment, I was remiss in failing to let you know that,  
5 as Mr. Ostoyich pointed out, the parties did agree to  
6 amend the underlying deal documents to remove the  
7 provisions that are cited in the FTC's slide deck. We  
8 communicated that information to staff, and in fairness  
9 to them, they have been attempting to get back to us  
10 about how they would like to proceed.

11 We don't think that those agreements are still  
12 on the table. We have been occupied with things like  
13 negotiating the scheduling order, so I believe that's  
14 still an open item to be resolved between the parties,  
15 but as far as we're concerned, those agreements are no  
16 longer part of the discussion here.

17 JUDGE CHAPPELL: Any comment on that?

18 MS. MILICI: Yes. Thank you, Your Honor.

19 We did receive the amendments to the agreements  
20 about two weeks after the complaint was filed, and so  
21 we are still kind of processing and thinking that  
22 through, but I would note that these voluntary  
23 rescissions of these provisions could be voluntarily  
24 undone. So if it made commercial sense for them to  
25 enter into these provisions in the first place, then I

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 think that there's a serious risk that, after this case  
2 is over, they would have those same commercial  
3 incentives. So in our view, the voluntary agreements  
4 do not necessarily resolve the issue.

5 At the same time, we are, of course, interested  
6 in narrowing the issues for trial, and if there is some  
7 way to narrow this issue, we are very happy to do it.

8 JUDGE CHAPPELL: Okay.

9 I will be issuing the actual scheduling order  
10 shortly. Anything further today?

11 MS. MCEVOY: Yes, Your Honor, largely by way of  
12 housekeeping. We have two scheduling conflicts. We  
13 fully recognize that you are not in a position to move  
14 the start of the hearing date, but what we would  
15 propose -- and we had proposed it to Complaint  
16 Counsel -- is to start the opening arguments on the  
17 19th, as scheduled --

18 JUDGE CHAPPELL: You mean opening statements?

19 MS. MCEVOY: I'm sorry, yes, opening  
20 statements, thank you, Your Honor -- I was thinking of  
21 the argument for today -- and we would propose to begin  
22 the presentation of evidence on June 15. There are two  
23 reasons for that.

24 One is that Ms. Petersen -- who, as you can  
25 see, is a valuable member of the defense team here --

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 has been planning for two years a trip out of the  
2 country with family and friends, and they have all  
3 purchased airplane tickets -- I shouldn't say all --  
4 but many of them have purchased airplane tickets and  
5 made arrangements. She is not back until June 12th.

6 JUDGE CHAPPELL: Let's do it this way. It  
7 sounds like you're working something out. Figure out  
8 what you want to do and send an email to my office --  
9 you don't need a pleading on that -- and I'll let you  
10 know.

11 MS. MCEVOY: All right. Thank you, Your Honor.  
12 We will let you know about the other -- I will say that  
13 Complaint Counsel has not agreed to consent to that  
14 particular -- accommodating that particular scheduling  
15 conflict, and so if the Court is amenable to some sort  
16 of structure like that, we would appreciate some  
17 guidance to help us come to resolution on it.

18 The other conflict is that --

19 JUDGE CHAPPELL: Well, if you can't come to  
20 some agreement, then you're going to have to file a  
21 motion, and I'll deal with it that way.

22 MS. MCEVOY: All right. Thank you, Your Honor.  
23 I have got a much smaller couple-of-day conflict in  
24 that same window that we'll need to deal with, too, but  
25 perhaps we can continue our conversations with

## Pretrial Conference

Axon Enterprises &amp; Safariland

1/30/2020

1 Complaint Counsel and try to file some motion practice  
2 on this issue.

3 JUDGE CHAPPELL: Okay.

4 MS. MCEVOY: Thank you, Your Honor.

5 JUDGE CHAPPELL: Anything else?

6 MS. MILICI: Nothing further from Complaint  
7 Counsel. Thank you, Your Honor.

8 JUDGE CHAPPELL: Okay. Hearing nothing  
9 further, until we meet again, we are adjourned.

10 (Whereupon, at 3:01 p.m., the hearing was  
11 adjourned.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Pretrial Conference

Axon Enterprises & Safariland

1/30/2020

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE OF REPORTER

I, Susanne Bergling, do hereby certify that the foregoing proceedings were recorded by me via stenotype and reduced to typewriting under my supervision; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.



SUSANNE BERGLING, RMR-CRR-CLR