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

In the Matter of	
Axon Enterprise, Inc. a corporation,	Docket No. 9389
and	
Safariland, LLC, a partnership,	
Respondents.	

ORDER DENYING RESPONDENT'S MOTION FOR ISSUANCE OF SUBPOENA *AD TESTIFICANDUM* TO THE DEPARTMENT OF JUSTICE UNDER RULE 3.36

I.

On March 16, 2020, Respondent Axon Enterprise, Inc. ("Respondent" or "Axon") filed a Motion for Issuance of a Subpoena *Ad Testificandum* to a representative from the Department of Justice, pursuant to Federal Trade Commission ("FTC") Rule 3.36 ("Motion").[1] FTC Complaint Counsel filed its Opposition on July 13, 2020. For the reasons set forth below, the Motion is DENIED.

II.

Respondent states that it seeks the issuance of a subpoena *ad testificandum* to a representative from the Department of Justice ("DOJ") to shed light on the process by which the DOJ and the FTC divide antitrust enforcement activity, which in turn determines whether a merger challenge must proceed in federal court as opposed to an administrative hearing. Respondent argues that discovery into this "clearance" process is necessary to develop its affirmative defense that the process denies Respondent equal protection. Specifically, Respondent claims that "it has been denied equal protection of the laws by being forced, without any rational basis, into an adjudicative proceeding that does not provide the same rights and protections available in federal court." *See* Motion at 1. *See also* Motion at 2 (citing Amended

[1] By Commission Orders dated March 19, April 13, and June 3, 2020, this action was stayed until July 7, 2020. Respondent's request for expedited treatment is DENIED.

Answer, Eighteenth Defense, which states: "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.").

Complaint Counsel contends that Respondent's deposition topics address investigatory decision-making that preceded the Complaint, which, according to Complaint Counsel, is not discoverable. Complaint Counsel further asserts that the information sought by Respondent is not relevant to the case, is privileged, and/or is overbroad.

To obtain the appearance of an official of a governmental agency other than the Commission, a party must apply for issuance of a subpoena and must demonstrate that: (1) the material sought is within the permissible scope of discovery under Rule 3.31(c)(1); (2) the subpoena is reasonable in scope; and (3) the material sought cannot reasonably be obtained by other means. 16 C.F.R. § 3.36(a), (b)(1-3).

The permissible scope of discovery under Rule 3.31(c)(1) is limited to information that may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. 16 C.F.R. § 3.31(c)(1). Notwithstanding the general scope of permissible discovery, the rules require that discovery "be denied or limited in order to preserve the privilege of a . . . governmental agency . . . ." 16 C.F.R. § 3.31(c)(4).

III.

The five deposition topics for which Respondent seeks information from a DOJ representative are discussed in order below.

Topics 1 and 2

Topics 1 and 2 of the proposed subpoena request testimony from the DOJ regarding:

> The clearance process or other decision-making used to determine whether the FTC or DOJ will investigate a particular proposed merger or consummated merger, including the criteria, procedures, and identity of decision-makers over the past 25 years (and any changes over time).
>
> The clearance process or other decision-making as to whether the FTC or DOJ would exercise authority over the Axon/Vievu merger and the Motorola/WatchGuard merger.

Topics 1 and 2, on their face, seek discovery into the decision-making process that culminated in the FTC, rather than the DOJ, taking enforcement action against Axon. The reasons for issuing a complaint and the information considered or evaluated prior to issuance "are outside the scope of discovery, absent extraordinary circumstances." *In re LabMD, Inc.*, 2014 FTC LEXIS 45, *7 (Mar. 10, 2014). Moreover,

1967) (citation omitted). *See also United States v. Farley*, 11 F.3d 1385, 1388-89 (7th Cir. 1993) (holding that the deliberative process privilege precludes pre-complaint decision-making and communications between the FTC and DOJ); *FTC v. Warner Communications, Inc*., 742 F.2d 1156, 1161 (9th Cir. 1984) ("[T]he government's 'deliberative process privilege' . . . permits the government to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated) (*citing NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 150 (1975)).

Respondent has not identified any line of inquiry contemplated by topics 1 and 2 that would not implicate governmental decision-making. *Compare LabMD*, 2014 FTC LEXIS 45, at *15-18 (allowing deposition of official of Bureau of Consumer Protection ("BCP") in part, because the respondent had "articulated a valid line of inquiry" as to the factual bases for allegation that respondent's data security standards were unreasonable, but barring inquiry into "why, or how, BCP or the Commission determined to use a reasonableness standard to enforce Section 5, or why the alleged facts justify a conclusion of unreasonableness," because "a request for such justification is explicitly a request for the 'mental impressions, conclusions, opinions or legal theories of a party's attorney'"). Respondent has also not identified any particularized need or extraordinary circumstances that would justify inquiry into these matters.

In addition, Respondent does not cite any precedent allowing the type of discovery sought by Respondent in topics 1 and 2. For example, the order in *In re Intel Corp.*, Docket No. 9341, 2010 WL 2544424 (June 9, 2010), cited by Respondent, authorized a deposition subpoena for an official of the Bureau of Labor Statistics to address pricing of various computer microprocessors that were at issue in the proceeding. The respondent noted that the deposition would not seek disclosure of "any non-public proprietary data or the details of [the agency's] methodology." *Id.* at *1. Regarding *Cabell Huntington Hospital., Inc.*, Docket No. 9366, 2016 WL 232552 (Jan. 14, 2016), also cited by Respondent, there is no indication that the requested Rule 3.36 deposition subpoena, which was unopposed, sought any information analogous to that sought by the Respondent here.

Based on the foregoing, Respondent has failed to make the showing required under Rule 3.36 as to topics 1 and 2 of its proposed subpoena. To be sure, Respondent has not presented "extraordinary circumstances" justifying discovery of the process and decision-making that resulted in the FTC, rather than DOJ, bringing this enforcement action against Axon.[2]

Topic 3

Topic 3 of the proposed subpoena requests testimony from the DOJ regarding:

The DOJ's assessments regarding the similarities or differences between: (1) the FTC's

[2] Although this decision holds that Respondent has failed to demonstrate that the governmental processes and decision-making leading up to the complaint in this case are within the scope of discovery, the Supreme Court has held that issuance of a complaint is reviewable on appeal of any resulting cease and desist order and noted that the FTC Act expressly authorizes a court of appeals to order that the Commission take additional evidence. *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 244-45 (1980) (citing 15 U.S.C. § 45(c) and stating that "a record which would be inadequate for review of alleged unlawfulness in the issuance of a complaint can be made adequate"). "Thus, limiting Respondent's discovery as provided herein does not prejudice Respondent's ability to pursue its claim at a later phase of the case." *In re LabMD, Inc*., 2014 FTC LEXIS 35, *9 n.3 (Feb. 21, 2014).

Part 3 rules and procedures, including, without limitation, the Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.1 et seq.); and (2) the rules and procedures applicable in federal district court, including, without limitation, the Federal Rules of Evidence and the Federal Rules of Civil Procedure.

As noted above, Respondent's burden under Rule 3.36 includes demonstrating that the information is within the scope of discovery and cannot be obtained through other means. 16 C.F.R. § 3.36 (b)(2), (3). To the extent the "similarities or differences" between the rules applicable to federal court litigation and FTC administrative litigation are relevant, this is publicly available information and thus may be obtained through means other than a deposition of DOJ. Moreover, Respondent has failed to persuasively explain how DOJ's "assessments" of such asserted similarities and differences are relevant. Accordingly, Respondent has failed to make the showing required under Rule 3.36 as to topic 3 of its proposed subpoena.

Topics 4 and 5

Topics 4 and 5 of the proposed subpoena request testimony from the DOJ regarding:

The number of, and identifying information about, instances when a defendant was found liable, without appeal or after the exhaustion of any appeals, in a merger challenge brought by the DOJ in federal court in the last 25 years.

The number of, and identifying information about, instances when a defendant was found not liable, without appeal or after the exhaustion of any appeals, in a merger challenge brought by the DOJ in federal court in the last 25 years.

Information regarding the outcomes of merger trials and appeals is readily available through public sources. Accordingly, Respondent has not demonstrated that the information sought cannot reasonably be obtained through means other than a deposition of DOJ. 16 C.F.R. § 3.36 (b)(3). Furthermore, Respondent has not established that its request to depose the DOJ about the outcome of every litigated merger challenge in the last 25 years is reasonable in scope. 16 C.F.R. § 3.36 (b)(1). Accordingly, Respondent has failed to make the showing required under Rule 3.36 as to topics 4 and 5 of its proposed subpoena.

IV.

As shown above, Respondent has failed to demonstrate that its requested subpoena meets all the requirements of Rule 3.36. Accordingly, the Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: July 21, 2020

Notice of Electronic Service

I hereby certify that on July 21, 2020, I filed an electronic copy of the foregoing Order Denying Respondents Motion for Issuance of Subpoena Ad Testificandum to the DOJ Under Rule 3.36, Order Denying Respondents MTC Production of Documents Responsive to Respondents Second Set of Requests, with:

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I hereby certify that on July 21, 2020, I served via E-Service an electronic copy of the foregoing Order Denying Respondents Motion for Issuance of Subpoena Ad Testificandum to the DOJ Under Rule 3.36, Order Denying Respondents MTC Production of Documents Responsive to Respondents Second Set of Requests, upon:

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