

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.

ORIGINAL

Docket No. D9389

PUBLIC DOCUMENT

**RESPONDENT'S MOTION TO ADJOURN HEARING
FROM MAY 21 THROUGH JUNE 12, 2020**

Pursuant to the Federal Trade Commission's Rule of Practice 3.41(b), Respondent Axon Enterprise, Inc. ("Axon") respectfully brings this Motion to adjourn the hearing from May 21 through June 12, 2020, in order to allow full participation by Axon's in-house litigation counsel, Ms. Pamela Petersen. Ms. Petersen, who has entered an appearance, will be Axon's corporate representative and a key member of the defense team throughout the hearing. Ms. Petersen, however, has a substantial, unresolvable scheduling conflict from May 21 through June 12. Axon therefore seeks a recess during that period, with opening arguments on May 19 and May 20, and with witness testimony to begin on June 15. Because the adjournment requested is of the kind typically granted in judicial proceedings, Axon's motion should be granted.¹

¹ Respondent Safariland, LLC consents to, but Complaint Counsel opposes, a recess from May 21 through June 12. However, Complaint Counsel does not oppose (and Safariland consents to) a recess on May 28 and May 29, to accommodate a scheduling conflict for Julie McEvoy, Axon's lead counsel. Ms. McEvoy is scheduled to travel to Miami on May 28 for witness preparation and representation of a client at an immigration court trial on May 29. That trial cannot be moved without significant prejudice to the client, who is seeking political asylum in the United States, as the court has already indicated that the next available trial date would be in 2021 or 2022. At the same time, Ms. McEvoy's presence for the entire hearing in this case is needed because she

ARGUMENT

Rule of Practice 3.41(b) provides that hearings “shall proceed with all reasonable expedition, and, insofar as practicable, . . . shall continue, except for brief intervals of the sort normally involved in judicial proceedings” 16 C.F.R. § 3.41(b). The requested adjournment here is a brief interval of the sort normally involved in judicial proceedings. First, it is needed to accommodate a major scheduling conflict for a key participant in the hearing. Second, it will not disrupt the flow of the hearing. Third, it will not have an appreciable impact on the overall timeline of this case or cause any prejudice.

Ms. Petersen’s pre-existing scheduling conflict is unresolvable. As detailed in her declaration, she plans to be out of the country from May 21 through June 12 on a long-scheduled, prepaid, and nonrefundable personal trip with 15 other people for her 60th birthday. Declaration of Pamela B. Petersen ¶ 4 (attached as Ex. B). This is a “once-in-a-lifetime” trip for Ms. Petersen. *See id.* Also, if Ms. Petersen did not go, the primary purpose of the trip—which she organized—would be defeated for everyone. *See id.*

At the same time, it is important for Ms. Petersen to be present throughout the hearing. Ms. Petersen has entered her appearance in this proceeding and is taking a leading, hands-on role defending Axon—as she has done in other cases as well. She has been one of Axon’s primary lawyers since 2005, has been in-house since 2012, and presently serves as Axon’s Director of Litigation and National Appellate Counsel. *See id.* ¶ 2. Ms. Petersen has the greatest knowledge

is leading all aspects of Axon’s defense. In light of the Court’s comments at the January 30 scheduling conference, it is Axon’s understanding that a formal motion to adjourn the hearing on May 28-29 is not necessary because the request is unopposed.

and experience with respect to Axon's business and industry, especially on issues specific to this case. *See id.*

The importance of Ms. Petersen's hearing attendance, moreover, goes well beyond her full participation as a litigator. Ms. Petersen will be Axon's corporate representative at the hearing, and in that capacity she needs to be present for all hearing activity. In particular, Ms. Petersen's involvement has been and will be essential to any settlement discussions. She makes risk assessments and settlement recommendations, and she is the only Axon attorney with the authority to engage in meaningful settlement negotiations for this matter. *Id.* ¶ 5. As discussed at the scheduling conference, this is a case that ought to settle, given Axon's willingness to spin off all elements of the company that it acquired. Successful settlement negotiations occur in many cases after witnesses have begun testifying in court, and the start of witness testimony likely will be an important juncture in this case as well. But the prospects of settlement at that point would at least be severely diminished—and probably would be completely eliminated—if the first weeks of witness testimony proceeded with Ms. Petersen in a remote, foreign locale.

Brief recesses or extensions to accommodate pre-existing and irresolvable attorney scheduling conflicts are routinely granted in judicial proceedings and should be granted here. That is especially true because the requested adjournment would not disrupt the flow of the proceedings. The hearing in this case is set to commence on May 19, 2020. Thus, if opening statements are delivered on May 19 and 20, the recess would come at a natural transition point in the hearing. The hearing then would resume on June 15 with the beginning of witness testimony, which could proceed uninterrupted.

The requested adjournment also would not have an appreciable effect on the overall timeline for resolving this matter, and it would be consistent with the Commission's policy of

expediting merger challenge proceedings. Based on that policy, Rule 3.11 provides a default hearing start date eight months from the issuance of an administrative complaint challenging consummated transactions like the one here. 16 C.F.R. § 3.11(b)(4). And even with Axon’s requested recess, witness testimony would be well underway within five and a half months after the Complaint was issued (on January 3)—much sooner than under the default rule. Indeed, a schedule that included the requested recess would be comparable to the default schedule for challenges to *unconsummated* mergers. For those mergers, the hearing presumptively begins five months after issuance of a complaint. *See id.* This proceeding—again, even with the requested adjournment—would be on a similar track even though Axon’s *consummated* transaction does not implicate the Commission’s primary motivation for expediting merger challenge proceedings: to protect respondents in unconsummated merger cases so that they are not forced to abandon their transaction due to a protracted administrative process.²

Nor would the brief adjournment result in “protracted” proceedings or implicate the Commission’s other asserted reasons for avoiding them. *See* 73 Fed. Reg. 58832, 58832 (Nov. 6, 2008). The recess would not “result in substantially increased litigation costs” through, for example, “nonessential discovery and motion practice.” *See id.* And a short recess would not reduce the chances for a “just” and “fair” decision. *See id.* On the contrary, it would promote justice and fairness by enabling a key player to participate fully in the hearing.

Conspicuously absent from the Commission’s stated reasons for expedition is Complaint Counsel’s mantra that *any* delay in the proceeding will prolong competitive harm. That asserted

² *See* 74 Fed. Reg. 1803, 1807 (Jan. 13, 2009) (“The Commission typically seeks preliminary injunctive relief under Section 13(b) when it challenges an unconsummated merger, and the Part 3 proceedings in these cases are frequently the ones that are most in need of expedition. As noted above, parties have argued that protracted proceedings for merger cases could result in their abandoning transactions before their antitrust merits can be adjudicated.”).

interest, of course, presumes that Complaint Counsel will prevail on the merits. Such unsupported prejudice of the outcome is impermissible and thus cannot be a proper basis on which to make scheduling decisions.

In any event, the requested recess will cause no prejudice. The challenged acquisition closed on May 3, 2018, and the Commission spent more than 18 months investigating before issuing the Complaint. *See* Compl. ¶ 2. After the hearing begins on May 19, 2020, the up-to-210 hours of hearing time allowed under Rule 3.41(b) could take well over six weeks, even without a single day of recess. Following the completion of the hearing in this case, the proceedings will continue for another month while the parties file their proposed findings of fact, proposed conclusions of law, and briefing in support of same. *See* 16 C.F.R. § 3.46. The Rules provide another 70 days—assuming no extensions—for issuance of the initial decision. *See id.* § 3.51. Furthermore, the Commission can take up to an additional 182 days—approximately 6 months—after the initial decision before issuing its final decision. *See id.* § 3.52. All told, this timeline adds up to a final decision approximately 11 months after the start of the hearing—which, in this case, would mean a final decision more than 20 months after issuance of the Complaint³ and almost 3 years after the challenged transaction. Put in proper context, therefore, Axon’s requested recess would have a negligible impact.

CONCLUSION

The requested extension would enable participation in the hearing by Axon’s corporate representative and key defense team member, who has a major scheduling conflict that cannot be

³ In comparison, a recent consummated merger case lasted for more than 21 months (excluding a 1-month stay due to the partial government shutdown) between filing of complaint and final Commission decision. *See In the Matter of Otto Bock HealthCare North America, Inc.* (<https://www.ftc.gov/enforcement/cases-proceedings/171-0231/otto-bock-healthcarefreedom-innovations>).

moved. The extension would not disrupt the flow of the proceeding, have more than a negligible effect on the overall timeline, or cause any prejudice. Because courts routinely grant adjournments in similar circumstances, the hearing should be adjourned from May 21 through June 12, 2020.

Dated: February 7, 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.*

**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

PUBLIC DOCUMENT

RESPONDENT'S MEET AND CONFER STATEMENT

Pursuant to the Scheduling Order issued on January 30, 2020, Respondent Axon Enterprise, Inc. ("Axon") submits this statement in support of its Motion To Adjourn the Hearing from May 21 through June 12, 2020. In an good faith effort to resolve by agreement the issues raised by the Motion, Axon has conferred with Complaint Counsel and counsel for Respondent Safariland, LLC. Safariland LLC consents to Axon's motion. Complaint Counsel does not oppose a recess on May 28 and May 29, but opposes adjournment of the hearing from May 21 through June 12, 2020. Because the parties were unable to reach an agreement, Axon respectfully submits its Motion To Adjourn the Hearing from May 21 through June 12, 2020.

Dated: February 7, 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 ON RESPONDENT'S MOTION TO ADJOURN HEARING
FROM MAY 21 THROUGH JUNE 12, 2020**

Respondent Axon Enterprise, Inc. has filed a Motion To Adjourn the Hearing from May 21 through June 12, 2020. Having considered the Motion position of all parties, it is hereby ORDERED that the Motion is GRANTED and the hearing in the above-captioned matter shall be adjourned from May 21 through June 12, 2020.

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>
--	--

DECLARATION OF PAMELA B. PETERSEN

I, Pamela B. Petersen, declare as follows:

1. I am a competent adult and have personal knowledge of the following facts.
2. I am the Director of Litigation and National Appellate Counsel for Axon Enterprise, Inc. (“Axon”), a Delaware corporation, with its principal place of business in Scottsdale, Arizona. I have represented Axon, formerly TASER International, Inc., as outside counsel beginning in 2005 and joined its in-house litigation team in 2012.
3. I appear as counsel of record and actively participate as an integral member of Axon’s trial team in all litigation, including in this enforcement action. In cases such as this where Axon is forced to also hire outside counsel, I not only direct outside counsel as to litigation strategy, but brief and argue motions, evidentiary matters and the like as the company’s subject matter, technology, and product expert. Such substantive participation is critical to impart institutional knowledge no outside counsel can possess and to prevent unintentional errors and omissions.

4. On May 21 through June 12, 2020, I am scheduled to be out of the country on an African safari with my husband and seven other couples, all family and friends, to celebrate my 60th birthday. This top-of-my-bucket-list trip has been planned for over two years and I was its organizer. In addition to my birthday, the trip was planned specifically for this year due to a medical condition that is increasingly restricting my ability to travel, particularly on long flights. My husband and I also have \$30,000 invested in this once-in-a-lifetime adventure, which is non-refundable for work-related conflicts under our travel insurance. Accordingly, I have a substantial, unchangeable conflict with the present hearing set to begin on May 19, 2020.

5. While no one is irreplaceable, there simply is no other litigation attorney at Axon who can step into my role during this 3-week period—no one with my 33 years of litigation experience, no one with my knowledge of important restricted Safariland confidential information critical to Axon's defense, and no one with authority to engage in meaningful settlement discussions should that need arise. It is my role to make risk assessments and settlement recommendations to our General Counsel and Litigation Committee, and to meet with and advise them regarding the same. And particularly here, where our General Counsel, executives and Board members are screened out from all Safariland confidential information, my counsel is necessary.

6. Axon's only outside counsel in this proceeding are attorneys from Jones Day (although conflict counsel may be necessary for certain third-party discovery). However, outside counsel can only act based on the consent of their client, and for the purpose of this litigation, I am that client representative.

7. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

EXECUTED this 6th day of February, 2020 at Scottsdale, Arizona.

A handwritten signature in cursive script that reads "Pam Petersen". The signature is written in black ink and is positioned above a horizontal line.

Pamela B. Petersen

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 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: nlinquist@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
Caroline Jones
Christine Ryu-Naya
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
Email: caroline.jones@bakerbotts.com
Email: christine.ryu-naya@bakerbotts.com

*Counsel for Respondent
Safariland LLC*

Counsel for the Federal Trade Commission

Dated: February 7, 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 7, 2020

s/ Julie McEvoy

Julie E. McEvoy

Notice of Electronic Service

I hereby certify that on February 07, 2020, I filed an electronic copy of the foregoing Motion of Respondent Axon Enterprise, Inc. to Adjourn Hearing from May 21 through June 12, 2020, 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 07, 2020, I served via E-Service an electronic copy of the foregoing Motion of Respondent Axon Enterprise, Inc. to Adjourn Hearing from May 21 through June 12, 2020, 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

Aaron Healey
Attorney