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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

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Pretrial Conference
Axon Enterprises & Safariland

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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

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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.

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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.

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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

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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

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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.

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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

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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

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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

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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.

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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

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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.

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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

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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

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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

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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?

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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

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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

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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

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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."

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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

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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

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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 --

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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

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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

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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

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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

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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

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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

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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.

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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

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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.

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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

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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

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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

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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

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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

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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

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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.

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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

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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 --

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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

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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.)

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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