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

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

ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO QUASH NOTICE OF DEPOSITION ISSUED UNDER RULE 3.33(c)

I.

On July 13, 2020, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion to Quash Notice of Deposition Issued Under Rule 3.33(c) ("Motion"). Respondent Axon Enterprise, Inc. ("Respondent" or "Axon") filed its Opposition on July 23, 2020. For the reasons set forth below, the Motion is GRANTED.

II.

Complaint Counsel contends that the topics upon which Respondent seeks to depose a Bureau of Competition designee, discussed below, are unrelated to any claim or defense in this case. Complaint Counsel further argues that the topics improperly seek to inquire into the FTC's internal "decision-making" and legal "assessments," and/or improperly seek information that is readily available from public sources.

Respondent contends that its deposition topics are designed to develop facts to support its Eighteenth Defense, set forth in Respondent's Amended Answer, 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."

III.

Pursuant to FTC Rule 3.33(c)(1), a party may notice a deposition naming as the deponent any bureau of the Federal Trade Commission, and describe with reasonable particularity the matters on which examination is requested. 16 C.F.R. § 3.33(c)(1). The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. 16 C.F.R. § 3.33(c)(1).

Pursuant to FTC Rule 3.31(c)(1), the permissible scope of discovery 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).

The Rules further require that discovery be limited when the Administrative Law Judge determines that:

> (i) The discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
>
> (iii) The burden and expense of the proposed discovery on a party or third party outweigh its likely benefit.

16 C.F.R. § 3.31(c)(2).

"A party seeking to quash a subpoena has the burden of demonstrating why discovery should be denied. *In re Polypore Int'l, Inc.*, 2008 FTC LEXIS 155, 2008 WL 4947490, at *6 (Nov. 14, 2008) (denying motion to quash subpoena *ad testificandum*)." *In re Otto Bock HealthCare N. Am., Inc.*, 2018 FTC LEXIS 48, at *4 (Mar. 28, 2018).

IV.

Topics 1, 2 and 8

These topics seek deposition testimony on the following:

1. The clearance process or other decision-making used to determine whether the FTC or [Department of Justice ("DOJ")] will investigate a particular proposed

merger or consummated merger, including criteria, procedures, and identity of decision-makers over the past 25 years (and any changes over time).

2. 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.

8. The process and/or decision-making relating to the choice of forum in which the FTC will bring a merger challenge – in federal court or as an administrative proceeding subject to the Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.1 et seq.) – including the criteria, procedures, and identity of decision-makers over the past 25 years (and any changes over time).

Two orders were issued in this matter on July 21, 2020: an order denying Respondent's Motion for Issuance of Subpoena *Ad Testificandum* to the Department of Justice Under Rule 3.36 ("Order Denying DOJ Deposition Subpoena"); and an order denying Respondent's Motion to Compel Production of Documents by Complaint Counsel ("Order Denying Motion to Compel") (hereafter collectively, the "Orders of July 21"). Respondent acknowledges, as it must, that the foregoing Orders rejected Respondent's prior requests for discovery into the clearance process or other decision-making process relating to whether a merger investigation or enforcement action is undertaken by the FTC rather than by the DOJ. Opposition at 1-2.[1] The Orders of July 21, citing applicable precedent, held that such matters were beyond the permissible scope of discovery. As stated in the Order Denying DOJ Deposition Subpoena:

> [O]n their face, [the requests] 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, any "attempt to probe the mental processes" of investigators and the decision-making leading up to the complaint "is ordinarily privileged since [such information relates] to an integral part of the decision-making process" of government. *In re School Services, Inc.*, 71 F.T.C. 1703, 1967 FTC LEXIS 125, *5 (June 16, 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

[1] Respondent includes in its Motion a request for "reconsideration of the orders denying Axon's motions for leave to depose a representative of the Department of Justice and to compel responses to Axon's second set of requests for production." Opposition at 1-2. This single-sentence request, inserted into an opposition to a separate motion and lacking any particularized reasoning or supporting authority, is insufficient to raise a cognizable motion under FTC Rule 3.22 and will not be considered.

> 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)).

Order Denying DOJ Deposition Subpoena at 2-3.

Respondent claims that it is not seeking to challenge the Commission's "reasons for issuing a complaint" or the information "evaluated and considered" before filing the complaint in this matter. Rather, according to Respondent, it seeks information about the "policy or practice" the FTC and the DOJ "follow in determining *which* agency pursues an antitrust investigation or enforcement action." Opposition at 2-3. This is a distinction without a difference, and is unpersuasive. Ultimately, the discovery seeks to uncover the reasons and decision-making process that led to the FTC, rather than the DOJ, filing an antitrust complaint against Axon. Similarly, the request in topic 8 for information regarding the FTC's decision-making process for determining whether to bring an action in federal court or in an administrative proceeding constitutes an attempt to discover the underlying reasoning for filing a complaint, and is outside the scope of discovery under the precedents cited in the Orders of July 21. Moreover, the 25-year time period covered by the discovery contemplated by topics 1 and 8 is excessive.

Based on the foregoing, as to topics 1, 2, and 8, Complaint Counsel's Motion to Quash is GRANTED.

Topic 3

This topic seeks deposition testimony on:

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

Topic 3 is substantively the same as a topic that Respondent had proposed for its deposition subpoena to the DOJ. *See* Order Denying DOJ Deposition Subpoena at 3-4 (quoting Respondent's proposed deposition topic: "The DOJ's assessments regarding the similarities or differences between: (1) the FTC's Part 3 rules and procedures, including, without limitation, the Rules of Practice for Adjudicative Proceedings . . .; 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"). That discovery was disallowed. *Id.* at 4. The Order stated in relevant part, "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 . . . ." *Id.*

The same principles hold for the instant Motion. Respondent characterizes topic 3 as seeking testimony about the Bureau's knowledge of ways it benefits from

proceeding in a Part 3 adjudication instead of in federal court and the Bureau's general assessment of features that distinguish Part 3 proceedings from litigation in federal court. Any alleged "similarities and differences" between the federal rules and administrative rules constitute publicly available information, and Respondent has failed to persuasively explain how the Bureau's knowledge or assessment of the alleged similarities and differences between the federal rules and administrative rules is relevant to any claim or defense, including its Eighteenth Defense. Furthermore, deposition questioning into the bases for such analyses would improperly probe the mental processes of decision-makers. *In re School Services, Inc.*, 1967 FTC LEXIS 125, at *5.

Based on the foregoing, as to topic 3, Complaint Counsel's Motion to Quash is GRANTED.

Topics 4-7

The remaining topics seek testimony as follows:

4. The number of, and identifying information about, instances when a respondent was found liable, without appeal or at the conclusion of an appeal to the Commission, in an enforcement action brought in the FTC's own administrative process in the last 25 years.

5. The number of, and identifying information about, any instance when a respondent was found not liable, without appeal or at the conclusion of any appeal to the Commission, in an enforcement action brought in the FTC's own administrative process in the last 25 years.

6. The number of, and identifying information about, instances when a defendant was found liable after the exhaustion of any appeals in a merger challenge brought by the FTC in federal court in the last 25 years.

7. The number of, and identifying information about, instances when a defendant was found not liable after the exhaustion of any appeals in a merger challenge brought by the FTC in federal court in the last 25 years.

The outcomes of enforcement actions brought by the FTC in federal court and through the administrative process, including the outcomes of appeals, for the past 25 years is readily available on databases regularly used for such information, such as LEXIS and Westlaw. Respondent cites no authority to justify shifting the burden of collecting and reviewing 25 years' worth of publicly available information to an FTC deponent under the auspices of discovery. *See* 16 C.F.R. § 3.31(c)(2)(i) (stating that discovery shall be limited when the information is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive"). *See also* Order Denying DOJ Deposition Subpoena at 4 (denying substantially similar topics proposed for DOJ deposition, holding that such information was publicly available and record failed to establish that the request for 25 years' worth of information was reasonable in scope).

Based on the foregoing, as to topics 4-7, Complaint Counsel's Motion to Quash is GRANTED.

V.

For the above stated reasons, Complaint Counsel's Motion is GRANTED.[2]

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: July 30, 2020

[2] 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, at *9 n.3 (Feb. 21, 2014). 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"). In a recent decision in related federal litigation between the FTC and Axon, the court reiterated the foregoing principles, stating in pertinent part: "[I]f the facts needed by the Ninth Circuit [to address Axon's constitutional defenses] are beyond judicial notice, the FTC Act specifically provides that 'the court may order such additional evidence to be taken before the [FTC] and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper'. 15 U.S.C. § 45(c)." *Axon Enter., Inc. v. Fed. Trade Comm'n*, 2020 WL 1703624, at *9 (D. Ariz. Apr. 8, 2020).