UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of

Axon Enterprise, Inc.,
a corporation,

and

Safariland, LLC,
a corporation.

DOCKET NO. 9389

PUBLIC VERSION

ORDER DENYING RESPONDENT'S MOTION FOR A STAY

On January 10, 2020, Respondent Axon Enterprise, Inc. ("Axon") filed a motion to stay this administrative proceeding until entry of a final judgment on Axon's complaint seeking declaratory and injunctive relief in federal district court or, in the alternative, until entry of an order in that court on Axon's motion for a preliminary injunction. Complaint Counsel oppose the motion. For the reasons stated below, we deny Axon's motion to stay.

I. BACKGROUND

On January 3, 2020, the Commission filed an administrative complaint against Respondents Axon and Safariland, LLC ("Safariland") challenging Axon's acquisition of VieVu, LLC ("VieVu") from Safariland. According to the Complaint, Axon is a leading manufacturer and supplier of body-worn cameras and digital evidence management systems (collectively "BWC Systems"), and VieVu is its closest competitor. FTC Compl. ¶¶ 1-2, 36. Axon purchased VieVu from Safariland in May 2018. *Id.* ¶ 2. The Complaint alleges that, after the acquisition, Axon enacted substantial price increases, limited the availability of VieVu BWC Systems to customers, and stopped developing new generations of VieVu hardware and software. *Id.* ¶¶ 6-7. The Complaint asserts that Axon plans [redacted] *Id.* ¶ 7

Further, the Complaint alleges that, as part of the acquisition, Respondent Safariland agreed not to compete with Axon and not to solicit Axon's customers, including with respect to products and services not related to the acquisition, and both Axon and Safariland agreed not to affirmatively solicit each other's employees, all for 10 years or longer. *Id.* ¶¶ 12, 44-53. According to the Complaint, the acquisition agreement and the acquisition, including the non-compete agreements, violate Section 5 of the Federal Trade Commission Act (FTC Act) and/or Section 7 of the Clayton Act. *Id.* ¶¶ 57-60.

Hours before the Commission filed its complaint, Respondent Axon filed an injunctive and declaratory judgment action in the District of Arizona. Count I of that action alleges that "[t]he imminent administrative proceeding" against Axon violates Axon's Fifth Amendment due process and equal protection rights by subjecting Axon to unfair procedures before an administrative body rather than a trial before a neutral, federal judge. Axon Compl. ¶¶ 57-60. Count II alleges that the Commission's structure is on its face unconstitutional under Article II because Commissioners are shielded from at-will removal and administrative law judges may be removed only for cause and only by officials who themselves cannot be removed at will. *Id.* ¶¶ 61-62. Count III seeks a declaratory judgment that Axon's acquisition of VieVu "did not violate Clayton Act § 7 or any other antitrust law." *Id.* ¶ 64.

On January 9, 2020, Axon moved the district court to preliminarily enjoin the Commission's administrative proceeding on the basis of the first two counts of Axon's complaint. The next day, Axon moved to stay this administrative proceeding until entry of a final judgment in Axon's federal action, or in the alternative, until entry of an order on the motion for a preliminary injunction. Mot. of Resp't Axon Enterprise, Inc., to Stay Admin. Proceeding ("Motion") at 1. On January 21, 2020, Axon filed an Answer in this matter asserting eighteen affirmative defenses, including defenses based on the same constitutional grounds alleged in its federal complaint. Answer at 20-22. The evidentiary hearing in the administrative proceeding is scheduled to begin on May 19, 2020.

II. ANALYSIS

Commission Rule of Practice 3.41(f) provides, in relevant part, that a pending "collateral federal court action that relates to the administrative adjudication shall not stay the proceeding unless a court of competent jurisdiction, or the Commission for good cause, so directs." 16 C.F.R. § 3.41(f) (2019). This rule reflects the Commission's commitment to expeditiously resolving administrative complaints and minimizing delay and the concomitant harm to the public interest. *See N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 640, 641-42 (2011) (citing Rules of Practice, 74 Fed. Reg. 1816 (Jan. 13, 2009) (codified at 16 C.F.R. pts. 3 & 4) and 16 C.F.R. § 3.1 (2009)). The default rule is, thus, that the pendency of a collateral proceeding in federal court does not constitute a basis to stay the administrative proceeding. Axon has failed to show good cause to depart from this usual rule.

Axon argues that there is good cause to stay the administrative proceeding because doing so will conserve resources. Specifically, Axon asserts that, because its claims before the district court concern the constitutionality of the Commission's structure and proceedings, the district court's ruling could terminate this matter entirely. *See* Motion at 3. Accordingly, Axon claims,

allowing the administrative action to continue would waste resources and subject Axon to the very proceeding it asserts is unconstitutional, *id.*, while intruding on the district court's decision-making. *Id.* at 5. At the same time, Axon argues, a stay would cause no harm to the Commission. *Id.* at 3-4. These arguments fail on all counts.

Proceeding administratively is unlikely to waste resources because Axon's federal action is likely to fail for lack of subject-matter jurisdiction. In attempting to convince the district court to upend a century-old administrative system, Axon seeks to bypass a comprehensive, statutorily-established process for judicial review. The FTC Act expressly lays out a process pursuant to which the Commission may bring an administrative action, and if it finds a violation of the Act, issue a cease-and-desist order. 15 U.S.C. § 45(b) (2006). After issuance of that order, the party subject to it may obtain judicial review in a federal court of appeals, which has "exclusive" jurisdiction. 15 U.S.C. § 45(c)-(d). Where Congress has set out an exclusive review process for administrative actions, as it has in the FTC Act,[1] a litigant must follow that process. *See generally Elgin v. Dep't of the Treasury*, 567 U.S. 1 (2012); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).[2]

In the context of similar review schemes, courts have consistently rejected attempts to bypass the administrative review process, dismissing for lack of subject-matter jurisdiction claims just like Axon's that assert that the administrative proceeding is unconstitutional. *See, e.g.*, *Bennett v. S.E.C.*, 844 F.3d 174, 177, 188 (4th Cir. 2016) (district court lacked jurisdiction where plaintiff's complaint alleged that the Security and Exchange Commission's provisions for appointing and removing administrative law judges violated Article II of the United States Constitution); *Hill v. S.E.C.*, 825 F.3d 1236, 1239-41 (11th Cir. 2016) (district court lacked jurisdiction where plaintiffs' complaints alleged that the administrative proceeding violated removal protections of Article II, the non-delegation doctrine under Article I, the Seventh Amendment right to a jury trial, and the Appointments Clause); *Tilton v. S.E.C.*, 824 F.3d 276, 291 (2d Cir. 2016) (district court lacked jurisdiction where plaintiffs' complaint alleged that the administrative proceeding violated the Appointments Clause); *Jarkesy v. S.E.C.*, 803 F.3d 9, 14-15, 29-30 (D.C. Cir. 2015) (district court lacked jurisdiction where plaintiffs' complaint alleged, *inter alia*, that the SEC had prejudged the charges and denied plaintiffs their fundamental right to a jury trial in violation of the Due Process Clause and the Equal Protection Clause); *Bebo v. S.E.C.*, 799 F.3d 765, 767-68, 775 (7th Cir. 2015) (district court lacked jurisdiction where plaintiff's complaint alleged that the SEC's administrative proceeding violated removal protections of Article II and that the governing statute violated the Constitution's equal

[1] The process for a Commission administrative action to enforce Section 7 of the Clayton Act is virtually identical. *Compare* 15 U.S.C. § 21(b)-(d) *with* 15 U.S.C. § 45(b)-(d). Like the FTC Act, the Clayton Act vests "exclusive" jurisdiction to review Commission cease-and-desist orders in the court of appeals. 15 U.S.C. § 21(c)-(d).

[2] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), in which the Supreme Court allowed a plaintiff to bring a constitutional challenge to actions of the Public Company Accounting Oversight Board directly in federal court, is distinguishable. There, the relevant administrative statute "provide[d] only for judicial review of [Securities and Exchange] *Commission* action, and not every Board action is encapsulated in a final Commission order or rule." *Id.* at 490 (emphasis in original). As a result, to have its claims heard through the agency route, plaintiff either would have had to "select and challenge a Board rule at random" or voluntarily "incur a sanction (such as a sizable fine)" in order to trigger the mechanism for administrative and judicial review. *Id.* Axon, in contrast, is already properly before the Commission by virtue of its alleged violations of the FTC Act.

protection and due process guarantees by giving the SEC "unguided" authority to choose which respondents would receive the procedural protections of a federal district court); *see also Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 496 (D.C. Cir. 2018) (holding that a "comprehensive scheme of administrative review, followed by judicial review in a court of appeals, makes it clear that Congress implicitly precluded district court jurisdiction"). Because the district court likely lacks jurisdiction to adjudicate Axon's claims, there is no good cause to stay this proceeding.[3]

Even apart from the likely dismissal of Axon's federal claims, allowing the administrative action to proceed through discovery will not waste resources or unduly burden Axon. The underlying antitrust claims will need to be litigated regardless of the forum: Axon's federal court complaint includes a declaratory relief claim concerning the allegations in the Commission's complaint, so discovery conducted in furtherance of the Commission's proceeding is likely to have utility in the federal case as well, in the event it were to go forward. In any case, it is well-established that "the expense and annoyance of litigation is part of the social burden of living under government" and does not constitute irreparable injury. *Standard Oil*, 449 U.S. at 244 (internal quotation marks and citation omitted); *see also La. Real Estate Appraisers Bd.*, No. 9374, 2018 FTC LEXIS 7, at *3 (F.T.C. Jan. 12, 2018) ("*LREAB*"); *LabMD, Inc.*, No. 9357, 2013 WL 6826948, at *6 (F.T.C. Dec. 13, 2013).

Axon's suggestion that a stay is warranted because it would suffer harm merely from having to participate in an allegedly unconstitutional administrative proceeding also lacks merit. If Axon ultimately prevails in the administrative proceeding, it will have suffered no harm from having litigated in an administrative tribunal rather than in federal court. If it loses, and the Commission issues a cease-and-desist order, it will have suffered no irreparable harm because its rights "can be vindicated by a reversal of the Commission's final order" by a court of appeals. *Jarkesy*, 803 F.3d at 27 (internal quotation marks and citation omitted); *see also Bennett*, 844 F.3d at 184–85 ("defending oneself in an unlawful administrative proceeding . . . does not amount to irreparable injury."). As the D.C. Circuit explained, even assuming the respondent is right that proceeding administratively is unconstitutional, the respondent "has no inherent right to avoid an administrative proceeding at all." *Jarkesy*, 803 F.3d at 27.

Axon's argument that a stay would not prejudice the Commission is also unavailing. The Commission represents the public interest,[4] and public interest factors strongly support denying the stay. The public has an interest in ensuring that Commission litigation proceeds efficiently and without delay. This interest is substantial. The Commission has repeatedly stated that "[g]enerally, routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters." *RagingWire Data Ctrs., Inc.*, No. 9386,

[3] Nor does the Administrative Procedure Act, 5 U.S.C. § 704, which allows a party to challenge in federal court "final agency action for which there is no other adequate remedy in a court," provide a basis for jurisdiction. The Commission has taken no "final" action in this case. *See FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980) (holding that Commission issuance of its complaint is not "final agency action"). Having concluded that Axon's federal complaint likely fails for lack of subject-matter jurisdiction, we do not reach the issue of whether Axon is likely to succeed on the merits.

[4] *See, e.g.*, *In re Sanctuary Belize Litig.*, 409 F. Supp. 3d 380, 418 (D. Md. 2019); *McWane, Inc.*, No. 9351, 2014 WL 1630460, at *4 (F.T.C. Apr. 11, 2014) (finding that Complaint Counsel are responsible for representing the public interest); *Cal. Dental Ass'n*, No. 9259, 1996 FTC LEXIS 277, at *8 (F.T. C. May 22, 1996) (same).

2020 WL 91293, at *1 (F.T.C. Jan. 6, 2020); *LREAB*, 2018 FTC LEXIS 7, at *3. But there is an even more compelling reason to move quickly where, as here, a consummated merger is alleged to cause ongoing harm. The Complaint alleges that, after the acquisition, Axon enacted substantial price increases, limited the availability of VieVu BWC Systems to customers, and stopped developing new generations of VieVu hardware and software. FTC Compl. ¶¶ 6-7. The Complaint also asserts that Axon plans [redacted] *Id.* ¶ 7. If, as the complaint alleges, customers are paying supracompetitive prices as a result of an illegal merger of two close competitors, and if Axon is taking steps to curb innovation and diminish VieVu's viability as an independent competitor, it is urgent that the Commission move quickly to remedy the violation. There is a strong public interest in arresting the continuation of consumer harm.

Axon argues that we should nevertheless stay this proceeding because the Commission could still litigate its antitrust claims in Axon's declaratory judgment matter in federal court. Motion at 3-4. In effect, Axon asks us to cede this administrative proceeding in favor of litigation in the forum of its own choosing. But we have previously explained that "[t]o allow respondents to stay FTC proceedings based on the pendency of collateral federal court actions that they themselves have initiated would create perverse incentives to attempt to create duplicative proceedings, and would place respondents, rather than the Commission, in control of the administrative proceedings schedule." *N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 642-43. As the D.C. Circuit recognized, "Congress granted the choice of forum to the Commission, and that authority could be for naught if respondents . . . could countermand the Commission's choice by filing a court action." *Jarkesy*, 803 F.3d at 17 (discussing the SEC).

The fact that Axon filed its suit first, a few hours before the FTC issued the administrative complaint, does not change the analysis. As courts repeatedly have found, when a party files a declaratory judgment action in order to preempt an imminent complaint and deprive the complainant of his choice of forum, the party should not be rewarded for winning a race to the courthouse. *See, e.g.*, *Chicago Ins. Co. v. Holzer*, No. 00-Civ-1062, 2000 WL 777907, at *2 (S.D.N.Y. June 16, 2000) (courts may "ignore the timing of a suit to avoid rewarding parties attempting to use the declaratory judgment action in a race to the courthouse") (citation and quotation marks omitted); *Southmark Corp. v. PSI, Inc.*, 727 F. Supp. 1060, 1063 (S.D. Miss. 1989) (denying motion to dismiss or stay pending an earlier-filed declaratory judgment action because the earlier action was filed "in an obvious attempt to deprive the potential plaintiff of its choice of forum"); *see also AmSouth Bank v. Dale*, 386 F.3d 763, 788 (6th Cir. 2004) ("Courts take a dim view of declaratory plaintiffs who file their suits mere days or weeks before the coercive suits filed by a 'natural plaintiff' and who seem to have done so for the purpose of acquiring a favorable forum."); *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 718 (7th Cir. 2002) ("We have expressed wariness at the prospect of a suit for declaratory judgment aimed solely at wresting the choice of forum from the natural plaintiff.") (internal quotation marks and citation omitted); *cf. Hill*, 825 F.3d at 1248-49 ("it makes no difference that the Gray respondents filed their complaint in the face of an impending, rather than extant, enforcement action").

In light of the low likelihood of a favorable ruling for Axon in federal court, the absence of cognizable harm to Axon, and the significant countervailing interests in expeditious

adjudication and stopping any ongoing competitive harm, we find no good cause to stay this proceeding.

Accordingly,

IT IS ORDERED THAT the Motion of Respondent Axon Enterprise, Inc., to Stay the Administrative Proceeding is **DENIED**.

By the Commission.

April Tabor
Acting Secretary

SEAL:
ISSUED: February 27, 2020