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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,

and

Safariland, LLC,

a corporation.

Docket No. D9389

PUBLIC VERSION

**RESPONDENT'S MOTION FOR *IN CAMERA* TREATMENT OF TRIAL EXHIBITS
AND DEPOSITION TESTIMONY**

Respondent Axon Enterprise, Inc. moves pursuant to Rule 3.45(b) for *in camera* treatment of 659 proposed trial exhibits in whole or in part—out of the 3,124 documents on Complaint Counsel's exhibit list and the 1,278 on Axon's exhibit list¹—including confidential portions of deposition testimony. These documents and testimony contain highly sensitive, confidential information, and public disclosure would cause Axon serious competitive harm.

BACKGROUND

Axon, a producer of body-worn cameras and digital evidence management systems, acquired Viewu in May 2018. A short time later, the Federal Trade Commission began investigating the acquisition. Complaint Counsel filed its Complaint in this matter in January 2020. Axon has produced nearly 500,000 documents, and its employees have sat for more than a dozen depositions. Many of the documents Axon produced are entitled to confidential treatment

¹ Axon seeks confidential treatment of 553 documents listed on Complaint Counsel's exhibit list. It seeks confidential treatment of 146 documents listed on its exhibit list. Because a small number of the documents for which Axon is seeking confidential treatment—40 documents—appear on both parties' exhibit lists, the total number of documents for which Axon seeks confidential treatment is 659.

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under the Court’s January 6, 2020 Protective Order. The same is true of a limited range of Axon witnesses’ deposition testimony.

Complaint Counsel’s exhibit list contains 3,124 documents—far more than the number of documents that could be introduced in the trial in this matter, which Complaint Counsel has suggested to limit to a duration as short as 70 hours. *See* 1/30/2020 Scheduling Order ¶ 22 (“The final exhibit lists shall represent counsel’s good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits.”). After undertaking the burden and expense of reviewing each of these documents, Axon has identified five key groups of documents and testimony that would cause a serious competitive injury if disclosed to the public in these proceedings: (1) internal pricing information, (2) internal financial and business planning, (3) business strategy information; (4) product security information; and (5) personal information. Axon requests that documents and testimony falling within these categories—or, in some cases, the portions of those documents and testimony that Axon has proposed to redact—should receive *in camera* treatment.

LEGAL STANDARD

“[C]onfidential records of businesses involved in Commission proceedings should be protected insofar as possible.” *In re H.P Hood & Sons, Inc.* 58 F.T.C. 1184, 1961 WL 65882, at *2 (F.T.C. 1961). *In camera* treatment applies to information when “public disclosure will likely result in a clearly defined, serious injury.” 16 C.F.R. 3.45(b). Serious injury occurs when documents that are “sufficiently secret and sufficiently material to [Respondent’s] business” are disclosed to the public. *In re Otto Bock Healthcare N. Am.*, 2018 WL 3491602, at *1 (July 2, 2018) (quoting *In re Gen. Foods Corp.*, 95 F.T.C. 352, 1980 WL 338997, at *4 (F.T.C. 1980)). Secrecy and materiality turn on:

PUBLIC

- (1) the extent to which the information is known outside of the business;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken to guard the secrecy of the information;
- (4) the value of the information to the business and to its competitors;
- (5) the amount of effort or money expended in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

In re Bristol-Meyers Co., 90 F.T.C. 455, 1977 WL 189054, at *2 (F.T.C. 1977).

Once a party shows that disclosure of confidential information will cause serious injury “the principal countervailing consideration weighing in favor of disclosure” becomes the “importance of the information in explaining the rationale of decisions at the Commission.” *In the Matter of ProMedica Health Sys.*, 2011 WL 2258040, at *1 (May 25, 2011) (quoting *In the Matter of Gen. Foods Corp.*, 95 F.T.C. 352, 1980 WL 338997, at *3 (F.T.C. 1980)). *In camera* treatment is particularly appropriate for information less than three years old. *In the Matter of Impax Labs, Inc.*, 2017 WL 4810534, at *1 (Oct. 16, 2017). The ALJ has broad discretion to grant *in camera* status. *In the Matter of Gen. Foods Corp.*, 96 F.T.C. 168, 1980 WL 339035, at *2 (F.T.C. 1980).

ARGUMENT

Axon seeks *in camera* treatment of documents and testimony—or portions thereof, for documents and testimony Axon has proposed to redact—that fall into one of five categories: pricing and pricing strategy information; business development strategy; internal financial information; product security information; and personal information. Public disclosure of the identified documents and testimony would cause serious injury to Axon. As described in the declaration of Isaiah Fields, Axon’s General Counsel, attached as Exhibit B, the documents contain

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secret, material information that Axon goes to great lengths to protect, including internal pricing information, internal financial information, bidding strategies, and product security information. A complete list of these documents is appended as Attachment 1 to the Fields declaration. Because of the highly sensitive nature of the documents in each of these categories, Axon requests that they be kept confidential for ten years. *See In the Matter of Impax Labs., Inc.*, 2017 WL 4948988, at *1 (F.T.C. Oct. 23, 2017) (ordering *in camera* treatment for ten years over “documents that include financial and sales projections for future years and pipeline products”).

First, documents and testimony reflecting Axon’s pricing and pricing strategy information should be kept confidential. These documents reflect Axon’s pricing strategy for responses to requests for proposals, requests for and approval of discounts to offer customers, and other internal price-setting discussions. [REDACTED]

[REDACTED]

[REDACTED] Most of the information is less than three years old.

Second, documents and testimony reflecting Axon’s business development strategy and plans should be kept confidential. These documents include plans for product development, marketing, company growth, and strategic plans for competing in the market for BWCs and DEMS. [REDACTED]

[REDACTED]

[REDACTED] Here too, most of the information is less than three years old.

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Third, documents and testimony reflecting Axon’s internal financial information should be kept confidential. These documents include detailed, non-public financial information like budgets, cash flow analyses, and financial projections. [REDACTED]

[REDACTED]

[REDACTED] Again, most of the information is less than three years old.

Fourth, documents concerning the security functions of Axon’s products (including discussions of security vulnerabilities and solutions) should be kept confidential to protect the security of these products in the hands of law enforcement officers. [REDACTED]

[REDACTED]

[REDACTED]

Finally, certain documents should be kept confidential because they reflect sensitive personal information. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

All six *Bristol-Myers* factors support *in camera* treatment with respect to each category of documents described in this motion. The attached declaration describes in detail the confidential nature of the documents, the harm that Axon would suffer if the information were made public, and the steps Axon takes to keep the information confidential. *See, e.g., In the Matter of Tronox Ltd.*, 2018 WL 2336015, at *1 (F.T.C. May 15, 2018).

First, the information is particular to Axon’s business and not known outside Axon, with the exception of some prices, which are known to individual customers. Decl. ¶ 3. “Recent sales

PUBLIC

and profit data generally suggest themselves as being both secret and material to the firm concerned.” *Gen. Foods. Corp.*, 1980 WL 339035, at *3 n.4.

Second, only a small group within Axon has access to the information. The material remains available only to employees whose job duties relate to the information. Decl. ¶ 3. That amounts to a fraction of the more than 1,600 Axon employees.

Third, Axon expends great effort to keep this information secret. Axon marked the material “confidential” under the protective order in this case, and protects the information in its course of business to keep it out of competitor’s hands. Decl. ¶ 3. Axon has established and adhered to these internal policies and practices prohibiting disclosure of the information and has provided the material here with assurances that it would remain confidential under the protective order. Decl. ¶ 3.

Fourth, public disclosure would harm Axon’s ability to compete in the marketplace. Decl. ¶¶ 6-8. Competitors with access to the information could seek to preempt and counteract Axon’s key business strategies. Decl. ¶¶ 6-8. Axon’s relationships and dealings with customers could also suffer: Customers may look to compare the set of products Axon provides them at a particular price to the products and pricing Axon provides other customers, without sufficient background to put that information in context. Decl. ¶ 6. In short, revealing the material would undermine Axon’s competitive standing, benefit other market players, and sour Axon’s relationships with customers. That is a serious injury, sufficient to justify keeping the information confidential. *See In re Dura Lube Corp.*, 1999 FTC Lexis 255 at *7 (Dec. 23, 1999) (“The likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’”)

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Fifth, Axon has dedicated huge amounts of time, money, and energy in developing business strategies, pricing, innovation, and products. Decl. ¶ 6. Axon created these strategies and policies over the course of more than a decade and continually updates them today. Decl. ¶ 6.

Sixth, other parties have no access to this information because it remains confidential and not in the public domain. Nor could competitors reverse engineer Axon's unique business strategies without access to the material. Decl. ¶¶ 6-8. Axon employees developed the data, information, and documents over years of heavy investment in time and money.

Granting *in camera* status to Axon's information would align with this tribunal's general approach to such requests. For example, the court has granted *in camera* status to pricing information, the "technical specifications and capabilities of [Respondent's] manufacturing plants and products," as well as "models underlying [Respondent's] sales structure," documents reflecting "compensation and benefits for specific individuals," and Respondent's "plans relating to future potential changes in its work force and compensation/benefits strategy for specific [Axon] facilities." *In the Matter of Tronox*, 2018 WL 2336015, at *1-*2 (May 15, 2018). Other information also fell within the ALJ's *in camera* order: pricing information, business plans, views on efficacy of substitutes for products, supplier relationships, marketing practices, strategies, customer acquisition methods, analyses of participants in the relevant market, internal risk assessments, purchasing trends, strategic plans, R&D testing and qualification reviews, supplier-level purchasing data and pricing communications, supplier contracts, customer information, and more. *Id.* at *4-*12. The same should apply here.

CONCLUSION

Axon respectfully requests that the court grant its motion for *in camera* treatment.

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Dated: September 23, 2020

Respectfully submitted,

s/ Julie E. McEvoy

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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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NON-PUBLIC VERSION

RESPONDENT'S MEET AND CONFER STATEMENT

The Court's January 30, 2020 Scheduling Order does not require a certificate of conference for motions for *in camera* treatment. *See* 1/30/2020 Scheduling Order at 6, Additional Provisions ¶ 4. Respondent submits this certification to apprise the Court that it has conferred with Complaint Counsel in a good faith effort to resolve by agreement the issues raised in this motion. Complaint Counsel has indicated that it will not oppose portions of this motion, pending their review of Axon's motion, supporting declaration, and redactions.

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Dated: September 23, 2020

Respectfully submitted,

s/ Julie E. McEvoy

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Axon Enterprise, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 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:

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Counsel for the Federal Trade Commission

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Dated: September 23, 2020

s/ Julie E. McEvoy

Julie E. McEvoy

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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: September 23, 2020

s/ Julie E. McEvoy

Julie E. McEvoy

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EXHIBIT A

PUBLIC

**UNITED STATES OF AMERICA
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In the Matter of

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a corporation;**

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Docket No. D9389

**[PROPOSED] ORDER GRANTING RESPONDENT'S
MOTION FOR *IN CAMERA* TREATMENT**

Respondent Axon Enterprise, Inc. has filed a Motion for *In Camera* Treatment of Certain Documents and Testimony. Having considered the Motion, it is hereby ORDERED that the Motion is GRANTED.

SO ORDERED.

D. Michael Chappell
Chief Administrative Law Judge

Date:

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EXHIBIT B

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**UNITED STATES OF AMERICA
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NON-PUBLIC VERSION

DECLARATION OF ISAIAH FIELDS

1. My name is Isaiah Fields. I am the General Counsel of Axon Enterprise, Inc.
2. I exercise oversight of Axon's legal and compliance departments. I am familiar with Axon's policies and procedures regarding the protection of confidential information, and I have personal knowledge of how the disclosure of various types of confidential information would harm Axon.
3. In the ordinary course of business, Axon keeps certain information strictly confidential and limits its distribution within the company to employees who must or should know it in connection with their job duties. For instance, customer-specific price information is generally known only to a handful of executives, sales, customer service, and accounting personnel. Generally speaking, the only people outside Axon would who be aware of this information are the customers themselves, and at times consultants that are required to keep information confidential through the engagement agreements. When Axon produced confidential material to the FTC, it relied on the confidentiality rules and protective order which shielded confidential information from public disclosure.
4. I understand that Complaint Counsel's exhibit list included 1,858 documents produced by Axon, for 553 of which Axon seeks confidential treatment in whole or in part. Axon's exhibit list included 146 documents it produced for which it seeks confidential treatment in whole or in part. A small number—40 of the documents for which Axon seeks confidential treatment in whole or in part—appear on both parties' exhibit lists. As a result, the total number of documents for which Axon seeks confidential treatment, in whole or in part, is 659. A complete list of the documents for which Axon seeks confidential treatment is attached as Attachment 1 to this Declaration.
5. Due to the volume, no one person could reasonably review and categorize each document. Axon's outside counsel has described to me the categories of

confidential information contained in these documents. For each category, I explain why Axon will be harmed if the confidential information is made public.

6. Pricing and Pricing Strategy Information. Axon has, for years, devoted significant time and resources to developing bids, including pricing, responsive to each customer's individual needs. It does not publicly reveal any customer-specific information related to prices, discounts, margins, or sales volumes. This information is highly sensitive. If confidential pricing information is disclosed, Axon's competitors could use it to unfairly take business from Axon. I believe this information should remain confidential because it can be used to infer relevant information about Axon's current (and future) prices and commercial relationships.

[REDACTED]

7. Business Development Strategy Information. Axon produced documents reflecting its strategic plans and other forward-looking business plans. These include documents reflecting its forward-looking strategy for developing competitive bids. The public release of these materials would harm Axon because they reveal its current and future plans to improve its business and compete in the market. Axon's competitors could use them to plan their own competitive activities or unfairly undermine its plans for growth. I believe this information should remain confidential.

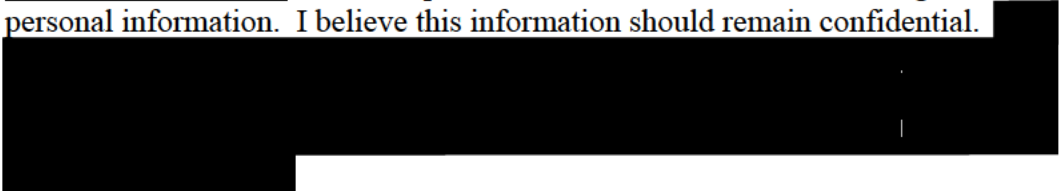
[REDACTED]

8. Internal Financial Information. Axon also produced documents reflecting internal financial information, including revenue and budget information. The public release of these materials would harm Axon because they reveal its current and prospective financial condition, which is important to its ability to compete in the market. Axon's competitors could use this information to plan their own competitive business strategy. I believe this information should remain confidential.

[REDACTED]

9. Product Security Information. Axon produced documents reflecting the security capabilities of its products, including security vulnerabilities and solutions to those vulnerabilities. I believe this information should remain confidential because its disclosure could adversely affect Axon's customers, in addition to public safety, and could harm Axon's position in the marketplace.

[REDACTED]

10. Personal Information. Axon produced some documents reflecting sensitive personal information. I believe this information should remain confidential. 

11. Other Confidential Information. For each category, the examples provided are merely representative—they are not meant to be an exhaustive list of the types of documents in that category that appear on the parties’ exhibit lists and that should be afforded *in camera* treatment because releasing them to the public would harm Axon. Similarly, these categories cannot capture every possible type of sensitive information that should not be released to the public. I understand that Axon’s outside counsel may identify such documents and, with my guidance, identify in applicable court filings why *in camera* treatment is warranted for those documents.

12. This declaration draws upon the collective efforts of multiple people other than myself, and is based on my understanding of the facts at this time. I reserve the right to modify or supplement this affidavit if I discover new facts that render it inaccurate or incomplete.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 23, 2020

s/ Isaiah Fields
Isaiah Fields

{ATTACHMENT 1}