UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION, *et al.*,

Defendants.

Case No. 6:25-cv-00009-JDK

DEFENDANTS' OPPOSITION TO MOTION FOR COMBINED BRIEFING SCHEDULE

Defendants the Federal Trade Commission and Chairman Andrew N. Ferguson (collectively, "the FTC" or "the Commission") respectfully oppose plaintiffs' motion to accelerate merits briefing before the Court resolves serious objections to jurisdiction and venue. Plaintiffs propose a briefing schedule that would combine the FTC's pending motion to transfer or dismiss (Dkt. 31) with premature cross-motions for summary judgment. This Court should neither enter a scheduling order nor decide summary judgment because those tasks should be managed by a court with proper venue. In any event, the parties cannot proceed to summary judgment briefing because the Commission will need discovery before the case reaches that stage.

1. This case involves a challenge to a rule issued by the FTC, with the concurrence of the Assistant Attorney General for the Antitrust Division at the Department of Justice ("DOJ"), updating the premerger notification form that parties file to comply with the Hart-Scott-Rodino Act. That Act requires some entities—parties to very large merger and acquisition transactions—to notify the FTC and DOJ so that the agencies can consider whether to seek an injunction to prevent transactions that may violate the antitrust laws. 15 U.S.C. § 18a. Between the HSR Act's high thresholds and its many exemptions, the Act and its implementing regulations apply to a small number of transactions.

The Rule was published in the Federal Register in November 2024 and went into effect on February 10, 2025. *See Premerger Notification; Reporting and Waiting Period Requirements*, 89 Fed. Reg. 89,216 (Nov. 12, 2024). Already, hundreds of parties have submitted the updated Form and many of these reported deals have already been consummated after the expiration or early termination of the statutory waiting periods.

Plaintiffs—three large, national associations based in Washington, D.C., and the Longview Chamber of Commerce, based in Longview, Texas—challenged the rule in this Court on January 10, 2025. Dkt. 1. The Commission moved to transfer or dismiss the case on April 10, 2025. Dkt. 23. The Commission's initial motion to transfer or dismiss prompted plaintiffs to amend their complaint rather than file an opposition. Dkt. 27. But the allegations in the amended complaint still fail to demonstrate the Longview Chamber's standing, and the Commission again moved to dismiss the Longview Chamber as a plaintiff and to transfer or dismiss this case. Dkt. 30.

2. This Court should first resolve the important preliminary objections to jurisdiction and venue before taking any action on the merits of the case, such as setting a summary judgment briefing schedule. "[O]nce a party files a transfer motion," as the FTC has done here, "disposing of that motion should unquestionably take top priority." *In re Apple Inc.*, 979 F.3d 1332, 1337 (Fed. Cir. 2020).

Plaintiffs' sole basis for suing in the Eastern District of Texas, Tyler Division, is that the Longview Chamber is located here. Dkt. 30 at 13, 23. But plaintiffs are wrong to suggest that their amended complaint includes "additional allegations [that] are plainly sufficient to plead Article III standing for all plaintiffs, including the Longview Chamber," Dkt. 31 at 2 (Motion for Combined Briefing Schedule). Plaintiffs have not alleged that any Longview Chamber members will certainly and imminently engage in an HSR-reportable transaction, and plaintiffs plainly have not alleged that *any* relevant member resides in the Eastern District of Texas, Tyler Division. Dkt. 30 at 13-19, 26-28. This Court thus lacks jurisdiction to consider Longview Chamber's claim, and venue is improper, both because no plaintiff who can assert venue here has standing and because the interests of justice favor a transfer to the U.S. District Court for the District of Columbia. *Id.*

The Fifth Circuit has emphasized that "disposition of [a] motion [to transfer] should … take[] a top priority." *In re Horseshoe Ent.*, 337 F.3d 429, 433 (5th Cir. 2003). The Third Circuit too has held that a district should resolve a transfer motion before turning to the merits. *See McDonnell Douglas Corp. v. Polin*, 429 F.2d 30 (3d Cir. 1970). And the Federal Circuit agrees. *See In re Apple Inc.*, 979 F.3d at 1337; *see also In re Nintendo Co.*, 544 F. App'x 934, 941 (Fed. Cir. 2013) (explaining that "a trial court must first address whether it is a proper and convenient venue before addressing any substantive portion of the case"); *In re EMC Corp.*, 501 F. App'x 973, 975 (Fed. Cir. 2013) (acknowledging the "importance of addressing motions to transfer at the outset of litigation"). District courts too—including in this district—have recognized the importance of first resolving motions to transfer before proceeding to the merits of a case. *See E. Texas Boot Co., LLC v. Nike, Inc.*, No. 2:16-cv-0290, 2017 WL 2859065, at *2 (E.D. Tex. Feb. 15, 2017). The proper path forward in this case, therefore, is for the Court to resolve the pending motion to dismiss and transfer. Should that motion be granted, then the transferee court will address scheduling and the merits of plaintiffs' claims. Should the motion be denied, the parties will meet and confer to discuss a schedule for both discovery and summary judgment.

3. Summary judgment would also be premature at this early stage because the FTC needs limited discovery to address significant factual questions concerning standing, venue, and remedies. While the merits of this case will rise and fall on whether the Rule is supported by the administrative record, summary judgment cannot proceed until the parties address those factual questions. The FTC anticipates that discovery can proceed quickly and will not delay consideration of the merits. But the facts must be discerned before the merits can be briefed or decided.

The only way to ensure the absence of any genuine dispute of material fact is through a short and focused discovery process. If this case proceeds in this Court, the Commission intends to depose and seek discovery from any declarants that plaintiffs proffer to ensure that they can attest that a member of the Longview Chamber is engaged in a certain, imminent transaction that is subject to the HSR Rule—facts that are absent from the amended complaint and that are necessary to support the invocation of jurisdiction or venue in this Court.[1] The Commission likewise plans to seek, through interrogatories, requests for production, or requests for admission, a list of all members of the plaintiff associations. This information is essential for the parties to brief, and for the Court to resolve, disputes about the scope of any potential remedy or the preclusive effect of a ruling against plaintiffs. *See generally United States v. Texas*, 599 U.S. 670, 693-703 (Gorsuch, J., concurring) (explaining that the APA may not permit vacatur and that, at the very least, courts should consider party-specific relief in APA cases); *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 402-03 (Thomas, J., concurring) (identifying concerns with associational standing in general, and particularly with defendants' ability to assert preclusion against association members); *cf.* Dkt. 27 (Am. Compl.) at 15 (¶ 33) (plaintiffs alleging that they "bring this suit on behalf of their members").

[1] Facts necessary to establish standing belong in the amended complaint, not later filed declarations or facts ascertained through discovery. *See Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1012 (7th Cir. 2021) (ordering dismissal because plaintiff's complaint was "facially deficient as to associational standing" even where "supplemental declarations" may have cured the shortcoming).

Any motion for summary judgment that precedes discovery would be futile and inappropriate. Indeed, the Commission would object to a premature summary judgment motion. Federal Rule of Civil Procedure Rule 56(d) provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may" take several steps, including deferring consideration of—or denying—summary judgment, or allowing time for discovery. Fed. R. Civ. P. 56(d)(1)-(2). Even apart from the insufficient allegations in the amended complaint, if this case were to proceed, the Court must satisfy its "independent obligation to assure [itself] of [its] jurisdiction." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 324 (2008). That requires discovery of facts about plaintiffs' individual members and their proposed transactions subject to the HSR notification requirements. The discovery needed to address factual disputes about both plaintiffs' injury and redressability should be overseen by a court with venue, which this Court lacks.

The Commission is prepared to proceed expeditiously with discovery so that this case does not drag out unnecessarily. Indeed, the FTC is currently identifying the specific discovery it needs so that it can meet and confer with plaintiffs. The Commission anticipates that discovery can begin—either here or in the transferee forum—soon after the Court decides the pending motion to transfer. But the Court should not enter a briefing schedule for summary judgment before considering the Commission's objections to venue.

4. Plaintiffs' rationale for their proposed consolidated schedule is unpersuasive and would create the very time and waste that they ostensibly hope to avoid.

First, plaintiffs say that "the Rule continues to harm Plaintiffs and their members." Dkt. 31 at 3. But plaintiffs themselves are nonprofit associations who do not engage in merger and acquisition transactions, so the Rule cannot possibly impose any harm on them. As for their members, plaintiffs have not alleged that a single member of any of their organizations has or imminently will file the updated HSR form that the Rule requires. Any supposed harm is thus unsupported and cannot justify plaintiffs' request.

Second, plaintiffs say that a consolidated briefing schedule "will promote judicial economy" and lead to "fewer briefs" for the Court. Dkt. 3. But that assumes that plaintiffs will prevail against the Commission's pending motion to transfer or dismiss, which has not yet been fully briefed or decided. As multiple courts have recognized, that question must be resolved before turning to the merits. Should the Commission prevail, then the Court will have disposed of this case in three relatively short briefs on standing and venue rather than the five briefs and 170 pages that plaintiffs propose—briefing that will dive into the substance of an esoteric antitrust statute and regulation. As multiple circuits have recognized, "[j]udicial economy requires that another district court should not burden itself with the merits of the action until it is decided [whether] a transfer should be effected." *In re Apple Inc.*, 979 F.3d at 1337 (quoting *McDonnell Douglas*, 429 F.2d at 30). Plaintiffs' proposal, meanwhile, offers at most minimal gains in efficiency for the parties or the Court even if the motion to transfer is denied, as the Commission would be amenable—once discovery is complete—to a four-brief schedule that roughly tracks the proposed approach to summary judgment briefing included in plaintiffs' proposal.

Third, plaintiffs cite several other recent cases, Dkt. 31 at 4, but none of those cases align with the posture of this case and plaintiffs' requested schedule. In three of those cases, the defendant had not moved to transfer based on lack of venue or had waived venue. *R.J. Reynolds Tobacco Co.* v. *FDA*, No. 6:20-cv-176, 2022 WL 17489170, at *8-11 (E.D. Tex. Dec. 7, 2022) (venue waived by earlier substantive motion); *Nat'l Horsemen's Benevolent & Protective Ass'n* v. *Black*, 596 F. Supp. 3d 691, 698 (N.D. Tex. 2022); *Consumers' Rsch.* v. *CSPC*, 6:21-cv-256 (E.D. Tex.). Those cases thus did not present concerns about judicial economy or skipping over a venue objection and proceeding to the merits. In the one case plaintiffs cite featuring a timely preserved motion to transfer, the parties briefed that transfer motion separately from the cross-motions for summary judgment. *See Lifenet, Inc.* v. *U.S. Dep't of Health and Hum. Servs.,* No. 6:22-cv-00162, (E.D. Tex.), Dkts. 22-24, 26-28. Nor did any of those cases include a discovery process. And in the fifth case, the parties agreed to a joint briefing schedule that bypassed discovery. *See Chamber of Commerce* v. *CFPB*, No. 6:22-cv-381, Dkt. 16 (E.D. Tex.). Indeed, Judge Barker relied upon the parties' stipulation that "no discovery is needed prior to this Court's resolution of the parties' respective dispositive motions" to render a decision. *Id*. Dkt. 41 at 5 (E.D. Tex. Sept. 8, 2023). There is no similar joint stipulation here.[2]

CONCLUSION

The Court should deny the motion to combine briefing schedules.

Respectfully submitted,

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[2] Should the court grant plaintiffs' motion, the Commission will also move for more pages and more time than plaintiffs' motion proposes. The additional pages will be needed due to the complexity of the issues in this case, and the additional time will be necessary due to the schedule of the FTC's counsel in this case.

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[PROPOSED] ORDER

Upon consideration of Plaintiffs' Motion for Combined Briefing Schedule, Plaintiffs' motion is HEREBY DENIED.

SO ORDERED.