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' OPPOSED MOTION TO STAY BRIEFING DEADLINES OR TO SEEK DISCOVERY UNDER RULE 56(d)

Defendants the Federal Trade Commission and Chairman Andrew N. Ferguson (collectively, "the FTC" or "the Commission") respectfully move this Court to stay the Commission's deadline to respond to plaintiffs' motion for summary judgment, Dkt. 44, until the Court has resolved the FTC's pending motion to dismiss or transfer, Dkt. 30. As explained in the FTC's motion, venue in this Court is improper, and the transferee forum should manage the summary judgment briefing schedule, consider the Commission's argument that discovery is necessary under Rule 56(d), and oversee any discovery disputes. Alternatively, the Court should deny or defer ruling on plaintiffs' motion for summary judgment under Rule 56(d) and allow the Commission to seek the discovery it requires to oppose plaintiffs' motion.

Plaintiffs oppose both requests in this motion.

BACKGROUND

This case involves a challenge to a rule issued by the FTC, with the concurrence of the Department of Justice, updating the premerger notification form that parties file to comply with the Hart-Scott-Rodino ("HSR") Act. *See Premerger Notification; Reporting and Waiting Period Requirements*, 89 Fed. Reg. 89,216 (Nov. 12, 2024). Under the HSR Act, parties to the very largest merger and acquisition transactions must submit an HSR form before merging. *See* 15 U.S.C. § 18a(a). The statute also has many exemptions. *Id.* § 18a(c). Between these statutory limitations and the reality that most companies do not engage in any M&A activity, the rule applies to very few parties at any given time. *See* 89 Fed. Reg. at 89,219; Federal Trade Commission, *Premerger Notification Program* (last visited Aug. 14, 2025), https://www.ftc.gov/enforcement/premerger-notification-program. And whether the rule applies to a particular merger or acquisition turns on various facts like the size of the transaction, the nature of the assets being acquired, the type of transaction, the purpose of the transaction, and more. *See* 15 U.S.C. § 18a(a), (c).

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. That initial motion raised arguments substantial enough to cause plaintiffs to amend their complaint rather than file an opposition. Dkt. 27. The Commission's motion also struck sufficient doubt in plaintiffs about their standing allegations that the Longview Chamber acquired three new members between the initial complaint and amended complaint and then relied on allegations about those new members to try to bolster its case for standing. *See* Dkt. 41 at 3-4 n.2; *see also* Dkt. 27 (Am. Compl.).

Believing that plaintiffs' amended complaint remained insufficient to establish that the Longview Chamber had standing or that venue was proper in this Court, the Commission again moved to dismiss or transfer the case. Dkt. 30. Instead of responding to the substantial concerns about jurisdiction and venue, plaintiffs instead sought to consolidate briefing on the motion to dismiss or transfer with briefing on plaintiffs' motion for summary judgment. Dkt. 31. The Commission opposed that proposal both because only a court with jurisdiction and proper venue should proceed with this case and because plaintiffs' motion for summary judgment would be futile absent discovery that would allow the Commission to gather the facts necessary to brief standing, venue, and remedies at that stage. Dkt. 33. The Court denied plaintiffs' proposed consolidated briefing schedule. Dkt. 34. Recognizing that the Commission had asserted that "limited discovery is needed to address factual questions concerning standing, venue, and remedies," the Court "ORDER[ED] the parties to meet and confer to discuss appropriate deadlines for limited discovery and summary judgment briefing" and directed the parties to "file a joint proposed scheduling order with these agreed-upon deadlines." *Id.*

Instead of agreeing to a proposed scheduling order for discovery and briefing, plaintiffs reiterated their prior position that no discovery was appropriate. *See* Dkt.

41 at 4. And while the parties discussed the possibility of an informal discovery process that might find common ground and limit or narrow any discovery disputes, plaintiffs offered only a single draft declaration that largely mimicked the amended complaint, *see* Dkt. 41-1, and they offered only a partial answer to one of the questions the Commission posed, *see* Dkt. 41 at 3-4 n.2.

The Commission accordingly proposed a schedule that included ten weeks of discovery with limited interrogatories, depositions, and requests for production focused on only standing, venue, and remedies. *See* Dkt. 42 at 3-5. Plaintiffs, by contrast, refused to propose any schedule for discovery, and again simply proposed to file their motion for summary judgment, at which point the Commission could move under Federal Rule of Civil Procedure 56(d) if it "believes it needs discovery to oppose the motion." Dkt. 41 at 5. The Court allowed plaintiffs to file their motion for summary judgment. Dkt. 43.

ARGUMENT

I. The Summary Judgment Briefing Schedule Should Be Stayed Pending the Outcome of the Pending Motion to Transfer or Dismiss.

As an initial matter, plaintiffs' motion is premature because there is a fully briefed motion to transfer or dismiss already pending, and any deadlines related to summary judgment should be stayed until that motion has been resolved.[1] As the Commission explained when opposing plaintiffs' proposal to consolidate the briefing

[1] Plaintiffs recognize that the Commission's motion is "ripe for resolution." Dkt. 41 at 6 n.3.

schedule, Dkt. 33, "disposition of [a] motion [to transfer] should take[] a top priority," *In re Horseshoe Ent.*, 337 F.3d 429, 433 (5th Cir. 2003). And multiple circuits—and district courts, including in this district—have concluded that motions to transfer should be resolved before proceeding to the merits of a case. Dkt. 33 at 3-4 (collecting cases).

This case does not belong in this district. *See* Dkt. 30 at 23-28. All defendants and all but one plaintiff are located in Washington, D.C. The one plaintiff located in this district lacks standing, and there are also prudential reasons to reject plaintiffs' naked forum-shopping. *Id.* at 12-28. For these reasons, it should fall to the transferee court to handle matters both ministerial (like setting briefing deadlines) and substantive (like resolving discovery disputes or the merits of the case). *See* Dkt. 33 at 4-5.

The Court's resolution of the motion to dismiss or transfer will also likely affect the substance of the parties' motions for summary judgment. For instance, a key dispute in this case is just how imminent a future transaction must be, and the level of detail plaintiffs must present about that future transaction, to qualify as a constitutionally cognizable injury for standing. *See* Dkt. 30 at 12-19; Dkt. 35 at 16-24; Dkt. 38 at 2-5. This Court's resolution of that dispute may lead to a transfer, may resolve the issue in such a way that there is no need for the parties to brief it on summary judgment, or may land somewhere in between and explain what more might be necessary at summary judgment rather than at the pleading stage. Any one of those determinations would affect summary judgment and affect how the parties brief the issue. The parties would therefore benefit from a decision on the pending motion—and the Court would benefit from focusing any future briefing on the issue to reflect the Court's prior determination.

The Commission accordingly moves this Court to stay all deadlines related to summary judgment until it has decided the pending motion to transfer or dismiss, which will also allow the Court to 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).

II. The Court Should Deny or Defer Ruling on the Motion for Summary Judgment Under Rule 56(d).

Should this Court decline to stay the briefing deadlines, it should deny or defer ruling on the motion for summary judgment until the Commission has had the opportunity to obtain discovery on standing, venue, and remedies. *See* Fed. R. Civ. P. 56(d).

As plaintiffs previously acknowledged, *see* Dkt. 41 at 5, the Federal Rules of Civil Procedure contemplate a scenario like this where a party prematurely moves for summary judgment before the nonmovant has had sufficient opportunity to obtain discovery. In that situation, a court may "defer considering the motion or deny it" or may "allow time to … take discovery." Fed. R. Civ. P. 56(d).

As a general matter, "[s]ummary judgment [for the defendant] is appropriate only where the plaintiff has had a full opportunity to conduct discovery." *Bailey v. KS Mgmt. Servs., L.L.C.*, 35 F.4th 397, 401 (5th Cir. 2022) (per curiam) (internal quotation omitted). Here the defendants have not had *any* discovery. While a court "may cut off discovery when the record shows that further discovery is not likely to produce the facts needed to withstand the motion for summary judgment … when a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error." *Brown v. Miss. Valley State Univ.*, 311 F.3d 328, 333 (5th Cir. 2002) (cleaned up). That makes this case a simple one. The Commission has not received any discovery despite its repeated insistence and explanation as to why it is necessary. Plaintiffs' motion should therefore be denied or deferred until the Commission has obtained discovery.

Even when a party *has* received discovery, "Rule 56(d) permits further discovery to safeguard non-moving parties from summary judgment motions that they cannot adequately oppose." *Bailey*, 35 F.4th at 401 (quotation omitted). To obtain relief under Rule 56(d), a party "must make two showings." *Id.* First, "that additional discovery will create a genuine issue of material fact"; and second, that the party "diligently pursued discovery." *Id* (quotation omitted). When that showing is made a district court must grant the Rule 56(d) motion. *Id.*

The Commission satisfies both prongs here.[2] First, additional discovery may create—or resolve in the Commission's favor—a genuine issue of material fact. Plaintiffs' declarations are full of vague, lawyerly statements that leave plenty of unanswered questions about the plaintiffs' basis for standing. For instance, the

[2] Accompanying this motion is a declaration that reiterates the many facts that the Commission does not know and that the Commission has sought, but failed to receive, from plaintiffs.

linchpin of Longview Chamber's claim to standing is that it has certain members with "plans" or "inten[t]" to "engage in" reportable transactions "this year" or in the "foreseeable future." Dkt. 44-4 at 3-4. The declaration does not explain, however, the basis for these statements, such as the nature of those members' plans or intent. The Commission does not know whether these plans are informed by actual discussions and negotiations with counterparties, or whether they merely reflect these members' hopes and goals. There is reason to suspect the latter—the declaration elsewhere speaks of reportable transactions "as part of [members'] business model." *Id.* Those details are crucial because even under plaintiffs' flawed framing of standing, they recognize that "[t]he critical question is … whether the 'alleged injury is … too speculative' to justify the exercise of federal jurisdiction." Dkt. 44 at 9 (quoting *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013)). Plans and intent based on nothing more than business objectives or aspirations cannot demonstrate a constitutionally cognizable injury.

There are many more ambiguities in plaintiffs' declarations that the Commission needs to probe through discovery because they could give rise to a genuine dispute of material fact—or could resolve such disputes in the Commission's favor. At a most basic level, the Commission should be permitted to depose the declarants to test the veracity of their declarations, just as any witness must typically be subject to cross-examination. Among other things, the declarants are principals of the plaintiff organizations, but they offer details about transactions involving unidentified private members of those organizations. *See* Dkts. 41-1 to 41-4. The

Commission is therefore entitled to ascertain whether the declarants have sufficient personal knowledge of the matter about which they are testifying.

And even assuming there is adequate basis for the declarants' testimony, the declarations do not offer any details about the size of any potential transactions, or any of the many details that would allow the Commission to determine whether the proposed transactions would be reportable under the Hart-Scott-Rodino Act or subject to any of its many exemptions. *See* 15 U.S.C. § 18a(a), (c). Similarly, the declarations do not explain how "often" some members have previously engaged in reportable transactions even though plaintiffs' brief expressly relies on that vague assertion to support their standing argument. *See* Dkt. 44 at 11. Nor do the declarations offer any details that would allow the Commission to effectively develop threshold arguments concerning venue, germaneness, individual participation, and remedies that it previously raised in its motion to dismiss and that could require additional factual support at the summary judgment stage. *See* Dkt. 30 at 19-23, 26-28. Similarly, the declarations lack any detail about any plaintiff association's membership, which would prevent the Commission from having the information it needs to assert issue preclusion if the Commission prevails on the merits. *See id.*; *see also FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 402-03 (2024) (Thomas, J., concurring) (identifying concerns with associational standing in general, and particularly with defendants' ability to assert preclusion against association members); Dkt. 27 (Am. Compl.) at 15 (¶ 33) (plaintiffs allege that they "bring this suit on behalf of their members"). The Commission needs these details to effectively present its arguments and dispute the many factual claims—and many factual gaps—in plaintiffs' brief and declarations.

Second, there can be little question that the Commission has "diligently pursued discovery." *Bailey*, 35 F.4th at 401 (quotation omitted). The Commission opposed plaintiffs' efforts to consolidate summary judgment briefing with the Commission's motion to transfer or dismiss in part because "the FTC needs limited discovery to address significant factual questions concerning standing, venue, and remedies." Dkt. 33 at 4. The Commission further explained that "[t]he only way to ensure the absence of any genuine dispute of material fact is through a short and focused discovery process." *Id*. at 5. The Commission then offered "a list of eight requests for specific additional information the Commission believes it needs in discovery." Dkt. 41 at 2. The Commission also opposed plaintiffs' proposal that they bring a pre-discovery motion for summary judgment precisely because the Commission would require discovery, and the Commission proposed a limited discovery schedule that would allow the parties to quickly complete that process and then effectively brief summary judgment. *See* Dkt. 42. There cannot be any dispute that the Commission has diligently pursued discovery.[3]

Because the Commission has satisfied its burden under Rule 56(d), the Court should deny or defer ruling on plaintiffs' motion. The Commission respectfully

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[3] Indeed, the Commission is prepared to immediately begin the discovery process should this motion be granted. The Commission maintains that discovery should be overseen by the transferee court but is prepared to move forward while its motion to transfer is pending.

submits that a schedule similar to the one previously proposed would be appropriate, and the Commission stands ready to submit a revised schedule with similar parameters and timing within a week of the Court's order.[4]

CONCLUSION

The Court should stay all summary judgment briefing deadlines until after it has decided the pending motion to transfer or dismiss. Alternatively, the Court should deny or defer ruling on plaintiffs' motion for summary judgment under Rule 56(d) and allow the Commission to seek discovery.

[4] Plaintiffs previously complained that the Commission's "proposed discovery is not 'limited' at all" and worried about the three-month timeline. Dkt. 41 at 3. To the contrary, the Commission's proposal is properly focused, comparatively rapid, and entirely consistent with the typical scope and timing of civil discovery. The Commission proposed a 10-week discovery schedule limiting interrogatories to ten per party and five per non-party, requests for production to three per party, and depositions to three per party plus any declarants. Dkt. 42 at 3-5. The schedule eliminated any requests for admission and proposed that summary judgment briefing begin the day after discovery closed. *Id.*

Respectfully submitted,

LUCAS CROSLOW
General Counsel

H. THOMAS BYRON III
Deputy General Counsel

BENJAMIN F. AIKEN
Attorney

August 18, 2025

/s/ Benjamin F. Aiken

D.C. Bar No. 1046730
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
T: (202) 326-2151
baiken@ftc.gov

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DECLARATION OF KATHRYN E. WALSH

Pursuant to 28 U.S.C. § 1746, I, Kathryn E. Walsh, hereby declare as follows:

1. I am Deputy Assistant Director of the Federal Trade Commission's Premerger Notification Office ("PNO"). PNO administers the premerger notification program and reviews filings made pursuant to the Hart-Scott-Rodino Act.

2. I have reviewed the declarations that plaintiffs attached to their motion for summary judgment in this case. *See* Dkts. 44-1, 44-2, 44-3, 44-4.

3. To my knowledge, nobody in the Commission is able to verify the facts asserted in those declarations relevant to plaintiffs' motion for summary judgment.

4. Among the facts I am unable to verify:

- I do not know whether the declarants have the personal knowledge necessary to assert the facts in the declaration or the basis for any such personal knowledge.

- I do not know the names or locations of the various pseudonymous members of the plaintiff organizations. *See, e.g.*, Dkt. 44-4 at 3-4.

- I do not know how often, or when, these pseudonymous members of the plaintiff organizations have filed HSR forms in the past. *See, e.g.*, Dkt. 44-4 at 3-4.

- I do not know the basis for these pseudonymous members' asserted plans to engage in HSR-eligible transactions in the future. *See, e.g.*, Dkt. 44-4 at 3-4.

- I do not know the full membership of any of the plaintiff organizations.

- I do not know the extent to which any of the plaintiff organizations have consulted with their full membership about this litigation, nor whether any members of the plaintiff organizations oppose this litigation. *See, e.g.*, Dkt. 44-4 at 6.

- I do not know whether any member of any of the plaintiff organizations has filed a new HSR form or whether any has concrete plans to imminently file a new HSR form.

- I do not know the basis for the declarants' speculation that the new HSR rule inflicts significant indirect costs on their associations' membership. *See, e.g.*, Dkt. 44-4 at 5. For example, I am unaware of the basis for the declarants' speculation that the new form will extend and delay deal timelines or hamper transacting parties' ability to obtain financing or otherwise impede or prevent deal consummation. *See id.*

- To be clear, I do not know the facts above as they pertain to any of the plaintiff organizations and have cited the declaration of the Longview Chamber of Commerce as an example. The declarations are materially identical, and the same shortcomings are present in each declaration. *See* Dkt. 44-1 at 3-6; Dkt. 44-2 at 2-4; Dkt. 44-3 at 3-6.

5. In general, whether the parties to a proposed transaction must file an HSR form is a fact-dependent inquiry that turns on the application of the

statute and the rules, including exemptions. Indeed, questions about whether a given transaction requires an HSR filing are so common that my office often fields questions from practitioners and often provides informal, nonbinding guidance. *See* https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations.

6. For example, determining whether a transaction is subject to the HSR rule requires—among other things—knowing the size of the transaction on an inflation-adjusted basis and the nature of what is being acquired. *See* 15 U.S.C. § 18a(a). The inquiry may also turn on the annual net sales or total assets of the buyer and seller. *Id.* There are also many exemptions from the requirement to make an HSR filing provided by the statute and implementing rules. *See* 15 U.S.C. § 18a(c); 16 C.F.R. Part 802. As just one example, the acquisition of certain carbon-based mineral reserves is exempt. *See* 16 C.F.R. § 802.3.

7. Based on the scant detail offered in the plaintiff declarations, I am unable to determine whether any of the contemplated future transactions discussed in the declarations would require an HSR filing.

8. It is my understanding that attorneys for the Commission have repeatedly sought discovery in this case that would help answer these questions and other questions related to plaintiffs' standing, venue in this Court, and the appropriate remedy. I also understand that plaintiffs have refused to

provide discovery that would address these questions and have refused to agree to any discovery schedule.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 15, 2025.

/s/ Kathryn E. Walsh

Kathryn E. Walsh

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[PROPOSED] ORDER

Upon consideration of Defendants' Opposed Motion to Stay Briefing Deadlines or to Seek Discovery Under Rule 56(d) it is hereby ORDERED that the motion to stay is granted. All deadlines related to plaintiffs' motion for summary judgment, Dkt. 44, are stayed until the Court has decided the pending motion to dismiss or transfer, Dkt. 30.

[ALTERNATIVELY]

Upon consideration of Defendants' Opposed Motion to Stay Briefing Deadlines or to Seek Discovery Under Rule 56(d) it is hereby ORDERED that the motion to stay is denied but the motion to seek discovery is granted. Plaintiffs' motion for summary judgment, Dkt. 44, is denied without prejudice. Within seven days of this order, defendants shall propose a discovery schedule.

SO ORDERED.