IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN INVESTMENT COUNCIL, and LONGVIEW CHAMBER OF COMMERCE, *Plaintiffs*, v. FEDERAL TRADE COMMISSION and ANDREW N. FERGUSON, in his official capacity, *Defendants*.	Case No. 6:25-cv-00009-JDK

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY BRIEFING DEADLINES OR TO SEEK DISCOVERY UNDER RULE 56(d)

In another effort to delay this litigation and forestall this Court's consideration of the merits of the HSR Rule, the FTC asks this Court to stay summary-judgment briefing until the Court rules on the FTC's motion to dismiss or allows the FTC to seek expansive and unwarranted jurisdictional discovery. The Court should deny that request. The parties are more than halfway through summary-judgment briefing in accordance with prior orders of the Court, and stopping those proceedings midstream would be wasteful and inefficient. Moreover, the FTC has already opposed Plaintiffs' motion and cross-moved for summary judgment on the ground that Plaintiffs have not established their standing, which confirms that the FTC does not need discovery in order to make those arguments. Instead, as frequently occurs in APA litigation, this Court can and should consider the FTC's various jurisdictional arguments—including those it makes in support of its Rule 56(d) motion—in the course of resolving the motion to dismiss and cross-motions for summary judgment together. This Court already moved to schedule combined oral argument on both motions. The appropriate course is to reschedule that argument, not consider the motions separately or grant unnecessary discovery.

I. This Court Should Not Stay Summary-Judgment Proceedings Until It Rules On The FTC's Motion To Transfer Or Dismiss.

The most obvious reason to deny the FTC's motion to stay summary-judgment briefing pending a ruling on its motion to dismiss is because the stay motion is untimely. Pausing summary-judgment briefing midstream would waste judicial and party resources and make little sense as a practical matter.

The FTC's request comes to the Court as the parties are now halfway through summary-judgment briefing pursuant to the Court's prior orders. On July 14, 2025, the Court recognized that Plaintiffs were entitled to file a motion for summary judgment notwithstanding the FTC's efforts to obtain unprecedented jurisdictional discovery, and directed Plaintiffs to file on August 1. Dkt. 43. Plaintiffs did so. Dkt. 44. On August 15, two weeks after Plaintiffs filed their summary-judgment motion, the FTC moved (over Plaintiffs' opposition) for an extension of its deadline to file an opposition, Dkt. 52, and then filed the present motion to stay summary-judgment proceedings entirely three days later on August 18, Dkt. 53. The Court then ordered the FTC to file its opposition and any cross-motion for summary judgment on August 29, and the FTC has since filed its combined brief. Dkt. 57.

There is no reason in civil procedure or common sense to stop summary-judgment proceedings now, as Plaintiffs are preparing their reply brief and briefing should conclude in a matter of weeks. Had the FTC wanted to seek a stay of summary judgment in a timely manner, it should have done so long ago when it became clear that this Court was permitting Plaintiffs to proceed to summary judgment. Instead, the FTC waited to file its stay motion until (i) five weeks after the Court's Order directing Plaintiffs to file a motion for summary judgment, (ii) nearly three weeks after Plaintiffs filed that motion, (iii) one week after the Court scheduled joint oral argument on the motions to dismiss and for summary judgment, and (iv) just a few days before the FTC's opposition brief was originally due.[1]

In any event, the FTC offers no persuasive reason to stay summary-judgment briefing. As the Commission acknowledges, its motion to dismiss and opposition to Plaintiffs' motion for summary judgment involve overlapping legal questions. *See* Dkt. 53 at 5. In both sets of briefs, the FTC contends that Plaintiff Longview Chamber lacks standing to challenge the HSR Rule. That overlap is not a reason to consider the motions separately; it is a reason to consider them together. Based on all of the arguments in both sets of briefs, the Court can determine whether Plaintiffs have sufficiently established the Longview Chamber's standing. Indeed, that is what this Court and other courts have frequently done in other APA cases in which the government challenged standing at both the pleading and summary-judgment stages. *See* Dkt. 31 at 4 (collecting cases).

[1] The Court subsequently postponed the hearing date pursuant to Defendants' unopposed motion and stated that it would be rescheduled.

Nor does the FTC provide support for its contention (at 4-5) that the Court is required to stay summary-judgment briefing until it rules on the motion to dismiss or transfer. The FTC points to cases that discourage unreasonable delays in deciding transfer motions, particularly until after extensive merits discovery.[2] But none of those cases imposes any requirement on the sequence of briefing or remotely suggests that it is improper for the Court to consider a motion to dismiss and cross-motions for summary judgment at the same time, particularly when all of those motions address the same jurisdictional issue. The FTC does not cite a single decision holding that a court must decide an issue such as standing on a motion to dismiss based on the pleadings when it can readily do so on the basis of fuller argument and an evidentiary record at summary judgment. Pausing summary-judgment briefing now while the Court first resolves the motion to dismiss would be wasteful, artificial, and only cause *more* delay.

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[2] *See In re Horseshoe Ent.*, 337 F.3d 429, 433 (5th Cir. 2003) (vacating denial of motion to transfer where district court, for "reasons not readily discernable," "waited some 13 months . . . to rule on [the] motion to transfer"); *see also McDonnell Douglas Corp.* v. *Polin*, 429 F.2d 30, 30-31 (3d Cir. 1970) ("[I]t is not proper to postpone consideration of the application for transfer . . . until discovery on the merits is completed, since it is irrelevant to the determination of the preliminary question of transfer."); *In re Apple Inc.*, 979 F.3d 1332, 1337-1338 (Fed. Cir. 2020) (granting mandamus petition directing transfer where district court "barreled ahead on the merits in significant respects" while transfer motion was pending, including undertaking a discovery hearing and other "important and time-intensive substantive tasks"); *In re EMC Corp.*, 501 F. App'x 973, 976 (Fed. Cir. 2013) (defendants were required to "partake in years of litigation prior to a determination on a transfer motion"); *In re Nintendo Co., Ltd.*, 544 F. App'x 934, 940 (Fed. Cir. 2013) ("[R]esolution of the motion to sever and transfer . . . should not be driven by claims that were later added under Rule 18.").

II. This Court Should Not Defer Summary-Judgment Proceedings Pursuant To Rule 56(d).

The FTC likewise has not shown any reason why this Court should "defer" summary-judgment proceedings to allow the FTC to seek discovery under Federal Rule of Civil Procedure 56(d). Rule 56(d) provides that a district court "may" defer or deny a summary-judgment motion if a party "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d); *see January* v. *City of Huntsville*, 74 F.4th 646, 651 (5th Cir. 2023). To prevail on a Rule 56(d) motion, the moving party must make two showings. *See January*, 74 F.4th at 651. *First*, it must show "why [it] needs additional discovery" to oppose summary judgment and "how that discovery will create a genuine issue of material fact." *Id.* (quotations omitted). *Second*, it must show that it "diligently pursued discovery." *Id.* (quoting *Jacked Up, L.L.C.* v. *Sara Lee Corp.*, 854 F.3d 797, 816 (5th Cir. 2017)). As underscored by the fact that the FTC has already opposed Plaintiffs' motion—and even argued that the Court should "grant [the FTC's] cross-motion" for failure to establish standing, Dkt. 57 at 10—the FTC cannot make either showing.

A. The FTC cannot show that it needs discovery to oppose Plaintiffs' motion for summary judgment.

1. The FTC first fails to show that any discovery is "essential to justify its opposition." To the contrary, the FTC's opposition and cross-motion demonstrate that it does not need any discovery to contest Plaintiffs' standing. That is unsurprising, because Plaintiffs bear the burden of establishing their standing, and all of the FTC's counterarguments—both in its stay motion and in its summary-judgment brief—are fundamentally legal arguments that Plaintiffs have not met that burden. In other words,

unlike the "'run-of-the-mill' civil case" in which a defendant moves for summary judgment and the plaintiff may have the right to seek more discovery to obtain evidence supporting its claims (on which it bears the ultimate burden of proof), here the FTC simply disputes Plaintiffs' legal positions and contends that Plaintiffs' "evidence . . . may not persuade the reasonable fact-finder" to find that Plaintiffs have met their burden. *Int'l Shortstop, Inc.* v. *Rally's, Inc.*, 939 F.2d 1257, 1264-1265 (5th Cir. 1991).

That is why the Commission cannot cite a single case in which a court granted Rule 56(d) relief to the government in an APA case like this one. Notwithstanding the FTC's repeated complaints that it has not obtained any discovery, it is the routine and appropriate practice in APA litigation to address plaintiffs' standing based on plaintiffs' declarations submitted at the summary-judgment stage.[3] Because Plaintiffs "bear[] the burden of establishing" their standing at summary judgment, they must "set forth by affidavit or other evidence specific facts" demonstrating their standing, "which . . . will be taken to be true" by the Court in assessing whether Plaintiffs satisfy their burden. *Texas* v. *Rettig*, 987 F.3d 518, 527-528 (5th Cir. 2021) (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). If the FTC is able to persuade the Court that Plaintiffs' evidence is insufficient to meet their burden, the Court will deny Plaintiffs' motion for summary

[3] *See, e.g.*, *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 153-156 (2010); *American Clinical Lab'y Ass'n* v. *FDA*, 2025 WL 964238, at *11 (E.D. Tex. Mar. 31, 2025); *Chamber of Com. of U.S.* v. *CFPB*, 691 F. Supp. 3d 730, 738 (E.D. Tex. 2023); *LifeNet, Inc.* v. *U.S. Dep't of Health & Hum. Servs.*, 617 F. Supp. 3d 547, 558-560 (E.D. Tex. 2022); *Purl* v. *U.S. Dep't of Health & Hum. Servs.*, 2025 WL 1708137, at *6-10 (N.D. Tex. June 18, 2025); *National Ass'n for Gun Rts., Inc.* v. *Garland*, 741 F. Supp. 3d 568, 588-591 (N.D. Tex. 2024); *Harrison County* v. *U.S. Army Corps of Eng'rs*, 651 F. Supp. 3d 843, 848-852 (S.D. Miss. 2023); *Louisiana* v. *Biden*, 622 F. Supp. 3d 267, 284-286 (W.D. La. 2022); *Ware* v. *U.S. Fed. Highway*, 2016 WL 1244978, at *6 (S.D. Tex. Mar. 30, 2016).

judgment. To be clear, the FTC will not be able to make that showing because Plaintiffs' evidence is more than sufficient to demonstrate their standing. But the point for present purposes is that the FTC does not need any discovery in order to complete summary-judgment briefing in just a few weeks so the Court can rule on that issue.

2. Nothing in the FTC's motion establishes that this is the highly unusual case where the Commission needs fact discovery in order to contest Plaintiffs' showing of standing. The Commission repeatedly claims that Plaintiffs' declarations "leave plenty of unanswered questions about the plaintiffs' basis for standing" and contain "ambiguities," that the Commission "does not know" various details from the declarations, and that "additional discovery may create . . . a genuine issue of material fact." Dkt. 53 at 7-8. But those are fundamentally legal arguments that Plaintiffs' declarations do not sufficiently substantiate their standing. And these kinds of general statements about what the FTC might like to know do not satisfy Rule 56(d) in any case. That Rule requires the FTC to "set forth a plausible basis for believing that *specified facts* . . . *probably exist*" and "will influence the outcome of the pending summary judgment motion." *Bailey* v. *KS Mgmt. Servs., L.L.C.*, 35 F.4th 397, 401 (5th Cir. 2022) (per curiam) (emphasis added and quotations omitted). The Commission "may not simply rely on vague assertions that discovery will produce needed, but unspecified, facts." *Id.* (quotations omitted); *see Bastin* v. *Federal Nat'l Mortg. Ass'n*, 104 F.3d 1392, 1396 (D.C. Cir. 1997) (affirming denial of discovery where plaintiff was "unable to offer anything but rank speculation" and discovery "would amount to nothing more than a fishing expedition"). Rule 56(d) is not a license for fishing expeditions.

The Commission's attempts to be more concrete do not help its cause. It asserts (at 8) that it is entitled to "test the veracity of the[] declarations," but Rule 56(d) "may not be used to test [an affidavit's] credibility" absent some "reason to doubt [its] veracity." *Citizens for Resp. & Ethics in Wash.* v. *Leavitt*, 577 F. Supp. 2d 427, 434 (D.D.C. 2008); *see Dunning* v. *Quander*, 508 F.3d 8, *9-10 (D.C. Cir. 2007); *Strang v. U.S. Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989); *see also American Fam. Life Assur. Co. of Columbus* v. *Biles*, 714 F.3d 887, 894-895 (5th Cir. 2013) (affirming denial of Rule 56(d) discovery where the only relevant evidence that "could have been obtained from deposing [the affiant]" was "a direct admission" of "perjury and fraud"). The FTC does not come close to creating any such doubt. It suggests that the declarants are unreliable because they "are principals of the plaintiff organizations," Dkt. 53 at 8-9, but trade associations frequently describe their members' harms, the FTC points to no authority suggesting that is impermissible, and the declarants unequivocally state that their declarations are based on their "personal knowledge or information made known to [them] in the course of [their] official duties." *Leavitt*, 577 F. Supp. 2d at 434 n.5; *see, e.g.*, Dkt. 44-4 ¶ 2. "[T]here can be no suggestion that [the declarants are] not the appropriate party to provide the relevant information." *Leavitt*, 577 F. Supp. 2d at 434 n.5.

The FTC's other examples of its desired information are already addressed in the declarations or are irrelevant. It claims (at 8) it needs more information about the "basis" for Plaintiffs' members' "plans . . . to engage in reportable transactions." But the declarations make specific assertions regarding when and how often the members intend to engage in HSR-reportable transactions in the future. *See, e.g.*, Dkt. 44-4 ¶¶ 7-11. The

FTC is free to argue that those assertions do not sufficiently "demonstrate a constitutionally cognizable injury," Dkt. 53 at 8, but it cannot simply seek to "test and elaborate" on those assertions. *Strang*, 864 F.2d at 861. As summary-judgment briefing will show, the fact that engaging in HSR-reportable transactions is part of the members' entire "business model[s]," *see, e.g.*, Dkt. 44-4 ¶ 7-9, 11, combined with those members' stated "intent[] to engage" in those transactions, amply demonstrates an imminent and substantial risk that injury from the Rule will occur. *See Texas* v. *Becerra*, 623 F. Supp. 3d 696, 716-717 (N.D. Tex. 2022), *aff'd*, 89 F.4th 529 (5th Cir. 2024); *see also* Dkt. 35 at 19 (collecting cases). The same reasoning applies to the FTC's contention (at 9) that it needs more information about how "often" and "when" Plaintiffs' members have filed HSR forms in the past. *See also* Dkt. 53-1 ¶ 4. That information too is set forth in the declarations, *see, e.g.*, Dkt. 44-4 ¶¶ 7-11, and if the FTC intends to argue that those statements do not sufficiently show "concrete plans" to engage in regulated conduct, Dkt. 44 at 10-11 (quoting *Consumers' Rsch.* v. *CSPC*, 592 F. Supp. 3d 568, 578 (E.D. Tex. 2022), *rev'd on other grounds*, 91 F.4th 342 (5th Cir. 2024)), it does not need more detail to do so.

The FTC's claim (at 9) that it needs further details about future transactions so it can "determine" whether the transactions would be HSR-reportable makes even less sense. Transacting parties are the ones who must determine whether a given transaction is HSR-reportable; they do so (and in fact are *required* to do so) all the time. So of course they are well-equipped to determine for themselves whether they will engage in "HSR-reportable transactions." Dkt. 44-4 ¶¶ 7-11. In any case, the FTC exaggerates the complexity of that question; as it tells private parties, all that determination "general[ly]" requires is assessing whether the transaction will meet certain dollar thresholds.[4]

Finally, the FTC briefly alludes (at 9) to "details" the Commission supposedly needs "to effectively develop threshold arguments concerning venue, germaneness, individual participation, and remedies that it previously raised in its motion to dismiss." Many of these "details" appear in the FTC's accompanying declaration without explaining why (or even whether) it needs them to oppose summary judgment. Dkt. 53-1 ¶ 4. And the items all raise (baseless) legal contentions that are already addressed in the parties' briefing on the motions to dismiss and for summary judgment—including most recently in the FTC's opposition and cross-motion.[5] These demands ultimately seem designed more to force Plaintiffs into dropping this suit than to address legally relevant issues. But in no event has the FTC shown that any such fact discovery is "essential" to its summary-judgment opposition.

B. The FTC has not diligently pursued discovery.

The FTC also fails to show that it "diligently pursued discovery" as required to warrant Rule 56(d) relief. *Jacked Up, L.L.C.*, 854 F.3d at 816. As explained above and in previous filings, *see* Dkt. 41, the FTC unreasonably read this Court's June 5 Order (Dkt. 34) to give it free license to demand broad-ranging and unprecedented discovery with no legal basis. The Court correctly declined to adopt that view and allowed Plaintiffs

[4] FTC, *What is the Premerger Notification Program? An Overview* (Aug. 2024) at 3, https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf.

[5] *See, e.g.*, Dkt. 30 at 26-27; Dkt. 35 at 28-29; Dkt. 44 at 10 n.4; Dkt. 57 at 12-14.

to proceed to summary judgment. *See* Dkt. 43. But the FTC waited nearly five weeks after that Order and nearly three weeks after Plaintiffs filed their summary-judgment motion to move for a stay so it could seek discovery. The Court should not reward that lack of diligence by stopping summary-judgment proceedings midstream to permit the FTC to take jurisdictional discovery it has shown no entitlement to.

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For the foregoing reasons, the Court should deny the Commission's stay motion, allow the parties to complete summary-judgment briefing, and address Plaintiffs' standing in the context of all pending motions together.

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Respectfully submitted,

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

Before the Court is Defendants' opposed motion to stay briefing deadlines or to seek discovery under Rule 56(d). After consideration of said Motion, IT IS ORDERED that the Defendants' motion is DENIED.

IT IS SO ORDERED.