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' REPLY IN SUPPORT OF MOTION TO STAY OR FOR DISCOVERY UNDER RULE 56(d)

Ordinarily, in civil litigation, discovery precedes summary judgment. Here, the Commission has consistently explained that summary judgment on the merits must await a determination of venue and jurisdiction. And those questions in turn depend on disputed facts, which require discovery to resolve. Plaintiffs offer no reason for the Court to treat this case differently from any other where disputed facts preclude summary judgment. Nor do plaintiffs offer any viable reason why this case should proceed to the merits before the Court has decided the fully briefed motion to dismiss or transfer.

Plaintiffs' opposition speaks most loudly by its silence about the key jurisdictional requirement of standing: Plaintiffs notably do not claim that there is a single member of the Longview Chamber that is in active negotiations to imminently complete an HSR-reportable transaction, confirming the need for discovery to investigate the vague language in the declarations (which add almost nothing to the vague allegations of the amended complaint).

Plaintiffs urge the Court to simply take their word for it that they have standing. But that is not how summary judgment works. The Court should either stay summary judgment proceedings or else deny or defer ruling on plaintiffs' motion for summary judgment until the Commission has received the discovery needed to determine whether plaintiffs can demonstrate standing and venue.

I. Summary Judgment Should Be Stayed Pending a Decision on the Commission's Motion To Transfer or Dismiss.

Because this Court lacks jurisdiction over plaintiff Longview Chamber of Commerce and therefore lacks venue over this case, only the transferee court should adjudicate the parties' pending disputes—including the merits of plaintiffs' claims. Dkt. 53 at 5. Multiple circuits and courts in this district have held that a motion to transfer should be resolved before the case proceeds to the merits. *See id.* at 4-5; *see also* Dkt. 33 at 3-4.

Plaintiffs object that the FTC's motion "is untimely," Dkt. 59 at 2, but neither the Federal Rules nor this Court's orders forbid seeking relief on an earlier threshold motion merely because plaintiffs seek to rush to the merits prematurely. Nor is a mere 17 days between plaintiffs' motion for summary judgment and the Commission's request an impermissible delay, especially in the face of plaintiffs' inexplicable effort to avoid discovery on the threshold jurisdictional question. The Commission argued *months ago* that the Court should not consider the merits of this case until it has rendered a decision on the Commission's motion to transfer. *See* Dkt. 33 at 3-4. Plaintiffs knew the Commission's position long before they filed their motion, and they identify no prejudice they have suffered from their own effort to speed ahead on the merits.

Nor would deciding the motion to transfer before reaching the merits "be wasteful … and only cause *more* delay," as plaintiffs contend. Dkt. 59 at 4. Plaintiffs do not seriously dispute that only a court with venue should resolve discovery disputes and the merits. Indeed, venue is a threshold objection to a pleading, *see* Fed. R. Civ. P. 12(b)(3), which should be decided at the pleading stage before the parties and the Court move to the merits. And plaintiffs' position is equally likely to cause delay and unnecessary expenditure of judicial resources: If the Commission prevails, then the parties will have briefed summary judgment, and the Court will have reviewed and prepared for those arguments, all for naught. Civil litigation should proceed in order: The Court should decide motions on the pleadings, then parties should complete discovery, and then they should brief summary judgment. Plaintiffs would upend this usual course without any basis in the Rules or precedent.

Plaintiffs also have no viable argument that the Court should reverse the ordinary sequence of ruling on the threshold questions of jurisdiction and venue before proceeding to the merits. They say that the "overlap" between Commission's motion to transfer or dismiss and for summary judgment counsels in favor of deciding the motions together. Dkt. 59 at 3. But motions to dismiss and motions for summary judgment constantly involve overlapping issues. Plaintiffs do not dispute that the evidentiary standard that governs those motions differs meaningfully, which the Commission's summary judgment motion highlights. Dkt. 57 at 8. Indeed, the Commission has made *different* arguments at the summary judgment stage than those presented at the pleading stage, precisely because plaintiffs are now relying on evidence rather than allegations (albeit inadequate evidence that adds little to the allegations in the amended complaint). *See id.* at 9-14. The Commission also emphasized the evidentiary gaps that remain because there has not been any discovery. *Id.* at 10, 11. Those differences highlight the need for this Court to resolve the pending motions in the usual sequence, and there is no efficiency to be gained by considering different arguments that respond to different evidence.[1]

Plaintiffs' effort to distinguish the many cases the Commission has cited, Dkt. 59 at 4 & n.2, is unpersuasive. The key in each case is that motions to transfer should be decided before a court becomes enmeshed in discovery and the merits. Even in plaintiffs' own telling, for instance, the Federal Circuit granted mandamus and directed a transfer precisely because a "district court 'barreled ahead on the merits in significant respects' while [the] transfer motion was pending, including undertaking a discovery hearing…." *Id.* (quoting *In re Apple Inc.*, 979 F.3d 1332, 1338 (Fed. Cir. 2020)). Similarly, plaintiffs agree that the Third Circuit held that motions to transfer should not be postponed "until discovery on the merits is completed, since it

[1] The Court is, of course, master of its docket and can decide the order in which it proceeds to resolve pending motions. The Commission has never "contend[ed] … that the Court *is required* to stay summary-judgment briefing until it rules on the motion to dismiss or transfer." Dkt. 59 at 4 (emphasis added). The caselaw confirms that district courts ordinarily resolve motions to transfer before proceeding to the merits of a case, as they should. Dkt. 53 at 5. That is all the Commission requests here.

is irrelevant to the determination of the preliminary question of transfer." *Id.* (quoting *McDonnell Douglas Corp.* v. *Polin*, 429 F.2d 30, 30-31 (3d Cir. 1970)). These concerns are exactly what animates the Commission's request for a stay of summary judgment proceedings here.

Plaintiffs offer no compelling reason why this case should rush to the merits before the Court resolves threshold issues of jurisdiction and venue. Plaintiffs have never moved to expedite this case, and they did not seek a preliminary injunction. They are now seeking the treatment that might come with those procedural maneuvers, but without ever showing any irreparable harm or public or private interests in favor of immediate relief. This case should proceed like any other case, which means all summary judgment deadlines should be stayed pending a decision on the Commission's motion to dismiss or transfer.

II. This Court Should Deny Or Defer Ruling On Plaintiffs' Summary Judgment Motion To Allow Jurisdictional Discovery.

If the Court denies a stay, then it should deny or defer ruling on plaintiffs' motion for summary judgment until the Commission has received the discovery it has sought from the start of this case. Rule 56(d) expressly provides for this relief, and plaintiffs cannot avoid its effect.

Plaintiffs' summary judgment motion relies on facially inadequate declarations that add almost nothing to their speculative allegations of injury in the amended complaint. This Court can and should deny the motion on that ground, as the Commission explained in its opposition to summary judgment and cross-motion for summary judgment. *See* Dkt. 57 at 8-14. That opposition also explained that plaintiffs' motion for summary judgment turns on disputed factual issues that would require further discovery, emphasizing the need for the Court to deny or defer plaintiffs' motion pending discovery.

1. The Commission has identified a host of factual questions that it lacks the information to rebut. Dkt. 53 at 7-10. Plaintiffs try to recast these factual issues as "fundamentally legal arguments." Dkt. 59 at 5, 7. They are not. Most critically, plaintiffs assert without adequate factual support that their members have unexplained plans to complete HSR-reportable transactions. *E.g.*, Dkt. 44-4 at 3-4. That is obviously a factual claim essential to showing the injury plaintiffs must identify to demonstrate standing. The Court and the Commission are entitled to discern whether the underlying facts bear out plaintiffs' conclusory assertions. That is the role discovery plays in every case, and this one is no different. While the parties have disagreed about the legal rule that applies, there remains a factual dispute about plaintiffs' standing even under their own preferred standard.[2] Plaintiffs similarly miss the mark by claiming that the Commission's "opposition and cross-motion demonstrate that it does not need any discovery to contest Plaintiffs' standing." Dkt. 59 at 5. The Commission's filing identified multiple instances of facts it lacked because of the lack of discovery. *See* Dkt. 57 at 10, 11.

The facts that the Commission seeks also undoubtedly exist. *But see* Dkt. 59 at 7. Plaintiffs do not deny that there is evidence about the basis for their declarants' assertions that certain members will complete an HSR transaction, or the names and locations of plaintiffs' members, or the basis for plaintiffs' belief that the contemplated transactions would indeed be reportable under the rule.[3] The specific discovery the Commission has long sought is in no way

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[2] To be sure, the Court should grant the Commission's motion for summary judgment because plaintiffs lack *any* admissible evidence that establishes their standing. *See* Dkt. 57 at 9-10. The Court can also grant the Commission's motion because plaintiffs misunderstand the legal requirements for standing, or for any of the other reasons the Commission identified. *Id.* at 10-14. The Court cannot, however, grant *plaintiffs'* motion for summary judgment, because even if the Court agrees with plaintiffs on the legal standard, and agrees that their allegations would satisfy that standard, plaintiffs' declarations are full of disputed facts that the Commission cannot rebut absent discovery. Dkt. 53 at 7-10.

[3] Plaintiffs erroneously claim that "[t]ransacting parties are the ones who must determine whether a given transaction is HSR-reportable." Dkt. 59 at 9. As an initial matter, private parties do not determine whether a law applies to them. The Commission is entitled to discovery of the

a "fishing expedition." Dkt. 59 at 7. The Commission has identified specific information that discovery would reveal, which is essential to the Court's resolution of the contested questions concerning standing, venue, and remedies. Plaintiffs are also thus demonstrably wrong that the Commission is "rely[ing] on vague assertions that discovery will produce needed, but unspecified, facts." Dkt. 59 at 7 (quotation omitted). The Commission described the facts it seeks in its motion and provided a declaration specifying the particular facts it seeks through discovery. *See* Dkts. 53, 53-1.

Discovery is also needed to identify the basis for the assertions in plaintiffs' declarations. The Commission explained that "the declarants are principals of the plaintiff organizations, but they offer details about transactions involving unidentified private members of those organizations," so the Commission requires discovery "to ascertain whether the declarants have sufficient personal knowledge of the matter about which they are testifying." Dkt. 53 at 8-9. Plaintiffs do not explain how the principal of a nonprofit organization could possibly have *personal* knowledge about ongoing negotiations concerning potential mergers and acquisitions between private businesses. Plaintiffs claim that such assertions are not "impermissible," Dkt. 59 at 8, but the Federal Rules of Evidence forbid hearsay and permit witnesses to testify only about matters within their personal knowledge. *See* Fed. R. Evid. 602, 802. Plaintiffs' position is that the Court and the Commission must simply take their word for it, but the point of discovery is

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facts that give rise to plaintiffs' claim that their members plan to complete *HSR-reportable* transactions. That is especially so in the HSR context because there are so many different factual scenarios that private parties often seek informal guidance from FTC staff about the application of the Act and its implementing regulations. *See HSR Informal Interpretations*, Federal Trade Commission, https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations. There is thus even more reason for the Commission to seek through discovery facts that will confirm whether plaintiffs' claimed transactions are actually HSR-reportable and that no exemption applies. No authority requires the Commission or the Court to accept plaintiffs' unverified assertions.

that parties must prove asserted facts with actual evidence. This is not merely a question about the credibility or veracity of plaintiffs' declarations. *Cf.* Dkt. 59 at 8. Instead, the declarations make vague or ambiguous assertions that require substantiation: The Commission has identified specific factual disputes about the underlying factual basis for those assertions, and it is entitled to discovery to seek proof about those disputed facts.

And there are plenty of reasons for skepticism about those ambiguities beyond just that they come from someone who does not work for any of the member businesses. While plaintiffs claim in their declarations that they have members who will complete HSR-reportable transactions by the end of the year or sometime in the foreseeable future, *see, e.g.*, Dkt. 44-4 at 3-4, their opposition here backs away from those supposedly imminent deals. They now claim that the combination of their "business model[s]" and general "intent[] to engage" in transactions "amply demonstrates an imminent and substantial risk that injury from the Rule will occur." Dkt. 59 at 9 (quotation omitted). This implicitly confirms the Commission's suspicion that plaintiffs' members are not actually in any active negotiations that would lead to an imminent HSR-reportable transaction, which in turn means their alleged injury is merely speculative and thus cannot satisfy Article III. *See* Dkt. 53 at 11; *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013). And the context of this case adds further doubt. The HSR Rule became effective on February 10, and parties have already filed roughly *a thousand* new forms. *See Premerger Notification Program*, Federal Trade Commission, https://www.ftc.gov/enforcement/premerger-notification-program. Yet Longview Chamber does not assert that any of those parties is a Longview Chamber member. And while Longview Chamber insists that their members' business models mean that an HSR filing is imminent, they do not explain why those business models have not led to such a transaction since the Rule took effect even though so many other parties have made a filing. All of this highlights the lack of detail in plaintiffs' declarations that the Commission should be able to examine through discovery.

Plaintiffs also repeatedly emphasize that this is an APA case, but the discovery the Commission seeks here has nothing to do with the merits of the case or the substantive claims. Rule 56(d) is necessary here only because the Commission has never received discovery concerning disputed issues related to standing, venue, and remedies issues, but discovery before summary judgment is the norm. As just one example, a district court in Ohio ordered discovery in an APA challenge brought by the Chamber of Commerce of the United States and some of its local affiliates. *Dayton Area Chamber of Com. v. Becerra*, No. 3:23-cv-156 (S.D. Ohio Sept. 29, 2023), Dkt. 55. The court then determined that the only plaintiff who could establish venue could *not* establish standing and accordingly dismissed the case—a ruling the Sixth Circuit then affirmed. *See Dayton Area Chamber of Com. v. Becerra*, No. 3:23-cv-156, 2024 WL 3741510 (S.D. Ohio Aug. 8, 2024); *Dayton Area Chamber of Com. v. Kennedy*, 147 F.4th 626 (6th Cir. 2025). That is exactly what should happen here. And even specifically in the Rule 56(d) context, at least one court has recently granted a 56(d) motion in an APA case so that the nonmovant could seek discovery related to standing. *See Mississippi v. Becerra*, 727 F. Supp. 3d 559, 587-88 (S.D. Miss. 2024).

Plaintiffs seem unusually averse to the ordinary procedure of discovery in the face of disputed factual assertions. Indeed, although the Commission's consistent demands for discovery have been appropriately focused on standing, venue, and remedies, plaintiffs interpret those reasonable inquiries as "designed more to force Plaintiffs into dropping this suit than to address legally relevant issues." Dkt. 59 at 10. But if plaintiffs can support their choice of forum with admissible evidence, there is no reason for them to drop this suit. The Commission's desire for discovery stems from a well-founded belief that there is no case or controversy in any claim by a party that can assert proper venue. That the Commission has sought to transfer this case to a court with proper venue underscores the Commission's desire to litigate this dispute in an appropriate forum, not for plaintiffs to voluntarily dismiss their case.

2. The Commission has diligently pursued discovery from the outset, based on its objections to standing and venue. Dkt. 53 at 10. The Commission made clear its position that it would need discovery over a month before plaintiffs even filed their motion for summary judgment. Dkt. 33. The Commission's response persuaded this Court to order the parties to meet and confer and propose a joint discovery schedule. Dkt. 34. The Commission then spent weeks negotiating with plaintiffs over a proposed discovery schedule and even offered "informal" discovery requests in an effort to identify information that the Commission needed without the burden of discovery proceedings. Dkt. 41-2. Plaintiffs offered only a single declaration that mimicked their complaint with little additional detail, and they responded to only one half of one of the Commission's questions about standing. Dkt. 41 at 3-4 n.2. Plaintiffs flatly refused to engage in any discovery, and they refused to comply with the Court's order that they work to propose a joint discovery schedule. *See* Dkts. 41, 42. Instead, they expressly told the Court that the Commission should bring a motion under Rule 56(d), Dkt. 41 at 5, as the Commission has now done. That motion is properly before the Court, and none of plaintiffs' objections can overcome the need for limited discovery to determine the factual basis for this Court's jurisdiction over the Longview Chamber.

The Commission's discovery requests—eight total questions about mundane facts such as the names of the businesses who allegedly have standing, and the basis for their assertions that a transaction is imminent, *see* Dkt. 41-2, are not "broad-ranging" or "unprecedented" or "without legal basis." Dkt. 59 at 10. Nor is a 10-week discovery schedule that skipped requests for admissions, limited requests for documents, and proposed fewer interrogatories and depositions than the Federal Rules of Civil Procedure ordinarily permit. *Compare* Dkt. 42-1 *with* Fed. R. Civ. P. 30, 33.

Nor is the Commission's Rule 56(d) motion untimely. The Commission promptly filed it after plaintiffs' summary judgment motion and before its own response was due. Plaintiffs' focus on the "nearly five weeks" that passed since the Court's order allowing plaintiffs to file their motion for summary judgment, Dkt. 59 at 11, is misplaced. Rule 56(d) presupposes that a party has already moved for summary judgment. The Commission could not show that it lacked "facts essential to justify its opposition" until it had seen plaintiffs' motion for summary judgment and reviewed the supporting evidence. Fed. R. Civ. P. 56(d). The Commission brought this motion 17 days after plaintiffs had filed that motion and their declarations, and plaintiffs cite no authority suggesting such a quick turnaround is actually an impermissible delay.

CONCLUSION

The Court should stay all summary judgment briefing deadlines until after it has decided the pending motion to transfer or dismiss. Alternatively, it should deny or defer ruling on plaintiffs' summary judgment motion until jurisdictional discovery is complete.

Respectfully submitted,

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