

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 EMERGENCY MOTION FOR
STAY PENDING APPEAL¹

Defendants (collectively, the “FTC” or the “Commission”) respectfully request that the Court grant a stay pending appeal, pursuant to Fed. R. Civ. P. 62, of its decision, Dkt. 75, vacating the HSR Rule. The Commission respectfully requests a determination on this motion by 4 p.m. CT tomorrow, February 18, so that the Fifth Circuit may consider a stay motion, if necessary, before this Court’s stay expires on Thursday, February 19. If this Court has not granted a stay pending appeal, the Commission intends to file a motion in the Fifth Circuit by February 18 seeking both a stay pending appeal and a brief administrative stay to allow time for the court of appeals to consider the motion.

¹ Counsel for the Commission has discussed this motion with counsel for plaintiffs, who has stated that plaintiffs oppose any stay in this Court.

As explained below, a stay of the Court’s decision pending appeal is necessary to preserve the status quo, which would otherwise be irreparably altered if the rule is vacated while appellate review proceeds. Parties to impending HSR-reportable transactions face substantial uncertainty as to which form to prepare and file, and parties to future HSR-reportable transactions will continue to face significant uncertainty while the Commission’s forthcoming appeal proceeds, given the possibility that the Commission will prevail on appeal.

STANDARD OF REVIEW

Courts consider four factors in evaluating a request for a stay pending appeal: (1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant will be irreparably harmed if the stay is not granted; (3) whether issuance of a stay will substantially harm the other parties; and (4) whether the granting of the stay serves the public interest. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). When the government is a party, its interests and the public interest overlap in the balancing of harms. *See Nken v. Holder*, 556 U.S. 418, 420 (2009).

ARGUMENT

I. The Commission Is Likely to Succeed on the Merits.

The Commission respectfully submits that it is likely to succeed on the merits of its appeal on, at minimum, the following issues:

First, plaintiffs lack standing because their only evidence of standing is hearsay, which “is not competent summary judgment evidence” unless the party offering the evidence can “show that the statement can be presented in an

admissible form at trial.” *Miller v. Michaels Stores, Inc.*, 98 F.4th 211, 218 (5th Cir. 2024). Here, plaintiffs did not even try to show that the hearsay statements could be presented by any identified, competent witness at trial. The Court nonetheless concluded it could consider plaintiffs’ hearsay statements because “the unnamed members” could “testify at trial, as Plaintiffs proposed” in their opposition to the Commission’s motion for summary judgment. Op. (Dkt. 75) at 9.

That conclusion directly conflicts with the holdings of three appellate courts that have considered the issue. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1294 (11th Cir. 2012) (“The possibility that unknown witnesses will emerge to provide testimony on this point is insufficient to establish that the hearsay statement could be reduced to admissible evidence at trial.”); *Friends of Animals v. Bernhardt*, 15 F.4th 1254, 1272 (10th Cir. 2021); *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1007-08 (6th Cir. 2017). The court’s conclusion also conflicts with the plain text of Rule 56, which provides that a “declaration used to support or oppose a motion must ... show that the ... *declarant* is competent to testify on the matters stated.” Fed. R. Civ. P. 56(c) (emphasis added). And it would render meaningless the default rule that hearsay evidence is inadmissible at summary judgment; it is almost always the case that some other witness, such as the hearsay declarant, *could* hypothetically testify at trial. Neither plaintiffs nor the court cited any case where a court rejected a hearsay objection to a declaration offered to support summary judgment based on nothing more than the proponent’s attorneys’ argument that the unnamed hearsay declarant could testify at trial.

Second, the Commission is likely to prevail on its argument that plaintiffs lack standing because their declarations rely on assertions about unnamed members. The Supreme Court has squarely held that an association is “require[d]” to “nam[e] the affected members” unless “*all* the members of the organization are affected by the challenged activity.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009). Plaintiffs have not argued that all their members are affected by the HSR Rule, nor did the Court so conclude. Instead, the Court said that the FTC “misreads *Summers*” based on a Fifth Circuit decision holding that “*Summers* requires only that the plaintiff allege that there is a specific injured member. ... Alleging that a specific member exists does not require naming that member.” Op. 14 (quoting *Nat’l Infusion Ctr. v. Becerra*, 116 F.4th 488, 497 n.5 (5th Cir. 2024)).

But *National Infusion Center* was decided on a motion to dismiss, not a motion for summary judgment, where plaintiffs’ burden to establish standing is higher and requires proof by sufficient admissible evidence, not mere allegations. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Indeed, one of the cases that *National Infusion Center* relied on expressly recognized that “[t]he defendants’ argument that the persons allegedly injured must be identified by name might have some validity if this litigation were at the summary judgment stage.” *Bldg. & Const. Trades Council of Buffalo, New York & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006). Moreover, multiple courts of appeals have held that associations “lack associational standing to sue on behalf of unnamed members.” *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 602 (8th Cir. 2022); *Draper v.*

Healey, 827 F.3d 1, 3 (1st Cir. 2016); *Tenn. Republican Party v. SEC*, 863 F.3d 507, 521 (6th Cir. 2017).

And far from misreading *Summers*, the Commission’s position is faithful to that decision. The Court there did not hold that associations must “identify” or “describe” their members, or that they must demonstrate only that some unnamed affected member exists. The Court unambiguously held that associations are “require[d]” to “nam[e] the affected members.” 555 U.S. at 498. And lest there be any doubt, *Summers* relied on *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 235 (1990), where the Court “noted that the affidavit provided by the [plaintiff] to establish standing would be insufficient because it did not *name the individuals* who were harmed by the challenged ... program.” *Summers*, 555 U.S. at 498 (emphasis added). *Summers* thus establishes that, at summary judgment, associational plaintiffs must name a harmed member. Plaintiffs here have not done so and thus have not carried their burden to establish their standing.

Third, the Commission is likely to succeed on its argument that it had statutory authority to promulgate the Rule, and that doing so was not arbitrary and capricious.² Congress directed the Commission to create a form that “is necessary and appropriate” to allow the antitrust agencies “to determine whether” an HSR-reportable transaction “may, if consummated, violate the antitrust laws.” 15 U.S.C.

² The Court determined that the Rule was the product of arbitrary and capricious decisionmaking for the “same reasons that” that the Court believed “the necessary-and-appropriate provision does not authorize the Final Rule.” Op. at 29. The Commission therefore treats these two issues together.

§ 18a. This is an unambiguously “capacious” standard that signals Congress’s intent to confer considerable discretion on the Commission, *Michigan v. EPA*, 576 U.S. 743, 752 (2015)—discretion that, respectfully, the Court failed to afford.

The Court’s approach is also inconsistent with the governing standard under the APA, which requires courts to “review ... a cost-benefit analysis deferentially,” which means that the “burden to show error is high.” *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *cf. Louisiana ex rel. Landry v. Biden*, 64 F.4th 674, 678 n.10 (5th Cir. 2023) (citing *National Association of Home Builders*). But under any standard, the Court’s criticism of the Commission’s cost-benefit analysis is flawed. Contrary to the Court’s conclusion, Dkt. 75 at 22, nothing in the APA or the HSR Act requires the Commission to identify mergers that violated the Clayton Act but that the antitrust agencies did not identify during the HSR review period. Congress gave the Commission unambiguous statutory authority to update the HSR form, and agencies may make “predictive judgement[s]” about the future, *Prometheus Radio Project*, 592 U.S. at 427, and may “promulgate prophylactic regulations which are broad in scope in order to effectuate the purposes of the enabling legislation,” *Sid Peterson Mem’l Hosp. v. Thompson*, 274 F.3d 301, 313 (5th Cir. 2001). A missed merger inflicts serious harm on society through its harm to competition, and Congress did not require the Commission to wait until society has suffered that harm before updating the HSR form.

Moreover, the Commission extensively documented the need for the Rule and the many reasons it believed the nearly 50-year-old form was outdated and

inadequate to review modern mergers and acquisitions. *See* 89 Fed. Reg. 89,216, 89,220-36 (Nov. 12, 2024). The Commission “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). By extensively documenting the need for the final rule, the Commission met this burden.

Finally, this case is nothing like *Michigan* or *Mexican Gulf Fishing Co. v. United States Dep’t of Com.*, 60 F.4th 956, 965 (5th Cir. 2023), where the agencies in question refused to consider the costs of the rules they promulgated. *Contra* Op. at 27. The Commission spent dozens of pages considering the costs and benefits of the Rule, including an entire section titled “Benefits and Costs of the Final Rule.” 89 Fed. Reg. 89,250-64. The thorough analysis in those sections more than satisfies the modest requirements of *Michigan* or *Mexican Gulf Fishing*.

Fourth, the Commission is likely to prevail on its argument that it reasonably considered proposed alternatives. As the Court recognized, “an agency must consider and explain its rejection” of “significant and viable and obvious alternatives.” Op. 30 (quoting *O Ring Precision, Inc. v. Jones*, 722 F.3d 711, 724 (5th Cir. 2013)). The Commission did so here, but the Court nonetheless held that the Commission’s explanation failed because it did “not specify what information was lacking in the prior form that the Final Rule would now provide.” Op. 31. Respectfully, the Commission spent *dozens* of pages documenting the information

that the new form requires but the old form omitted, and how that information is relevant to its premerger review. *See* 89 Fed. Reg. 89,270-330. And as before, neither the APA nor the HSR Act required the Commission to “show that a single illegal merger occurred due to ‘information deficiencies’ in the old Form.” Op. 31. The Commission also explained why it was choosing to impose certain costs on all filing parties rather than just some, and why neither Second Requests nor voluntary submissions were adequate alternatives. *See* 89 Fed. Reg. 89,246. The Commission considered these alternatives and reasonably explained why it was rejecting them, which is all the APA requires. *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008).

This Court considered and rejected those arguments, and we do not here ask for reconsideration of that decision. But the Court should recognize that the Fifth Circuit could well disagree, and that the arguments are sufficiently compelling to warrant a stay pending appeal.

II. The Commission Will Suffer Irreparable Harm Absent a Stay.

Any time a court vacates a regulation on a nationwide basis, it “‘intrud[es]’ on ‘a coordinate branch of the Government’ and prevents the Government from enforcing its policies against nonparties.” *Trump v. CASA, Inc.*, 606 U.S. 831, 835 (2025) (quoting *INS v. Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U.S. 1301, 1306 (O’Connor, J., in chambers) (staying an injunction against an administrative regulation)); *see also Abbott v. Perez*, 585 U.S. 579, 603 (2018) (“[T]he inability to enforce its duly enacted plans clearly inflicts

irreparable harm on the State.”). That alone establishes irreparable harm: The Commission has exhaustively detailed why it believes the information in the new form is necessary, and the Court’s vacatur will prevent the Executive Branch from receiving this information.

The vacatur will also prevent the Commission from receiving information that even plaintiffs did not dispute the Commission was entitled to seek, including information the Commission is *mandated* to seek. Most significantly, the Rule implemented the 2022 Merger Fee Modernization Act, which provides that the Commission “shall require” HSR filers to report any subsidy from a “foreign entity of concern.” 15 U.S.C. § 18b. *See* 89 Fed. Reg. at 89,270. The Court’s vacatur of the Rule will prevent the Commission from receiving this crucial information until it can promulgate a new rule that carries out Congress’s mandate.

Similarly, the Court’s decision to vacate the rule in its entirety—rather than sever any provisions that pose particular concerns—prevents the Commission from receiving information that imposes minimal costs and to which plaintiffs never objected. For instance, the Rule requires filers to provide translation of documents in foreign languages. *Id.* at 89,273. It also instructed filers to provide North American Industry Classification System (NAICS) codes from 2022, rather than the outdated codes from 2017. *Id.* at 89,321. Filers will now be submitting outdated information, and the Commission will be denied access to relevant information that imposes no significant costs on filers. These effects of the Court’s decision, together

and separately, pose irreparable harms to the Commission—and the Department of Justice—that warrant a stay pending appeal.

III. The Balance of Harms and Public Interest Favor a Stay.

The balance of harms and public interest also favor a stay. Absent a stay, this Court's decision will introduce substantial uncertainty and impose significant costs on private parties who plan to seek premerger review of their HSR-reportable transactions. Already, parties to impending transactions will have to decide whether to begin filling out the old form instead of the new form, even if they have already incurred the time and expense of completing some or all of the new form. And filers will face this uncertainty even if the judgment takes effect while the appeal is pending. As documented above, there are serious appellate issues for the Fifth Circuit to review, and the Commission respectfully submits that it is likely to prevail on appeal. Given that possibility, parties to HSR-reportable transactions will have to weigh the risk that if they begin completing the old HSR form but the rule is reinstated, they will need to complete the new form, potentially delaying any deal. To protect those private parties who did not challenge this Rule and never asked for the relief the Court granted, the Court should stay its judgment pending appeal and provide all parties, and the marketplace, with certainty while the litigation proceeds.

By contrast, any harms to plaintiffs are minimal. Plaintiffs have yet to name a single member affected by this Rule and have suggested that a handful of HSR-reportable transactions by some pseudonymous members are imminent. Indeed, any harms to plaintiffs are minimal enough that they did not seek a temporary

restraining order or preliminary injunction against the Rule, allowing it to remain in effect for the duration of this litigation. That, in turn, meant that the marketplace accepted the new form, and any entities planning mergers and acquisitions in the near future had already planned to complete the new form. Weighed against the harm to the antitrust agencies, the general public, and private non-parties, plaintiffs' harms are insubstantial. A stay is warranted for this reason too.

CONCLUSION

The Court's vacatur of the HSR Rule should be stayed pending appeal.

Respectfully submitted,

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[PROPOSED] ORDER

Upon consideration of Defendants' motion for a stay pending appeal, Defendants' motion is hereby GRANTED. The Court's judgment vacating the HSR Rule, *see* Dkt. 74, is hereby STAYED pending appeal.

SO ORDERED.