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 CROSS-MOTION FOR SUMMARY JUDGMENT

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ARGUMENT

I. Plaintiffs Have Failed To Demonstrate Standing.

A. Plaintiffs have no admissible evidence of standing.

Plaintiffs do not dispute that their *only* evidence of standing is hearsay. *See* Dkt. 57 at 8-10; Dkt. 62 at 2-4. Plaintiffs urge the Court to accept this hearsay evidence because someone other than the declarant (such as an unidentified employee of the association's member) could testify at trial.[1] That argument is incompatible with the text of Rule 56, which says 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)(4) (emphasis added). And multiple courts of appeals have "rejected the … argument" that "hearsay could be considered at summary judgment because it could later be replaced at trial by admissible live testimony." *See Friends of Animals v. Bernhardt*, 15 F.4th 1254, 1272 (10th Cir. 2021); *see also Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1007-08 (6th Cir. 2017). Plaintiffs' argument would also negate the consensus rule that "[h]earsay is not competent summary judgment evidence" unless plaintiffs 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). That rule would be meaningless if parties could skirt it merely by asserting that unidentified witnesses, or unseen "business records," "could" appear at trial. Dkt. 62 at 4; *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.").

Plaintiffs also claim that their declarants have "personal knowledge" of the matters in their

[1] Plaintiffs also suggest their approach is permissible because they "routinely" submit similar declarations. Dkt. 62 at 2. That is irrelevant and also ignores that associational plaintiffs routinely introduce declarations from named members attesting to their harm. Dkt. 57 at 12 n.5.

declarations, Dkt. 62 at 4, but they never contend that their declarants have first-hand knowledge about the details of the contemplated transactions described in the declarations. Regardless, the Supreme Court has held that courts should not "accept[] the organizations' self-descriptions of their membership" in lieu of "individual affidavits." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009).[2] Because plaintiffs lack any admissible evidence to establish that they have standing to bring this case, judgment must be entered for the Commission.

B. Longview Chamber lacks associational standing.

Plaintiffs' declarations also fail to demonstrate that Longview Chamber has standing. Plaintiffs again rely on cases about "parties directly regulated by a rule," Dkt. 62 at 5, but the HSR rule does not impose obligations on *anyone* unless and until there is an HSR reportable transaction. And Longview Chamber now implicitly concedes that it does not have any member in active negotiations to complete an HSR-eligible transaction. *See* Dkt. 62 at 5.[3]

Longview Chamber is also wrong that it does not need to name a member with standing. Dkt. 62 at 7-8. The Supreme Court unambiguously held that associations are "require[d]" to "nam[e] the affected members." *Summers*, at 498. And multiple circuits have confirmed 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); *see also Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016); *Tenn. Republican Party v. SEC*, 863 F.3d 507, 521 (6th Cir. 2017). Nor does Longview Chamber dispute that it neither sought leave for its members to proceed pseudonymously nor tried to satisfy the appropriate standard. Dkt. 57 at 12.

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[2] At the very least, the Commission is entitled to probe the basis for the declarants' personal knowledge through discovery. Dkt. 57 at 10.

[3] The Commission is not "accusing Plaintiffs of perjury." Dkt. 62 at 6. It has pointed out that the declarations are full of vague ambiguities that do not suffice to show the Court that any of plaintiffs' members will imminently engage in an HSR-reportable transaction.

Finally, Longview Chamber fails to show this case is germane to its interests. As in *Dayton Area Chamber of Commerce* v. *Kennedy*, 147 F.4th 626 (6th Cir. 2025), the regulation here affects only one (small) group of businesses, not all members of the plaintiff chamber. The rule applies to only businesses required to report an imminent HSR transaction—and Longview Chamber has never identified one residing in the Longview Trade Area. The rule also benefits many businesses—perhaps including Longview Chamber members—whether they are parties to HSR transactions who prefer the rule's efficiency or are competitors who prefer robust antitrust enforcement.[4] Just like in *Dayton Chamber*, Longview Chamber is not broadly advancing the interests of the entire business community, so this case is not germane to its interests.

II. The Commission Properly Construed and Exercised Its Statutory Authority.

A. The Commission acted within its statutory authority.

Plaintiffs continue to insist that the Commission must explain why the new form is better than the old one. Dkt. 62 at 9. But the Supreme Court held that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Plaintiffs point to the language in *Fox* that—consistent with longstanding APA precedent—requires an agency to provide reasons for adopting the new rule, Dkt. 62 at 9, but the Supreme Court did not contradict itself: The agency's "good reasons" for adopting a rule are focused on the new rule, and do not require satisfying plaintiffs that the new rule is better (by their measure) than the old one. Regardless, in addition to provision-specific explanations, the Commission included an entire section on "The Need for the Final Rule" that explains, among other things, the shortcomings of

[4] Longview Chamber also labels it "absurd" that the Commission would disagree with the untested assertions in plaintiffs' declarations. Dkt. 62 at 8. If plaintiffs' standing turned on just this issue, it would be the classic factual dispute warranting discovery.

the old regime and how those deficiencies undermine premerger review. 89 FR 89,220-36.

1. The Commission repeatedly considered the costs and benefits of the Rule. Plaintiffs now concede as much, *see* Dkt. 62 at 12, but assert without explanation that something more was necessary, *see id.* Throughout the rule, the Commission discussed various costs and benefits dozens of times and concluded in multiple instances that the benefits outweighed the costs.[5] The Commission even provided a prolonged "analysis [that] considers the potential economic effects that may result from the final rule … including the benefits and costs to market participants." 89 FR 89,237. And it included an entire section titled "Benefits and Costs of the Final Rule." *Id.* at 89,250. Plaintiffs never explain what more the APA required.

Plaintiffs are correct (Dkt. 62 at 12-13) that the Commission significantly pared back the scope of the NPRM due to the costs or benefits of the proposal. *See* Dk. 57 at 25-26. But plaintiffs are wrong that, in over 100 pages of discussion, the Commission provided no explanation for the provisions it adopted. 89 FR 89,270-330. And plaintiffs have no retort to the Commission's conclusion that "the final rule achieves the benefits associated with mandatory premerger review with an overall burden that is reasonable and consistent with the legislative purpose of the HSR Act." Dkt. 57 at 18.[6]

2. Although the Commission exhaustively discussed the costs and benefits of the rule, neither the HSR Act nor the APA required any such justification. Dkt. 62 at 10-11. Plaintiffs rely

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[5] *See, e.g.*, 89 FR at 89,233, 37, 40, 45, 47, 48, 50-54, 63, 64, 67, 74, 97, 99 (benefits); *id.* at 89,238, 47, 54-60, 62, 63, 64, 68, 69, 72, 73, 78, 88, 301, 04, 20 (costs); *id.* at 89,218, 36-37 (benefits justified costs).

[6] Plaintiffs single out the officers-and-directors provision specifically, but this is just a recharacterization of their merits challenge to that provision. In any event, the Commission extensively discussed that provision's benefits, *see* 89 FR 89,295, and its costs, *id.* at 89,296, before concluding that despite the "higher cost … the benefit to the Agencies is necessary and proportionate," *id.* at 89,297. Plaintiffs are thus demonstrably wrong that "[t]he Commission entirely failed to perform" any cost benefit "analysis" concerning this provision. Dkt. 62 at 13.

on *Michigan v. EPA*, 576 U.S. 743 (2015), but the Supreme Court expressly limited its holding to the "context" of the statute there, which "direct[ed] EPA to determine whether *regulation* is appropriate and necessary" while recognizing that there were "settings" in which "appropriate and necessary" may carry a different meaning. *Id.* at 752-53 (cleaned up). The Supreme Court, not the Commission, thus drew the distinction that plaintiffs now claim "makes no sense." Dkt. 62 at 10. Similarly, the Supreme Court described the phrase "appropriate and necessary" as "capacious[]," *Michigan*, 576 U.S. at 752, and later cited *Michigan* as a paradigmatic example of when a statute "authorize[s]" an agency "to exercise a degree of discretion." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394-95 (2024). Those decisions refute plaintiffs' insistence that the phrase "necessary and appropriate" somehow does not provide a capacious standard that confers significant discretion to the agency. Dkt. 62 at 10. Regardless, this is indisputably not a case where the agency "refused to consider whether the costs of its decision outweighed the benefits." *Michigan*, 576 U.S. at 750.

3. Plaintiffs are also wrong that certain requirements of the rule exceed the Commission's statutory authority, but they lack standing to bring these challenges. Plaintiffs never show, even in their inadmissible declarations, that the specific provisions they say are unlawful would apply to their members' hypothetical transactions. *See* Dkt. 57 at 11-12. It does not matter that plaintiffs *also* argue that the entire rule is invalid. Dkt. 62 at 6. Plaintiffs cannot challenge specific requirements that do not apply to any member.

a. Plaintiffs' argument against these provisions is wrong anyway. The officers-and-directors requirement allows the Commission to determine whether the proposed acquisition would violate Sections 7 or 8 of the Clayton Act or the HSR Act itself. It is simply not true, as plaintiffs claim, that "Section 8 expressly permits acquisitions with interlocking directorates to

be consummated." Dkt. 62 at 14. Section 8 says no such thing. Indeed, it expressly prohibits interlocking directorates. *See* 15 U.S.C. § 19. The safe-harbor provision in § 19(b) does not authorize any acquisitions, and the Commission thus can take premerger enforcement action to prevent such interlocks, as plaintiffs recognize. *See* Dkt. 62 at 14. And the HSR Act allows the Commission to seek information in the form that bears on whether the acquisition may violate the antitrust laws, such as by creating an interlocking directorate. 15 U.S.C. § 18a(d)(1).

Overlapping directorates (whether they violate Section 8 or not) can also threaten competition and thus violate Section 7. *See* 89 FR 89,295. Contrary to plaintiffs' claim, *see* Dkt. 62 at 14 n.6, the threat results directly from the acquisition because absent the acquisition there would be no director with inside information about competing businesses. The dearth of past examples of such cases, *see id.* at 14, merely demonstrates the inadequacy of the previous form, which did not provide the information necessary to allow the Commission to identify and challenge mergers that would create directorates that threaten competition. *See* 89 FR 89,223, 89,295 (explaining why the requirement became necessary). Still, the Commission did cite Section 7 cases involving common managers. *See* 89 FR 89,222.

The officers-and-directors requirement also allows the Commission to detect violations of the HSR Act, which is an antitrust law. Plaintiffs are wrong that the Commission did not explain how gun-jumping "is relevant to whether the 'proposed acquisition violates the antitrust laws.'" Dkt. 62 at 15 (quoting 15 U.SC. § 18a(d)(1)). Plaintiffs just ignored the explanation. *See* Dkt. 57 at 21-22. Alternatively, the requirement is also necessary and appropriate to carry out the purposes of the HSR Act. If § 18a(d)(2)(C) does not give the Commission authority beyond what

the rest of the Act provides, as plaintiffs claim, *see* Dkt. 62 at 15, then it is surplusage.[7]

b. Plaintiffs also offer insubstantial objections to the new form's required transaction rationale, competitive overlaps, and supply relationships descriptions. *See* Dkt. 62 at 15. Plaintiffs claim that even though the Commission has explained that the transaction rationale does not require a substantive legal analysis, the "rule itself belies those conclusory statements." *Id.* at 16. But the rule itself *disclaims* that construction. *See* Dkt. 57 at 23 (citing 89 FR 89,334). And the form's instructions demonstrate that no legal rationale is required (for any of these challenged provisions). *See* 89 FR 89,370-72. There is no reason to broadly interpret the rule to create a legal infirmity that the Commission rejected. Plaintiffs also appear to concede that the overlap and supply-relationship descriptions ask for only factual information, but they suggest this is still impermissible because it "goes to the core" of what must be proven to challenge the transaction. Dkt. 62 at 16. Plaintiffs have seemingly abandoned their argument that these requirements demand legal conclusions, Dkt. 44 at 19, and they cite no authority that prevents the Commission from collecting basic factual information about the proposed transaction.

B. The rule is a rational product of reasoned decisionmaking.

Plaintiffs' disagreement with the Commission's assessment of the rule's costs and benefits is nowhere close to sufficient even if this were de novo review, much less the deferential arbitrary and capricious standard under which courts assess merely whether there is a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (quotation omitted); *see* Dkt. 57 at 24. First,

[7] Plaintiffs also claim this argument is an impermissible post-hoc rationalization because the Commission did not cite § 18a(d)(2)(C) in the rule. Dkt. 62 at 15. But the Commission explained that the officers-and-directors requirement would allow it to enforce the HSR Act, 89 FR 89,295, and *Chenery* and its ilk apply to agencies' rationales, not their citations.

plaintiffs again argue that the Commission did not properly assess the direct costs of the rule, Dkt. 62 at 16-18, but they never cite any evidence in the record that contradicts the Commission's conclusions. Instead, they pivot their argument to one about sample sizes, Dkt. 62 at 17. They never explain, however, what a reliable sample size would be or why the FTC should have relied on plaintiffs' handpicked survey instead of the agency's own survey of attorneys with extensive experience in the area. They instead again cite their own expert's report, which used a similar methodology (albeit with unvetted participants) and assessed *the NPRM*, not the rule. Dkt. 62 at 17-18. Plaintiffs have not identified any actual flaw with the Commission's methodology or its conclusions other than their steadfast belief that it "cannot possibly" be right. Dkt. 62 at 18. That conclusory assertion is insufficient to sustain an arbitrary and capricious challenge.

Plaintiffs next claim that the Commission did not consider the indirect costs of the new HSR form. But the Commission spent dozens of paragraphs responding to various comments in a section titled "Other Costs Not Attributable to the Final Rule." 89 FR 89,257-60. The Commission disagreed with many of those comments, explaining that it largely viewed them as speculative given the absence of any reliable data. Plaintiffs now claim they "supported their assertions with specific data," Dkt. 62 at 19, but there simply is not any reliable data in any of the documents they cite that demonstrates that the rule "would deter or delay some deals merely by increasing the costs associated with making an HSR Filing." 89 FR 89,257; *see* Dkt. 44-15 at 10 & n.22; Dkt. 44-11 (Kothari Report) at 24. The Commission also exhaustively explained its disagreement with much of the Kothari Report. *See* 89 FR 89,257-59. Plaintiffs also try to distinguish *FCC* v. *Prometheus Radio Project*, 592 U.S. 414 (2021) on the grounds that the Commission "made a 'predictive judgment' based on no evidence at all," Dkt. 62 at 20, but the Commission expressly cited "the evidence available to the Commission" that formed the basis for its predictive judgment. 89 FR

89,257. That plaintiffs do not like that judgment does not render the rule arbitrary and capricious.

Plaintiffs are also wrong that the Commission unreasonably assessed the benefits of the rule. Plaintiffs first quibble with the hospital study the Commission cited, which they incorrectly say was the "only concrete evidence" showing gaps in the prior form. Dkt. 62 at 20-21. The Commission dedicated a full section to detailing the gaps in the previous form and the basis to believe that anticompetitive mergers were likely to slip through those gaps. *See* 89 FR 89,220-36; *cf.* Dkt. 62 at 24 (claiming the Commission is "unwilling" to identify the gaps in the old form). As for the hospital study, the Commission directly responded to plaintiffs' similar complaint in the rule, and recognized that the "study was not designed to test" the new rule while explaining that it still "support[ed] the Commission's belief that there are information deficiencies … prevent[ing] the Agencies from identifying" potentially unlawful mergers. 89 FR 89,221 & n.25. Next, plaintiffs claim that the rule "obviously does not address" stealth acquisitions because they are designed to evade reporting. Dkt. 62 at 21. But one of the goals of the rule is to require information that will make it more difficult to evade antitrust scrutiny, including through a pattern of serial acquisitions, 89 FR 89,234-36, so it "obviously" does address the problem. Finally, the Commission also explained, repeatedly, how "the Rule will materially help the FTC's initial screen." Dkt. 62 at 21; *see, e.g.*, 89 FR 89,250-54, 88.

Plaintiffs also claim that they know better than the Commission whether the new form will save the Commission time. Dkt. 62 at 22. Plaintiffs say there is a "denominator problem," *id.*, but the Commission explained that the agencies spend considerable staff time on unnecessary investigations that the rule will stave off, 89 FR 89,252-53, which plaintiffs do not dispute. Similarly, plaintiffs do not deny that the rule will indeed save time by making the second request process more efficient. *See* Dkt. 57 at 32. They instead say it is irrational to require so much more

information just to streamline the second request process. Dkt. 62 at 22. But a more efficient second request process is just one benefit among many that justify the rule. *See* Dkt. 57 at 28-33; 89 FR 89,250-54. Plaintiffs repeat the same mistake for time savings for third parties. Dkt. 62 at 23. Whether each benefit, standing alone, does not justify the rule is irrelevant because the Commission concluded that taken together they do, and plaintiffs never demonstrate otherwise.[8]

Lastly, the Commission reasonably explained its decision not to adopt plaintiffs' preferred alternatives. The Commission found that these alternatives were inefficient, imposed costs on third parties, and created delays, Dkt. 57 at 33-38, and plaintiffs rebut none of those rationales. Plaintiffs contend that "the cure is worse than the disease," Dkt. 62 at 23-24, to opt for the rule over expanding alternative information requests. But Congress entrusted the agencies, not plaintiffs, to make those judgments. Nor do plaintiffs deny that expanding second requests would impose substantial and sometimes unnecessary burdens on some parties, or that the old form did not always allow the agencies to effectively determine who should receive a second request. Dkt. 57 at 36-37. That the Commission chose the rule over these flawed alternatives was not irrational.

III. Any remedy should be appropriately tailored.

Plaintiffs argue that vacatur is required, Dkt. 62 at 25, but do not explain why that vacatur cannot or should not be party-specific. Nor do they deny that a universal vacatur would harm third parties, including potentially some of plaintiffs' members. Dkt. 57 at 38-39.

CONCLUSION

The Court should grant the Commission's motion and deny plaintiffs' motion.

[8] The Commission also explained that "[b]ecause the final rule will provide the agencies with additional information necessary to conduct antitrust assessments, the rule will help inform the processes and procedures used to grant early terminations." *FTC Finalizes changes to Premerger Notification Form*, Federal Trade Commission (Oct. 10, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form.

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