UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. AON plc and WILLIS TOWERS WATSON plc, *Defendants*.	Case No. 1:21-cv-01633-RBW

PLAINTIFF'S OPPOSITION TO DEFENDANTS'
MOTION FOR EXPEDITED ENTRY OF SCHEDULING ORDER

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INTRODUCTION

Aon's proposed $30 billion acquisition of Willis Towers Watson would combine two of the world's three largest insurance brokers. At trial, Plaintiff United States will show that the proposed merger would eliminate head-to-head competition between Defendants, leading to higher prices, less innovation, and reduced quality of service for American businesses and their customers, employees, and retirees in five markets. Given the stakes, Plaintiff agrees with Defendants that the American people deserve for this case to be decided on the merits. For that to occur, there must be a fair period of discovery and preparation. Defendants' proposal to set a trial date without engaging on any interim steps necessary to prepare would unreasonably rush the schedule and severely prejudice Plaintiff's ability to meet its burden of proof.

Plaintiff wants to try the case expeditiously. While Defendants posture that Plaintiff wishes to delay, it was Plaintiff that, on the day it filed its complaint, provided Defendants with a draft proposed case management order (appended as Exhibit 1) that addresses the many steps required to prepare for trial. And it was Plaintiff that repeatedly offered to meet and confer about a proposed case management order—offers Defendants refused until the day before this opposition was due (15 days *after* Plaintiff sent its draft proposed case management order to Defendants and five days before the hearing on this motion). Even then, Defendants sent only a partial mark-up of the proposed case management order and still failed to address the schedule leading up to trial. To date, Plaintiff's proposed case management order stands alone as the only comprehensive scheduling proposal put forward by either side.

Plaintiff proposed a reasonable schedule that would afford time to develop a record on which this Court can base its decision. Defendants, in contrast, have rushed to Court to ask for an unreasonably early trial based on a deadline entirely within their control while refusing to

negotiate with Plaintiff about a trial date and the necessary steps leading to it. The Court should deny Defendants' motion and direct the parties to meet and confer about a schedule and proposed case management order.

BACKGROUND

On issues of timing, Defendants' actions speak louder than their words. Contrary to Defendants' claims (Memorandum of Points and Authorities in Support of Defendants' Motion for Expedited Entry of Scheduling Order ("Mem.") at 4–5), before the complaint's filing Defendants had significant control over the investigation's timing, yet they did not act with the urgency they now present to support their proposed trial date. For example, Defendants did not file Hart-Scott-Rodino Act materials notifying Plaintiff of the proposed merger until 46 days after they had agreed to combine—time Plaintiff could have used for its investigation.[1]

Following a limited preliminary investigation, Plaintiff issued requests for additional information under the Hart-Scott-Rodino Act. *See* 15 U.S.C. § 18a. It took 126 days for Aon and 123 days for Willis Towers Watson to produce documents and information in response. That was the pace Defendants set when timing was largely in their control; now they seek to force Plaintiff to conduct not only document discovery but all depositions and data work, all expert discovery, and all pretrial processes in less than half that time.

Defendants' delays continued for six months after they finished their document

[1] *See* "Aon to Combine with Willis Towers Watson to Accelerate Innovation on Behalf of Clients," WILLIS TOWERS WATSON, Mar. 9, 2020, https://www.willistowerswatson.com/en-US/News/2020/03/aon-to-combine-with-willis-towers-watson-to-accelerate-innovation-on-behalf-of-clients; Schedule 14A, WILLIS TOWERS WATSON, May 8, 2020, at 24–25, https://investors.willistowerswatson.com/static-files/17098293-fd6e-4812-bfc0-3e4003c90836 ("On April 24, 2020, each of Aon and [Willis Towers Watson] filed a Notification and Report Form (referred to as the 'HSR Notification Form') pursuant to the HSR Act with the FTC and the Antitrust Division, initiating a 30-day waiting period.").

productions. In January 2021 and after, Plaintiff informed Defendants it had significant concerns about the merger's anticompetitive effects in each of the markets alleged in the complaint. Defendants' initial remedy proposals omitted entirely a proposed remedy for one of the five alleged markets Plaintiff identified in January 2021 as an area of concern—an omission Defendants did not address with a revised proposal until April. In total, Defendants revised their divestiture proposal six times after their initial proposal in January and continuing into late May 2021, and the scope of the divestitures may still be in flux.

At Defendants' request, Plaintiff investigated each of the divestiture proposals before filing the complaint and determined Defendants' proposals would not resolve all competition concerns in the United States. Plaintiff communicated this decision to Defendants, after which Defendants acknowledged in a letter written by the Chief Executive Officer of Defendant Aon plc to Plaintiff on June 14, 2021 that the parties were at an impasse regarding the commercial risk and health benefits markets.

On June 16, Plaintiff filed its complaint and sent a draft proposed protective order and draft proposed case management order to Defendants, both of which are necessary to start discovery.[2] Ex. 2 at 11–12. The draft proposed case management order contained a full pretrial schedule, covering issues required under Rules 16(b) and 26(f), including a 30-day period to enter into a consent decree governing claims over which the parties may be able to reach agreement to try and narrow the case. Ex. 1 at 3–8. The draft also included dates for fact and expert discovery, culminating in a February 2022 trial. *Id.*

[2] Plaintiff and Defendants have not agreed to the terms of the draft protective order, although Defendants have moved the Court to enter their revised version of that draft.

Plaintiff subsequently told Defendants it is not inflexibly tied to its proposed trial date and remains willing to negotiate in good faith on a comprehensive proposed case management order. Although Defendants stated multiple times they would send a mark-up of Plaintiff's proposed case management order, they failed to do so for 15 days—at which point they provided only a partial mark-up that did not specifically address any interim deadlines, and they reserved the right to change their position on other terms following the Court's ruling on their motion to set a trial date. The fact that Defendants reserved the right to address certain items in the proposed case management order if the Court rejects their proposed August 23 trial date is a clear indication that Defendants can in fact move their so-called "outside date" should the Court set the trial for after September 9.

ARGUMENT

I. DEFENDANTS' REQUEST FOR A TRIAL DATE NEXT MONTH IS UNREASONABLE AND WOULD PREJUDICE PLAINTIFF

Defendants would require that all pretrial litigation be completed within 68 days from the complaint filing for an August 23 trial date. That number is shrinking every day, as Defendants continue to refuse to discuss a full case management plan, including all interim deadlines, that would allow the parties to begin discovery. If the Court were to grant Defendants' request at the status hearing on July 6, there would be only 48 days left to accomplish fact discovery, expert discovery, pretrial motions, and all other trial preparations.

Defendants' demand for an August 23 trial date does not provide the parties with enough time to develop the evidence needed to present this case to the Court. Plaintiff has alleged harm in five separate relevant markets, each of which involves distinct evidence and data. While Plaintiff's draft proposed case management order suggests an initial period to negotiate a consent

decree and narrow the issues for discovery and trial, Defendants initially rejected that proposal, *see* Ex. 2 at 3, and then stated during conversations on June 25 and July 2 that they could not take a position on whether they intended to litigate all five alleged markets rather than narrow the case's scope. Given the expedited schedule Defendants seek, if a consent decree cannot be negotiated quickly, Plaintiff may still require discovery on all five markets, each with separate divestiture proposals. *See* Complaint, ¶¶ 77–86, Dkt. No. 1.

Because a trial presents distinct issues and is governed by different standards than an investigation focused on whether the United States should bring an enforcement action, courts recognize that an agency's pre-complaint investigation is no substitute for, nor should it limit, post-complaint discovery.[3] Indeed, the majority of documents and data collected from Defendants had collection cutoff dates from summer 2020 and will need to be supplemented. Several third parties produced documents or data as early as August 2020, and those productions likely will need to be supplemented as well. Defendants acknowledged the distinction between investigation and litigation discovery during the investigation when they agreed not to make the very argument they now advance. *See* Ex. 3 at 3 ("The parties . . . agree not to argue to a court that pre-complaint discovery by the Division should forestall or otherwise limit post-complaint discovery.").

Less than two months of trial preparation is nowhere near sufficient to meaningfully

[3] *See, e.g.*, *SEC v. Sargent*, 229 F.3d 68, 80 (1st Cir. 2000) ("Here, even though the [agency] had already conducted a pre-filing investigation . . . , 'there is no authority which suggests that it is appropriate to limit the [agency]'s right to take discovery based upon the extent of its previous investigation into the facts underlying its case.'" (quoting *SEC v. Saul*, 133 F.R.D. 115, 118 (N.D. Ill. 1990))). *Saul* further notes that "the Court finds considerable merit in the [agency]'s contention that once it has completed its investigation and filed suit, it is entitled to review its investigation and avail itself of its discovery rights in order to prepare its case for trial." 133 F.R.D. at 118; *see also United States v. GAF Corp.*, 596 F.2d 10, 14 (2d Cir. 1979) ("It is important to remember that the [Justice] Department's objective at the pre-complaint stage of the investigation is not to 'prove' its case but rather to make an informed decision on whether or not to file a complaint." (quoting H.R. Rep. No. 94-1343, at 26 (1976))).

complete, among many other things, document discovery, fact witness depositions, expert reports and depositions, pretrial briefing, exchanges of interrogatories, deposition designations, trial exhibits, and resolution of evidentiary and confidentiality objections. Nor is it a feasible period for third parties to respond to the data and document requests that will be necessary for the parties' experts to provide opinions. Requiring Plaintiff to present a trial on the merits under such an abbreviated schedule would prejudice Plaintiff and impede the Court's ability to determine the merits of this case.

Unsurprisingly, Defendants' proposed 68-day schedule has no support in merger cases of this size and these stakes. Not only do all of the cases cited by Defendants have a much longer time between complaint and trial than what Defendants propose, but most involved preliminary injunction motions under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). In those cases, "[t]he FTC is not required to *establish* that the proposed merger would in fact violate Section 7 of the FTC Act" but must show, based on "a weighing of the equities and a consideration of the Commission's likelihood of success on the merits," that a preliminary injunction "would be in the public interest." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (emphasis in original).

By contrast, in recent scheduling orders involving actions seeking a permanent injunction under the Clayton Act, as is the case here, courts in this district provided the parties with nearly double the amount of time proposed by Defendants. *See, e.g.*, *United States v. Aetna Inc.*, No. 1:16-cv-01494 (D.D.C. filed July 21, 2016), Dkt. No. 55 (137 days); *United States v. AB Electrolux*, No. 1:15-cv-01039 (D.D.C. filed July 1, 2015), Dkt. No. 28 & Minute Order dated July 21, 2015 (124 days); *United States v. Anthem, Inc.*, No. 1:16-cv-01493 (D.D.C. filed July 21, 2016), Dkt. No. 68 (123 days); *United States v. AT&T Inc.*, No. 1:17-cv-02511 (D.D.C.

filed Nov. 20, 2017), Dkt. No. 55 (119 days); *see also United States v. Sabre Corp.*, No. 1:19-cv-01548 (D. Del. filed Aug. 20, 2019), Dkt. No. 31 (160 days); *United States v. Energy Solutions, Inc.*, No. 1:16-cv-01056 (D. Del. filed Nov. 16, 2016), Dkt. No. 103 (159 days).

Defendants' proposed trial date, untethered to the work that must be done to prepare for trial, would mark a departure from recent practice in this district and would severely prejudice Plaintiff in meeting its burden of proof. *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1041 (D.C. Cir. 2008) (district court should take "whatever time it need[s]" to fully consider the evidence).

II. DEFENDANTS' ARGUMENTS FOR RUSHING LACK MERIT

Defendants justify their rushed schedule—and their attempt to bind Plaintiff and the Court to such a rushed schedule—because of the September 9 option date in their merger agreement. But Defendants can simply extend the option date at will, or take no action and leave the merger agreement in place after September 9. Even Defendants contemplate the possibility that September 9 is not a true "outside date": At least one of the proposed divestiture agreements provides Defendants with the unilateral right to extend the agreement well past September 9, and even to March 30, 2022.[4]

In light of the illusory nature of option dates, courts routinely decline to defer to defendants' artificial deadlines when scheduling merger trials. *See, e.g.*, Transcript of Status Conference at 69:13–17, *United States v. Aetna Inc.*, No. 1:16-cv-01494 (D.D.C. Aug. 10, 2016), Dkt. No. 50 (setting schedule that produced decision after option date because "I haven't heard that much that gives legitimacy, if you will, to the December 31st cutoff date"); Transcript of Status Conference at 10:4–13, *United States v. AT&T Inc.*, No. 1:17-cv-02511 (D.D.C. Dec. 7,

[4] *See* Security and Asset Purchase Agreement, May 12, 2021, at 156 (§ 10.01(e)), https://www.sec.gov/Archives/edgar/data/354190/000119312521163665/d318483dex21 htm.

2017) (instructing defendants to extend "drop-dead" date of April 22 and imposing a schedule that produced a decision after that date because "[g]etting an opinion out on April 22nd is not happening").[5]

Defendants also imply that this Court should move quickly because Plaintiff's allegations lack legal or factual merit, noting that other international jurisdictions are "on a path to obtain timely clearance." (Mem. at 1.) Whether other jurisdictions find anticompetitive concerns under their laws as to their markets of course does not impact the Court's determination as to Plaintiff's claims under Section 7 of the Clayton Act. Likewise, Defendants' argument that "large customer" markets are disfavored is incorrect. Contrary to Defendants' citation to a single, out-of-circuit, seventeen-year-old decision (Mem. at 2), large customer markets are grounded in the 2010 Horizontal Merger Guidelines[6] and well-supported by recent merger case law. *See FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 51–58 (D.D.C. 2018) (defining market based on customers with "Global Fleets" that satisfy certain criteria); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 195–201 (D.D.C. 2017) (noting that Supreme Court "[c]ase law provides for the distinction of product markets by customer" and defining market based on employers with 5000 or more employees); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 118–127 (D.D.C. 2016) (observing that "[a]ntitrust laws exist to protect competition, even for a targeted group that represents a relatively small part of an overall market" and defining market based on "large [business-to-business] customers who spend $500,000 or more on office supplies annually"); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 24, 37–48 (D.D.C. 2015) (defining market for "broadline

[5] Relevant excerpts of these transcripts are appended as Exhibits 4 and 5.

[6] Fed. Trade Comm'n & U.S. Dep't of Justice, *Horizontal Merger Guidelines* § 4.1.4 (2010).

foodservice distribution to national customers"); *cf. Whole Foods*, 548 F.3d at 1039 (opinion of Brown, J.) (rejecting district court's conclusion that FTC could not define price-discrimination market based around targeted customers).

If Defendants continue to believe this merger would benefit their companies and shareholders, they will not terminate simply because the option date has passed.[7] And if the merger no longer benefits both companies, either should be able to avail itself of the option negotiated in their agreement. Either way, Plaintiff had no say in creating the option date and should not be short-changed by a precipitous schedule on account of it.

III. DEFENDANTS' REQUEST TO SET A TRIAL DATE IS PREMATURE

Defendants' motion also is improper the Federal Rules of Civil Procedure, the Local Rules, and the Court's General Order for Civil Cases. Those rules contemplate an orderly process in which the parties discuss all pretrial matters—not limited to a trial date but including all discovery and pretrial issues—at a Rule 26(f) conference and submit a proposed case management plan to the Court before it enters a scheduling order. Fed. R. Civ. P. 16(b), 26(f); LCvR 16.3(a), (c)–(d); *see also* General Order for Civil Cases Before the Honorable Reggie B. Walton, Dkt. No. 18, at 5–6.

In compliance with those rules, Plaintiff provided Defendants a draft proposed case management order covering the topics contemplated by Rule 16(b) and Rule 26(f), including interim deadlines for all stages of discovery and pretrial preparation. For 15 days, Defendants did not respond to Plaintiff's proposal beyond requesting an August 23 trial date; even now, they

[7] Defendants express concern about the "uncertainty" that is causing them to "los[e] top talent—and their clients—to competitors" before the transaction is consummated. (Mem. at 5.) But every company that decides to merge must contend with the uncertainty that arises while the deal remains pending, and they typically factor that uncertainty into their decision to combine.

have not participated in a Rule 26(f) conference and have made no effort to work with Plaintiff on the interim deadlines necessary to prepare for trial. Between the time Plaintiff sent its draft proposed case management order and Defendants responded, Defendants have moved the court three separate times seeking discovery and a trial date and have not taken a consistent position on the scope of issues to be included at trial. Following the federal and local rules as well as this Court's procedures would have avoided these serial motions. Plaintiff respectfully requests that this Court order Defendants to negotiate the proposed case management order (including a complete pretrial schedule) and proposed protective order to facilitate the efficient resolution of this case for both the parties and the Court.

CONCLUSION

For these reasons, Plaintiff respectfully requests that the Court deny Defendants' motion, instruct Defendants to meet and confer with Plaintiff about a draft proposed case management order and a draft proposed protective order, and order the parties to file a joint submission moving for entry of the agreed-upon proposed orders or, if complete agreement cannot be reached, outlining the parties' positions on the areas of disagreement.

Dated: July 2, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 2, 2021, I served the foregoing upon all counsel of record via the Court's CM/ECF system.

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