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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Federal Trade Commission,
10 Plaintiff,

11 v.

12 James D. Noland, Jr., et al.,
13 Defendants.
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No. CV-20-00047-PHX-DWL

ORDER

15 In March 2021, following the close of fact discovery, Plaintiff Federal Trade
16 Commission (“FTC”) filed a motion for summary judgment as to liability. (Doc. 285.)
17 The Individual Defendants filed their response in May 2021 (Docs. 335, 348) and the
18 motion became fully briefed in June 2021 (Doc. 370), although the FTC later filed
19 corrected versions of its briefs (Doc. 381). In mid-August 2021, the Court informed the
20 parties that it was is in the process of reviewing the liability-related summary judgment
21 briefing and intended to rule soon. (Doc. 395 at 4.) Separately, in June 2021, the FTC
22 filed a motion for summary judgment as to remedies. (Doc. 365.) In mid-August 2021,
23 that motion became fully briefed. (Docs. 392, 398.)

24 Notwithstanding all of this, on September 6, 2021, the Individual Defendants filed
25 a motion under Rule 56(d) of the Federal Rules of Civil Procedure “for leave to supplement
26 the record on the pending motions for summary judgment.” (Doc. 402.) In a nutshell, the
27 motion argues that, due to the purportedly “unlawful” orders issued during earlier stages
28 of this case, which had the effect of freezing certain assets, “the Individual Defendants

1 have been hamstrung in their ability to afford counsel and for counsel to fully investigate
2 the facts of this matter and defend their interests.” (*Id.* at 2-3.) More specifically, the
3 Individual Defendants contend that, due to the asset freezes, they were “unable to take key
4 depositions, such as those of the FTC’s investigator Adam Rottner, its expert Stacey
5 Bosley, its data analyst Amanda Wilson, the receiver, and Evan Mendelson i[n] his
6 capacity as a declarant making factual statements in support of the FTC’s claims for relief”
7 and were “unable to obtain evidence about and from alleged complainants, upon whose
8 alleged statements the FTC’s case is built.” (*Id.* at 3-4.) Additionally, the motion accuses
9 the FTC, both in its own capacity and “through the receiver,” of engaging in the “deliberate
10 destruction of critical evidence in the form of SBH’s customer support ticketing system.”
11 (*Id.* at 4-6.) The motion concludes by asking the Court to “refrain from ruling on the
12 pending summary judgment motions” so the Individual Defendants can pursue unspecified
13 “discovery regarding the matters raised by this motion.” (*Id.* at 6.) Notably, the motion is
14 not accompanied by a declaration from counsel specifying the additional discovery that the
15 Individual Defendants wish to pursue or explaining the relevance of that unspecified
16 discovery to the issues raised in the FTC’s pending (and fully briefed) summary judgment
17 motions.

18 Although the FTC has not yet responded to the Individual Defendants’ motion, the
19 Court finds it unnecessary to receive further briefing. The motion is denied for several
20 independent reasons.

21 First, the motion is untimely. “A motion under Rule 56(d) should be made before
22 the close of discovery.” *Miyares v. City of New York*, 2013 WL 3940816, *2 n.3 (S.D.N.Y.
23 2013). Here, fact discovery closed in December 2020. (Doc. 211). The Individual
24 Defendants make no effort to explain why they failed to raise their Rule 56(d) request until
25 nine months after the close of discovery—and, indeed, do not acknowledge that they have
26 already filed responses to both of the FTC’s summary judgment motions, which have been
27 fully briefed for some time. *Cf. Gonzalez v. Garibay*, 2012 WL 12875366, *4 (S.D. Cal.
28 2012) (“Since Garibay’s motion was not filed until two-and-a-half months after discovery

1 ended, the Court DENIES Gonzalez’s untimely and unsupported request for relief
2 under Rule 56(d).”).

3 Second, the motion is procedurally deficient. Rule 56(d) provides that “[i]f a
4 nonmovant *shows by affidavit or declaration* that, for specified reasons, it cannot present
5 facts essential to justify its opposition, the court may: (1) defer considering the motion or
6 deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue
7 any other appropriate order.” *Id.* (emphasis added). Put another way, a “party seeking to
8 delay summary judgment for further discovery must show that: (1) it has *set forth in*
9 *affidavit form* the specific facts it hopes to elicit from further discovery; (2) the facts sought
10 exist; and (3) the sought-after facts are essential to oppose summary judgment.” *Stevens*
11 *v. Corelogic, Inc.*, 899 F.3d 666, 678 (9th Cir. 2018) (cleaned up) (emphasis added)
12 (emphasis omitted). Here, the Individual Defendants have failed to submit the required
13 affidavit or declaration from counsel.¹ This, alone, precludes relief. *Brae Transp., Inc. v.*
14 *Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986) (“[Rule 56(d)] requires affidavits
15 setting forth the particular facts expected from the movant’s discovery. Failure to comply
16 with the requirements . . . is a proper ground for denying discovery and proceeding to
17 summary judgment.”).

18 Third, even if the Court were to overlook this procedural deficiency and treat the
19 motion as the Individual Defendants’ declaration, relief would still be unwarranted. The
20 motion is an exercise in vagueness—it makes no effort to identify the additional facts the
21 Individual Defendants believe they would uncover if permitted to take the additional “key
22 depositions” and makes no effort to explain why those unspecified missing facts are
23 relevant to (let alone essential for opposing) the FTC’s pending summary judgment
24 arguments. Such a showing is a prerequisite to relief under Rule 56(d). *See, e.g., Ohno v.*

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26 ¹ Although the Individual Defendants have provided declarations from three fact
27 witnesses (Docs. 402-1, 402-2, 402-3), those declarations merely provide background
28 details concerning SBH’s customer support ticketing system—they make no effort to
identify the additional discovery-related steps the Individual Defendants wish to pursue or
explain why the facts generated during those discovery-related steps would be essential in
opposing the FTC’s summary judgment arguments.

1 *Yasuma*, 723 F.3d 984, 1013 n.29 (9th Cir. 2013) (“[I]t is not enough to rely on vague
2 assertions that discovery will produce needed, but unspecified, facts.”) (internal quotation
3 marks omitted); *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998) (“In making a [Rule
4 56(d)] motion, a party opposing summary judgment must make clear what information is
5 sought and how it would preclude summary judgment.”) (internal quotation marks
6 omitted); 2 Gensler, Federal Rules of Civil Procedure, Rules and Commentary, Rule 56, at
7 173 (2021) (“A general or conclusory assertion that additional discovery is needed will not
8 suffice.”).

9 Accordingly, **IT IS ORDERED** that the Individual Defendants’ Rule 56(d) motion
10 (Doc. 402) is **denied**.

11 Dated this 8th day of September, 2021.

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16 Dominic W. Lanza
17 United States District Judge
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