UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Andrew N. Ferguson

Concurring Statement of Commissioner Andrew N. Ferguson
Joined by Commissioner Melissa Holyoak
In the Matter of Planned Building Services, Inc.
Matter Number 2410029

January 6, 2025

Today, the Commission issues an administrative complaint and accepts a proposed consent agreement with building services contractors Planned Building Services, Inc., Planned Security Services, Inc., Planned Lifestyle Services, Inc., and Planned Technologies Services, Inc. ("Planned").[1] Planned is headquartered in New Jersey and employs more than 3,000 building services workers, primarily in the Northeast and Mid-Atlantic, but also in the metro regions of Boston, the District of Columbia, Atlanta, San Francisco, and Florida. Planned's employees provide cleaning, maintenance, security, and concierge services at residential and commercial buildings.

The Complaint alleges that Planned's standard contracts with its customers include "no-hire" provisions.[2] These no-hire provisions restrict Planned's customers from directly or indirectly hiring a Planned employee in a similar capacity within six months of that employee separating from Planned, or within six months after the end of the building's contract with Planned.[3] In the event that a customer violates a no-hire provision, the customer must pay to Planned a placement or conversion fee.[4] The Complaint charges[5] that Planned's no-hire provisions violate Section 1 of the Sherman Act[6] and Section 5 of the Federal Trade Commission Act.[7]

As I have said before, the Commission should devote resources to protecting competition in labor markets.[8] Today's action rightly deploys the antitrust laws to do just that.[9] I write

[1] *In re Planned Bldg. Servs., Inc.*, Complaint ("Complaint") & Decision and Order ("Order").
[2] Compl. ¶ 10–11.
[3] *Id*. ¶ 11.
[4] *Ibid*.
[5] *Id*. ¶¶ 16–17.
[6] 15 U.S.C. § 1
[7] 15 U.S.C. § 45.
[8] See, e.g., Statement of Comm'r Andrew N. Ferguson, Concurring in Part and Dissenting in Part, *United States v. Lyft*, Matter No. 2223028, at 14 (Oct. 25, 2024) ("Ferguson Lyft Statement"); Dissenting Statement of Comm'r Andrew N. Ferguson, *In re Guardian Serv. Indus., Inc*., Matter No. 2410082, at 1 (Dec. 4, 2024) ("Ferguson Guardian Dissent").
[9] Ferguson Guardian Dissent at 1 & n.7. The Chair pitches my concurrence in this matter as evidence that I "have started to value the importance of the Commission's efforts to protect workers from violations of the statutes that we enforce." Statement of Chair Lina M. Khan, *In re Planned Bldg. Servs., Inc.*, Matter No. 2410029, at 3 & n.9 (Jan. 6, 2025) ("Chair's Statement"). I have always valued protecting workers from violations of the law. But I vote only for Commission action that is fully consistent with the laws Congress wrote. The Chair's litany of examples were all

separately to explain why, notwithstanding the bare-bones allegations in the Complaint, I have "reason to believe" that Planned's no-hire provisions violate Section 1 of the Sherman Act.[10]

The Complaint alleges that Planned's no-hire provisions reduce competition for labor, undermine worker mobility, reduce worker bargaining power as to their terms of employment,[11] and that "any legitimate objectives" of Planned's no-hire provisions "could have been achieved through significantly less restrictive means."[12] This formulation of Planned's alleged offense—that the legitimate objectives of Planned's no-hire provisions could have been achieved through means less offensive to the competitive process in the labor markets—is consistent with the rule of reason.[13] The rule of reason is the default analytical framework for every potential agreement in restraint of trade, save only a few horizontal restraints that the antitrust laws proscribe categorically.[14] Under the rule of reason, a restraint, such as the no-hire provision in Planned's

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lawless, involving rules that the courts swiftly enjoined or the settlement of bunk legal theories for pennies on the dollar, accompanied by self-congratulatory press releases. Still seeking to tout the failed non-compete clause rule as a win, the Chair for the third time claims that the Middle District of Florida "reject[ed]" my statutory arguments against the rule. Chair's Statement at 3; Statement of Chair Lina M. Khan, Joined by Comm'rs Rebecca Kelly Slaughter & Alvaro M. Bedoya, *In re Guardian Serv. Indus., Inc.*, Matter No. 2410082, at 2 n.6 (Dec. 4, 2024); Statement of Chair Lina M. Khan, Joined by Comm'r Alvaro M. Bedoya, Concurring in the Denial of the Motion, *In re H&R Block, Inc.*, Docket No. 9427, at 3 n.20 (Oct. 18, 2024). Yet, as I have explained before, in preliminarily enjoining the rule, the district court expressly adopted one of my statutory arguments and invoked my dissent. Statement of Comm'r Andrew N. Ferguson, Dissenting in Part and Concurring in the Denial of the Motion, *In re H&R Block, Inc.*, Docket No. 9427, at 17 n.157 (Oct. 18, 2024) (citing Excerpt of Proceedings, *Properties of the Villages, Inc. v. FTC*, No. 5:24-cv-316, 2024 WL 3870380, at *6 (M.D. Fla. Aug. 15, 2024)). But that argument is rather beside the point—the fact remains that the non-compete clause rule is enjoined nationwide and has not protected a single worker. Ferguson Guardian Dissent at 2 n.10. Investigating, proving, and punishing actual violations of the law protects workers. Failed rules and press releases do not. See Ferguson Lyft Statement at 14 (citing *Ryan LLC v. FTC*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024) (vacating the Commission's Non-Compete Clause Rule); *Properties of the Villages, Inc. v. FTC*, 2024 WL 3870380 (M.D. Fla. Aug. 15, 2024) (issuing a preliminary injunction prohibiting enforcement of the Commission's Non-Compete Clause Rule as to plaintiff)); Ferguson Guardian Dissent at 1–2 & n.10 (same).

[10] 15 U.S.C. § 45(b).

[11] Compl. ¶¶ 13, 14.

[12] *Id*. ¶ 15.

[13] *Ohio v. Am. Express Co*., 585 U.S. 529, 541–42 (2018) (outlining the rule of reason's "three-step, burden-shifting framework": (1) "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market;" (2) "[i]f the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint[;]" and (3) "[i]f the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." (cleaned up)).

[14] *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("[T]his Court presumptively applies rule of reason analysis…."); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723, 726 (1988) ("there is a presumption in favor of a rule-of-reason standard …. (cleaned up)); see also *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977) ("[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect rather than ... upon formalistic line drawing."); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) ("Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused."); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 551 U.S. 877, 899 (2007) ("Resort to *per se* rules is confined to restraints, … 'that would always or almost always tend to restrict competition and decrease output.' To justify a *per se* prohibition a restraint must have 'manifestly anticompetitive' effects and 'lack … any redeeming virtue.'" (cleaned up)).

primarily vertical agreements, violates the antitrust laws where the anticompetitive effects of the restraint outweigh its procompetitive effects.[15]

But merely articulating the correct legal standard is not enough to file an administrative complaint against a firm. Section 5 requires that the Commission have "reason to believe" that the anticompetitive effects of Planned's challenged no-hire provisions outweigh procompetitive justifications for those provisions.[16] Evidence sufficient to satisfy the reason-to-believe requirement is not the same as evidence sufficient to succeed in litigation. To satisfy the reason-to-believe standard, the Commission must have collected sufficient evidence in its pre-filing investigation to make a "threshold determination that further inquiry is warranted."[17]

The Commission recently brought a similar complaint against Guardian Service Industries, Inc. I dissented.[18] The complaint did not allege a single fact suggesting that the anticompetitive effects of the no-hire provisions at issue outweighed the procompetitive justifications.[19] Nor had I seen any evidence not alleged in the complaint giving me "reason to believe" that Guardian violated Section 1.

The Complaint against Planned similarly fails to allege facts demonstrating that the no-hire provisions' anti-competitive effects outweigh the procompetitive justifications. But the Commission has evidence giving me "reason to believe" that the provisions do. Specifically, as to anticompetitive effects, [redacted]

[15] *Am. Express*, 585 U.S. at 541–42; *NCAA v. Alston*, 594 U.S. 69, 100 (2021) ("[A]nticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits."); cf. *Eichorn v. AT&T Corp*., 248 F.3d 131 (3d Cir. 2001) (challenged no-hire agreement "not an antitrust violation under the rule of reason" where the particular provision at issue "did not have a significant anti-competitive effect on the plaintiffs' ability to seek employment"); *Aya Healthcare Servs., Inc. v. AMN Healthcare*, *Inc.*, 9 F.4th 1102, 1110 (9th Cir. 2021) (challenged non-solicitation agreement, involving employee outsourcing arrangement between healthcare staffing agencies collaborating to supply traveling nurses, not unlawful under rule of reason where restraint was reasonably necessary to ensure neither would lose personnel during collaboration); *Giordano v. Saks Inc*., 654 F. Supp. 3d 174, 201 (E.D.N.Y. 2023) (challenged no-poach agreement involving collaborative business arrangement not unlawful under rule of reason where luxury brands agreed not to poach Saks employees who were trained to sell brand products unless current managers consented or the employee had left Saks at least six months prior).

[16] 15 U.S.C. § 45(b).

[17] *FTC v. Standard Oil of Cal*., 449 U.S. 232, 241 (1980); see also *AMREP Corp. v. FTC*, 768 F.2d 1171, 1177 (10th Cir. 1985); *Boise Cascade Corp. v. FTC*, 498 F. Supp. 772, 779 (D. Del. 1980).

[18] Ferguson Guardian Dissent.

[19] Ferguson Guardian Dissent at 3–4.

[20] [redacted]

[21] [redacted]

[22] [redacted]

[23] [redacted]

With respect to procompetitive justifications, [redacted]

It is a mistake for the Commission not to allege these facts in the Complaint. Although the statutes governing confidentiality of material obtained by the Commission prevent us from publicly alleging the specific details of Planned's challenged conduct,[28] the Commission nonetheless could have included additional information in the Complaint. Doing so would have provided important guidance to similarly situated firms of the Commission's view of Section 1's requirements for no-hire provisions and would have promoted governmental transparency. But that decision was not mine. And Section 5 does not limit me to the text of the Complaint in determining whether we have "reason to believe" the law has been violated.[29] Given the record before me, I have "reason to believe" that the anticompetitive effects of Planned's challenged no-hire provisions outweigh their procompetitive justifications. I therefore concur in the filing of the Complaint.

[24] [redacted]
[25] [redacted]
[26] [redacted]
[27] [redacted]

[28] 15 U.S.C. §§ 46(f), 57b-2(b), 57b-2(c); 16 C.F.R. § 4.10(g).
[29] 15 U.S.C. § 45(b).