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

Office of Commissioner
Melissa Holyoak

Dissenting Statement of Commissioner Melissa Holyoak

In the Matter of Guardian Service Industries, Inc.,
Commission File No. 2410082

December 4, 2024

As I have previously explained,[1] the Commission cannot issue a complaint unless it has reason to believe that the law has been violated.[2] The same requirement applies equally to complaints headed toward litigation and to complaints that accompany a consent order that simultaneously resolves the matter. Today's Complaint against Guardian Service Industries, Inc. fails to provide sufficient allegations to establish a violation of Section 1 of the Sherman Act or a violation of Section 5 of the FTC Act. Because the restraint at issue is between a building services contractor and its clients, it would qualify as a vertical restraint, and "nearly every . . . vertical restraint" should be analyzed under the rule of reason.[3] Further, this is a novel area, and the *per se* rule "is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason."[4] Under the rule of reason, "the factfinder weighs all of the

[1] Dissenting Statement of Comm'r Melissa Holyoak, *In the Matter of Chevron Corporation & Hess Corporation*, Comm'n File No. 241-0008 (Sept. 30, 2024); Joint Dissenting Statement of Comm'r Melissa Holyoak and Comm'r Andrew N. Ferguson, *In the Matter of ExxonMobil Corporation*, No. 241-0004 (May 2, 2024).
[2] 15 U.S.C. § 45(b).
[3] *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018).
[4] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007) (citation omitted). Chair Khan contends that "some no-poach or no-hire provisions may be analyzed as *per se* restraints under Section 1 of the Sherman Act." Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter & Commissioner Alvaro M. Bedoya, *In the Matter of Guardian Service Industries, Inc*., Matter Number 2410082 (Dec. 4, 2024). First, to be clear, the Complaint in today's action does *not* allege a *per se* violation. Second, the Seventh Circuit case upon which she relies, *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 703 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024), does not stand for the proposition that today's conduct, or no-hire and no-poach provisions more generally, should be condemned as *per se* unlawful. To begin with, the no-poach provisions alleged in *Deslandes* were purely horizontal, *see id.* at 703, lacking the vertical component at issue in today's complaint against Guardian. Further, Judge Easterbrook, analyzing a motion for judgment on the pleadings, made clear that the district court had "jettisoned the *per se* rule too early." *Id.* He did not declare that such agreements were *per se* unlawful. In fact, he went on to explain a variety of questions that needed to be considered before such a determination could be made, including, *inter alia*: "So what was the no-poach clause doing? Was it protecting franchises' investments in training, or was it allowing them to appropriate the value of workers' own investments?" *Id.* at 704. He explained that "[t]hese are all potentially complex questions, which cannot be answered by looking at the language of the complaint. They require careful economic analysis. More than that: the classification of a restraint as ancillary is a defense, and complaints need not anticipate and plead around defenses." *Id.* at 705. Such considerations are a far cry from declaring no-poach agreements *per se* unlawful.

circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[5] To do so, the court conducts "an inquiry into market power and market structure designed to assess the combination's actual effect."[6] Today's Complaint, however, does not plead sufficient facts to make a violation under the rule of reason plausible.[7] For this reason, I dissent.[8]

[5] *Leegin*, 551 U.S. at 885; *see also Am. Express Co.*, 585 U.S. at 541.

[6] *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984).

[7] The Commission's 2022 Policy Statement states that under Section 5 of the FTC Act, "the inquiry will not focus on the 'rule of reason.'" *See* Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, Comm'n File No. P221202, at 10 (Nov. 10, 2022); *id.* at 2 ("Congress passed the FTC Act to push back against the judiciary's adoption and use of the open-ended rule of reason for analyzing Sherman Act claims."). I disagree with this conclusion and the 2022 Policy Statement in general. *See* Dissenting Statement of Comm'r Christine S. Wilson, *Regarding the Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, Comm'n File No. P221202 (Nov. 10, 2022). Among other problems with the statement, Section 5 requires a showing of anticompetitive effects. *See Boise Cascade Corp. v. FTC*, 637 F.2d 573, 579 (9th Cir. 1980); *cf. E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 141 (2d Cir. 1984) (rejecting unfair method of competition claim because there was no "causal connection" between the challenged practices and adverse competitive effects); *FTC v. Raladam Co.*, 283 U.S. 643, 647-48 (1931).

[8] Chair Khan somehow believes that just because she, as one agent of the American government, declares her choices as helpful to "American workers," that it makes it so. Khan, *supra* note 4. Good intentions do not, however, translate into tangible results. And while her rhetoric may make for good PR, the facts and the law matter. The Chair's decision to assert that the agreements are *per se* illegal in today's statement but not in the actual Complaint is just one more example where the public should rely more on the Chair's revealed preferences than her expressed preferences.