Office of Commissioner
Andrew N. Ferguson

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

Statement of Commissioner Andrew N. Ferguson
Concurring in Part and Dissenting in Part
In the Matter of Grubhub, Inc.
Matter Number 2023157

December 17, 2024

More than 160 million Americans ordered food through an online delivery service in 2023.[1] These services generally operate as two-sided platforms. On one side are hungry consumers looking for a meal. One the other side are restaurants wanting to serve those customers. Some food-delivery services are three-sided platforms, adding delivery drivers to the transaction that deliver the food from the restaurant to the customer. Grubhub Inc. and Grubhub Holdings Inc. (collectively, "Grubhub") operate one of the largest of such services.[2] Grubhub operates in over 2,400 cities in the United States. The platform hosts more than 500,000 restaurants, over 200,000 delivery drivers, and approximately 31 million active users who place 262 million orders each year.[3]

Today, the Commission accuses Grubhub of a wide range of misconduct, and approves a complaint and settlement against Grubhub for this alleged misconduct. The complaint alleges that Grubhub made false or misleading representations to consumers about the cost of delivery,[4] denied consumers access to their Grubhub accounts and the funds in those accounts,[5] failed to provide consumers a simple cancellation mechanism to stop recurring charges,[6] created listings for restaurants on Grubhub's platform without those restaurant's consent,[7] and made unsubstantiated earnings claims to prospective delivery drivers.[8]

I concur in all the counts in the Complaint except Counts IV and IX, from which I dissent. I write to explain why I concur in Count V, which alleges that Grubhub made unsubstantiated earnings claims to prospective delivery drivers, and why I dissent from Count IV, which alleges Grubhub engaged in an unfair method of competition by listing restaurants on its platform without the restaurants' express, informed consent.[9]

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[1] Number of users of the online food delivery market in the United States from 2017 to 2029, Statista (Nov. 20, 2024), https://www.statista.com/forecasts/891084/online-food-delivery-users-by-segment-in-united-states (showing 161.5 million estimated online meal delivery users in 2023 and 173 million in 2024).
[2] *In re Grubhub, Inc.*, Complaint ("Complaint") & Proposed Stipulated Order.
[3] Compl. ¶ 4.
[4] *Id*. ¶¶ 61–77.
[5] *Id*. ¶¶ 88–108.
[6] *Id*. ¶¶ 78–87.
[7] *Id*. ¶¶ 109–47.
[8] *Id*. ¶¶ 148–68.
[9] I dissent from Count IX for the same reason I dissented from a similar count in *United States v. Lyft*. Concurring and Dissenting Statement of Comm'r Andrew N. Ferguson, *United States v. Lyft*, Matter No. 2223028 (Oct. 25, 2024) ("Ferguson Lyft Statement"). One of the elements of a Section 5(m)(1)(B) violation is the existence of a predicate

I

I have repeatedly criticized the Commission's evolving treatment of "up to" earnings claims.[10] Historically, the Commission treated "up to" claims as substantiated if an "appreciable number" of consumers achieve the promised performance.[11] While the Commission has never explicitly stated what constitutes an "appreciable number," the plain meaning of that phrase suggests a noticeable, nonnegligible amount.[12] A reasonable person would fairly interpret the claim that someone may earn "up to" some amount to mean that the advertised amount was not a complete aberration.[13] Instead of proceeding under the Commission's historic approach, however, the Complaint reiterates the Commission's post-2012 approach to "up to" claims,[14] requiring the advertiser to demonstrate that consumers were "likely to achieve" the "up to" amount in the advertisement.[15] I remain of the view that the Commission's approach since 2012 is deeply flawed.[16]

I nevertheless concur in the "up to" counts in the Complaint because I have reason to believe that Grubhub has failed to substantiate its "up to" claims even under the Commission's historical approach. The Complaint alleges that only the top two percent of delivery drivers earned the "up to" hourly rate that was advertised by Grubhub.[17] The Complaint alleges that during some time periods and in some locations, only 0.1 percent to 1.5 percent of delivery drivers earned the advertised hourly rate.[18] If only two percent of delivery drivers, and in some situations only 0.1 percent, earned the advertised hourly rate, I have sufficient reason to believe that an "appreciable number" of Grubhub drivers were not able to achieve the promised performance.[19]

II

Whereas most of the counts in the Complaint allege that Grubhub committed unfair or deceptive acts and practices, Count IV alleges that Grubhub engaged in an unfair method of

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cease-and-desist order in which the Commission previously determined that the same "such act or practice" as the one articulated in the civil-penalties complaint was an unfair or deceptive act or practice. *Id*. at 13. But here, just as in *Lyft*, the Commission has failed to identify any such order. See *ibid*.

[10] Concurring Statement of Comm'r Andrew N. Ferguson, *In the Matter of Arise Virtual Solutions, Inc.*, Matter No. 2223046 (Jul. 1, 2024) ("Ferguson Arise Concurrence"); Ferguson Lyft Statement.

[11] Ferguson Lyft Statement at 3 (citing Ferguson Arise Concurrence).

[12] *Ibid*.

[13] *Id*. at 4.

[14] *Ibid*. (citing 2012 FTC Press Release announcing settlement that adopted "likely to achieve" standard).

[15] Compl. ¶¶ 194, 216.

[16] Ferguson Lyft Statement at 5.

[17] Compl. ¶ 167.

[18] *Id*. ¶¶ 164–66, Table 1.

[19] I do not take a position today on what "subset of consumer outcomes is relevant for measuring the typicality of the promised performance" in this case. Ferguson Arise Concurrence at 4. "Some 'up to' earnings claims, for example, might reasonably be premised on some level of diligence, competence, or commitment by consumers who use the product or service." *Id.* Had Grubhub disputed liability, it might have argued that we should consider the performance of drivers only during periods when they accepted a high proportion of delivery jobs offered to them, especially considering that many drivers work multiple apps at the same time. But Grubhub does not dispute liability, and the Complaint does not take a firm position on the question. I reserve its resolution for another day.

competition.[20] It rests on the same alleged facts as the unfair and deceptive acts and practices counts—deceptively creating listings for restaurants without those restaurants' consent, falsely representing to consumers that Grubhub had an affiliation with those restaurants, and deceiving consumers about delivery fees.[21] It claims, however, that those acts "are deceptive and coercive and tend to negatively affect competitive conditions in the meal delivery market" because they "enable[] Grubhub to gain customers, divert sales from rivals, grow its operations, and gain an unfair advantage over competing delivery services."[22] These deceptive acts, the Complaint reasons, therefore violate both the competition and consumer-protection provisions of Section 5.

A single course of conduct may violate more than one law. A carjacking by a convicted felon, for example, could simultaneously violate the Hobbs Act,[23] the federal carjacking statute,[24] the felon-in-possession statute,[25] and the Armed Career Criminal Act.[26] But each crime has different elements, and the government would have to plead each element in an indictment and prove each element separately at trial.[27] The same is true of Section 5 of the FTC Act. Certain business conduct may simultaneously be an unfair or deceptive act or practice as well as an unfair method of competition. But each of Section 5's prohibitions have different elements, and the Commission must plead (and, if this case were litigated, prove) each element.

The Complaint acknowledges as much in its recitation of the elements of each species of Section 5 claims. For an unfair act or practice, the Complaint recites Section 5's enumeration of the elements: "Acts or practices are unfair under Section 5 … if [1] they cause or are likely to cause substantial injury to consumers [2] that consumers cannot reasonably avoid themselves and [3] that are not outweighed by countervailing benefits to consumers or competition."[28] The Complaint then lists the distinct elements of an unfair-method-of-competition claim: "Conduct is an unfair method of competition under Section 5 of the FTC Act if it [1] is undertaken by an actor in the marketplace and [2] goes beyond competition on the merits. Deceptive conduct that negatively affects competitive conditions goes beyond competition on the merits."[29] These unfair-method-of-competition elements do not come from the statute or from any case law. They are instead an adumbration of a 2022 policy statement—adopted by the same majority approving this claim—that purported to declare *ipse dixit* the elements of an unfair-method-of-competition claim.[30]

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[20] *Id*. at 51–53.
[21] *Id*. ¶¶ 188–91.
[22] *Id.* ¶ 192.
[23] 18 U.S.C. § 1951.
[24] *Id.* § 2119.
[25] *Id.* § 922(g)(1).
[26] *Id.* § 924(e).
[27] See *Hurst v. Florida*, 577 U.S. 92, 97 (2016) (The Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.").
[28] Compl. ¶ 177 (citing 15 U.S.C. § 45(n)).
[29] *Id.* ¶ 178.
[30] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022) ("2022 Section 5 Policy Statement").

Although I agree that Section 5 proscribes conduct beyond what the Sherman Act proscribes,[31] I have constitutional concerns about the 2022 policy statement's incredible breadth.[32] But I take the majority's view of Section 5 on its own terms for purposes of analyzing its claim. To establish that conduct is an unfair method of competition, the Commission must plead negative effects on competitive conditions.[33] Its allegation on this front is that the alleged deception "enables Grubhub to gain customers, divert sales from rivals, grow its operations, and gain an unfair advantage over competing delivery services."[34] That theory is consistent with the terms of the 2022 policy statement. But even assuming *arguendo* that consistency with the policy statement is consistency with the law, the Complaint cannot survive only on a theory. It must properly allege facts supporting the theory.

The Complaint lacks such allegations. When a plaintiff goes to federal court, the defendant may immediately test the legal sufficiency of the plaintiff's complaint by moving to dismiss the complaint, or any part of it, for failure to state a claim.[35] To survive that motion, the "complaint must contain sufficient factual matter, accepted as true, to state 'a claim to relief that is plausible on its face.'"[36] A claim is facially plausible "when the plaintiff pleads factual content that allowed the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[37] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[38] The complaint must plead actual facts sufficient to allege that the defendant committed "each element" of the claim.[39]

"Threadbare recitals" and "conclusory statements" are all the Complaint has as to the unfair-method-of-competition claim. It does not allege any facts supporting a plausible inference that Grubhub's deception affected competitive conditions in the alleged market for prepared meal delivery.[40] The Complaint asserts that "[b]y falsely representing an affiliation with … restaurants,

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[31] Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, In the Matter of the Non-Compete Clause Rule, Matter No. P201200, at 35 n.286 (June 28, 2024) ("Ferguson Non-Compete Rule Dissent").

[32] *Id.* at 28 ("Given the way the Commission and courts have interpreted Section 5, it is well-nigh impossible to identify what 'intelligible principle' Congress provided to constrain our discretion.").

[33] See 2022 Section 5 Policy Statement at 10; Compl. ¶ 178.

[34] Compl. ¶ 192.

[35] See Fed. R. Civ. P. 12(b)(6).

[36] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[37] *Ibid*. (citing *Twombly*, 550 U.S. at 566).

[38] *Ibid*. (citing *Twombly*, 550 U.S. at 555).

[39] *Jaros v. Ill. Dep't of Corrections*, 684 F.3d 667, 672 (6th Cir. 2012); see also *Twombly*, 550 U.S. at 562 ("A complaint … must contain either direct or inferential allegations respecting all material elements necessary to sustain recovery under *some* viable legal theory." (cleaned up)).

[40] Compl. ¶ 188. As to the scope of the Complaint's alleged relevant market for its unfair-method-of-competition claim, at least one court has disagreed with the contention that restaurant direct delivery competes with restaurant delivery platforms. *Davitashvili v. Grubhub Inc.*, No. 20-cv-3000 (LAK), 2022 WL 958051, at *8 (S.D.N.Y. Mar. 30, 2022) (denying motion to dismiss challenging separately alleged markets for (1) restaurant platforms, and (2) direct takeout and delivery because "[o]nly other two-sided platforms can compete with a two-sided platform for transactions." (quoting *Ohio v. Am. Express*, 585 U.S. 546 (2018))). Of course, if restaurants do not compete with Grubhub for prepared meal delivery, then the Complaint suffers another fatal flaw—to be unfair, a method of competition must affect competition in the market where the method's devisor competes. *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931) ("It is obvious that the word 'competition' imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors-that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade

Grubhub boosts its own offerings, expands its scale, and fuels its business—but at significant cost to the restaurants that have not consented to a partnership with Grubhub."[41] It goes on to claim that "Grubhub's practices harm the Unaffiliated Restaurants by diverting business away from the restaurants' own delivery services"[42] and that "Unaffiliated Restaurants often lose business because consumers are unhappy with their experience ordering through Grubhub."[43]

While the Complaint provides some examples of unaffiliated restaurants attempting to be removed from Grubhub's platform, the Complaint alleges nothing about the nature or volume of business that any unaffiliated restaurant lost because of an unauthorized listing on Grubhub's platform. The Complaint is silent as to whether customers stopped ordering from unaffiliated restaurants through Grubhub, or stopped ordering delivery from those restaurants through all channels. It does not even allege that any customer ordered prepared meal delivery directly from an unaffiliated restaurant, or any restaurant at all. And the Complaint does not address where customers turned to for their prepared meal delivery services once they became fed up with the poor service Grubhub was providing from unaffiliated restaurants. Indeed, the Complaint alleges no facts as to the effects of Grubhub's practices on its own or its competitors' relative positions in the markets.[44] It does not allege facts about the number and behavior of Grubhub's competitors, that is, the methods other than Grubhub by which customers might purchase prepared meal delivery. It is impossible to assess whether Grubhub's conduct tended to affect competitive conditions in prepared meal delivery services without alleging facts about Grubhub's competitors.

Even assuming—again, only *arguendo*—that the majority is correct that "Section 5 does not require a separate showing of market power or market definition when the evidence indicates that [the condemned] conduct tends to negatively affect competitive conditions,"[45] the Commission still must allege enough about markets, competitors, and behavior to establish a tendency toward negative competitive effects.[46] The complaint is utterly silent on any of this. All

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whose business will be, or is likely to be, lessened or otherwise injured."); *cf. FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 313 (1934) ("A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed."); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927–28 (2d Cir. 1980) (rejecting an FTC order that treated a business practice as an unfair method of competition because it disadvantaged a business in an industry in which the subject of the order did not compete). While restaurants may exert some competitive pressure on food-delivery platforms even if they lack some of the platform's features, it is impossible to assess the propriety of the alleged relevant market without any facts.

[41] Compl. ¶ 110.

[42] *Id*. ¶ 111.

[43] *Id*. ¶ 125; see also *id*. ¶ 111 ("the diners end up blaming the Unaffiliated Restaurants, which ultimately lose business); *id*. ¶ 128 ("frustrated diners … complain … and [u]ltimately, they stop ordering from the Unaffiliated Restaurants"). I must assume that the generic loss of business alleged is limited to a restaurant's delivery service. Of course, a restaurant's dine-in or take-out services fall outside the Complaint's alleged relevant market so loss of business in those segments cannot be considered for purposes of the effects analysis here.

[44] The Complaint in passing mentions that DoorDash is "a major competitor" of Grubhub's and that "by early 2020, Grubhub's restaurant supply surpassed DoorDash's." *Id*. ¶ 117. But the level of restaurant supply on Grubhub's platform says nothing about the number of prepared meal delivery orders it, or any of its competitors process or fulfill, nor how many customers DoorDash lost as a result of Grubhub's allegedly unfair conduct.

[45] 2022 Section 5 Policy Statement at 10.

[46] *Ibid*.

it has is speculation embodied in a few conclusory assertions—precisely what the federal pleading rules forbid.[47]

We should not include Count IV in this Complaint. It relies on the same facts underlying the Commission's other claims—while carrying a different title. The Commission obtains no additional relief in connection with it. The count does not improve the lot of any consumer, restaurant, or platform. It is instead a poorly pleaded effort to get the majority's 2022 policy statement into a federal court complaint unaccompanied by counts under the other antitrust laws—the first such foray since the majority issued that statement.[48] But it does so in a complaint that will not be litigated and therefore will not get any judicial review. This maneuver furthers the majority's regrettable practice of advancing its most aggressive and novel theories in cases no judge will decide, while retreating to the motte any time a judge will get a say.[49]

I therefore concur in all counts except Counts IV and IX.

[47] See *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level.").

[48] The only other times the Commission has invoked a standalone Section 5 claim since the 2022 policy statement's launch were in the lead up to the Commission's ill-fated Non-Compete Clause Rule in three consent orders against businesses enjoining them from enforcing noncompete agreements against their employees, Ferguson Non-Compete Rule Dissent at 6, and in the Commission's recent Part 3 complaint against three prescription drug benefit managers and their affiliated group purchasing organizations challenging rebate practices related to insulin drugs, *In re Caremark Rx, LLC, et al.*, Docket No. 9437 (Sept. 20, 2024).

[49] See Concurring Statement of Comm'r Andrew N. Ferguson, *In re Asbury Automotive Group, Inc., et al.*, Matter No. 2223135 (Aug. 16, 2024).