Office of Commissioner
Andrew N. Ferguson

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

Dissenting Statement of Commissioner Andrew N. Ferguson
In the Matter of Guardian Service Industries, Inc.
Matter Number 2410082

December 4, 2024

The Commission today issues an administrative complaint and accepts a proposed consent agreement with Guardian Service Industries, Inc. ("Guardian").[1] Guardian is a building services contractor operating throughout the Northeast, New England, and Mid-Atlantic regions.[2] It employs about 2,800 workers who provide concierge, security, custodial, maintenance, engineering, and related services at residential and commercial buildings.[3] The Complaint alleges that some of Guardian's contracts with building-management clients contain so called "no-hire" provisions, also sometimes referred to as "no-poach" provisions.[4] As written, these provisions forbid Guardian's clients from hiring Guardian's employees directly, or by hiring them from one of Guardian's competitors.[5] This restriction applies both during the contract term and for six to twelve months beyond it.[6]

The Commission is wise to focus its resources on protecting competition in labor markets. After all, the antitrust laws protect employees from unlawful restraints of the labor markets as much as they protect any output market.[7] But, as I have warned before, we must always act within

[1] *In re Guardian Serv. Indus., Inc.*, Complaint ("Complaint") & Decision and Order ("Order").
[2] Compl. ¶ 1; *In re Guardian Serv. Indus., Inc.*, Analysis of Agreement Containing Consent Order to Aid Public Comment ("AAPC"), at 1.
[3] AAPC at 1.
[4] Compl. ¶ 11. No-hire provisions are not non-compete clauses. No-hire provisions are agreements between two or more employers not to recruit, solicit, or hire each other's employees. Non-compete clauses are agreements between an employer and its employee in which the employee promises not to work for the employer's competitors after the termination of the employment relationship. No-hire provisions do not fall within the scope of the Commission's failed Non-Compete Clause Rule. 89 Fed. Reg. 38342 (May 7, 2024).
[5] Compl. ¶¶ 10–11; AAPC at 2.
[6] *Ibid.*
[7] *NCAA v. Alston*, 594 U.S. 69, 86–87 (2021) (explaining that an employee challenging a labor-market restraint need show competitive injury only in the market for labor); *Anderson v. Shipowners Ass'n*, 272 U.S. 359, 361–65 (1926) (agreement among group of associations that "own[ed], operat[ed], or control[led] substantially all the merchant vessels … [in] the ports of the Pacific Coast" to control employment of seamen violated the Sherman Act); *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (addressing labor market and explaining that "[t]he Sherman Act … applies … to abuse of market power on the buyer side—often taking the form of monopsony or oligopsony.… Plaintiff is correct to point out that a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers."); Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 352a (rev. ed. 2024) ("employees may challenge antitrust violations that are premised on restraining the employment market."); *id*. at ¶ 352c ("Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of

the boundaries Congress has imposed on our authority. For example, while I have no doubt that some noncompete agreements violate the Sherman Act,[8] the now-enjoined Non-Compete Clause Rule[9] wildly exceeded our authority to address noncompete agreements.[10] Today, we again exceed our authority by failing to comply with Congress's procedural requirements for issuing an administrative complaint. I therefore respectfully dissent.

The Complaint charges that Guardian's no-hire clauses are unreasonable restraints of trade under Section 1 of the Sherman Act,[11] and are also therefore unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.[12] The Complaint proceeds on a rule-of-reason theory, rather than a *per se* theory. That choice makes sense. The rule of reason "presumptively applies" to every restraint,[13] especially when, as here, the restraint is ancillary to

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employment services."); see also *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 322 (2007) (Thomas, J.) ("The kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization." (citing Roger Noll, "Buyer Power" and Economic Policy, 72 Antitrust L.J. 589, 591 (2005) ("[A]symmetric treatment of monopoly and monopsony has no basis in economic analysis."))); *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) ("It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers and consumers.").

[8] See 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 18 n.142 (June 28, 2024) (hereinafter "Ferguson Non-Compete Dissent"), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf ("Noncompete agreements are contracts in restraint of trade, and therefore subject to the rule of reason under Section 1 of the Sherman Act and Section 5 of the FTC Act. But as is true of all agreements that do not implicate one of the few *per se* rules, whether a given noncompete agreement violates the antitrust laws will turn entirely on the particular circumstances and competitive effects of that agreement." (internal citations omitted)).

[9] 89 Fed. Reg. 38342 (May 7, 2024).

[10] Ferguson Non-Compete Dissent at 8–9; *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). With the Presidential transition in full swing, the Chair has some parting shots. She argues that my dissent is part of a "trend in matters where the Commission is protecting American workers." Statement of Chair Lina M. Khan, Joined by Comm'rs Rebecca Kelly Slaughter and Alvaro M. Bedoya, *In re Guardian Serv. Indus., Inc.*, Matter No. 2410082, at 2 (Dec. 4, 2024) (hereinafter "Chair's Statement"). For the second time in a couple months, she cites as an example of this "trend" my dissent from the Non-Compete Clause Rule. *Id*. at 2 n.6; Statement of Chair Lina M. Khan, Joined by Comm'rs Rebecca Kelly Slaughter and Alvaro M. Bedoya, *In re Lyft, Inc.*, Matter No. 2223028, at 8–9 & n.35 (Oct. 25, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement-Chair-Khan-Joined-Comm-Slaughter-Comm-Bedoya-In-the-Matter-Lyft-Inc-10-25-2024.pdf. It bears repeating once more that this rule is enjoined nationwide as unlawful, and the Biden-Harris Administration will leave office without it ever having taken effect. *Ryan LLC*, 2024 WL 3879954; 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) (hereinafter "Ferguson Lyft Statement"), https://www.ftc.gov/system/files/ftc_gov/pdf/Ferguson-Lyft-Dissent-10-25-2024.pdf. As I said in *Lyft*, I strongly favor protecting workers to the fullest extent of our statutory authority. Ferguson Lyft Statement at 14. Promulgating failed rules and settling cases for pennies on the dollar does not protect workers, no matter how triumphant the Commission's press releases are. *Ibid*.

[11] Compl. ¶ 16.

[12] *Id*. ¶ 17.

[13] *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); 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."); *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

an otherwise lawful and primarily vertical agreement.[14] Under the rule of reason, a restraint violates Section 1 if the anticompetitive effects of the restraint outweigh its procompetitive effects.[15] Put slightly differently, the rule of reason forbids restraints for which the procompetitive justifications for the restraint could have been achieved through "less anticompetitive means" than those imposed by the restraint.[16]

Here, the Complaint alleges that "[a]ny legitimate objectives of Guardian's" use of the no-hire provisions "could have been achieved through significantly less restrictive means."[17] This certainly may be true of some no-hire agreements. And no-hire clauses undoubtedly can have anticompetitive effects.[18] In some circumstances, those anticompetitive effects will outweigh the procompetitive justifications for a no-hire clause.[19] When those facts obtain, the no-hire provision violates the Sherman Act.

But we cannot issue a Complaint against a company based solely on a theory about hypothetical effects of no-hire agreements. To lawfully invoke our enforcement authority, we must have a "reason to believe" that Guardian's no-hire provisions violate Section 5, not that no-hire provisions generally could violate Section 5.[20] The Commission has a "reason to believe" the law

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and decrease output.' To justify a *per se* prohibition a restraint must have 'manifestly anticompetitive' effects and 'lack … any redeeming virtue.'" (cleaned up)).

[14] See, e.g., *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021) (citing *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986)). The Chair invokes *Deslandes v. McDonald's USA, LLC* as "affirm[ing]" that "some no-poach or no-hire provisions may be analyzed as *per se* restraints under Section 1 of the Sherman Act." Chair's Statement at 2 n.6. That is not quite right. *Deslandes* held only that a properly pleaded *per se* claim challenging no-hire clauses could survive a motion to dismiss because "the classification of a restraint as ancillary," and therefore not subject to the *per se* standard, "is a defense, and complaints need not anticipate and plead around defenses." 81 F.4th 699, 705 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024). Whether a restraint is ancillary, and therefore subject to the rule of reason, "requires discovery, economic analysis, and potentially a trial." *Ibid*.

[15] See, e.g., *GTE Sylvania Inc.*, 433 U.S. at 49 & n.15 (citing *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.)); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990); *Ohio v. Am. Express Co.*, 585 U.S. 529, 541–42 (2018).

[16] *Am. Express Co.*, 585 U.S. at 542; *Alston*, 594 U.S. at 100 ("[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.").

[17] Compl. ¶ 14. Potential procompetitive justifications, i.e., legitimate objectives, in these circumstances could include Guardian seeking to recoup any costs for the training of and investment in its workers or for screening and background checks to employ these workers, or to protect any relevant trade secrets.

[18] Matthew Gibson, Employer Market Power in Silicon Valley, IZA Discussion Paper No. 14843 (Nov. 2021), https://docs.iza.org/dp14843.pdf (comparing workers' salaries at Silicon Valley firms subject to DOJ's no-poach investigation to worker salaries at other information-technology firms and concluding that the challenged no-poach agreements reduced salaries at colluding firms by 4.8%).

[19] 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.*, 9 F.4th at 1110 (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).

[20] 15 U.S.C. § 45(b).

has been violated only if it has evidence sufficient to make the "threshold determination that further inquiry is warranted."[21] That reason must be "well-grounded" in evidence that the Commission gleaned from its pre-filing investigation.[22]

Had the Complaint plausibly alleged anticompetitive effects outweighing procompetitive justifications, I would have voted for it. But the Complaint alleges nothing about the no-hire provisions' effects. It does not allege direct evidence of anticompetitive effects, or of indirect, economic evidence of anticompetitive effects, like market power and harm to competition. It does not even allege that Guardian has ever tried to enforce any of these agreements, nor does it allege that a single Guardian customer or worker believed Guardian would enforce any of these provisions.[23] Nor have I seen any such evidence that goes unmentioned in the Complaint. Indeed, I am at a loss about how my colleagues have formed their reason to believe that Guardian is violating the antitrust laws.

The Commission ought to protect competition in the labor markets, but it cannot bend the law to do so. We must form a "well-grounded reason to believe" that the law has been violated before issuing an administrative complaint. Because we have no evidence of the effects of the no-hire agreements in this case, the Commission should not have issued this Complaint.

I respectfully dissent.

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[21] *FTC v. Standard Oil of Cal.*, 449 U.S. 232, 241 (1980); *Boise Cascade Corp. v. FTC*, 498 F. Supp. 772, 779 (D. Del. 1980).

[22] *Standard Oil*, 449 U.S. at 246 n.14; see also *AMREP Corp. v. FTC*, 768 F.2d 1171, 1177 (10th Cir. 1985).

[23] The Chair presents this case as a choice between Guardian's no-hire provisions "remain[ing] in place," ostensibly presuming anticompetitive effects from their very existence, or continuing the investigation. Chair's Statement at 2. That is not correct. I have seen no evidence of actual or threatened enforcement of these clauses. And even if Guardian did threaten or attempt to enforce such provisions, I have seen no evidence that such threatened or actual enforcement would violate the antitrust laws—the question before the Commission when deciding whether to issue a Complaint. The Chair's citation of public comments submitted in response to the Commission's separate, unrelated Non-Compete Clause Rule, *id*. at 2 n.9, does not change the facts, or lack thereof, in this matter. Moreover, I have no objection to the Commission agreeing not to bring an enforcement action so long as Guardian agrees not to enforce its no-hire provisions—akin to a non-prosecution agreement. But if the Commission invokes its power to issue a complaint, it must comply with the statute giving it that power—including the requirement that we have "reason to believe" that Section 5 has been violated.