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 Chevron Corporation & Hess Corporation
Commission File No. 241-0008

September 30, 2024

For the second time in five months, the Majority has used its leverage in the HSR process to extract a consent from merging parties with *no reason* to believe the law has been violated.[1] To make it worse, once again, the consent targets an individual and deprives him of his contractual rights. I dissent.

The two largest mergers announced in 2023 were the $64.5 billion acquisition of Pioneer Natural Resources by Exxon Mobil Corporation and the $53 billion acquisition of Hess Corporation by Chevron Corporation.[2] Not only were they the two largest mergers of 2023, the mergers involved oil companies and attracted the ire of certain elected officials. In November of 2023, right after the mergers were announced, 23 senators wrote to the FTC expressing their "concerns about two blockbuster oil-and-gas deals."[3] The letter urged the Commission to "carefully consider all the possible anticompetitive harms" from the proposed mergers because the "Industry Is Already Too Concentrated"[4] and "The FTC Must Protect Americans from Big Oil."[5] The letter classified the Commission's efforts as "[t]he fight against Big Oil" and concluded that the Commission should be investigating "to determine whether these energy giants should be

[1] 15 U.S.C. § 53(b).
[2] *See* Devensoft, *The Top Mergers and Acquisitions of 2023 – Meet the Power Players Behind the Year's Largest Deals* (Feb. 1, 2024), https://www.devensoft.com/blog/the-top-mergers-and-acquisitions-of-2023/; Press Release, Fed. Trade Comm'n, *FTC Order Bans Former Pioneer CEO from Exxon Board Seat in Exxon-Pioneer Deal* (May 2, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-order-bans-former-pioneer-ceo-exxon-board-seat-exxon-pioneer-deal (listing $64.5 billion as the value of Exxon's acquisition of Pioneer); Compl., *In re Chevron Corp.*, No. 241-0008 at ¶ 17 (F.T.C. Sept. 26, 2024) (listing $53 billion as the value of Chevron's acquisition of Hess Corporation) [hereinafter Compl.].
[3] Letter from Charles E. Schumer, U.S. Senator, et al., to Lina Khan, Chair, Fed. Trade Comm'n, at 1 (Nov. 1, 2023) https://www.democrats.senate.gov/imo/media/doc/Letter%20to%20FTC%20re%20Exxon-Pioneer.pdf.
[4] *Id.*.
[5] *Id.* at 3.

broken up once again."[6] After the Commission published its complaint and order in *Exxon* back in May,[7] there was still significant opposition to the deal between Chevron and Hess Corporation.[8]

But herein lies the problem: no legitimate and factually supported theory of harm existed for the Commission's Majority to execute the bidding of the political left. Still, the fact that the Commission opted not to challenge the biggest merger of 2023 seems to have been lost on the press. So the Majority got what it wanted. And they are trying to repeat the play here. Rather than accept reality and any political blowback, the Majority creates a sequel to the fairy tale in *Exxon* where Section 7 of the Clayton Act means whatever the Majority needs it to mean to appease political demands. Unfortunately for Mr. Hess, the CEO of Hess Corporation, the author of every fairy tale must also fabricate a villain, and today's action unjustifiably gave him that label.

To violate Section 7 of the Clayton Act, Chevron must "acquire . . . assets . . . where . . . the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly."[9] But the Majority's complaint does not take issue with Chevron's acquisition of Hess Corporation's assets. Nor could it. There is no evidence to suggest Chevron, post-merger, could diminish competition in the global market for oil. Even if one were to accept the Majority's fetish with concentration levels, post-merger Chevron would have a low single-digit share of the world market for oil and natural gas. And the delta in concentration from the merger is miniscule. Thus, the tangible and intangible assets of Hess Corporation have nothing to do with the violation of law—it's all about the acquisition of Mr. Hess. Of course, I assume the Majority is not endorsing a view that Mr. Hess is an asset or transferrable human chattel. Certainly no court would endorse such a view—further highlighting the farcical nature of today's complaint.

Even if one were to accept *arguendo* the outlandish antitrust theory of harm the Majority puts forward, the facts and arguments alleged in the complaint to justify the theory are no less ridiculous. Section 7 requires a "probable anticompetitive effect" that is based on "reasonable probabilit[ies]," not "ephemeral possibilities."[10] The Majority's complaint does not reach even ephemeral possibilities. And as the Majority surely knows, if it were litigated, the complaint would not survive a motion to dismiss.[11] Nothing in the complaint alleges that Mr. Hess has ever attempted to, or coordinated with, a rival.[12] At most, the complaint alleges that he was a cheerleader for OPEC's efforts. And yet somehow Chevron, despite its low share of the market, has violated

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[6] *Id.* at 4.
[7] *See* Press Release, Fed. Trade Comm'n, *FTC Order Bans Former Pioneer CEO from Exxon Board Seat in Exxon-Pioneer Deal* (May 2, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-order-bans-former-pioneer-ceo-exxon-board-seat-exxon-pioneer-deal; *Joint Dissenting Statement of Commissioners Melissa Holyoak and Andrew N. Ferguson in the Matter of Exxon Mobil Corporation*, Commission File No. 241-0004 (May 2, 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/joint-dissenting-statement-commissioners-melissa-holyoak-andrew-n-ferguson-matter-exxon-mobil [hereinafter Exxon Dissent].
[8] *See e.g.*, @SenSchumer, X (May 12, 2024, 4:07 PM), https://x.com/SenSchumer/status/1789749253956399528.
[9] 15 U.S.C. § 18.
[10] *Brown Shoe Co. v. United States*, 370 U.S. 294, 323, 325 (1962).
[11] *See* Fed. R. Civ. P. 12(b)(6); *see generally Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
[12] My analysis is limited to whether his conduct is sufficient to create anticompetitive coordinated effects that may substantially lessen competition under Section 7 of the Clayton Act.

the law by agreeing to make efforts to appoint Mr. Hess as one of Chevron's twelve board members.[13] Such a theory of coordinated effects is so bizarre that no court—or even scholarly work—has endorsed it or even discussed it.[14]

The implausibility of the alleged theory is heightened by a few additional observations. *First*, under Section 7 the harm must result from the merger. But the merger transitions Mr. Hess from the role as Chief Executive Officer of a company to a role as one of 12 board members of another company. Pre-merger, Hess Corporation has an infinitesimally small share of the global market for oil, and post-merger Chevron will still only have low single digits. It strains credulity to argue that Mr. Hess will have *more* power or ability to orchestrate coordination while serving as one of twelve board members than he had while serving as a CEO for the last several decades. If anything, it seems more plausible that a CEO is better equipped to orchestrate coordination than the same individual serving as one of twelve board members.

Second, coordinated effects normally manifest when one firm buys, and thereby removes, a maverick who has undermined the ability to coordinate.[15] But Mr. Hess is the alleged coordinator, not the maverick, and his firm is the one being acquired. Thus, Chevron's acquisition does not remove an impediment to successful coordination, making this situation very different from the normal manifestation of merger-specific coordinated effects.

Third, the complaint does not allege that the firms in the alleged market will have the post-merger incentive to engage in coordinated behavior. Focusing merely on an individual's conduct—without allegations about the incentives of Chevron and all the other firms in the industry—does not amount to a plausible pleading of coordinated effects.[16]

An appeal to the Majority's own 2023 Merger Guidelines[17] would not provide refuge from a motion to dismiss either. According to the Guidelines, three primary factors are used to "assess the extent to which a merger may increase the likelihood, stability, or effectiveness of

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[13] Chevron Leadership, https://www.chevron.com/who-we-are/leadership#boardofdirectors (last visited Sep. 16, 2024) (listing the company's twelve board members); Compl. ¶ 10.

[14] To my knowledge, the only other circumstance where such a novel theory has been advanced was in the Commission's complaint against Exxon and Pioneer. *See* Compl., *In the Matter of Exxon Mobil Corp*., No. 241-0004 (F.T.C. May 1, 2024).

[15] *See, e.g.*, *F.T.C. v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 146 (D.D.C. 2004), *case dismissed*, No. 04-5291, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004) ("An important consideration when analyzing possible anticompetitive effects is whether the acquisition would result in the elimination of a particularly aggressive competitor in a highly concentrated market. . . . The loss of a firm that does not behave as a maverick is unlikely to lead to increased coordination." (citations, ellipses, and internal quotation marks omitted); U.S. Dept. of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines at § 7.1 (Aug. 19, 2010) ("An acquisition eliminating a maverick firm . . . in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.").

[16] *See, e.g.*, *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 724–25 (D.C. Cir. 2001) ("Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels. The creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices." (brackets, citations, and internal quotation marks omitted)); U.S. Dept. of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines at § 7.1 (Aug. 19, 2010) ("The Agencies seek to identify how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct.").

[17] U.S. Dept. of Just. & Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023).

coordination"[18]: (1) highly concentrated market, (2) prior actual or attempted attempts to coordinate; and (3) elimination of a maverick.[19] The complaint alleges none of these factors. It avoids making allegations of concentration because the combined share of the two firms in the alleged global market would not exceed low single digits, the HHI is very low, and the delta is miniscule. Taking the allegations and the implications against Mr. Hess as true, neither he nor Hess Corporation ever coordinated or attempted to coordinate with Hess Corporation's rivals.[20] Nor does the complaint allege that Hess Corporation is a maverick eliminated by the merger. The Guidelines also include a list of six secondary factors used to assess coordinated effects,[21] but again, the complaint does not rely upon any of them.

Setting aside the dubious Section 7 claim, the hypocrisy of the process is apparent from the Majority's express willingness in today's order to allow Mr. Hess to consult with Chevron on projects that align with the climate agenda of the political left.[22] For the Majority, Mr. Hess is too dangerous to be allowed to participate as a board member or generally "in an advisory or consulting capacity."[23] But Mr. Hess ceases to be dangerous if his services further climate change-related activity.

Today's case is the most recent example of the Majority's unfortunate proclivity to ignore statutory text to reach politically beneficial outcomes.[24] And they appear even more comfortable when embracing indefensible positions in the context of *settlements*[25]—knowing very well that the substance of their pleadings will never be litigated. Today's approach, which is becoming increasingly common, allows the Majority to coerce concessions from parties without pleading facts that satisfy what the statute requires.[26] Because so many of the Commission's cases settle without litigation, the Majority has the luxury of advancing unsound legal theories below the radar.[27] However the Majority wants to move the law, it cannot do so by manufacturing change through some fictitious body of extracted settlements.

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[18] *Id.* at § 2.3.
[19] *Id.* at §2.3.A.
[20] *See supra* note 7.
[21] *Id.* at § 2.3.B.
[22] The order allows Mr. Hess to consult with Chevron as long as his consulting services are "solely related to interactions and discussions with (a) Guyanese government officials about Hess's oil-related and health ministry-related activities in Guyana, and (b) the Salk Institute's Harnessing Plants Initiative." Decision & Order, *In re Chevron Corp.*, No. 241-0008 at § II.B. (F.T.C. Sept. 26, 2024).
[23] *Id.*
[24] *See, e.g.*, Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew N. Ferguson, *In the Matter of the Non-Compete Clause Rule*, Matter Number P201200 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf; *cf. generally* Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew Ferguson, *Health Breach Notification Rule*, File No. P205405 (Apr. 26, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/p205405_hbnr_mhstmt_0.pdf.
[25] *See, e.g.*, Exxon Dissent, *supra* note 7, at 1, 3.
[26] *See, e.g.*, *id.* at 1, 3 (explaining that "the Commission is leveraging its merger enforcement authority to extract a consent from Exxon" and that "[t]he Commission should not leverage its merger enforcement authority—or any authority—the way it does today").
[27] *Cf.* Dissenting Statement of Commissioner William E. Kovacic, *In the Matter of Negotiated Data Solutions, LLC*, File No. 051-0094 (Jan. 23, 2008) ("The prospect of a settlement can lead one to relax the analytical standards that ordinarily would discipline the decision to prosecute if the litigation of asserted claims was certain or likely."), https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122kovacic.pdf.