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

Office of Commissioner
Andrew N. Ferguson

**Dissenting Statement of Commissioner Andrew N. Ferguson**

In the Matter of Chevron Corporation and Hess Corporation
Commission File No. 241-0008

September 30, 2024

The Commission today authorizes the filing of an administrative complaint and proposed decision and order against Chevron Corporation and Hess Corporation. The Complaint alleges that Chevron's proposed $53 billion acquisition of Hess Corporation would violate Section 7 of the Clayton Act.[1] The Complaint does not plead a traditional Section 7 theory because the Commission has none. Chevron and Hess together have a two percent share of the relevant market.[2] No court has ever blocked a merger between companies with such small shares. The aggressive new Merger Guidelines presume that a merger would harm competition when it combines companies with market shares of over thirty percent.[3] A two percent market share does not raise any competitive concerns at all.

The Complaint instead alleges that adding John Hess—Hess Corporation's CEO—to Chevron's twelve-member board of directors turns an unobjectionable merger into a Section 7 violation. The Commission's Complaint alleges that while serving as Hess Corporation's CEO, Mr. Hess "communicated publicly and privately with OPEC representatives . . . about global output and other dimensions of crude oil market competition."[4] This conduct, the Commission suggests, is dangerous to competition. The Commission then contends that Mr. Hess's position on Chevron's board would give him even more power to harm competition in global oil markets than he currently wields as Hess Corporation's CEO and as a member of its board.[5] This increase in power, the Commission claims, would "substantially lessen competition, or tend to create a monopoly" in the global market for crude oil.[6] Because the increase in power is a function of Chevron's acquisition of Hess Corporation, the Commission reasons that the acquisition therefore violates Section 7 of the Clayton Act.

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[1] Compl. ¶ 50, *In re Chevron Corp. and Hess Corp.*, FTC File No. 241-0008 (Sept. 26, 2024) ("Complaint") (citing 15 U.S.C. § 18).
[2] See BP Statistical Review of World Energy (2023); Chevron 2022 10-K; Hess 2022 10-K.
[3] Dep't. of Justice & Fed. Trade Comm'n, Merger Guidelines, §2.1 (Dec. 18, 2023); see also *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364 (1963) (establishing a rebuttable presumption that a merger resulting in a single firm's control of at least thirty percent of the relevant market violates Section 7).
[4] Compl. at ¶ 4.
[5] *Id*. at ¶ 50.
[6] *Ibid*. (citing 15 U.S.C. § 18).

The Commission's Section 7 theory does not hold water. It rests on a series of implausible and unsupported assumptions that fall well short of pleading a violation of the Clayton Act. But it does satisfy a constituency important to the Commission majority—Democratic politicians who have repeatedly and publicly urged the Commission to block this merger in order to advance their climate agenda.[7] Bending Section 7 to political pressure is incompatible with the rule of law. I therefore dissent from the filing of the Complaint.

I

*First*, the majority necessarily assumes that Mr. Hess would continue his communications with OPEC representatives after joining Chevron's board. If that were not the case, then the transaction would be at worst competitively neutral or even pro-competitive insofar that Mr. Hess's previous communications were injurious to competition.[8] This assumption is utterly implausible. Discussing output with representatives of Hess Corporation's competitors at OPEC is obviously risky.[9] Mr. Hess's past communications with OPEC officials have landed him and Hess Corporation in hot water. The statements to which the majority objects attracted the attention of government regulators and formed the basis of several private class-action lawsuits pending against Hess Corporation.[10] It is unreasonable to assume that Mr. Hess would continue his OPEC discussions unabated in light of the consequences those statements have generated.

Even if Mr. Hess could not appreciate the risk of discussing output with OPEC officials, Chevron has a strong incentive to ensure that its officers and directors avoid risky conversations with OPEC representatives. The Complaint does not allege that any current Chevron officer or

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[7] See, e.g., Letter from U.S. Senator Charles E. Schumer, Representative Ro Khanna, et al., to Lina Khan, Chair, Fed. Trade Comm'n (Mar. 6, 2024) ("We write concerning the wave of oil-and-gas consolidation, building on top of a longstanding trend, that threatens competition in the industry . . . In just the most recent months . . . Chevron moved to acquire Hess. Many of us warned in a November letter that [this] mega-deal[ ] could provoke a wave of mergers and acquisitions in the energy sector and trigger a new 'consolidation trend' to the detriment of industry competition and American consumers. . . . We applaud the FTC for opening investigations of the . . . Chevron-Hess . . . acquisition[ ] . . . [W]e urge the FTC to extend its current investigations . . . ."); Letter from U.S. Senator Charles E. Schumer, U.S. Senator Amy Klobuchar, et al. to Lina Khan, Chair, Fed. Trade Comm'n (Nov. 1, 2023) ("We write regarding our concerns about two blockbuster oil-and-gas deals announced in October: ExxonMobil's (Exxon) proposed $60 billion acquisition of Pioneer Natural Resources (Pioneer) and Chevron's proposed $53 billion acquisition of Hess Corporation (Hess)—two of the largest oil-and-gas deals of the 21st century. By allowing Exxon and Chevron to further integrate their extensive operations into important oil-and-gas fields, these deals are likely to harm competition, risking increased consumer prices and reduced output throughout the United States.").

[8] Section 7 is a forward-looking statute, intended to prevent future harm to competition, not punish past conduct. See *United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990) (Thomas, J.) ("By focusing on the future, section 7 gives a court the uncertain task of assessing probabilities"); Deborah Feinstein, then-FTC Director of the Bureau of Competition, The Forward-Looking Nature of Merger Analysis, Advanced Antitrust U.S., 3 (2014) ("In markets, the past is not always prologue. For example, the Commission recently closed its investigation of the Office Depot/OfficeMax transaction without action, 17 years after obtaining an injunction to block the Staples/Office Depot combination.").

[9] *In re Domestic Airline Travel Antitrust Litig.*, 691 F. Supp. 3d 175, 219 (D.D.C. 2023) (finding that defendant airlines' statements regarding restrained output could support inference of a conspiracy violating the Sherman Act).

[10] Compl., *Rosenbaum v. Permian Res. Corp.*, No. 2:24-cv-00103 (D. Nev. 2024); Compl., *Mellor v. Permian Res. Corp.*, No. 2:24-cv-00253 (D. Nev. 2024). The United States Judicial Panel on Multidistrict Litigation consolidated these two lawsuits with three others and transferred them to the District of New Mexico. See Transfer Order, *In re: Shale Oil Antitrust Litig.*, MDL No. 3310 (Aug. 1, 2024). The parties also "informed the Panel of eleven potentially-related actions pending in four districts." *Id.*

director had any potentially unlawful discussions with OPEC officials. In fact, one private lawsuit against Hess Corporation specifically alleges that Chevron rejected OPEC's calls for constrained output in favor of increased production.[11] But for the proposed order, Mr. Hess would become a director of Chevron. He would then be subject to Chevron's direction, and Chevron's incentive to prevent its officers and directors from cavorting with OPEC officials would apply to Mr. Hess. The Commission's assumption that Mr. Hess's behavior as a Chevron board member would be identical to his behavior as Hess Corporation's CEO is not only implausible; the only plausible inference is precisely the opposite.

*Second*, the majority must also assume that Mr. Hess's post-merger behavior would have a sufficiently major effect on global oil markets "substantially to lessen competition or tend to create a monopoly."[12] No other aspect of this transaction poses any risk at all of substantially lessening competition or tending to create a monopoly. The Commission's entire theory rests on a prediction about the competitive effects of Mr. Hess's conduct.

The proposition that Mr. Hess's comments could move global oil markets is laughable. The Complaint does not allege that Mr. Hess encouraged other U.S. producers to reduce output. Instead, the Complaint's primary theory of harm is that "Mr. Hess's supportive messaging to OPEC encourages OPEC's output stabilizing agenda, and . . . reduces the unpredictability of the non-OPEC response to OPEC's output decisions."[13] The Complaint does not allege that Mr. Hess ever discussed non-public information with OPEC. Yet it suggests that the international oil cartel hangs on his every word, and his musings and suggestions spur national governments to action. Mr. Hess should be flattered that the Commission thinks so much of his influence. But I do not share my colleagues' view about the reach of Mr. Hess's powers. OPEC's *raison d'etre* for decades has been to manage output and raise crude oil prices to maximize its member nations' monopoly rents.[14] OPEC does not need the encouragement of the CEO of a midsized American producer to pursue its cartel goals.

*Third*, even if the Commission were correct that Mr. Hess's conduct would continue unabated as a Chevron director and that the conduct substantially affects competition, the majority does not state a Section 7 claim unless it can show that Mr. Hess's addition to the Chevron board would injure competition *more* than if he were to remain Hess Corporation's CEO. If his addition to the Chevron board is no more dangerous to competition than his service as Hess Corporation's

[11] Compl., *Rosenbaum v. Permian Res. Corp.*, No. 2:24-cv-00103, ¶ 104 (D. Nev. 2024) ("the supermajors started investing in shale in 2021 and 2022 at rates previously unseen, in direct response to U.S. shale producers underinvesting as an industry . . . Mid way through 2022, Chevron anticipated a '15% year-over-year increase' in shale oil production from 2021 and promised to continue 'bolstering production'").
[12] 15 U.S.C. § 18.
[13] Compl. at ¶ 50.
[14] See Org. of the Petroleum Exporting Countries, OPEC: Our Mission ("In accordance with its Statute, the mission of the Organization of the Petroleum Exporting Countries (OPEC) is to coordinate and unify the petroleum policies of its Member Countries and ensure the stabilization of oil markets . . .").

CEO, then the transaction poses no competitive risks.[15] The Complaint proposes two theories for why his addition to the Chevron board is worse than the status quo. Both fail.

The Commission first argues that because Chevron is larger than Hess Corporation, Mr. Hess's position on Chevron's board would "amplify the importance and likely effect" of his statements on OPEC.[16] This statement is pure *ipse dixit*. No allegations in the Complaint lend that allegation any plausibility.[17] And common sense suggests otherwise. The CEO of an oil producer directs the daily operations of the company. He exercises far more control over the company on a daily basis—including on pricing and output decisions—than one member of a twelve-person board of directors. The statements of an oil-company CEO would therefore likely carry much greater weight than the same statements made by one of twelve oil-company directors. The Complaint contains nothing suggesting that the opposite is true.

The Complaint also contends that Mr. Hess's service on Chevron's board would "meaningfully increas[e] the likelihood that Chevron would align its production with OPEC's output decisions to maintain higher prices."[18] But this allegation too is conclusory *ipse dixit*. Nothing in the Complaint explains how this would happen. For example, the Complaint does not allege that Mr. Hess's communications with OPEC officials had any effect on Hess Corporation's capital plans, output decisions, or any other behavior by the company. Indeed, under his leadership, Hess Corporation's production growth routinely exceeded that of peer companies.[19] If Mr. Hess as CEO, did not curtail Hess Corporation's output in response to conversations with OPEC, it beggars belief that he could, and would, do so as one of the twelve members of Chevron's board.

But even if the Commission's assumptions were all correct—and they are not—the Commission still fails to state a Section 7 violation. Even if Chevron were, at Mr. Hess's instigation, to reduce its output, the Complaint does not explain how that output would meaningfully affect competition. The combined Chevron-Hess Corporation entity will control two percent of the global oil market. A reduction in its output would hardly remove a drop from the metaphorical bucket.

That is not to say that I favor Mr. Hess's alleged conduct. (I emphasize that the conduct is merely alleged; the Commission has not proven anything.) OPEC is not a friend to the American people. Just ask any American who lived through 1973. OPEC's goal is to keep oil prices high to extract monopoly rents from every consumer of petroleum products on the planet—including every single American. OPEC's member states include some of America's bitterest foes. I am not fond of the idea that American oil executives would share encouraging messages with an organization that includes America's enemies, the goal of which is to keep our oil prices high. But

[15] See Dep't. of Justice & Fed. Trade Comm'n, Merger Guidelines, §2.3 (Dec. 18, 2023) ("Guideline 3: Mergers Can Violate the Law When They *Increase* the Risk of Coordination") (emphasis added).

[16] Compl. at ¶ 50.

[17] See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (requiring that a complaint plead "enough facts to state a claim to relief that is plausible on its face.").

[18] Compl. at ¶ 11.

[19] See, e.g., Fitch Maintains Rating Watch Positive on Hess' 'BBB' Ratings, Fitch Ratings, Inc., (Aug. 21, 2024) ("Hess' growth profile differentiates it from most exploration and production (E&P) peers"); Sourasis Bose and Sabrina Valle, Oil producer Hess beats profit estimates on U.S. production boost, Reuters (July 26, 2023).

Section 7 does not forbid disquieting conduct.[20] It forbids transactions "the effect" of which "may be substantially to lessen competition, or to tend to create a monopoly."[21] Nothing in the Commission's Complaint suggests that this transaction will have such an effect. The Commission should not twist Section 7 into knots to get at Mr. Hess's alleged conduct.

II

Neither judicial nor Commission precedent supports the Complaint's theory of Section 7. The only time we have ever posited this sort of theory before was in a recent unlitigated settlement complaint involving the merger of Exxon Corporation and Pioneer Natural Resources Company.[22] And we did so over my dissent.[23] I cannot imagine that the majority Commission would ever risk litigating a Section 7 claim involving two percent shares of the market simply because of one potential director's speeches and texts. I therefore doubt that the Commission will ever risk letting the courts review the interpretation of Section 7 embodied in today's Complaint.

It is not a coincidence that the Commission has trotted out this theory only in settlements. I have lamented repeatedly that the majority has a penchant for pressing far-fetched, novel theories in complaints it knows will not be litigated, and relying on those unadjudicated complaints as a form of precedent for subsequent Commission action.[24] No court should give this consent, or its equally lawless predecessor in Exxon-Pioneer, any precedential value.[25] Unadjudicated complaints tell us nothing about the law. This Complaint is an accusation leveled by three Commissioners, nothing more.[26]

One might wonder why I object to a complaint that the merging parties are voluntarily settling. The Complaint is the Commission's statement of what Section 7 means. I believe that statement to be woefully incorrect and therefore cannot join it. And the fact of settlement should lend no credibility to the majority's outlandish interpretation of Section 7. Parties settle civil cases when it suits their interests even if they would prevail in litigation.[27] This consent agreement is a stark example. The Commission leveraged its Hart-Scott-Rodino Act[28] authority by threatening to

[20] Whether Mr. Hess's alleged conduct violated some other antitrust law or, any other federal law, is not at issue in this case and I therefore take no position on that question.
[21] 15 U.S.C. § 18.
[22] Compl., *In re Exxon Mobil Corp.*, FTC File No. 241 0004 (May 2, 2024).
[23] See Joint Dissenting Statement of Melissa Holyoak, Comm'r, Fed. Trade Comm'n, and Andrew N. Ferguson Comm'r, Fed. Trade Comm'n, *In re ExxonMobil Corp.*, FTC Matter No. 241 0004 (May 1, 2024).
[24] See Concurring Statement of Andrew N. Ferguson, Comm'r, Fed. Trade Comm'n, *In re Asbury Automotive Group, Inc., et al.*, FTC Matter No. 222 3135, 2 (Aug. 16, 2024) ("*In re Asbury*"); see also Concurring and Dissenting Statement of Andrew N. Ferguson, Comm'r, Fed. Trade Comm'n, *In re Invitation Homes*, FTC Docket No. 9436, 5 (Sep. 16, 2024).
[25] See Joint Dissenting Statement of Melissa Holyoak, Comm'r, Fed. Trade Comm'n, and Andrew N. Ferguson, Comm'r, Fed. Trade Comm'n, *In re ExxonMobil Corp.*, FTC Matter No. 241 0004 (May 1, 2024).
[26] See *In re Asbury*, *supra* note 24, at 2 ("[U]nadjudicated complaints are not the law. A complaint is an accusation, nothing more. It is subject neither to adversarial testing—the defining feature of the American legal tradition—nor to adjudication by the Commission or an impartial Article III judge.").
[27] See *id.* at 3 ("[M]any firms settle even if they honestly believe that they did nothing wrong and that they would prevail in litigation. Those firms reasonably conclude that a swift end to the Commission's investigation or threatened enforcement advances their interests more than a litigation victory.").
[28] 15 U.S.C. § 18a.

hold up Chevron and Hess's $53 billion dollar merger even though the lack of a plausible Section 7 theory had long been obvious. And yes, the parties could have told the Commission to make their day and file a lawsuit. But that lawsuit would cause months of delay and cost countless millions of dollars in legal fees. The merging parties surely would have prevailed on this Section 7 claim, but the victory could very well have been Pyrrhic if market conditions changed in the intervening months. They therefore rationally took the quick and easy path opened to them by this consent agreement. For Hess Corporation's shareholders, the consent is all upside: with the merger cleared, they will soon get paid. And for Chevron's shareholders, the benefit is clear and the cost is minimal: a valuable asset in exchange for keeping one person off of the board of directors.

The Commission majority and the Democratic politicians who urged them on will hail today's Complaint and proposed order as a victory. Those politicians have loudly urged the Commission to block this merger, and today the Commission majority can pretend it delivered, even as it allows the merger to proceed.[29] Fawning press coverage will surely follow—a nice bonus for the Democrats as voters head to the polls to pick the next President. The American public rightly loathes OPEC and has little affection for its perceived friends. Few apart from seasoned antitrust practitioners will look under the hood of the Commission's antitrust theory. The Commission will tout this modest, coerced settlement as a "win" and add it to the list of "wins" it uses to calculate a supposed "90% win rate."[30]

But this settlement is not a victory for the rule of law. "A settlement extracted from an innocent party reveals much about the Commission's power, but nothing about the law."[31] The Commission's power under the Hart-Scott-Rodino Act is considerable and coercive. We do not approve or forbid mergers, but we may sue to block them. Lawsuits are expensive and time-consuming, and the mere risk of an enforcement action can make an otherwise valuable transaction too costly to pursue.[32] Our gatekeeping function therefore gives us the power to exact tolls on merging parties even if our legal theory is bunk.[33] The risk, time, and expense associated with convincing a judge that the Commission's theory is bunk is coercive enough that merging parties will pay for the Commission to go away. But such a settlement does not vindicate the rule of law. It is instead a sort of tax on mergers made possible by the fact that Congress has made the Commission a merger gatekeeper.

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Today, two merging companies pay a toll to pass through the Hart-Scott-Rodino gate. They do not pay the toll because Section 7 requires it. Nothing in Section 7 requires Mr. Hess to stay off

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[29] See *supra* note 7.
[30] See Douglas Farrar, X, (Sept. 13, 2024), https://x.com/DouglasLFarrar/status/1834727643171733651 ("FTC Chair Khan has won more than 90% of her lawsuits") (quoting remarks of Rep. Alexandria Ocasio-Cortez).
[31] *In re Asbury*, supra note 24, at 3.
[32] *Id.* at 4 ("That a firm may break this cycle by litigating is no answer to my objection. For most small businesses—and many large ones—a Commission investigation is costly. Lawyers are expensive, and investigations sometimes last for years. Litigation may take many years more. The mere risk of a Commission investigation is coercive and can be enough to force some businesses to yield.").
[33] See Joint Dissenting Statement of Melissa Holyoak, Comm'r, Fed. Trade Comm'n, and Andrew N. Ferguson, Comm'r, Fed. Trade Comm'n, *In re ExxonMobil Corp.*, FTC Matter No. 241 0004 (May 1, 2024).

the Chevron board. They pay the toll because the Commission has threatened to make their lives difficult if they do not, and they have concluded that it is easier to pay than to resist. The Commission collects the toll and proclaims victory. But reducing antitrust enforcement to a pay-for-peace racket inflicts serious injury on the rule of law—and on the Commission's credibility.

I therefore respectfully dissent.