Office of Commissioner
Andrew N. Ferguson

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

Concurring Statement of Commissioner Andrew N. Ferguson
Joined by Commissioner Melissa Holyoak
In the Matter of US Anesthesia Partners/Guardian Anesthesia
Matter Number 2010031

January 17, 2025

The Commission today issues an administrative complaint and accepts a proposed consent order with Welsh, Carson, Anderson & Stowe ("Welsh Carson").[1] The Complaint alleges that Welsh Carson, through its portfolio company U.S. Anesthesia Partners, acquired a series of anesthesia practices in the Houston and Dallas-Fort Worth metropolitan areas.[2] The Complaint further alleges that these acquisitions gave Welsh Carson monopoly power over anesthesia services in the relevant markets, and it used that monopoly power to increase the prices for anesthesia services above competitive levels.[3] This inflicted real economic injury on Americans at their most vulnerable moments—when they needed medical intervention so substantial that anesthesia was required. That conduct, the Complaint alleges, violated Section 2 of the Sherman Act and Section 5 of the FTC Act,[4] as well as Section 7 of the Clayton Act.[5]

I concur in today's Commission action because it is a routine law-enforcement matter embodying a traditional approach to competition law.[6] A reader might reach a different conclusion given the agency's rhetoric in connection with the public announcement of this settlement. The press release and the Chair's statement both suggest that this case is extraordinary because it involves "private equity" and "serial acquisitions," and hint at antipathy toward private equity.[7]

I write to pierce through this breathless rhetoric to make clear that this case is an ordinary application of the most elementary antitrust principles. That Welsh Carson is a private equity firm is irrelevant; the antitrust analysis would be the same if Welsh Carson were, for example, an individual or institutional investor. Section 7 prohibits mergers that may substantially lessen

[1] *In re Welsh, Carson, Anderson & Stowe XI, L.P.*, Complaint ("Complaint") & Decision and Order.
[2] Compl. ¶ 25.
[3] *Id*. ¶¶ 1–4, 13–21, 27–31.
[4] *Id*. ¶¶ 33-34, 37.
[5] *Id*. ¶ 35.
[6] See Dissenting Statement of Comm'r Andrew N. Ferguson, Regarding the Telemarketing Sales Rule, Matter No. R411001 (Nov. 27, 2024) ("The proper role of this lame-duck Commission is … to hold down the fort, conduct routine law enforcement, and provide for an orderly transition to the Trump Administration. I will vote against all new rules not required by statute, and any enforcement action that advances an unprecedented theory of liability until that transition is complete.").
[7] Statement of Chair Lina M. Khan, In the Matter of Welsh, Carson, Anderson & Stowe, Matter No. 2010031 (Jan. 17, 2025); Press Release, FTC, FTC Secures Settlement with Private Equity Firm in Antitrust Roll-Up Scheme Case (Jan. 17, 2025).

competition or tend to create a monopoly.[8] In most of our Section 7 cases, we are predicting the likely effects of a transaction before it takes place.[9] Here, however, we did not have to predict anything. Welsh Carson made acquisitions. As alleged in the Complaint, those acquisitions demonstrably created monopoly power and Welsh Carson wielded that power to raise prices. That is *exactly* what Section 7 prohibits anyone from doing. There is thus no reason for the Commission to single out private equity for special treatment.

Similarly, the Chair's reference to the 2023 Merger Guidelines is a red herring. The Guidelines provide that "[a] firm engages in an anticompetitive pattern or strategy of multiple acquisitions in the same or related business lines may violate Section 7."[10] But Section 7 does not prohibit anticompetitive "pattern[s]" or "strateg[ies]." It prohibits "acqui[sitions]" "the effect of [which] may be substantially to lessen competition or to tend to create a monopoly."[11] That is what the Complaint accuses Welsh Carson of doing—making acquisitions that *in fact* tended to create a monopoly and injured vulnerable Americans. The public should disregard my Democratic colleagues' rather clumsy attempt to make a run-of-the-mill enforcement matter seem like an avant-garde application of novel provisions of the 2023 Guidelines.[12]

[8] 15 U.S.C. § 18. Similarly, Section 2 of the Sherman Act has long been understood to prohibit "merging viable competitors to create a monopoly." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 701a (rev. ed. 2024); see also *United States v. Grinnell*, 384 U.S. 563, 576 (Sherman Act Section 2 violation based in part on acquisitions of competitors in the central station service business including burglar alarm services, fire alarm services, and the like because "[b]y those acquisitions it perfected the monopoly power to exclude competitors and fix prices.").

[9] *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713, 727 (D.C. Cir. 2001) (preliminarily enjoining a proposed merger and explaining that "Congress has empowered the FTC, *inter alia*, to weed out those mergers whose effect 'may be substantially to lessen competition' from those that enhance competition." (quoting H.R. Rep. No. 1142, at 18–19 (1914))); see also Concurring Statement of Comm'r Andrew N. Ferguson, Final Premerger Notification Form and the Hart-Scott-Rodino Rules, Matter No. P239300, at 2 (Oct. 10, 2024) (describing Congress's intent to provide for premerger review with the 1976 Hart-Scott-Rodino Act).

[10] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines, at 3, 23 (Dec. 18, 2023).

[11] 15 U.S.C. § 18.

[12] The Chair's reference to the partisan 2022 Section 5 Policy Statement for the proposition that serial acquisitions can present an incipient violation of the antitrust laws is equally unavailing. The Complaint charges Section 2 and Section 7 violations, which Section 5 indisputably reaches even under the Democrats' own reading of Section 5 jurisprudence. FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, at 12 (Nov. 10, 2022) ("examples of conduct that have been found to violate Section 5 include: Practices deemed to violate Sections 1 and 2 of the Sherman Act or the provisions of the Clayton Act, as amended (the antitrust laws)").