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

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 ctul coordinher

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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 clai