



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

Office of Commissioner
 Andrew N. Ferguson

Statement of Commissioner Andrew N. Ferguson
Concurring in Part and Dissenting in Part
In the Matter of Grubhub, Inc.
 Matter Number 2023157

December 17, 2024

More than .

² Grubhub operates in over 2,400 cities in the United States. The platform hosts more than 500,000 restaurants, over 200,000 delivery drivers, and approximately 31 million active users who place 262 million orders each year.³

Today, the Commission accuses Grubhub of a wide range of misconduct, and approves a complaint and settlement against Grubhub for this alleged misconduct. The complaint alleges that Grubhub made false or misleading representations to consumers about the cost of delivery,⁴ denied consumers access to their Grubhub accounts and the funds in those accounts,⁵ failed to provide consumers a simple cancellation mechanism to stop recurring charges,⁶ created listings for restaurants (as explained in Count V, which alleges that Grubhub made unsubstantiated earnings claims to prospective delivery drivers, and why I dissent from Count IV, which alleges Grubhub engaged in an unfair method of competition by listing restaurants on its platform without the restaurants’ express, informed consent.

¹ Number of users of the online food delivery market in the United States from 2017 to 2029, Statista (Nov. 20, 2024), <https://www.statista.com/forecasts/891084/online-food-delivery-users-by-segment-in-united-states> (showing 161.5 million estimated online meal delivery users in 2023 and 173 million in 2024).

² *In re Grubhub, Inc.*, Complaint (“Complaint”) & Proposed Stipulated Order.

³ Compl. ¶ 4.

⁴ *Id.* ¶¶ 61–77.

⁵ *Id.* ¶¶ 88–108.

⁶ *Id.* ¶¶ 78–87.

⁷ *Id.* ¶¶ 109–47.

⁸ *Id.* ¶¶ 148–68.

⁹ I dissent from Count IX for the same reason I dissented from a similar count in

I

I have repeatedly criticized the Commission's evolving treatment of "up to" earnings claims.¹⁰ Historically, the Commission treated "up to" claims as substantiated if an "appreciable number" of consumers achieve the promised performance.¹¹ While the Commission has never explicitly stated what constitutes an "appreciable number," the plain meaning of that phrase suggests a noticeable, nonnegligible amount.¹² A reasonable person would fairly interpret the claim that so1 (c)0.9 (ia.0047845 015(ha)-1 (t)3 (p/4 (a)-1 (bllsc7h1 (c)0.9 (ia.0047845 04y)2 (irp).05 h1 t)-2 (

competition.²⁰ It rests on the same alleged facts as the unfair and deceptive acts and practices counts—deceptively creating listings for restaurants without those restaurants’ consent, falsely representing to consumers that Grubhub had an affiliation with those restaurants, and deceiving consumers about delivery fees.²¹ It claims, however, that those acts “are deceptive and coercive and tend to negatively affect competitive conditions in the meal delivery market” because they “enable[] Grubhub to gain customers, divert sales from rivals, grow its operations, and gain an unfair advantage over competing delivery services.”²² These deceptive acts, the Complaint reasons, therefore violate both the competition and consumer-protection provisions of Section 5.

A single course of conduct may violate more than one law. A carjacking by a convicted felon, for example, could simultaneously violate the Hobbs Act,²³

Although I agree that Section 5 proscribes conduct beyond what the Sherman Act proscribes,³¹ I have constitutional concerns about the 2022 policy statement’s incredible breadth.³² But I take the majority’s view of Section 5 on its own terms for purposes of analyzing its claim. To establish that conduct is an unfair method of competition, the Commission must plead negative effects on competitive conditions.³³ Its allegation on this front is that the alleged deception “enables Grubhub to gain customers, divert sales from rivals, grow its operations, and gain an unfair advantage over competing delivery services.”³⁴ That theory is consistent with the terms of the 2022 policy statement. But even assuming *arguendo* that consistency with the policy statement is consistency with the law, the Complaint cannot survive only on a theory. It must properly allege facts supporting the theory.

The Complaint lacks such allegations. When a plaintiff goes to federal court, the defendant may immediately test the legal sufficiency of the plaintiff’s complaint by moving to dismiss the complaint, or any part of it, for failure to state a claim.³⁵ To survive that motion, the “complaint must contain sufficient factual matter, accepted as true, to state ‘a claim to relief that is plausible on its face.’”³⁶ A claim is facially plausible “when the plaintiff pleads factual content that allowed the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”³⁷ “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”³⁸ The complaint must plead actual facts sufficient to allege that the defendant committed “each element” of the claim.³⁹

“Threadbare recitals” and “conclusory statements” are all the Complaint has as to the unfair-method-of-competition claim. It does not allege any facts supporting a plausible inference that Grubhub’s deception affected competitive conditions in the alleged market for prepared meal delivery.⁴⁰ The Complaint asserts that “[b]y falsely representing an affiliation with ... restaurants,

³¹ 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 35 n.286 (June 28, 2024) (“Ferguson Non-Compete Rule Dissent”).

³² *Id.* at 28 (“Given the way the Commission and courts have interpreted Section 5, it is well-nigh impossible to identify what ‘intelligible principle’ Congress provided to constrain our discretion.”).

³³ See 2022 Section 5 Policy Statement at 10; Compl. ¶ 178.

³⁴ Compl. ¶ 192.

³⁵ See Fed. R. Civ. P. 12(b)(6).

³⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

³⁷ *Ibid.* (citing *Twombly*, 550 U.S. at 566).

³⁸ *Ibid.* (citing *Twombly*, 550 U.S. at 555).

³⁹ *Jaros v. Ill. Dep’t of Corrections*, 684 F.3d 667, 672 (6th Cir. 2012); see also *Twombly*, 550 U.S. at 562 (“ 59.004 TJ/TT 10.7

Grubhub boosts its own offerings, expands its scale, and fuels its business—but at significant cost to the restaurants that have not consented to a partnership with Grubhub.”⁴¹ It goes on to claim that “Grubhub’s practices harm the Unaffiliated Restaurants by diverting business away from the restaurants’ own delivery services”⁴² and that “Unaffiliated Restaurants often lose business because consumers are unhappy with a “te, ferusstath Grces”

