here, the restraint is ancillary to an otherwise lawful and primarily vertical agreement.[14] Under the rule of reason, a restraint violates section 1 if the anticompetitive effects of the restraint outweigh its procompetitive effects.[15] Put slightly differently, the rule of reason forbids restraints for which the procompetitive justifications for the restraint could have been achieved through ''less anticompetitive means'' than those imposed by the restraint.[16]

Here, the Complaint alleges that ''[a]ny legitimate objectives of Guardian's'' use of the no-hire provisions ''could have been achieved through significantly less restrictive means.'' [17] This certainly may be true of some no-hire agreements. And no-hire clauses undoubtedly can have anticompetitive effects.[18] In some circumstances, those anticompetitive effects will outweigh the procompetitive justifications for a no-hire clause.[19] When those facts obtain, the no-hire provision violates the Sherman Act.

But we cannot issue a Complaint against a company based solely on a theory about hypothetical effects of no-hire agreements. To lawfully invoke our enforcement authority, we must have a ''reason to believe'' that Guardian's no-hire provisions violate section 5, not that no-hire provisions generally could violate section 5.[20] The Commission has a ''reason to believe'' the law has been violated only if it has evidence sufficient to make the ''threshold determination that further inquiry is warranted.'' [21] That reason must be ''well-grounded'' in evidence that the Commission gleaned from its pre-filing investigation.[22]

Had the Complaint plausibly alleged anticompetitive effects outweighing procompetitive justifications, I would have voted for it. But the Complaint alleges nothing about the no-hire provisions' effects. It does not allege direct evidence of anticompetitive effects, or of indirect, economic evidence of anticompetitive effects, like market power and harm to competition. It does not even allege that Guardian has ever tried to enforce any of these agreements, nor does it allege that a single Guardian customer or worker believed Guardian would enforce any of these provisions.[23] Nor have I seen any such evidence that goes unmentioned in the Complaint. Indeed, I am at a loss about how my colleagues have formed their reason to believe that Guardian is violating the antitrust laws.

The Commission ought to protect competition in the labor markets, but it cannot bend the law to do so. We must form a ''well-grounded reason to believe'' that the law has been violated before issuing an administrative complaint. Because we have no evidence of the effects of the no-hire agreements in this case, the Commission should not have issued this Complaint.

I respectfully dissent.

[FR Doc. 2024–28720 Filed 12–5–24; 8:45 am]

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se prohibition a restraint must have 'manifestly anticompetitive' effects and 'lack . . . any redeeming virtue.''' (cleaned up)).

[14] See, *e.g., Aya Healthcare Servs., Inc.* v. *AMN Healthcare, Inc.,* 9 F.4th 1102, 1109 (9th Cir. 2021) (citing *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.,* 792 F.2d 210, 224 (D.C. Cir. 1986)). The Chair invokes *Deslandes* v. *McDonald's USA, LLC* as ''affirm[ing]'' that ''some no-poach or no-hire provisions may be analyzed as *per se* restraints under section 1 of the Sherman Act.'' Chair's Statement at 2 n.6. That is not quite right. *Deslandes* held only that a properly pleaded *per se* claim challenging no-hire clauses could survive a motion to dismiss because ''the classification of a restraint as ancillary,'' and therefore not subject to the *per se* standard, ''is a defense, and complaints need not anticipate and plead around defenses.'' 81 F.4th 699, 705 (7th Cir. 2023), *cert. denied,* 144 S. Ct. 1057 (2024). Whether a restraint is ancillary, and therefore subject to the rule of reason, ''requires discovery, economic analysis, and potentially a trial.'' *Ibid.*

[15] See, *e.g., GTE Sylvania Inc.,* 433 U.S. at 49 & n.15 (citing *Chi. Bd. of Trade* v. *United States,* 246 U.S. 231, 238 (1918) (Brandeis, J.)); *Atl. Richfield Co.* v. *USA Petroleum Co.,* 495 U.S. 328, 342 (1990); *Ohio* v. *Am. Express Co.,* 585 U.S. 529, 541–42 (2018).

[16] *Am. Express Co.,* 585 U.S. at 542; *Alston,* 594 U.S. at 100 (''[A]nticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits.'').

[17] Compl. ¶ 14. Potential procompetitive justifications, *i.e.,* legitimate objectives, in these circumstances could include Guardian seeking to recoup any costs for the training of and investment in its workers or for screening and background checks to employ these workers, or to protect any relevant trade secrets.

[18] Matthew Gibson, Employer Market Power in Silicon Valley, IZA Discussion Paper No. 14843 (Nov. 2021), *https://docs.iza.org/dp14843.pdf* (comparing workers' salaries at Silicon Valley firms subject to DOJ's no-poach investigation to worker salaries at other information-technology firms and concluding that the challenged no-poach agreements reduced salaries at colluding firms by 4.8%).

[19] Cf. *Eichorn* v. *AT&T Corp.,* 248 F.3d 131 (3d Cir. 2001) (challenged no-hire agreement ''not an antitrust violation under the rule of reason'' where the particular provision at issue ''did not have a significant anti-competitive effect on the plaintiffs' ability to seek employment''); *Aya Healthcare Servs.,* 9 F.4th at 1110 (challenged non-solicitation agreement, involving employee outsourcing arrangement between healthcare staffing agencies collaborating to supply traveling nurses, not unlawful under rule of reason where restraint was reasonably necessary to ensure neither would lose personnel during collaboration); *Giordano* v. *Saks Inc.,* 654 F. Supp. 3d 174, 201 (E.D.N.Y. 2023) (challenged no-poach agreement involving collaborative business arrangement not unlawful under rule of reason where luxury brands agreed not to poach Saks employees who were trained to sell brand products unless current managers consented or the employee had left Saks at least six months prior).

[20] 15 U.S.C. 45(b).

[21] *FTC* v. *Standard Oil of Cal.,* 449 U.S. 232, 241 (1980); *Boise Cascade Corp.* v. *FTC,* 498 F. Supp. 772, 779 (D. Del. 1980).

[22] *Standard Oil,* 449 U.S. at 246 n.14; see also *AMREP Corp.* v. *FTC,* 768 F.2d 1171, 1177 (10th Cir. 1985).

[23] The Chair presents this case as a choice between Guardian's no-hire provisions ''remain[ing] in place,'' ostensibly presuming anticompetitive effects from their very existence, or continuing the investigation. Chair's Statement at 2. That is not correct. I have seen no evidence of actual or threatened enforcement of these clauses. And even if Guardian did threaten or attempt to enforce such provisions, I have seen no evidence that such threatened or actual enforcement would violate the antitrust laws—the question before the Commission when deciding whether to issue a Complaint. The Chair's citation of public comments submitted in response to the Commission's separate, unrelated Non-Compete Clause Rule, *id.* at 2 n.9, does not change the facts, or lack thereof, in this matter. Moreover, I have no objection to the Commission agreeing not to bring an enforcement action so long as Guardian agrees not to enforce its no-hire provisions—akin to a non-prosecution agreement. But if the Commission invokes its power to issue a complaint, it must comply with the statute giving it that power—including the requirement that we have ''reason to believe'' that section 5 has been violated.

FEDERAL TRADE COMMISSION

[File No. 232 3023]

IntelliVision Technologies Corp.; Analysis of Proposed Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair or deceptive acts or practices. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before January 6, 2025.

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write ''IntelliVision; File No. 232 3023'' on your comment and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Mail Stop H–144 (Annex F), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Robin Rosen Spector (202–326–3740), Attorney, Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule § 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of 30 days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained at *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before January 6, 2025. Write ''IntelliVision; File No. 232 3023'' on your comment. Your comment—including your name and your State—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Because of heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website. If you prefer to file your comment on paper, write ''IntelliVision; File No. 232 3023'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Mail Stop H–144 (Annex F), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other State identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule § 4.10(a)(2), 16 CFR 4.10(a)(2)—including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule § 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule § 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the *https://www.regulations.gov* website—as legally required by FTC Rule § 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule § 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *https://www.ftc.gov* to read this document and the news release describing the proposed settlement. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments it receives on or before January 6, 2025. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an agreement containing a consent order from IntelliVision Technologies Corp. (''IntelliVision'' or ''Respondent''). The proposed consent order (''Proposed Order'') has been placed on the public record for 30 days for receipt of public comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement, along with the comments received, and will decide whether it should make final the Proposed Order or withdraw from the agreement and take appropriate action.

IntelliVision is a Delaware corporation with its principal place of business in San Jose, California. Respondent advertises and sells an artificial intelligence-based facial recognition software product to original equipment manufacturers, large integrators, and large end users. Respondent's facial recognition software has been incorporated into two consumer products sold by its parent corporation Nice North America, LLC: the 2GIG Edge, a home security system; and the Elan Intelligent Touch Panel, a smart home touch panel. The software allows consumers to register their face and then scan their face to gain access to the 2GIG Edge home security system. Similarly, the software allows consumers to register their face and then scan their face to gain access to the smart home features of the Elan Intelligent Touch Panel.

The Commission's proposed three-count complaint alleges that Respondent represented that IntelliVision's facial recognition software has one of the highest accuracy rates on the market and has been trained on millions of faces. The proposed complaint further alleges that Respondent represented that IntelliVision's facial recognition software can detect faces of all ethnicities without racial bias, was developed with multi-ethnic and gender datasets to ensure no built-in bias and performs with zero gender or racial bias. In addition, the proposed complaint alleges that IntelliVision claimed its anti-spoofing technology ensures the system cannot be fooled by photo or video images. According to the proposed complaint, these claims are false or misleading or were not substantiated at the time the representations were made, in violation of section 5 of the FTC Act.

The Proposed Order contains injunctive relief designed to prevent Respondent from engaging in the same or similar acts or practices in the future. Provision I prohibits Respondent from making any misrepresentation (1) about the accuracy or efficacy of its Facial Recognition Technology; (2) about the comparative performance of its Facial Recognition Technology with respect to individuals of different genders, ethnicities, and skin tones, or reducing or eliminating differential performance

based on such factors; or (3) about the accuracy or efficacy of its Facial Recognition Technology with respect to detecting spoofing or otherwise determining Liveness. (Facial Recognition Technology and Liveness are defined in the Proposed Order.)

Provision II prohibits Respondent from making any representation about the effectiveness, accuracy, or lack of bias of Facial Recognition Technology, or about the effectiveness of such Facial Recognition Technology at detecting spoofing, unless Respondent possesses and relies upon competent and reliable testing that substantiates the representation at the time the representation is made. For the purposes of this Provision, competent and reliable testing means testing that is based on the expertise of professionals in the relevant area, and that (1) has been conducted and evaluated in an objective manner by qualified persons and (2) is generally accepted by experts in the profession to yield accurate and reliable results. Respondent also must document all such testing including: the dates and results of all tests; the method and methodology used; the source and number of images used; the source and number of different people in the images; whether such testing includes Liveness tests; any technique(s) used to modify the images to create different angles, different lighting conditions or other modifications; demographic information collected on images used in testing if applicable; information about the skin tone collected on images used in testing if applicable; and any information that supports, explains, qualifies, calls into question or contradicts the results. Provision III requires Respondent to obtain and submit acknowledgments of receipt of the Order.

Provisions IV–VI are reporting and compliance provisions, which include recordkeeping requirements and provisions requiring Respondent to provide information or documents necessary for the Commission to monitor compliance. Provision VII states the Proposed Order will remain in effect for 20 years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the Proposed Order, and it is not intended to constitute an official interpretation of the complaint or Proposed Order, or to modify the Proposed Order's terms in any way.

By direction of the Commission.

April J. Tabor,

Secretary.

Concurring Statement of Commissioner Andrew N. Ferguson

Today, the Commission approves a complaint and settlement against IntelliVision, a developer of facial recognition software.[1] Count I charges IntelliVision with misrepresenting the efficacy of its software. IntelliVision claimed that its software had one of the highest accuracy rates in the world, but in reality it was not even among the top hundred best performing algorithms tested by the National Institute of Standards and Technology.[2] Count I further accuses IntelliVision of claiming that its software was trained on ''millions'' of faces, when the software was in fact trained on only 100,000 faces.[3] Count III accuses IntelliVision of claiming that its software could not be fooled by photo or video images even though it had insufficient evidence to support that categorical claim.[4] I support these counts without reservation.

I write briefly to explain why I also support Count II, which accuses IntelliVision of misrepresenting that its software performs with ''zero gender or racial bias'' when in fact its software exhibits substantially different false-negative and false-positive rates across sex and racial lines.[5] Treating IntelliVision as having committed a deceptive act or practice in these circumstances could lead one to believe that the Commission is taking the position that to be ''unbiased,'' a software system must produce equal false-negative and false-positive rates across race and sex groups.

I do not read the complaint that way, and I today do not vote to fix the meaning of ''bias.'' Statistical disparity in false-positive and false-negative rates is not necessarily the only or best definition of what it means for an automated system to be ''biased.'' The question is open to philosophical and political dispute. Other definitions might consider the discriminatory intentions of the developers, the developers' diligence in avoiding artificial disparities while training the automated system, or whether any statistical disparities reflect the underlying realities the system is designed to reflect or epistemological limitations in that underlying reality that are impossible or uneconomical to overcome. This complaint does not choose from among these competing definitions and considerations.

But IntelliVision used the word ''bias.'' If it intended to invoke a specific definition of ''bias,'' it needed to say so. But it did not say so; it instead left the resolution of this ambiguity up to consumers. IntelliVision must therefore bear the burden of substantiating all reasonable interpretations that consumers may have given its claim that its software had ''zero gender or racial bias.'' [6] A reasonable consumer could interpret ''zero gender or racial bias'' in this context to mean equal rates of false positives and false negatives across those lines. I therefore have reason to believe that IntelliVision's claims were false or unsubstantiated because its software did not have equal false-positive and false-negative rates across those lines.

Pursuant to that understanding, I concur in the filing of the complaint and settlement.

[FR Doc. 2024–28716 Filed 12–5–24; 8:45 am]

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[1] Complaint, *In re IntelliVision Technologies Corp.*

[2] *Id.* ¶ 11.

[3] *Id.* ¶ 14.

[4] *Id.* ¶ 13.

[5] *Id.* ¶ 11.

[6] FTC Policy Statement on Deception, 103 F.T.C. 174, 178 (1984) (''When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation''); FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839, 840 (1984) (''Although firms are unlikely to possess substantiation for implied claims they do not believe the ad makes, they should generally be aware of reasonable interpretations and will be expected to have prior substantiation for such claims. The Commission will take care to assure that it only challenges reasonable interpretations of advertising claims.'').

FEDERAL TRADE COMMISSION

[File No. 212 3035]

Gravy Analytics, Inc.; Analysis of Proposed Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair or deceptive acts or practices. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before January 6, 2025.