

Congress of the United States
Washington, DC 20515

August 30, 2018

The Honorable Joseph J. Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

In the Matter of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray
Commission File No. 1710134

Dear Chairman Simons:

We write in response to the Commission's proposed consent order to resolve allegations against several health staffing companies for colluding to lower the compensation of therapists in an effort to prevent them from switching to a staffing service with better compensation.¹

We applaud the Commission for its decision to pursue this matter. Wage fixing is a clear violation of the antitrust laws and a fundamental threat to the economic opportunity and financial security of hardworking Americans. We agree with the Commission that workers are "entitled to competitive wages" and deserve the full benefits of competition in their workplace.² Moreover, as a general matter, we are deeply concerned with the rising tide of economic concentration among employers and the effect of this monopsony power on workers' wages and mobility.³ Vigilant enforcement of the antitrust laws is critical to reversing this dangerous trend.⁴

We are concerned, however, that the Commission's proposed consent order does not provide adequate notice to victims or potential victims of wage theft. As you know, collusion among

¹ Press Release, Federal Trade Comm'n, Therapist Staffing Company and Two Owners Settle Charges that They Colluded on Rates Paid to Physical Therapists in Dallas/Fort Worth Area (July 31, 2018), <https://www.ftc.gov/news-events/press-releases/2018/07/therapist-staffing-company-two-owners-settle-charges-they>.

² *Id.*

³ *See, e.g.*, Letter from Sen. Cory A. Booker (D-NJ) to the Honorable Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice, and the Honorable Maureen K. Ohlhausen, Acting Chairman, Federal Trade Comm'n (Nov. 1, 2017); Press Release, House Democratic Caucus, House Democrats Unveil Legislation to Protect American Workers Against Anti-Competitive Employment Practices (Apr. 26, 2018), <https://www.dems.gov/newsroom/press-releases/house-democrats-unveil-legislation-to-protect-american-workers-against-anti-competitive-employment-practices>.

⁴ *See generally* Marshall Steinbaum, Heidi Shierholz, & Sandeep Vaheesan, Comment Letter on Proposed Consent Decree In the Matter of Your Therapy Source, LLC; Neeraj Jindal; and Sheri Yarbray (Aug. 8, 2018); The Washington Center for Equitable Growth, Comment Letter on Proposed Consent Decree In the Matter of Your Therapy Source, LLC; Neeraj Jindal; and Sheri Yarbray (Aug. 30, 2018).

firms is among the greatest threats to competition.⁵ But collusion is often difficult to detect,⁶ particularly by those who are being victimized.⁷ And even where collusion is uncovered, the availability of civil penalties in private enforcement has been greatly diminished by the sweeping use of forced arbitration clauses in employment contracts.⁸ The proposed consent order, however, lacks “any notice or restitution to those targeted by this unlawful conduct, nor any admission of facts or liability,” despite resolving liability for a clear violation of the law, as Commissioner Rohit Chopra states.⁹ The order only requires a copy of the complaint and order to be sent to the “officers, partners, directors, and employees” of the staffing agencies. There is no requirement to notify the therapists who, as *non-employee* independent contractors, were actually harmed by the anticompetitive behavior of the staffing agencies.¹⁰ In effect, the proposed consent order merely requires Respondents to *notify themselves* of a complaint they have already received and an order they have already consented to. This is unacceptable. We believe that the therapists who contract with the employers subject to this consent decree deserve full transparency in the workplace to keep their employers honest and to detect wage fixing in the future.

We also ask that you consider whether the proposed consent order will adequately deter anticompetitive conduct by other employers. The antitrust laws are not suggestions. In order to strongly deter other violations of the antitrust laws that harm workers, employers who collude to fix wages must be placed in a worse position than if they had followed the law in the first place. Because the proposed consent order appears to merely prohibit the respondents from engaging in conduct that is already clearly illegal—rather than an admission of facts or liability—it is unclear how it will deter wage fixing and other illegal conduct by other employers.¹¹

⁵ Joseph J. Simons, Director, Bureau of Competition of the Federal Trade Comm’n, Keynote Address at the 51st Annual ABA Antitrust Section Spring Meeting (Apr. 4, 2003), <https://www.ftc.gov/public-statements/2003/04/report-bureau-competition>.

⁶ See generally Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL’Y INT’L 3 (2010).

⁷ Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 454 (2006).

⁸ *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 241 (2013) (J. Kagan, dissenting); Deepak Gupta & Lina Khan, *Arbitration As Wealth Transfer*, 35 YALE L. & POL’Y REV. 499, 510 (2017) (“The growing prevalence of forced arbitration clauses in employee contracts significantly curbs workers’ ability to hold their employers accountable for labor violations.”); see also *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968) (“[T]hose who violate the antitrust laws by price fixing or monopolizing [should not] retain the fruits of their illegality because no one was available who would bring a suit against them.”).

⁹ Statement of the Honorable Rohit Chopra, Commissioner, Federal Trade Comm’n, on In the Matter of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray Commission File No. 1710134 (July 31, 2018), https://www.ftc.gov/system/files/documents/public_statements/1396706/1710134_your_therapy_source_statement_of_commissioner_chopra_7-31-18.pdf.

¹⁰ The Respondents in this case compete with themselves and other staffing agencies to contract with therapists who actually treat the patients.

¹¹ FEDERAL TRADE COMM’N AND DEP’T OF JUSTICE, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 2 (2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

To be sure, we are aware that in the past the Commission has limited its pursuit of monetary remedies to “exceptional cases.”¹² However, given that this case involves a clear violation of the antitrust laws, we strongly suggest modifying the order to include disgorgement of those funds if the Commission determines a reasonable method for calculating any ill-gotten gains.¹³ In addition to providing restitution to the affected therapists, the Commission would send a powerful message to employers by imposing a monetary penalty.

It is important that the public understands the Commission will hold employers in these types of cases accountable going forward. This very case is an example of how the Commission’s prior efforts at communicating its expectations have been ignored. For example, in 2016, the Commission joined the Justice Department to issue guidelines that clarify that wage-fixing agreements are a *per se* violation of the antitrust laws.¹⁴ The agencies expressly warned that this type of antitrust violation “can have severe consequences,” including criminal prosecution against the company or a private party.¹⁵ Since then, the Justice Department’s Antitrust Division has re-affirmed that it will criminally investigate wage-fixing agreements that began after October 2016.¹⁶ Despite this clear guidance, Respondents—and likely many other employers—apparently do not fear repercussions for harming workers. It is also fair to ask whether the proposed consent decree establishes a *de minimis* exception to the 2016 Guidelines. If so, we would consider this to be a step in the wrong direction when it comes to protecting American workers against unscrupulous employers and enforcing the antitrust laws. If the Commission does not ensure real accountability, it risks having its guidelines and pronouncements continue to fall on deaf ears.

Finally, if Respondents are unwilling to agree to the modified terms, the Commission should consider pursuing litigation on its own or, alternatively, referring the matter to the Justice Department or the Attorney General of Texas for criminal prosecution.

With these concerns in mind, we respectfully request that you respond to the following:

¹² See FEDERAL TRADE COMM’N, POLICY STATEMENT ON MONETARY EQUITABLE REMEDIES—INCLUDING IN PARTICULAR DISGORGEMENT AND RESTITUTION—IN FEDERAL TRADE COMMISSION COMPETITION CASES ADDRESSING VIOLATIONS OF THE FTC ACT, THE CLAYTON ACT, OR THE HART-SCOTT-RODINO ACT (2003), <https://www.ftc.gov/public-statements/2003/07/policy-statement-monetary-equitable-remedies-including-particular>.

¹³ See FEDERAL TRADE COMM’N, POLICY STATEMENT ON MONETARY EQUITABLE REMEDIES—INCLUDING IN PARTICULAR DISGORGEMENT AND RESTITUTION—IN FEDERAL TRADE COMMISSION COMPETITION CASES ADDRESSING VIOLATIONS OF THE FTC ACT, THE CLAYTON ACT, OR THE HART-SCOTT-RODINO ACT (2003), <https://www.ftc.gov/public-statements/2003/07/policy-statement-monetary-equitable-remedies-including-particular>; ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS, 241 (2007); Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127 (2009).

¹⁴ FEDERAL TRADE COMM’N AND DEP’T OF JUSTICE, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 2 (2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

¹⁵ *Id.* at 2–3.

¹⁶ DEP’T OF JUSTICE, NO MORE NO-POACH: THE ANTITRUST DIVISION CONTINUES TO INVESTIGATE AND PROSECUTE “NO-POACH” AND WAGE-FIXING AGREEMENTS (2018), <https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements> (internal quotation omitted).

1. Please explain the policies of the antitrust agencies as it relates to enforcement of anticompetitive conduct in labor markets.
2. Why did the Commission not seek an admission of liability or a statement of facts in this case?
3. When will the Commission seek an admission of liability or a statement of facts from parties in these types of cases?
4. What is the Commission's policy for notify or providing restitution for employees who are harmed by an employer's anticompetitive conduct?

Thank you for your attention to this matter and efforts to vigorously enforce the antitrust laws.

Sincerely,

David N. Cicilline
Ranking Member
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives



Cory A. Booker
United States Senator

CC: The Honorable Makan Delrahim, Assistant Attorney General, Dep't of Justice
The Honorable Maureen K. Ohlhausen, Commissioner, Federal Trade Comm'n
The Honorable Noah Joshua Phillips, Commissioner, Federal Trade Comm'n
The Honorable Rebecca Kelly Slaughter, Commissioner, Federal Trade Comm'n
The Honorable Rohit Chopra, Commissioner, Federal Trade Comm'n