

In the Matter of Your Therapy Source, LLC; Neeraj Jindal; and Sheri Yarbray
FTC File No. 171-0134
August 30, 2018

Honorable Commissioners:

As legal scholars who collectively teach and research in the areas of labor regulation and antitrust, we submit this comment regarding the above-captioned matter involving an agreement among staffing agencies to suppress home health therapists' pay rates. In particular, given Commissioner Chopra's request for comments regarding "whether [the Commission] should follow this approach in this and future matters, especially those involving our country's growing 'gig economy,'" we write in our capacity as experts on the changing nature of work in today's economy, characterized in part both by the "gig economy" and the "fissuring" of traditional business enterprises

As you know, the proposed consent order primarily reiterates already-existing rules of law without imposing a monetary penalty, without requiring notification of the affected individual service-providers, and without requiring the respondents to stipulate to any of the alleged facts. As the rest of this comment describes, entities like the respondents in this case are already incentivized to engage in coordinated wage suppression, and affected employees are unlikely to learn of that suppression. The proposed order does nothing to remedy either of those problems. Our recommendations are twofold. First, when the Commission brings enforcement proceedings against co-conspirators that have engaged in wage suppression, it should demand remedies that meaningfully deter future similar behavior. Second, the Commission should prioritize enforcement efforts against larger and relatively more powerful buyers of services that result in upstream wage suppression, over enforcement against small service providers and independent contractors.

Thus far, the FTC has failed to incorporate any analysis of relative economic power in its enforcement against the coordination activities of either sellers or buyers, an omission that acts to entrench and reinforce deep imbalances of power in the "gig economy" and in sectors characterized by "fissured" business entities. For example, the FTC's investigation of low-income, putatively independent contractor truck drivers some years ago lent credibility to the argument that workers' organizing efforts violated antitrust law, an argument that has proven to be a major obstacle to ameliorating some of the most abysmal working conditions in America.¹ Since that time, the FTC has continued to seek enforcement against coordination among individual, low or middle-income service-providers, even though such coordination frequently presents numerous social and economic benefits to sellers, buyers, and the public.² And most recently, the FTC stepped in to support the position of Uber and other firms in the app-based ride services

¹ Sanjukta Paul, "The Enduring Ambiguities of Antitrust Liability for Worker Collective Action," 47 Loy. U. Chi. L.R. 969, 980-84 and notes 40-45 (2016) (describing the adverse consequences that the antitrust threat had for drivers' working conditions and the state of the port trucking sector generally, for decades to come). *See also, e.g.*, "FTC Investigates Port Trucker Organizing Efforts," December 2, 1999 (<https://www.truckinginfo.com/86044/ftc-investigates-port-trucker-organizing-efforts>).

² For example, we note this eloquent comment submitted by a *buyer* in an FTC proceeding against a group of service-providers: "The guild, I found, made the entire process fair and organized - and knowing that the available talent pool was subscribed to a clear and explicit set of practices made the hiring of a qualified professional smooth from beginning to end. I implore the FTC to reconsider this action, as I feel it would be detrimental to the profession, as well as to the instruments entrusted to their care - bought at great cost to the hiring organization." *In the Matter the American Guild of Organists*, FTC File No. 151-0159, #6: (<https://www.ftc.gov/policy/public-comments/2017/04/11/comment-6>).

market,³ opposing the City of Seattle’s decision⁴ to facilitate collective bargaining rights for drivers. In this last instance, opposing individual service-providers’ coordination rights is particularly irrational given that Uber and similar firms themselves coordinate the prices of rides, and benefit from that coordination.⁵

We believe that the FTC ought to consider overall economic power, defined broadly to include wealth and other relevant circumstances, in calibrating its enforcement priorities. While in some cases enforcement will mitigate power imbalances that harm workers, individual service-providers, and small producers who contribute so much to the fabric of society, in many other cases enforcement exacerbates those destructive dynamics. The facts of the instant case illustrate the latter possibility. The co-conspirator respondents in this case dealt with relatively more-powerful buyers (home health agencies, who in turn deal with health insurance companies) on one side, and with relatively less-powerful sellers (individual therapists) on the other. Equipped with greater institutional knowledge, resources, and bargaining power, more powerful downstream buyers should be expected to use the blanket anti-coordination rule against relatively small sellers. Very much like small trucking firms whose rates are effectively dictated by powerful customers such as retail giants, and which seek to ensure reasonable profits by lowering the rates they pay to individual truck drivers, “middlemen” like respondents have every incentive to engage in wage suppression rather than price inflation. Attempts to engage in price inflation are quickly ferreted out by sophisticated buyers, while wage suppression is much more likely to evade detection and censure – as this very case illustrates. In the real world, antitrust norms against price coordination (which on paper are to operate identically on the buyer and the seller side) operate much more strongly to protect such powerful downstream buyers’ interests than small sellers’.

Thus, adequate enforcement to remedy rate *suppression* in such instances is especially recommended as a policy matter in order to help redress these differential –and perverse– incentives on the part of “middlemen” like the therapist staffing companies. The legal authority for using the agency’s full enforcement power to remedy wage and price suppression is well-settled, and amply set out in a comment submitted by some of our colleagues.⁶ For all these reasons, we ask you to reconsider the proposed order.

Respectfully submitted,

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Charlotte Garden, Associate Professor, Seattle University School of Law
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Veena Dubal, Associate Professor of Law, University of California-Hastings

³ BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL, *Chamber of Commerce of the United States of America and Rasier, LLC, v. City of Seattle, et al* (<https://www.ftc.gov/policy/advocacy/amicus-briefs/2017/11/chamber-commerce-united-states-america-rasier-llc-v-city>).

⁴ Charlotte Garden, “The Seattle Solution: Collective Bargaining by For-Hire Drivers & Prospects for Pro-Labor Federalism,” *Harvard Law & Policy Review* (2017).

⁵ Sanjukta Paul, “Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and its Implications,” 38 *Berkeley Jnl. of Labor & Employment Law* 233 (2017).

⁶ See August 6 Comment submitted by the Open Markets Institute, the Roosevelt Institute, and the Economic Policy Institute.