In the Matter of Your Therapy Source, LLC; Neeraj Jindal; and Sheri Yarbray
FTC File No. 171-0134
August 8th, 2018

The labor market suffers from widespread monopsony power: the ability of employers to depress wages unilaterally or collusively (Steinbaum 2018). One important source of employers' power is their ability to outsource work to contractors and thereby deprive workers of legal protections under labor, civil rights, and other statutes (Weil 2014), as well as reduce their wages (Dube and Kaplan 2010). Employer power in the labor market is a particular problem for women, thanks to gender discrimination and the resulting lack of alternative employment opportunities (Webber 2016). Antitrust law can and should play a role in protecting the interests of workers, especially when they lack the full protection of labor and civil rights laws. The FTC can enforce antitrust law against employer power in labor markets arising from anticompetitive conduct and mergers (Ohlhausen 2017).

We commend the FTC for bringing an administrative challenge against Your Therapy Source, LLC and several individuals on account of their collusive behavior to reduce payments to contracted therapists. This case involves a labor market segment characterized by outsourcing of work and gender discrimination (Rau 2018). The FTC's action represents a positive development toward greater enforcement of competition laws on behalf of workers. Given the pervasiveness of anticompetitive behavior by employers in the labor market, we applaud this action and look forward to further enforcement actions against labor market monopsony.

Vigorous public enforcement against the anticompetitive behavior of employers is essential. The Supreme Court's recent decision in *Epic Systems v. Lewis* frustrates workers' ability to vindicate their rights through lawsuits. Employers who require workers to assent to arbitration agreements, and especially arbitration agreements containing class action waivers, can now immunize themselves, in large measure, against private damages actions for violations of antitrust, civil rights, labor, and other laws protecting workers' rights. In the absence of class actions, the typical alternative is not numerous individual lawsuits by workers, but, given the costs of litigation relative to individual damages, few, if any, worker lawsuits.

Considering the importance of strong public antitrust enforcement in labor markets, we believe the proposed settlement order in this proceeding is inadequate. First, the respondents are not required to provide notice to the injured therapists. Workers—including non-employee contractors—often suffer in ignorance of monopsony power wielded by their employers against their interests (Cooper and Kroeger 2017). Second, the respondents do not admit liability, nor do they stipulate to the facts of the conspiracy to depress payments to therapists. Third, the respondents are not required to pay a monetary penalty.

The proposed order fails to advance both the compensatory and the deterrence functions of an effective settlement. The proposed order does not compensate injured workers—and indeed does not even enable them to seek compensation through lawsuits. It also provides no deterrence against anti-worker collusion by other employers and may even embolden other employers to collude together against workers, in light of the settlement's insufficient remedy. By neither imposing monetary penalties nor empowering the injured workers to seek legal redress, the FTC effectively signals to employers that the legal consequences for colluding against workers are likely to be minor.

The FTC has ample room to pursue more effective remedies. The relevant law is clear. The respondents' collusive price suppression is the type of collusion that is typically prosecuted criminally by the

Department of Justice. Horizontal collusion by purchasers against sellers of goods and services, including workers, has long been per se illegal under the antitrust laws (*Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948)). Furthermore, the 2016 Guidance for Human Resource Professionals affirms this per se prohibition and (once again) puts employers on notice that collusion against workers is subject to criminal prosecution. In light of the seriousness and unambiguous illegality of the conduct at issue, the FTC should seek remedies that make the injured workers whole and deter future wage fixing by employers— including through aggressive litigation, if the respondents refuse to settle on terms that would serve those legitimate policy aims.

More broadly, the FTC should use this case as an opportunity to study how economic concentration and market power at different levels of a supply chain affect workers. Health insurance companies dominate the market for contracted home health aides and occupational and physical therapists. The FTC should examine whether the exercise of monopsony power by health insurers against the therapist staffing companies motivated the staffing companies to reduce costs through illegal price fixing. Growing evidence shows that downstream concentration is projected upstream through supply chains and operates to the detriment of workers (Wilmers 2018). The commission should recognize the ability of powerful buyers to hold down prices paid to their (often dependent) suppliers and use its enforcement authority to address that buyer-side power.

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