

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

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<sup>2</sup> As noted in the Statement of the Commission, where an investigation uncovers facts that could give rise to criminal liability, the Commission routinely refers matters to the Department of Justice and state law enforcement agencies for potential criminal prosecution. Once we make a referral, the other agency makes the ultimate determination as to whether or not to proceed criminally. No inference can or should be made as to whether we referred this matter for criminal prosecution based on the Commission's action in this case.

<sup>3</sup> See, e.g. Marshall Steinbaum et al., Pub. Cmt. No. 00003, *Re Your Therapy Source, LLC*, Neeraj Jindal, and Sheri Yarbray at 2 (Aug. 8, 2019) [https://www.ftc.gov/system/files/documents/public\\_comments/2018/08/00003-147707.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/08/00003-147707.pdf) (“[T]he FTC should seek remedies that make the injured workers whole deter future wage fixing by employers”); Sanjukta Paul et al., Pub. Cmt. No. 00107, *Re Your Therapy Source et al.* 1 (Aug. 30, 2019) [https://www.ftc.gov/system/files/documents/public\\_comments/2018/08/00107-147707.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/08/00107-147707.pdf)

would be the best use of limited Commission resources ~~open~~ a settlement that was negotiated largely before the Commissioners participating today arrived at the FTC<sup>4</sup>

I echo commenters' calls for dedicating more of the Commission's limited resources to investigating and bringing more cases in which the anticompetitive harms fall on workers, especially as the trend toward gig employment accelerates. Although monopsony issues were not evident in this case, I agree with the commenters that monopsony power in the healthcare industry (and more broadly) should be a high priority for the agency. It is important that we consider the entire market ecosystem including the role of downstream consolidation on upstream labor markets in determining where to focus enforcement efforts. We should prioritize enforcement against the market participants ~~wield~~ with the most market power, especially "larger and relatively more powerful buyers of services that result in upstream wage suppression,"<sup>7</sup> as one comment suggested.

Finally, I note that wage-fixing cases such as this one are not and should not be the only way the Commission addresses harms imposed on workers. For example, I am deeply troubled by the pervasive use of non-compete clauses in employer-employee contracts, and I support calls for the Commission to consider banning such conduct by ~~the~~ <sup>8</sup> The Commission should also consider whether non-poach provisions in franchise agreements that limit competition and worker mobility should be banned.

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<sup>4</sup> The case began and was developed before the Commissioners participating in this vote arrived at the FTC and before staff could reasonably have been expected to anticipate our particular priorities and views on enforcement. While I share Commissioner Chopra's general view about the negotiating posture the Commission should adopt in settlement discussions, I will apply these principles to cases going forward.

<sup>5</sup> See, e.g. Cmt. of Marshall Steinbaum et al. at 1 ("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."); Cmt. of American Antitrust Institute at 1 ("AAI applauds the Commission for challenging an alleged naked horizontal agreement, and invitations to collude, among therapist staffing companies to reduce therapist pay rates.").

<sup>6</sup> See, e.g. American Antitrust Institute, Pub. Cmt. No. 00106, *re Your Therapy Source et al.* 2 (Aug. 30, 2019), [https://www.ftc.gov/system/files/documents/public\\_comments/2018/08/0010623.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/08/0010623.pdf) ("[I]t is particularly important to deter per se antitrust violations that harm buyer competition among employers to hire and retain workers . . . in the healthcare industry, where consolidation throughout the supply chain (among insurers, pharmacy benefit managers, group purchasing organizations, health pharmacies, and generic and branded drug manufacturers, for example) has opened the door to all manner of strategic anticompetitive behavior."); Michael Kades & Raksha Kopparam, Washington Center for Equitable Growth, Pub. Cmt. No. 00104, *re Your Therapy Source et al.* at 2 (Aug. 30, 2018), [https://www.ftc.gov/system/files/documents/public\\_comments/2018/08/0010424.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/08/0010424.pdf) ("The Federal Trade Commission is right to focus on stopping anticompetitive activity in an industry in which monopsony power is prevalent."); Cmt. of Marshall Steinbaum et al. at 2 ("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. . . Growing evidence shows that downstream concentration is projected upstream through supply chains and operates to the detriment of workers. 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 this buyer power.").

<sup>7</sup> Cmt. of Sanjukta Paul et al. at 1

<sup>8</sup> See Open Markets Institute et al., *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses* (Mar. 15, 2019), <https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf>