

## Before the Federal Trade Commission

In re:  
The Matter of Your Therapy Source, LLC;  
Neeraj Jindal; and Sheri Yarbray

FTC Matter No. 171-0134

The Washington Center for Equitable Growth commends the Federal Trade Commission on its decision to challenge the agreement by Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray to lower therapists' wage rates. A growing body of research identifies employer-monopsony power over wages as a problem. When anticompetitive conduct creates monopsony power, it is illegal under the antitrust laws. Although antitrust enforcement has traditionally focused on harms to consumers, workers have the same protections from violations of antitrust laws as consumers. This action is a step forward in protecting workers from antitrust violations, especially in an occupation dominated by women. Occupations and industries with a predominantly female labor force have lower wages than similar industries with a traditionally male labor force, which means downward pressure on wages due to anticompetitive conduct has even greater damaging consequences.<sup>1</sup>

Since 1979, wages among the lower income quartiles of the labor force have either stagnated or declined.<sup>2</sup> Monopsony power—the ability of an employer to set wages due to a lack of competition for workers—is an identified cause of this constraint on wages, and research indicates that monopsony power has been growing over the past three decades.<sup>3</sup> Monopsony power allows companies to set wages below the level that would exist in a competitive labor market as a means to increase profits.<sup>4</sup> Pervasive monopsony power reduces employee wages and decreases the labor supply, which can have a deleterious effect on economic growth.<sup>5</sup> Lower wages also lead to a decline in disposable income, thus suppressing consumer demand.<sup>6</sup> This labor market structure contributes to unemployment and decreases labor output while reducing consumer choices—all of which limit economic dynamism and constrain U.S. economic growth.

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<sup>1</sup> Glynn, Sarah Jane, "Gender Wage Inequality: What We Know and How We Can Fix It," Washington, DC: Washington Center for Equitable Growth, April 2018.

<sup>2</sup> Liu, Patrick, Jay Shambaugh, Ryan Nunn, and Greg Nantz, "Thirteen Facts about Wage Growth," Washington DC: The Hamilton Project at The Brookings Institution, September 2017.

<sup>3</sup> Azar, José, Ioana Marinescu, and Marshall Steinbaum, "Labor Market Concentration," Cambridge, MA: National Bureau of Economic Research, December 2017 at <https://doi.org/10.3386/w24147>.

<sup>4</sup> Bahn, Kate, "Understanding the importance of monopsony power in the U.S. labor market" *Washington Center for Equitable Growth*, (July 5, 2018) at <https://equitablegrowth.org/understanding-the-importance-of-monopsony-power-in-the-u-s-labor-market/>

<sup>5</sup> Naidu, Suresh and Posner, Eric A. and Weyl, E. Glen, "Antitrust Remedies for Labor Market Power" (February 23, 2018), *Harvard Law Review*, Forthcoming; University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 850; University of Chicago, Public Law Working Paper No. 665. <http://dx.doi.org/10.2139/ssrn.3129221>.

<sup>6</sup> Naidu, Suresh and Posner, Eric A. and Weyl, E. Glen, "More and more companies have monopoly power over workers' wages. That's killing the economy," *VOX*, (April 6, 2018) at <https://www.vox.com/the-big-idea/2018/4/6/17204808/wages-employers-workers-monopsony-growth-stagnation-inequality>

This is why Equitable Growth supports an increased focus on antitrust violations that impact labor markets.<sup>7</sup>

The Complaint alleges that respondents agreed to lower the rates for therapists and attempted to induce other staffing agencies to join their agreement. The Complaint further alleges the agreement was not ancillary to a procompetitive justification. Therefore, the agreement is a per se violation of the antitrust laws, whether or not it had any actual effect.

Conduct affecting home therapy workers, such as those targeted by this agreement, deserves careful scrutiny. Research by Douglas Webber indicates that monopsony power can suppress long-term wages in the pursuit of profit growth.<sup>8</sup> Webber's analysis shows that wages in the healthcare and administrative industries are the least competitive, giving employers the power to set wages below competitive rates. The Federal Trade Commission is right to focus on stopping anticompetitive activity in an industry in which monopsony power is prevalent.

Commissioner Rohit Chopra asked for public comments regarding the use of restitution or admission of liability as an effective remedy in a consent decree. Equitable Growth believes that the Federal Trade Commission should periodically evaluate its policies on remedies. An admission of liability or equitable monetary remedies (disgorgement and restitution) are important remedies that increase the effectiveness of the agency's orders. If parties will not agree to those remedies, however, the Federal Trade Commission will expend substantial resources in litigation. As long as the remedies in a consent decree are effective, a settlement can make vital resources available for the Federal Trade Commission to pursue other antitrust enforcement matters.

Requiring the admission of liability is a powerful yet severe tool in preventing repeat offenses. Since 2013, the U.S. Securities and Exchange Commission has required various forms of admissions in certain cases with mixed success.<sup>9</sup> The Federal Trade Commission should seek an admission of liability when it is necessary to prevent recidivism or deter others from engaging in similar behavior.

Equitable monetary remedies already play an important role in the Federal Trade Commission's consumer protection agenda, and the Federal Trade Commission has used them in a few competition matters or cases.<sup>10</sup> As a threshold matter, the agency can only seek monetary remedies if victims have been harmed or if respondents earned illegal profits. When that threshold is met, the Federal Trade Commission should consider whether it needs to seek disgorgement and restitution more frequently. Legal developments, such as forced arbitration clauses, have limited the ability of private plaintiffs to recover monetary losses. Therefore,

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<sup>7</sup> Kades, Michael, "Anticompetitive mergers: They are not just a threat to U.S. consumers anymore" *Washington Center for Equitable Growth*, (June 20, 2018) at <https://equitablegrowth.org/anticompetitive-mergers-they-are-not-just-a-threat-to-u-s-consumers-anymore/>

<sup>8</sup> Webber, Douglas A., "Firm market power and the earnings distribution," *Labour Economics*, Vol. 35, 2015, 123-134.

<sup>9</sup> See generally Verity Winship & Jennifer K. Robbenholt, "Admissions of Guilt in Civil Enforcement," forthcoming *Minnesota Law Review*, vol. 101 at 25. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2942279](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942279)

<sup>10</sup> See *In the Matter of Mylan*, Docket Number C-4590, available at <https://www.ftc.gov/enforcement/cases-proceedings/161-0102/mylan-nv-matter>. The Commission obtained \$100 million in disgorgement after challenging a vertical exclusive licensing agreement that allowed the company to raise prices 2,000 percent to 3,000 percent on two pharmaceutical products. It does not appear that any other company has tried a similar strategy, which absent antitrust enforcement would have been highly profitable.

consent orders without monetary remedies may be less effective in deterring illegal conduct than in the past. At the same time, each case depends on the amount of harm incurred and resources required balanced against their benefits of the remedy.

Respectfully Submitted,

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