

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL TRADE COMMISSION**

In the Matter of Your Therapy Source, LLC et al. | FTC File No. 171-0134

**COMMENTS OF THE  
AMERICAN ANTITRUST INSTITUTE**

The American Antitrust Institute (AAI)<sup>1</sup> appreciates the opportunity to respond to the unanimous Commission’s invitation for public comment in *Your Therapy Source, LLC, et al.*, FTC File No. 171-0134 (filed July 31, 2018). AAI also responds to Commissioner Chopra’s invitation to comment on whether it is advisable for the Commission to resolve administrative challenges without any notice or restitution to those targeted by the unlawful conduct, nor any admission of facts or liability, especially in matters involving the gig economy.<sup>2</sup>

**I. Introduction**

AAI applauds the Commission for challenging an alleged naked horizontal agreement, and invitations to collude, among therapist staffing companies to reduce therapist pay rates. The Commission plays a vital role in protecting workers by policing mergers and conduct that have upstream anticompetitive effects harming employees and individual sellers.<sup>3</sup> We agree with Bureau of Competition Director Bruce Hoffman that

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<sup>1</sup> AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information, see <http://www.antitrustinstitute.org>. For questions or comments regarding these comments, contact Randy Stutz, [rstutz@antitrustinstitute.org](mailto:rstutz@antitrustinstitute.org).

<sup>2</sup> Statement of Rohit Chopra, Comm’r, Fed. Trade Comm’n, In the Matter of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray, 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](https://www.ftc.gov/system/files/documents/public_statements/1396706/1710134_your_therapy_source_statement_of_commissioner_chopra_7-31-18.pdf).

<sup>3</sup> See RANDY M. STUTZ, THE EVOLVING ANTITRUST TREATMENT OF LABOR-MARKET RESTRAINTS: FROM THEORY TO PRACTICE, AM. ANTITRUST INST. (2018), <https://www.antitrustinstitute.org/sites/default/files/>

agreements among competitors to fix wages or fees paid to workers should be treated just like agreements among competitors to fix product prices.<sup>4</sup>

AAI has no reason to doubt that the Commission acted appropriately in using its administrative powers to obtain a cease-and-desist order by way of a negotiated consent decree in this matter. Given the egregious conduct at issue, however, it is worthwhile to consider whether the Commission could or should have gone further. As the agencies' Antitrust Guidance for Human Resource Professionals makes clear, it is particularly important to deter *per se* antitrust violations that harm buyer competition among employers to hire and retain workers.<sup>5</sup> And furthermore, it is particularly important to do so in the healthcare industry, where consolidation throughout the supply chain (among insurers, pharmacy benefit managers, group purchasing organizations, retail pharmacies, and generic and branded drug manufacturers, for example) has opened the door to all manner of strategic anticompetitive behavior.<sup>6</sup>

We write to emphasize the importance of ensuring that public civil, private civil, and criminal sanctions operate cohesively to insure the antitrust laws' twin remedial goals

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AAI%20Labor-Antitrust%20White%20Paper\_0.pdf; DIANA MOSS, ANTITRUST AND INEQUALITY: WHAT ANTITRUST CAN AND SHOULD DO TO PROTECT WORKERS, AM. ANTITRUST INST. (2017), <https://www.antitrustinstitute.org/content/antitrust-and-inequality-what-antitrust-can-and-should-do-protect-workers>.

<sup>4</sup> See Press Release, Fed. 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) (statement of Bruce Hoffman, Director, Bureau of Competition), <https://www.ftc.gov/news-events/press-releases/2018/07/therapist-staffing-company-two-owners-settle-charges-they> [hereinafter "Press Release"]; see also Dep't. of Justice Antitrust Div. & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals 4* (2016) (naked wage-fixing and no-poaching agreements "eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers") [hereinafter "HR Guidance"].

<sup>5</sup> See HR Guidance, *supra* note 4, at 2-3.

<sup>6</sup> See THOMAS L. GREANEY & BARAK D. RICHMAN, PART I: CONSOLIDATION IN PROVIDER AND INSURER MARKETS: ENFORCEMENT ISSUES AND PRIORITIES, AM. ANTITRUST INST. (2018), [https://www.antitrustinstitute.org/sites/default/files/AAI\\_Healthcare%20WP%20Part%20I\\_6.12.18.pdf](https://www.antitrustinstitute.org/sites/default/files/AAI_Healthcare%20WP%20Part%20I_6.12.18.pdf); THOMAS L. GREANEY & BARAK D. RICHMAN, PART II: PROMOTING COMPETITION IN HEALTHCARE ENFORCEMENT AND POLICY: FRAMING AN ACTIVE COMPETITION AGENDA, AM. ANTITRUST INST. (2018), [https://www.antitrustinstitute.org/sites/default/files/AAI\\_Healthcare%20WP%20Part%20II\\_6.18.18.pdf](https://www.antitrustinstitute.org/sites/default/files/AAI_Healthcare%20WP%20Part%20II_6.18.18.pdf).

of compensation and deterrence, particularly in *per se* cases. In the sections that follow, we elaborate on our views in the context of this particular matter and offer suggestions for the Commission on how it can best serve competition, consumers, and workers in our interconnected system of private, state, and (dual-agency) federal enforcement. We also encourage the Commission to consider amending Part III of the consent order to require respondents to provide a copy of the Order and Complaint to any independent-contractor therapists retained by Your Therapy Source and to independent-contractor and employee therapists retained or controlled by Integrity during the period of the alleged conspiracy.

## **II. The Commission’s Proposed Consent Agreement Should be Considered in Light of the Federal Antitrust Agencies’ Commitment to Protect Labor-Market Competition and Workers**

In 2016, the Antitrust Division of the U.S. Department of Justice (DOJ) and the FTC jointly released HR Guidance stating unequivocally that “naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are *per se* illegal under the antitrust laws.”<sup>7</sup> The Guidance also pledged that, “Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements,” and that it “will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each others’ employees.”<sup>8</sup> “And if that investigation uncovers a naked wage-fixing or no-poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.”<sup>9</sup>

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<sup>7</sup> HR Guidance, *supra* note 4, at 3.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.*

In a speech on January 19, 2018, Assistant Attorney General Makan Delrahim stated that the DOJ “has a handful of criminal cases in the works” and that in “the coming couple of months you will see some announcements, and to be honest with you, I’ve been shocked about how many of these there are, but they’re real.”<sup>10</sup> General Delrahim added that, “If the activity has not been stopped, and continued from the time when the DOJ’s policy was made, a year and a couple of months ago, we’ll treat that as criminal.”<sup>11</sup> On May 17, 2018, in remarks delivered at the American Bar Association’s Antitrust in Healthcare Conference, DOJ Deputy Assistant Attorney General Barry Nigro stated that the Division was investigating a criminal no-poach agreement restricting competition for employees in the healthcare industry in particular.<sup>12</sup>

The agencies’ HR Guidance, and Antitrust Division speeches, have already had concrete, salutary deterrence effects. In their aftermath, and in the aftermath of the attendant, widespread media coverage, the defense bar has sprung into action to educate – and warn – clients of the severe consequences of entering into naked anticompetitive agreements that harm workers.<sup>13</sup>

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<sup>10</sup> Lauren Norris Donahue, Brian J. Smith & Gina A. Jenero, *Assistant Attorney General Announces that DOJ Antitrust Division is Building Criminal Cases Against Companies for Anti-Poaching Agreements*, K&L GATES (Jan. 31, 2018), <http://www.klgates.com/assistant-attorney-general-announces-that-doj-antitrust-division-is-building-criminal-cases-against-companies-for-anti-poaching-agreements-01-31-2018/> (repeating quotes transcribed in Matthew Perlman, *Delrahim Says Criminal No-Poach Cases Are In The Works*, LAW360.COM (Jan.19, 2018)).

<sup>11</sup> *Id.*

<sup>12</sup> Barry Nigro, Dep’y Ass’t Att’y Gen., Dep’t of Justice Antitrust Div., Keynote Remarks Delivered at the American Bar Association’s Antitrust in Healthcare Conference (May 17, 2018), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-keynote-remarks-american-bar>.

<sup>13</sup> See, e.g., PilieroMazza PLLC, *No-Poaching Agreements: You Could Be Criminally Liable* (July 12, 2018); Tonkon Torp LLP, *Wage-Fixing and No-Poaching Agreements – Criminal Prosecution Is a Real Risk* (Jul. 10, 2018); K&L Gates LLP, *Employers Beware: Time for a New “A-Poach”* (Mar. 13, 2018), collectively available at Search of Publications in the Last Year, JDSUPRA.COM (navigate to “Publications”; search “criminal no-poach”).

Since the publication of the HR Guidance in 2016, however, the public has not seen the promised, severe consequences from government enforcers. While the private plaintiffs' bar has begun to actively litigate for damages and injunctive relief on behalf of injured workers,<sup>14</sup> no criminal cases have been announced by the DOJ.<sup>15</sup> And to our knowledge, the consent agreement in this matter is the first such administrative action brought by the FTC since the HR Guidance was issued.

The Commission's proposed consent order in this matter deserves careful attention insofar as it rests against this important policy and enforcement backdrop.

### **III. Negotiated Consent Agreements Containing Cease-and-Desist Orders Are Typically an Appropriate and Efficient Use of Scarce Commission Resources**

Administrative exercises of cease-and-desist authority to stop and prevent future anticompetitive practices are at the core of the FTC's identity and mission. Although some may believe mere promises to stop breaking the law, and not to do it in the future, are not especially helpful when viewed in isolation, the FTC's cease-and-desist authority accomplishes much more. Most important, the Commission's use of cease-and-desist authority creates "specific deterrence" by increasing the monetary penalties associated with recidivism.<sup>16</sup>

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<sup>14</sup> See Stutz, *supra* note 3, at 6, n.27 (citing private cases).

<sup>15</sup> In April, the DOJ did announce a civil settlement alleging that railroad equipment manufacturers unlawfully entered a naked no-poaching agreement covering skilled employees. The alleged conspiracy began prior to the 2016 publication of the HR Guidance. See Press Release, Dep't of Just., Antitrust Div., *Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees* (April 3, 2018), <https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete>.

<sup>16</sup> "Specific deterrence refers to how an *actual* wrongdoer responds to an *actual* lawsuit against it: does the wrongdoer stop the misbehavior after it gets caught? General deterrence, by contrast, refers to how potential wrongdoers respond to a potential lawsuit: do potential wrongdoers decide not to commit misconduct to begin with because they are afraid of lawsuits against them?" Brian T. Fitzpatrick, *Do Class Actions Deter Misconduct?*, in *THE CLASS ACTION EFFECT: FROM THE LEGISLATOR'S IMAGINATION TO TODAY'S USES AND PRACTICES* 181, 184 (Catherine Piché, ed., Éditions Yvon Blais, Montreal, forthcoming 2018).

While the Commission does not ordinarily have authority to impose civil fines on first-time offenders, firms that are made subject to cease-and-desist orders become subject to civil monetary penalties under the FTC Act and Clayton Act if they violate the order.<sup>17</sup> Moreover, consent agreements containing cease-and-desist orders are typically accompanied by compliance reporting obligations, notice requirements, and monitoring provisions that afford access to documents and interviews, which further decreases the risk of recidivism and can aid in future investigations.

The FTC's administrative process works as intended, however, only when it fits cohesively within the broader U.S. antitrust enforcement scheme. Congress created the FTC in 1914 to augment existing antitrust enforcement mechanisms. It was designed to "exercise the trained judgment of a body of experts" when dealing with "special questions concerning industry."<sup>18</sup> The agency was conceived as an antitrust prosecutor, adjudicator, and "analytical 'think tank'" that would "facilitate the development of antitrust policy while simultaneously enhancing certainty and accuracy in the decision of specific antitrust cases."<sup>19</sup>

The U.S. enforcement scheme can afford to allow the FTC to devote its scarce resources to its core mission only because there are other key components of the scheme that fulfill other important roles. In particular, for the FTC administrative process to function effectively, it must be complemented by private enforcement and DOJ criminal enforcement, so that the threat of treble damages, criminal fines, and jail sentences,

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<sup>17</sup> See Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l); Section 11(l) of the Clayton Act, 15 U.S.C. § 21(l).

<sup>18</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935) (quoting S. Rep. No. 63-597, at 10-11 (1914)).

<sup>19</sup> D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 *Antitrust L.J.* 319, 319 (2003).

respectively, create “general deterrence.”<sup>20</sup> So long as there are realistic threats of severe sanctions to deter future wrongdoing by *other* putative defendants who may be considering strategic anticompetitive conduct, the FTC is free to exercise its cease-and-desist authority to “facilitate the development of antitrust policy” and address the “special questions concerning industry.”

#### **IV. The Commission Should Factor General Deterrence Considerations into Its Exercise of Administrative Authority in Certain Cases**

AAI is concerned that the U.S. enforcement system overall may not be providing sufficient deterrence in this particular matter. Although, generally speaking, the application of the antitrust laws to labor markets can present novel analytical challenges, which are precisely the kind of challenges the FTC was designed to address,<sup>21</sup> the conduct alleged in the present matter is clearly illegal. The administrative complaint sets forth an obvious naked agreement and clear *per se* violation, with strong evidence. When challenged conduct lacks nuance and is unequivocally anticompetitive and irredeemable, such as price-fixing, market allocation, bid-rigging, wage-fixing, and no-poaching agreements, general deterrence and compensation are the overall enforcement system’s key deliverables.

We agree with and applaud what we take to be the underlying premise of Commissioner Chopra’s statement, which is that the Commission should be actively considering how it can be more cognizant and accommodating of the needs of the U.S. antitrust enforcement system as a whole. Under the present circumstances, we are

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<sup>20</sup> See *supra* note 16.

<sup>21</sup> In a recent white paper, AAI has advocated that the FTC’s Bureau of Economics should allocate resources to produce an Economic Report, Issue Paper, Working Paper, or Discussion paper exploring institutional steps necessary to quickly and effectively ramp up enforcement to protect labor-market competition. It has also encouraged the FTC Office of Policy Planning to produce a workshop and report. See Stutz, *supra* note 3, at 20.

concerned that *both* federal agencies may not have given “general deterrence” the attention it deserves where naked wage-fixing agreements are concerned. Accordingly, AAI respectfully poses several questions to the Commission in the spirit of improving the broader enforcement system and promoting competition in labor markets and in the healthcare industry.

**A. Why Wasn’t This Agreement Prosecuted Criminally?**

Neither the FTC nor the DOJ has publicly explained why this matter was not prosecuted as a criminal case. The HR Guidance and Antitrust Division speeches state that, going forward, as of the HR Guidance’s 2016 publication date, the DOJ will exercise its discretion to prosecute naked wage fixing criminally. According to the complaint, the alleged conspiracy in this matter was initiated on March 9, 2017, when an agent for Mr. Jindal sent a text message to Ms. Yarbray.<sup>22</sup>

We are not privy to internal or inter-agency deliberations, of course, nor the details of the investigation, but Section 16(b) of the FTC Act requires the FTC to refer cases to the DOJ “[w]henver the Commission has reason to believe that any person, partnership, or corporation is liable for a criminal penalty.”<sup>23</sup> In this case, it is unclear to the public whether the FTC determined that it did not have reason to believe the alleged agreement constituted a criminal offense, or if instead it referred the case for criminal prosecution and the DOJ chose not to prosecute.

AAI recognizes that many factors go into the exercise of prosecutorial discretion

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<sup>22</sup> To be sure, the complaint notes that therapist staffing companies may use an employment model or an independent contractor model in their relationships to therapists, and the complaint does not clarify which model is used by each defendant, or whether it is the same model. Compl. ¶ 9, at 2; *but see* Analysis in Aid of Public Comment at 1 (“Staffing companies generally contract with therapists on a non-exclusive basis”). However, the answers to these questions do not affect the irredeemable nature of fixing therapists’ “pay rates.”

<sup>23</sup> Section 16(b) of the Federal Trade Commission Act, 15 U.S.C. § 56(b).



to bring a criminal case, including the DOJ's substantial resource constraints. However, if the FTC did refer the case for criminal prosecution, and the DOJ wrongly "took a pass," then that would be very regrettable for workers. If powerful employers perceive the criminal provisions of the HR Guidance to be an empty threat, then the short-term deterrence gains from speeches and writings will yield to the cold business reality that executives would do better to break the law and get caught than to play by the rules.

We encourage the agencies to make efforts to improve transparency around the decision not to prosecute this matter as a criminal a case.

#### **B. Why Did the Commission Forego Disgorgement or Restitution?**

Although the FTC has rarely pursued monetary equitable remedies such as disgorgement and restitution in the past, its policy is to be willing to do so in appropriate cases.<sup>24</sup> Equitable remedies are designed to make victims whole and not necessarily to provide deterrence, but they nonetheless can have deterrence value insofar as they reduce the profitability of anticompetitive behavior, as the Commission has recognized.<sup>25</sup> Particularly here, where the Commission was confronted with (at least) (1) a clear *per se* violation, (2) no criminal prosecution by the DOJ, and (3) its joint commitment in the HR Guidance to severely punish naked wage-fixing, the deterrence value of a monetary equitable remedy might have been especially high.

In 2012, the Commission withdrew its Policy Statement on Monetary Equitable Remedies in Competition Cases because the statement was overly restrictive, opting

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<sup>24</sup> See Statement of the Fed. Trade Comm'n, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases 1 (July 31, 2012), [https://www.ftc.gov/system/files/documents/public\\_statements/296171/120731commstmt-monetaryremedies.pdf](https://www.ftc.gov/system/files/documents/public_statements/296171/120731commstmt-monetaryremedies.pdf) [hereinafter "Policy Statement"].

<sup>25</sup> *Id.* ("disgorgement and restitution can be effective remedies in competition matters, both to deprive wrongdoers of unjust enrichment and to restore their victims to the positions they would have occupied but for the illegal behavior").

instead to rely on existing case law.<sup>26</sup> Nevertheless, the Commission noted at the time that the withdrawn Policy Statement “will continue to inform our future consideration of the use of monetary equitable remedies.”<sup>27</sup> The Policy Statement, which therefore retains some relevance, focuses on three factors, including “(1) whether the underlying violation is ‘clear’; (2) whether there is a reasonable basis to calculate the remedial payment; and (3) whether remedies in other civil or criminal litigation are likely to accomplish fully the purposes of the antitrust laws.”<sup>28</sup>

Here, it seems possible that these factors could militate in favor of monetary equitable relief, even under what has been deemed an overly-restrictive test. The underlying violation seems “clear,” and there are no obviously insurmountable challenges to calculating remedial payments. No criminal litigation is apparently forthcoming. Unless civil litigation is likely forthcoming, or the damages and ill-gotten gains are too small to justify the use of FTC resources to pursue them in court, publicly available information suggests monetary equitable remedies may otherwise have been worthwhile in this matter, particularly given their general deterrence value.

In perhaps a tacit acknowledgement of this point, Bureau Director Hoffman stated in the Press Release that the FTC “seek[s] relief commensurate with the conduct, the harm to workers, and—where appropriate—any ill-gotten benefits received by the firms engaged in the illegal activities.”<sup>29</sup> Presumably, then, the Commission considered restitution and disgorgement of ill-gotten gains in this matter and concluded that

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<sup>26</sup> Policy Statement, *supra* note 24, at 1.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.* at 1.

<sup>29</sup> Press Release, *supra* note 4.

monetary equitable relief was inappropriate.

Not being privy to the Commission's deliberations or the details of the investigation, we have no basis to question the Commission's decision. However, we encourage the Commission to make efforts to improve transparency around why it chose to forego monetary equitable relief in this matter. In future matters, AAI believes monetary equitable relief ordinarily should not be necessary in administrative actions, but that it can be a critical tool in certain instances, including when private, state, or other federal enforcers are unlikely to deliver adequate deterrence.

**C. Do Private Plaintiffs Have Sufficient Enforcement Incentives in this Matter?**

When neither criminal prosecution nor monetary equitable relief is available, the U.S. system's primary remaining source of general deterrence, as well as victim compensation, is private treble-damages class actions. Private class actions also serve a variety of other critical functions that free-up scarce agency resources. Rule 23, for example, ensures that members of the class receive notice of the alleged violation. Successful class claims also can obviate the need for agencies to expend resources seeking monetary equitable relief.

In the present matter, Bureau Director Hoffman noted that the Commission, in cooperation with the Texas Attorney General's Office, was "successful in stopping this conduct quite quickly."<sup>30</sup> Depending on how quickly (the complaint says when the conspiracy began but not when it ended), one might speculate that the total amount of monetary damages may be relatively small. Indeed, if that were the case, it might help explain the Commission's decision to forego monetary equitable relief, and perhaps even

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<sup>30</sup> *Id.*

the DOJ's decision to forego criminal prosecution, if indeed it did so.

However, insofar as the Commission's cease-and-desist order obviates the need for injunctive relief, the absence of meaningful damages would leave no remaining incentives for a private class action. If that is the case, then the Commission should recognize that none of the benefits of private class claims will be brought to bear accordingly.

To the extent that neither criminal prosecution nor monetary equitable relief will be forthcoming in this matter, AAI encourages the Commission to consider whether the proposed consent order can be amended to more fully recognize and promote the role of private enforcement, without unduly burdening Commission resources. The Commission has recognized the value of private enforcement and supported it in the past, including by filing amicus briefs highlighting the importance of private plaintiffs in the U.S. system.<sup>31</sup> And the Supreme Court has recognized that private and federal enforcement were designed to work together as parts of one integrated enforcement scheme.<sup>32</sup>

**V. The Commission Should Consider Amending the Notice Provision of the Consent Order to Promote Private Enforcement and Strengthen “General Deterrence”**

Ordinarily, special notice provisions, monetary equitable relief, or fact or liability admissions<sup>33</sup> should be unnecessary in FTC administrative orders, not because these aspects of enforcement aren't critical, but because the U.S. system tasks other actors with

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<sup>31</sup> See, e.g., Brief for the United States as Amicus Curiae Supporting Respondents 33, *American Exp. Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) (filed Jan. 1, 2013) (“Private actions are a vital supplement to government enforcement not only under the antitrust laws, but also under a wide range of other federal statutes.”).

<sup>32</sup> See *California v. American Stores*, 495 U.S. 271, 284 (1990) (private enforcement not only affords relief but “serve[s] as well the high purpose of enforcing the antitrust laws” and “was an integral part of the congressional plan for protecting competition”).

<sup>33</sup> See Statement of Commissioner Chopra, *supra* note 2.

serving general deterrence goals (which, in turn, frees the FTC to pursue its own unique mission). Here, however, because the DOJ is not prosecuting criminally and it is unclear whether private enforcers will have sufficient incentives to bring class claims, the FTC is in a unique position as the steward of this investigation and remedy.

If class claims are unlikely to be forthcoming, AAI believes the FTC should take reasonable steps to help facilitate *some* victim compensation and general deterrence through private enforcement. Otherwise, there would be a significant risk that the U.S. enforcement system's overarching remedial goals would be significantly underserved in an area law that is critically important to workers. Such a result would send the wrong message to other employers who may be considering collusive behavior to enrich themselves at the expense of their employees or vulnerable independent contractors.

**A. The Notice Provision of the Consent Order Should Be Strengthened**

Strengthening the notice provision of the proposed agreement is one way the Commission might be able to better serve overarching remedial goals without unduly taxing Commission resources or undermining the prospect of settlement. By requiring the respondents to notify all potential victims of the anticompetitive conduct in this case, the Commission arguably could increase the likelihood that one or more victims will bring an individual private treble damages action, thereby increasing general deterrence and facilitating at least limited compensation.

The complaint does not specify whether Your Therapy Source and Integrity retain therapists through employment or independent contractor relationships, but Part III of the proposed order requires notice only to employees of Your Therapy Source. The Commission should consider expanding Part III to require notice to any Your Therapy

Source independent contractors affected by the alleged conspiracy during the relevant period and for the next three years. It should also consider requiring respondents to provide notice to any affected employees or independent contractors who were affiliated with Integrity during the alleged conspiracy period. Indeed, it may be wise as a general matter for the Commission to revisit its notice policies where “gig economy” workers are concerned, as the distinction between employees and independent contractors in this sphere is increasingly slippery.<sup>34</sup>

**B. Insisting on Admissions of Key Facts or Liability May Do More Harm than Good**

AAI is skeptical that insisting on admissions of key facts or liability as a condition of settlement in consent agreements would be advisable in this or other matters. Absent unusual circumstances, insisting on such admissions likely would derail settlement, because respondents would be left with very little to lose by taking their chances in administrative litigation or court. Particularly where, as here, the Commission apparently can obtain all the relief through settlement that it could hope to obtain if it were to litigate *and win*, insisting on such admissions does not seem to pass the cost-benefit test. Foregoing admission of key facts or liability seems like a comparatively small price to pay for the gain in scarce agency time and resources.

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Thank you for considering the views of the American Antitrust Institute.

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<sup>34</sup> See Marina Lao, *Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption*, 51 UC Davis L. Rev. 1543, 1543 (2018) (“Gig economy workers straddle the line between employee and independent contractor and do not currently receive the benefits and protections that are tied to employment.”).