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Dear Federal Trade Commission,

We submit this comment regarding the consent decree in *In The Matter of Your Therapy Source, LLC; Neeraj Jindal; and Sheri Yarbray*, FTC File No. 171-0134.

Wages have been stagnant for several years despite a growing economy, low unemployment and rising corporate profits.<sup>1</sup> Two reasons for sluggish wage growth—the prevalence of “fissured” work and increasing labor market monopsony power—are at play in this case and will continue to depress wages until agencies, including the FTC, aggressively enforce the law.

According to data from the Bureau of Labor Statistics, one in ten U.S. workers (15.5 million workers) finds her primary job in a “nonstandard”—i.e., subcontracted, temporary, on-call, on-demand, or freelance—work arrangement.<sup>2</sup> These jobs are often popularly referred to as “gig work,” and the dissolution of a clear relationship between employer and worker is often called the “fissured workplace.”<sup>3</sup> The use and misuse of these nonstandard work arrangements shifts economic risk away from employers and onto workers, whose livelihoods become more acutely subject to the vagaries of markets, and facilitates the exercise of monopsony power. Without robust enforcement of antitrust laws, this sizable portion of the American workforce is likely to face depressed wages and additional financial burdens. A failure to enforce these laws also creates further incentives for employers to outsource work to subcontractors like staffing companies, and to label workers as independent contractors, depriving those workers of core labor protections. The labor market trends demonstrated in the instant case emphasize that robust enforcement in the “fissured,” “gig,” or “nonstandard” work sector is crucial to ensuring economic opportunity for these 15.5 million workers.

### **Fissured Work Puts Downward Pressure on Wages**

The “fissured” workplace refers to the practice of outsourcing work – to subcontractors like staffing companies or to independent contractors.<sup>4</sup> As discussed in

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<sup>1</sup> Drew Desilver, *For Most U.S. Workers, Real Wages Have Barely Budgeted in Decades*, PEW RESEARCH CENTER, Aug. 7, 2018, <http://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budgeted-for-decades/>.

<sup>2</sup> Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements*, May 2017, <https://www.bls.gov/news.release/pdf/conemp.pdf> (hereafter “CWS.”)

<sup>3</sup> DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE ABOUT IT* (2014).

<sup>4</sup> David Weil, *How to Make Employment Fair in an Age of Contracting and Temp Work*, HARV. BUS. REV., Mar. 24, 2017, <https://hbr.org/2017/03/making-employment-a-fair-deal-in-the-age-of-contracting-subcontracting-and-temp-work>.

detail below, regardless of whether the workers are labeled as employees of staffing companies or as independent contractors, these contingent jobs impose huge costs on the contracting worker.<sup>5</sup>

### ***Multiple Layers of Subcontracting Depress Wages and Work Conditions***

As evidenced by this case, fissuring is rampant in the home care sector. Temporary staffing agencies recruit and hire workers to be placed in homes to care for elderly and disabled individuals. Sometimes staffing companies label workers employees, and other times they label them as independent contractors.<sup>6</sup> The more layers of businesses in the outsourcing chain, the less money there is to pay the workers, who too often work for poverty wages.<sup>7</sup>

Although staffing agencies can provide important intermediary roles, in highly competitive and labor-intensive industries like home care where bidding for jobs is intense, this competition drives down wages. When staffing agencies classify their workers as employees, these full-time staffing agency workers typically earn 41 percent less than do workers in standard work arrangements.<sup>8</sup> These workers also report high incidences of wage theft, and a near-total absence of work-related benefits.<sup>9</sup>

### ***Increasing Prevalence of Independent Contractors Depresses Wages and Work Conditions***

When staffing agencies classify their workers as independent contractors, these workers do not enjoy the same protections as employees, although they often do the same work for the same pay. They are denied the protection of wage-and-hour, civil rights and other workplace laws and are deprived of social safety benefits normally provided by employers, such as unemployment insurance, workers' compensation and employer-sponsored health insurance and retirement benefits.<sup>10</sup> They also incur expenses that would otherwise be covered by employers, such as the employer's share of payroll taxes and workplace equipment, such as uniforms, tools, and gas.<sup>11</sup>

Because of the lack of legal protection and added financial burdens, independent contractors tend to make substantially less than employees doing the same work. One government expert calculated that a construction worker earning \$31,200 a year before taxes would be left with an annual net compensation of \$10,660.80 if paid as an independent contractor, compared to \$21,885.20 if paid

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<sup>5</sup> The complaint and the press release state that the companies "contract with or employ therapists" so this comment assumes that some therapists are employees and some are independent contractors.

<sup>6</sup> Fact Sheet, *Independent Contractor Classification in Home Care*, NATIONAL EMPLOYMENT LAW PROJECT, May 2015, at 3, <https://www.nelp.org/publication/independent-contractor-classification-in-home-care/>.

<sup>7</sup> "Although home care industry revenues have rapidly grown, real wages for this workforce have actually declined since 2004. Our survey found that roughly one-third are earning less than \$10.00 per hour. Less than two-thirds (58 percent) earned between \$10.00 and \$15.00 per hour." See Anastasia Christman & Caitlin Connolly, *Surveying the Home Care Workforce*, NATIONAL EMPLOYMENT LAW PROJECT, Sept. 22, 2017, at 3, <https://www.nelp.org/publication/surveying-the-home-care-workforce>.

<sup>8</sup> CWS, Table 13, <https://www.bls.gov/news.release/conemp.t13.htm>.

<sup>9</sup> Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America's Workers*, NATIONAL EMPLOYMENT LAW PROJECT & NATIONAL STAFFING WORKERS ALLIANCE, Sept. 2, 2014, at 13-15, <https://s27147.pcdn.co/wp-content/uploads/2015/02/Temped-Out.pdf>.

<sup>10</sup> Sarah Leberstein and Catherine Ruckelshaus, *Independent Contractor vs. Employee: Why independent contractor misclassification matters and what we can do to stop it*, NATIONAL EMPLOYMENT LAW PROJECT, May 2016, at 3.

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

properly as an employee. A study on port truck drivers found that annual median net earnings before taxes were \$28,783 for drivers paid as contractors as compared with \$35,000 for employees.<sup>12</sup>

Both subcontracting and independent contractor models create intense competition that depresses wages and increases the risk of illegal conduct, such as wage theft or misclassification. In these sectors, workers are particularly vulnerable to anticompetitive conduct and robust enforcement is crucial.

### **Labor Market Monopsony Power Depresses Wages**

The second reason for sluggish wage growth—the increase in labor market monopsony power—refers to reduced competition among employers, which shifts bargaining power to employers and allows them to dictate wages. The Obama White House found that “such a shift could explain not only the redistribution of revenues from worker wages to managerial earnings and profits, but also the rising disparity in pay among workers with similar skills.”<sup>13</sup> According to the economist Alan Krueger, the labor market’s increasing reliance on temporary help agencies, staffing agencies and outsourcing allows employers to wage discriminate, which facilitates the exercise of monopsony power.<sup>14</sup> Limited competition among employers also increases the risk of implicit or explicit collusion, such as agreements not to hire each other’s workers or—as is the case here—agreements to coordinate on wage offers.<sup>15</sup>

### **Conclusion**

In 2016, the FTC and DOJ published antitrust guidance for human resource professionals on collusion among employers. The guidance warned that companies that collude on wages or other terms of employment face serious consequences, including civil and criminal liability.<sup>16</sup> Considering the explicit warning in guidance issued less than two years ago, it is inexplicable that the FTC has decided not to impose civil or criminal liability on the parties in this case, who are alleged to have engaged in clear violations of antitrust law and the guidance issued in 2016. We believe that the consent decree in this case—which imposes no civil liability or restitution requirements on the parties—does not adequately compensate the victims of the illegal collusion. The decree also fails to deter other companies from colluding to suppress wages, which has significant consequences for the millions of American workers working in staffing companies and classified as independent contractors. It also does nothing to deter illegal conduct by other

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<sup>12</sup> *Id.*

<sup>13</sup> Obama White House Archives, *Labor Market Monopsony: Trend, Consequences, and Policy Responses*, Council of Economic Advisors, Oct. 2016, at 1, available at [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025\\_monopsony\\_labor\\_mrkt\\_cea.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf).

<sup>14</sup> “If a hospital has persistent vacancies for nursing positions, for example, it can reach out to a staffing firm that pays its nurses a higher salary to supply additional nurses without having to raise its wage scale for incumbent nurses.” Alan B. Krueger, *Reflections on Dwindling Worker Bargaining Power and Monetary Policy*, Luncheon Address at the Jackson Hole Economic Symposium, Aug, 24, 2018, available at <https://www.kansascityfed.org/~media/files/publicat/sympos/2018/papersandhandouts/824180824kruegerremarks.pdf?la=en>.

<sup>15</sup> Obama White House Archives, *supra* note 14 at 4.

<sup>16</sup> Department of Justice & Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals*, Oct. 2016.

companies in the home care sector, an industry where billions of federal Medicaid and Medicare dollars are at stake.

Given the clear violation of antitrust law and FTC guidance and the far-reaching ramifications for America's workforce, in cases like this one, the FTC should seek remedies that make the injured workers whole and that effectively deter future wage fixing by employers. These cases have real-world consequences for our health care system, labor market competition, and the millions of independent contractors and other "nonstandard" or "gig" workers who rely on precarious and often poorly paid work for their livelihoods.

Respectfully submitted,

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