

Complaint

IN THE MATTER OF

**YOUR THERAPY SOURCE, LLC,
NEERAJ JINDAL,
AND
SHERI YARBRAV**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket No. C-4689; File No. 171 0134

Complaint, October 26, 2019 – Decision, October 26, 2019

This consent order addresses Your Therapy Source, LLC's agreement to lower rates paid to therapists and inviting other therapist staffing companies to lower rates paid to therapists. The complaint alleges that (1) Your Therapy Source, (2) Sheri Yarbray, the owner of Your Therapy Source, and (3) Neeraj Jindal, the former owner of Integrity Home Therapy agreed, and invited others to agree, to lower the rates paid to therapists for treating patients of home health agencies in the Dallas/Fort Worth, Texas area. The consent order prohibits Respondents from entering into or organizing agreements with any person to lower, fix, maintain, or stabilize the compensation that a Respondent or such person pays, or is willing to pay, in competing with each other for employees and independent contractors, including therapists.

Participants

For the *Commission*: *Armine Black and Robert S. Canterman.*

For the *Respondents*: *William E. Berlin, Hall, Render, Killian, Heath & Lyman, P.C.,
Daniel Kotchen, Kotchen & Low, LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray, hereinafter sometimes collectively referred to as "Respondents," have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges in that respect as follows:

I. Nature of the Case

1. This matter concerns competing therapist staffing companies agreeing, and inviting other therapist staffing companies to agree, on rates paid to therapists for treating home health agency patients in the Dallas/Fort Worth, Texas area. Respondents' conduct harmed competition among therapist staffing companies to contract with therapists at competitive rates.

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II. Respondents

2. Your Therapy Source, LLC (“Your Therapy Source”) is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its principal address at 8624 Mid Cities Boulevard, Suite 200, North Richland Hills, Texas 76182. Your Therapy Source is a therapist staffing company operating in the Dallas/Fort Worth, Texas area.

3. At all times relevant to this Complaint, Neeraj Jindal owned Fit 4 Life Therapy, LLC, d/b/a Integrity Home Therapy (“Integrity”), a therapist staffing company operating in the Dallas/Fort Worth, Texas area. As owner, Mr. Jindal was responsible for Integrity’s business and financial operations. Mr. Jindal sold Integrity in August, 2017, to a new owner who had no prior affiliation with Integrity or involvement in the conduct alleged in this Complaint. Mr. Jindal’s principal address is 1901 Long Prairie Road, Suite 220-75, Flower Mound, Texas 75022.

4. Sheri Yarbray owns Your Therapy Source and has served as the Chief Executive Officer since she founded the company over ten years ago. As Chief Executive Officer, Ms. Yarbray is responsible for Your Therapy Sources’ business and financial operations. Ms. Yarbray’s principal address is 8624 Mid Cities Boulevard, Suite 200, North Richland Hills, Texas 76182.

III. Jurisdiction

5. Respondents are “persons” or a “corporation” within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. Respondents’ business practices and conduct, including the practices and conduct alleged herein, are in commerce or affect commerce, as Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44, defines “commerce.”

IV. Overview of Therapist Staffing Companies

7. Therapist staffing companies contract with home health agencies to provide therapists, including physical therapists, physical therapist assistants, occupational therapists, occupational therapist assistants, and speech therapists, to treat home health agency patients (hereinafter sometimes collectively referred to as “therapists”).

8. Home health agencies pay therapist staffing companies a negotiated rate referred to as a “bill rate” to provide therapists to treat home health agency patients. The bill rate is the primary source of revenue for therapist staffing companies.

9. Therapist staffing companies contract with or employ therapists to provide services to home health agency patients. Therapists provide an initial patient evaluation and then may treat—or supervise a therapist assistant to treat—the patient during a patient visit. Therapist staffing companies pay therapists a rate per patient visit or per patient evaluation referred to as a

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“pay rate.” Pay rates usually are the primary expense of therapist staffing companies. A therapist staffing company maximizes its profits when bill rates are high and pay rates are low.

10. Therapist staffing companies compete with each other for contracting with or employing therapists. Therapists may contract with multiple therapist staffing companies and choose among them based on pay rate, volume of patient referrals, and location of patients.

V. Anticompetitive Conduct

A. Respondents agreed to lower pay rates for therapists

11. Respondents exchanged Integrity’s and Your Therapy Source’s pay rate information with each other and jointly agreed to lower therapist pay rates to the same level. Respondents agreed to coordinate with each other on pay rates in an attempt to prevent therapists from switching to competing therapist staffing companies paying higher rates.

12. In March 2017, a home health agency contracting with Integrity informed Integrity that it planned to lower Integrity’s bill rate for therapists effective April 1, 2017. The new bill rate was substantially lower than the bill rate the home health agency was currently paying Integrity.

13. Mr. Jindal was concerned that the difference between the bill rates and pay rates for therapists would leave Integrity with shrinking profits.

14. Mr. Jindal wanted to know the pay rates of his competitors and whether his competitors also were facing lower bill rates. He asked a physical therapist contracting with Integrity to contact Your Therapy Source as Integrity’s agent to find out what Your Therapy Source was paying its therapists, whether home health agencies had lowered Your Therapy Source’s bill rates, and whether Your Therapy Source intended to lower its pay rates.

15. In response to Mr. Jindal’s request, Integrity’s physical therapist, acting as an agent for Integrity, sent a text message on March 10, 2017, to Sheri Yarbray, the owner of Your Therapy Source, asking whether she had considered lowering pay rates for physical therapist assistants. Based on pay rate information he received from Mr. Jindal, Integrity’s physical therapist disclosed in his text message to Ms. Yarbray the lower pay rate per patient visit that Integrity was planning to pay physical therapist assistants.

16. In her text message replying to Integrity’s agent, Ms. Yarbray wrote, “Yes I agree[.] I’ll do it with u.” Ms. Yarbray also informed Integrity’s agent that, in addition to pay rates for physical therapist assistants, she also wanted to lower pay rates for physical therapists and included Your Therapy Source’s therapist pay rates in her text message.

17. Integrity’s agent replied that if all therapist staffing companies were “on the same page, there [wouldn’t] be a bunch of flip-flopping,” meaning therapists would not just leave one therapist staffing company to contract with others paying higher rates. In her reply text message, Ms. Yarbray wrote, “I agree but we need to get everybody to do it[.]”

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18. On March 10, 2017, shortly after exchanging text messages with Ms. Yarbray, Integrity's agent informed Mr. Jindal that Your Therapy Source was willing to lower pay rates.

19. On March 17, 2017, Integrity's agent followed up with Ms. Yarbray in another text message. He told Ms. Yarbray that Integrity was decreasing physical therapist and physical therapist assistant pay rates with Integrity's next scheduled date to pay therapists.

20. In her reply, Ms. Yarbray told Integrity's agent "I can join in where did you go," and disclosed Your Therapy Sources' current pay rates. Integrity's agent then sent a text message to Ms. Yarbray with the pay rates Integrity was planning to pay physical therapists and physical therapist assistants. In response, Ms. Yarbray wrote "Ok we are going to lower [physical therapist rates] to your numbers."

21. Two days later, on March 19, 2017, Mr. Jindal notified a number of physical therapists, physical therapist assistants, and occupational therapists contracting with Integrity that he was lowering their pay rates.

22. On April 6, 2017, after a home health agency notified Your Therapy Source that it planned to lower bill rates, Ms. Yarbray sent a text message to Integrity's agent telling him, "We have to drop rates everywhere."

B. Respondents invited other therapist staffing companies to collude on pay rates for therapists

23. Respondents communicated invitations to collude on pay rates to other competing therapist staffing companies in the Dallas/Fort Worth area.

24. On March 10, 2017, the same day Integrity's agent told Mr. Jindal that Ms. Yarbray agreed to lower pay rates, Mr. Jindal sent separate text messages containing almost identical language to four other competing therapist staffing companies. Mr. Jindal informed the other therapist staffing companies that he was "reaching out to [his] counterparts about lowering PTA [physical therapist assistant] rates" and told them the rate per patient visit that Integrity was planning to pay physical therapist assistants. Mr. Jindal also asked them about their "thoughts" on "collectively [lowering physical therapist assistant rates] together."

25. In his text messages, Mr. Jindal also told two of the four therapist staffing companies that he had Your Therapy Source "on board" to lower rates. He informed the other two therapist staffing companies that he had Your Therapy Source plus one other therapist staffing company "on board."

26. Sometime in March or early April, 2017, the same home health agency that lowered Integrity's bill rates notified Your Therapy Source that it was planning to lower Your Therapy Source's bill rates.

27. After receiving the notice from the home health agency, Ms. Yarbray sent a text message on April 6, 2017, to the owner of another competing therapist staffing company in the

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Dallas/Fort Worth area asking the owner what he thought about lowering pay rates. In her text message, Ms. Yarbray wrote that other therapist staffing companies were reaching out to her regarding “rate drops” and disclosed the dollar amounts of the “rate drops” in her text message.

VI. Respondents’ Conduct Is Not Legally Justified

28. Respondents’ conduct described above has not been, and is not, reasonably related to any efficiency-enhancing justification.

VII. Anticompetitive Effects

29. Respondents’ actions described in paragraphs 11 through 27 have had the purpose and effect of unreasonably restraining trade and suppressing competition among therapist staffing companies to contract with therapists to treat home health agency patients in the following ways, among others:

- a. unreasonably restraining competition to offer competitive pay rates to therapists;
- b. fixing or decreasing pay rates for therapists; and
- c. depriving therapists the benefits of competition among therapist staffing companies.

VIII. Violation Charged

30. The acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-sixth day of October, 2019, issues its Complaint against Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray.

By the Commission, Commissioner Chopra dissenting and Commissioner Wilson not participating.

Decision and Order

DECISION

The Federal Trade Commission (“Commission”) initiated an investigation of certain acts and practices of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray, collectively “Respondents.” The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Order” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Act, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order (“Order”):

1. Respondent Your Therapy Source, LLC is a limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Texas, and its principal address is 8624 Mid Cities Blvd., Suite 200, North Richard Hills, Texas 76182.
2. Respondent Neeraj Jindal, an individual, owned Fit for Life Therapy, LLC, d/b/a Integrity Home Therapy (“Integrity”) from 2013 until he sold Integrity in August 2017. His principal address is located at 1901 Long Prairie Road, Suite 220-75, Flower Mound, Texas 75022.
3. Respondent Sheri Yarbray, an individual, owns Respondent Your Therapy Source, and has been its Chief Executive Officer for more than 10 years. Her principal address is 8624 Mid Cities Blvd., Suite 200, North Richard Hills, Texas 76182.
4. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondents, and this proceeding is in the public interest.

Decision and Order

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Respondent Jindal” means Neeraj Jindal.
- B. “Respondent Yarbray” means Sheri Yarbray.
- C. “Respondent Your Therapy Source” means Your Therapy Source, LLC, its directors, officers, employees, agents, representatives, successors, and assigns, including Respondent Yarbray; and any joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Your Therapy Source, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Commission” means the Federal Trade Commission.
- E. “Compensation” means wages, salaries, benefits, payment terms, or Pay Rates.
- F. “Home Health Agency” means any Person that contracts with one or more Therapist Staffing Competitors to provide Therapist services to home health patients.
- G. “Pay Rate” means the payment Respondents or Therapist Staffing Competitors make to a Therapist to treat patients.
- H. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture, or other entity or a government body.
- I. “Therapist” means a physical therapist, physical therapist assistant, occupational therapist, occupational therapist assistant, or speech therapist.
- J. “Therapist Staffing” means the provision of Therapists to treat patients through contractual arrangements by and between Therapist Staffing Competitors and Therapists.
- K. “Therapist Staffing Competitor” means any Person engaged in the business of Therapist Staffing.

II.

IT IS FURTHER ORDERED that in connection with establishing the Compensation of any employee or independent contractor, including Therapists, in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. §44,

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Respondents shall cease and desist from, either directly or indirectly, or through any corporate or other device:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, or enforcing any agreement or understanding, express or implied, between or among a Respondent and any Person to lower, fix, maintain, or stabilize the Compensation that a Respondent or such Person pays, or is willing to pay, in competing with each other for employees or independent contractors, including Therapists;
- B. Exchanging or facilitating, in any manner, the exchange or transfer of information between or among a Respondent and any Person concerning Compensation that a Respondent or such Person pays, or is willing to pay, in competing with each other for employees or independent contractors, including Therapists;
- C. Inviting, encouraging, offering, soliciting, pressuring, suggesting, advising, recommending, or inducing any Person to engage in any agreement, understanding, or other action prohibited by Paragraphs II.A. and II.B.; and
- D. Attempting to engage in any action prohibited by Paragraphs II.A. and II.B.

Provided, however, that nothing in this Paragraph II. shall prohibit a Respondent and a Home Health Agency from agreeing upon the rate that the Home Health Agency pays the Respondent for the provision of Therapists to treat Home Health Agency patients.

III.

IT IS FURTHER ORDERED that Respondent Your Therapy Source shall:

- A. Within 30 days after the date on which this Order is issued, provide to each of Your Therapy Source's officers, partners, directors, and employees a copy of this Order and the Complaint;
- B. For a period of 3 years from the date this Order is issued, provide a copy of this Order and the Complaint to any person who becomes an officer, partner, director, or employee of Your Therapy Source, and provide such copies within 30 days of the commencement of such Person's employment or term as an officer, partner, director, or employee; and
- C. Retain documents and records sufficient to record Your Therapy Source's compliance with its obligations under Paragraph III. of this Order.

IV.

IT IS FURTHER ORDERED that each Respondent shall submit verified written reports ("compliance reports") in accordance with the following:

Decision and Order

- A. Each Respondent shall submit:
1. an interim compliance report 60 days after the Order is issued;
 2. an annual compliance report one year after the date this Order is issued, and annually for the next 3 years on the anniversary of that date; and
 3. additional compliance reports as the Commission or its staff may request.
- B. Each compliance report shall set forth in detail the manner and form in which Respondent intends to comply, is complying, and has complied with this Order.
- C. Each compliance report shall be verified in the manner set forth in 28 U.S.C. § 1746. Respondent Jindal and Respondent Yarbray shall each verify his or her compliance report. Each compliance report by Respondent Your Therapy Source shall be verified by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.
- D. For purposes of this paragraph, Respondent Your Therapy Source and Respondent Yarbray may submit a joint compliance report.

V.

IT IS FURTHER ORDERED that Respondent Your Therapy Source shall notify the Commission at least 30 days prior to:

- A. Any proposed dissolution of Your Therapy Source, LLC;
- B. Any proposed acquisition, merger, or consolidation of Your Therapy Source, LLC; and
- C. Any other change in Respondent Your Therapy Source including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that for 3 years from the date this Order becomes final, each Respondent shall notify the Commission of any change in his, her, or its respective principal address within 20 days of such change in address.

Statement of the Commission

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent;
- B. To interview officers, directors, or employees of Respondent Your Therapy Source, who may have counsel present, regarding such matters; and
- C. To interview each Respondent Jindal and Respondent Yarbray, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on October 26, 2039.

By the Commission, Commissioner Chopra dissenting and Commissioner Wilson not participating.

**STATEMENT OF THE FEDERAL TRADE COMMISSION CONCERNING THE
COMMISSION'S CONSENT ORDER**

Three years ago, the Federal Trade Commission and the Department of Justice's Antitrust Division jointly issued guidance for human resource ("HR") professionals and others who are involved in hiring and compensation decisions. We created that guidance to educate and inform HR professionals and others involved in hiring and compensation decisions about how the antitrust laws apply in the context of employment. Just as it was true then, it is still true now that the Commission is committed to ensuring that workers receive the benefits of a competitive market for their services. As the 2016 guidance explains:

Statement of the Commission

Free and open markets are the foundation of a vibrant economy. Just as competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation, competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment. Consumers can also gain from competition among employers because a more competitive workforce may create more or better goods and services.¹

The outcome in this case affirms that commitment.

The Commission has voted to finalize the consent order, and send responses to commenters in the matter of Your Therapy Source, LLC (“Your Therapy Source”), Neeraj Jindal, and Sheri Yarbray.² As alleged in the complaint,³ Your Therapy Source, LLC (“Your Therapy Source”), a provider of therapist staffing services to home health agencies in Texas, Sheri Yarbray as the owner of Your Therapy Source, and Neeraj Jindal as the owner of Integrity Home Therapy entered into an agreement to lower wages to their contracted therapists and invited four other competitors to collude on these rates. The Commission alleged that their agreement was per se illegal and harmed competition.

The Commission appreciates the level of public interest that it has received in this matter.⁴ It reaffirms the importance of our efforts to pursue wage-fixing cases. Issues raised by the public comments are addressed below.

Monopsony Power

The Commission takes very seriously the potential for monopsony power among employers to affect workers’ wages and mobility. Monopsony power requires a showing that employers (or an employer) have significant market power in the market for labor, giving them the ability to set wages below competitive levels. In this case, there was no evidence that credibly suggested the existence of monopsony power. At the time of our investigation, respondents were small business owners of two therapist staffing companies, and operated in the Dallas/Fort Worth area where there are many other therapist staffing companies that did not participate in the agreement.

1 U.S. Dep’t of Justice & Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* at 2 (Oct. 20, 2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

2 This statement reflects the views of Chairman Simons and Commissioners Phillips and Slaughter.

3 See Compl., *In re Your Therapy Source et al.* (July 31, 2018), https://www.ftc.gov/system/files/documents/cases/1710134_your_therapy_source_complaint_7-31-18.pdf.

4 See Public Comments, Fed. Trade Comm’n, *In re Your Therapy Source et al.*, <https://www.ftc.gov/policy/public-comments/2018/08/initiative-769>.

Statement of the Commission

Monetary Penalties

The law gives the Commission the authority to issue an order requiring a respondent to stop engaging in anticompetitive conduct, but the law does not provide the Commission with the authority to impose punitive civil penalties in antitrust conduct cases like this one. After a respondent is under order, the Commission may seek civil penalties for violations of the order. To monitor compliance, the Decision and Order requires respondents to submit written compliance reports and permits the Commission to access respondents' records and to conduct interviews with them. Should respondents violate the Decision and Order, the Commission will consider all appropriate penalties and other steps to enforce the Decision and Order.

The Commission may and does seek equitable monetary remedies — including disgorgement and restitution — to compensate victims for losses resulting from unlawful conduct. As detailed in the Complaint, Respondents in this case entered into a per se illegal agreement to fix wages. The facts showed that this per se illegal agreement harmed the competitive process because, by its nature, it involved competitors agreeing to substitute their collective decisions for the normal workings of the marketplace. However, the evidence in this case did not provide support for seeking equitable monetary remedies. That is, our investigation did not yield evidence that any reductions in pay rates were the result of the unlawful conduct. Noteworthy here is the fact that the FTC staff launched an investigation very quickly after learning of Integrity's owner's invitation to collude, which may explain the lack of such evidence. We will continue to investigate this type of behavior and will not hesitate to seek equitable monetary remedies in cases where such remedies are appropriate.

Notice

Based on the facts, we do not believe an order should include a requirement to provide notice of the Commission's action to the individual therapists here. Because the facts found in the investigation did not indicate that any therapists' wages were reduced as a result of the illegal agreement, individual notice would not be likely to facilitate recovery in private civil litigation. However, the Commission will take steps to ensure that this order and the facts of this case are disseminated as widely as possible in order to educate staffing firms, home healthcare workers, and small businesses about the illegality of wage fixing and to emphasize that the FTC will be a vigilant cop on the beat.

Admissions of Liability

When the circumstances of a given case merit doing so, the Commission will consider seeking admissions of fact or law. In this case, we did not obtain such an admission. As the Washington Center for Equitable Growth and the American Antitrust Institute noted in their public comments, requiring admissions of liability could result in fewer settlements and more litigation surrounding otherwise effective remedies, which would result in the enforcement of fewer matters due to resource constraints.⁵ The Washington Center for Equitable Growth

⁵ See Michael Kades & Raksha Koppam, Washington Center for Equitable Growth, Pub. Cmt. No. 00104, *In re Your Therapy Source et al.* at 1 (Aug. 30, 2018), https://www.ftc.gov/system/files/documents/public_comments/

Statement of the Commission

believes that the Commission should seek admissions of liability when they are “necessary to prevent recidivism or deter others from engaging in similar behavior,”⁶ yet the American Antitrust Institute notes that “[f]oregoing admission of key facts or liability seems like a comparatively small price to pay for the gain in scarce agency time and resources.”⁷ The amount of resources required to litigate a case cannot be overstated. When deciding whether to settle a case, we have to seriously consider whether the outcome of a protracted litigation will provide material benefits beyond the remedy obtained through a negotiated settlement.

Criminal Referrals

The Commission does not have criminal jurisdiction. Instead, 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. 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.

Conclusion

After careful consideration of each comment, we have concluded not to modify the order. The remedy that we have accepted is carefully tailored to match the facts and circumstances of this case. The remedy prohibits the parties from colluding with competitors on wages paid to their employees or independent contractors, and bars them from entering into agreements to lower, fix, maintain, or stabilize the therapists’ or other independent contractors’ wages. The remedy also bars the parties from inviting competitors to enter into such agreements or exchanging information with competitors related to compensation of employees and independent contractors.

The Commission vigorously enforces the antitrust laws with respect to large and small companies alike. Going forward, we will continue to aggressively investigate any instances in which companies collude or attempt to collude to fix wages. Likewise, we will continue to seek relief commensurate with the facts and circumstances of each case, including, where appropriate, disgorgement, notice, and admissions.

[2018/08/00104-155424.pdf](#); American Antitrust Institute, Pub. Cmt. No. 00106, *In re Your Therapy Source et al.* at 1 (Aug. 30, 2019), https://www.ftc.gov/system/files/documents/public_comments/2018/08/00106-155423.pdf.

6 Cmt. of Washington Center for Equitable Growth at 2.

7 Cmt. of American Antitrust Institute at 14.

Concurring Statement

STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

Today, the Commission votes to finalize the proposed order *In re Your Therapy Source, et al.* I carefully read the thoughtful and constructive comments submitted in this case, paying particular attention to the calls for the FTC to revisit the proposed order to better achieve its enforcement objectives. After considering the arguments raised and the specific facts in the record, I vote today to finalize this order. Rather than renegotiate the settlement, the Commission's resources would be best used to investigate and prosecute additional cases of anticompetitive conduct that harms workers. However, I urge our enforcement partners with criminal jurisdiction to pursue a criminal investigation of the individuals involved in this case.

Agreements to fix the wages of employees or contractors, such as the one alleged in this matter, are *per se* illegal under the antitrust laws and give rise to criminal as well as civil liability.¹ As a general matter, I think criminal sanctions are the most effective remedy in these cases. The FTC's enforcement authority is limited to the civil realm.²

Like many commenters, I favor pursuing remedies that most effectively provide compensation and deterrence, as well as facilitate private enforcement—including disgorgement, notice, and an admission of liability.³ If any of those terms had been included in this order when it was originally negotiated, I would have supported it. However, because staff investigated the conduct so quickly, there was no evidence tying the unlawful agreement to wage reductions. Without such evidence, the Commission and private litigants are unlikely to recover damages in court, which in turn diminishes the value of pursuing notice or admissions. While this circumstance should not dictate the scope of appropriate remedies for the Commission to pursue at the start of a settlement negotiation in the future, I cannot ignore them in evaluating whether it would be the best use of limited Commission resources to re-open a settlement that was negotiated largely before the Commissioners participating today arrived at the FTC.⁴

1 See U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* at 2–3 (Oct. 20, 2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

2 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.”

3 See, e.g., Marshall Steinbaum et al., Pub. Cmt. No. 00003, *In 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 (“[T]he FTC should seek remedies that make the injured workers whole and deter future wage fixing by employers.”); Sanjukta Paul et al., Pub. Cmt. No. 00107, *In re Your Therapy Source et al.* at 1 (Aug. 30, 2019), https://www.ftc.gov/system/files/documents/public_comments/2018/08/00107-155426.pdf.

4 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 that the Commission should adopt in settlement discussions, I will apply these principles to cases going forward.

Concurring Statement

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,⁵ 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.⁶ 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 who wield the most market power, especially “larger and relatively more powerful buyers of services that result in upstream wage suppression,”⁷ 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 rule.⁸ The Commission should also consider whether no-poach provisions in franchise agreements that limit competition and worker mobility should be banned.

5 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.”).

6 See, e.g., American Antitrust Institute, Pub. Cmt. No. 00106, *In re Your Therapy Source et al.* at 2 (Aug. 30, 2019), https://www.ftc.gov/system/files/documents/public_comments/2018/08/00106-155423.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, retail pharmacies, and generic and branded drug manufacturers, for example) has opened the door to all manner of strategic anticompetitive behavior.”); Michael Kades & Raksha Koppam, Washington Center for Equitable Growth, Pub. Cmt. No. 00104, *In re Your Therapy Source et al.* at 2 (Aug. 30, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/00104-155424.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 that buyer-side power.”).

7 Cmt. of Sanjukta Paul et al. at 1.

8 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>.

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DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA**Summary**

- When an investigation uncovers clear evidence of wrongdoing with no major dispute of fact or law, Commissioners should avoid entering into weak, no-consequences settlements that fail to hold a bad actor accountable nor provide meaningful deterrence in the marketplace.
- Commissioners must reject the false choice between settling for nothing and litigating. Even in clear-cut matters, the Commission sometimes approaches settlement negotiations without seeking any meaningful relief or consequences. There should be a strong presumption against no-consequences settlements in these matters.
- In addition to monetary remedies, the FTC should consider seeking a broader set of remedies, such as a finding or admission of liability, formal notification to third parties, and debarments or bans in cases of clear misconduct where the law and evidence is clear.

Avoiding Weak Settlements

Catching individuals and firms in the act of fixing prices and wages is extremely difficult. Given the harm that this collusion can inflict on families, the labor force, and our economy, it warrants serious consequences, including criminal sanctions.¹

In very rare instances, it may be warranted for the Federal Trade Commission to resolve a matter without meaningful consequences, by entering into a settlement that simply requires a company or individual to stop breaking the law and to submit paperwork to the agency. This matter is not one of those instances. In this matter, the Commission is resolving an attempted theft of wages through a no-consequences settlement. “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,” noted one response to the proposed settlement.² Our approach must change.

1 As I noted in a recent submission to the Department of Justice’s initiative on competition in labor markets, the Department of Justice is better suited to address illegal collusion on wages and compensation, given its ability to pursue remedies under its civil and criminal authorities. In the rare instances where the Federal Trade Commission must act alone, it is particularly important that the remedy go beyond a no-consequences settlement. *See* Comment of Comm’r Rohit Chopra, In the Matter of Dep’t of Just. Initiative on Competition in Labor Markets (Sept. 18, 2019), [https://www.ftc.gov/system/files/documents/public_statements/1544564/chopra - letter to doj on labor market competition.pdf](https://www.ftc.gov/system/files/documents/public_statements/1544564/chopra_-_letter_to_doj_on_labor_market_competition.pdf).

2 Comment of Marshall Steinbaum, Heidi Shierholz, and Sandeep Vaheesan, In the Matter of Your Therapy Source, LLC; Neraj Jindal; and Sheri Yarbay, FTC File No. 171-0134 at 1 (Aug. 3, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/00003-147707.pdf.

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Settlements are important. They can help the public resolve an issue more quickly and with fewer resources. But when there is overwhelming evidence of wrongdoing, it is dangerous for government agencies to enter into weak settlements that give a violator a free pass. In settlement negotiations, the Commission may not obtain all of the relief it seeks. But when we fail to make any substantive demands at all, we guarantee that our settlements will fail to hold bad actors accountable. We need to reject the false choice between settling for nothing and litigating. Instead, we can make thoughtful demands based on rigorous analysis that lead to accountability and deterrence.

In this matter, the FTC's investigation uncovered text messages and other unambiguous evidence that revealed a conspiracy to fix wages, a per se violation of antitrust laws that can even carry criminal sanctions. Despite these facts, the settlement carries virtually no consequences.

The vast majority of enforcement actions taken by the Commission are unanimous. Over the last year, the Commission has failed to reach a unanimous decision in only a handful of consumer protection and competition conduct cases. Where I have disagreed, it is typically because the Commission essentially demanded nothing in settlement negotiations beyond paperwork requirements and a promise not to violate the law again. Since these no-consequences settlements fail to deter bad actors, they should only be used in narrow circumstances.

Calibrating Consequences

The Commission should generally presume that no-consequence settlements that simply order a Respondent to cease and desist are not in the public interest. Advocates for wrongdoers sometimes argue that violations should not carry meaningful consequences when there is no known "harm." This logic is flawed, particularly for misconduct that has a low probability of detection and high likelihood of harm. For example, by this logic, society would never punish dangerous drivers unless they actually injured someone. In commerce, lawbreaking firms also gain a competitive advantage over firms that follow the law. Just because a harm is difficult to quantify does not mean it is nonexistent. In matters of unambiguous violations of law, the absence of known harm might help us calibrate consequences, but not exclude them altogether.

Rather than opening settlement negotiations with essentially no demand at all, below are some potential non-monetary consequences³ that the Commission could seek to advance the agency's law enforcement and compliance mission.

Debarments and Bans. The Commission routinely seeks debarments and bans against individual defendants, especially against those engaged in egregious conduct. The agency even maintains a public database of individuals banned from debt collection.⁴ Former FTC

³ Monetary relief is an important way for the Commission to advance goals of accountability for wrongdoing. In cases where we do not seek monetary relief, it is particularly important that we are thoughtful about other remedies to avoid a no-consequences settlement.

⁴ *Companies and People Banned From Debt Relief*, <https://www.ftc.gov/enforcement/cases-proceedings/banned-mortgage-relief-debt-relief-companies-people>, Fed. Trade Comm'n (last visited Oct. 16, 2019); see also *Banned*

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Commissioner Joshua Wright and former Assistant Attorney General of the Antitrust Division Douglas Ginsburg have argued that individual debarments can often be appropriate in price-fixing matters, given the low probability of detection.⁵

Notice to Affected Parties. When a wrongdoer formally notifies potential victims, customers and clients, employees, creditors, and counterparties, this facilitates transparency and follow-on actions for third parties to remedy or mitigate actual and potential harms, especially for harms that may not have been uncovered or unaddressed in an investigation.

In this settlement, the Commission includes standard language requiring the firm to notify its officers, directors, and employees about the Commission's order, but not the independent contractors targeted by the misconduct, nor the paying clients seeking these services. In a comment, Rep. David Cicilline and Sen. Cory Booker question this logic, noting that the Commission requires the violators to essentially notify themselves.⁶ Even if the Commission's investigation did not uncover specific evidence that the conspiracy led to suppressed wages in this instance, notice to current and former contractors will help uncover if there were other instances of illegal price-fixing. Without notice, clients of these staffing agencies will also be left in the dark about the violations and may unknowingly be continuing to do business with bad actors, subjecting them to reputational damage and other risks.

Findings or Admissions of Liability. As I noted in *Patriot Puck*, a recent no-consequences settlement, findings and admissions can reduce the likelihood that a flagrant violator can lie about their past conduct.⁷ Findings or admissions of facts and liability can also advance the interests of those seeking to vindicate their rights through private litigation.

Conclusion

The conduct in question in this matter raises questions of criminal liability. Ideally, it would be resolved by an entity with both criminal and civil enforcement authority. But, when the FTC takes action, it should avoid a no-consequences settlement, especially for matters with virtually no litigation risk. The FTC is typically far harsher with small firms than with large firms, so this outcome may send a signal to those engaging in widespread wage-fixing that their illegal conduct will be worth the risk.

Debt Collectors, <https://www.ftc.gov/enforcement/cases-proceedings/banned-debt-collectors>, Fed. Trade Comm'n (last visited Oct. 16, 2019).

5 Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 Competition Pol'y Int'l 3-39 (2010), https://cpip.gmu.edu/wp-content/uploads/sites/27/2016/10/Session-7_Antitrust-Sanctions.pdf.

6 Comment of Sen. Cory A. Booker & Rep. David N. Cicilline, In the Matter of Your Therapy Source, LLC, Neraj Jindal, and Sheri Yarbey, FTC File No. 171-0134 at 2 (Aug. 30, 2019), https://www.ftc.gov/system/files/documents/public_comments/2018/08/00105-155425.pdf.

7 Statement of Comm'r Chopra In the Matter of Patriot Puck, Comm'n File No. 1823113 (Apr. 17, 2019), https://www.ftc.gov/system/files/documents/public_statements/1514801/patriot_puck_chopra_dissenting_statement_4-17-19.pdf.

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The 2016 Antitrust Guidance for Human Resources Professionals set expectations for greater and more effective enforcement when it comes to wage-fixing and other antitrust violations in labor markets.⁸ But enforcers have taken few actions to reinforce this message. Today's no-consequences settlement finalized by the FTC is a step in the wrong direction. This must change.

Given the evidence, the public comments, and public interest considerations, the Commission should not finalize this no-consequences settlement. For these reasons, I dissent.

⁸ Department of Justice Antitrust Division and Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 20, 2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT**I. Overview**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an agreement containing consent order with Your Therapy Source, LLC, (“Your Therapy Source”), the owner of Your Therapy Source, and the former owner of Integrity Home Therapy (collectively “Respondents”). The agreement settles charges that Respondents violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by agreeing to lower rates paid to therapists and inviting other therapist staffing companies to lower rates paid to therapists.

The proposed consent order has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed consent order along with the comments received, and decide whether it should withdraw from the consent agreement, modify it, or make final the proposed consent order.

The purpose of this analysis is to facilitate public comment on the proposed consent order. The analysis is not intended to constitute an official interpretation of the proposed consent order or to modify its terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Respondents that they violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

II. The Complaint

The proposed complaint charges that (1) Your Therapy Source, (2) Sheri Yarbray, the owner of Your Therapy Source, and (3) Neeraj Jindal, the former owner of Integrity Home Therapy agreed, and invited others to agree, to lower the rates paid to therapists for treating patients of home health agencies in the Dallas/Fort Worth, Texas area.

Your Therapy Source and Integrity Home Therapy are therapist staffing companies that provide therapists, including physical therapists, physical therapist assistants, occupational therapists, occupational therapist assistants, and speech therapists (collectively “therapists”) to treat patients pursuant to contracts with home health agencies. Home health agencies pay therapist staffing companies a negotiated rate referred to as a “bill rate.” Staffing companies generally contract with therapists on a non-exclusive basis and pay them a rate per patient evaluation and per patient visit referred to as a “pay rate.” Therapist staffing companies compete with each other for therapists. Therapists may contract with more than one staffing company and generally choose among them based on pay rate, volume of patient referrals, and location of patients.

The complaint alleges that Respondents exchanged Integrity’s and Your Therapy Source’s therapist pay rate information with each other and agreed to jointly lower therapist pay rates to the same level. The complaint also alleges that Respondents invited other therapist

Analysis to Aid Public Comment

staffing companies to collude on pay rates. Finally, the complaint alleges that Respondents' conduct was not reasonably related to any efficiency-enhancing justification.

III. The Proposed Consent Order

The proposed consent order is designed to prevent recurrence of the illegal conduct alleged in the complaint. The key provisions make it a violation of the proposed consent order for Respondents to collude with competitors on compensation paid to their employees or independent contractors. The proposed consent order does not name Integrity Home Therapy as a respondent because Mr. Jindal sold Integrity Home Therapy in August 2017 to a new owner who had no involvement with the conduct alleged in the complaint.

Paragraph II.A of the proposed consent order prohibits Respondents from entering into or organizing agreements with any person to lower, fix, maintain, or stabilize the compensation that a Respondent or such person pays, or is willing to pay, in competing with each other for employees and independent contractors, including therapists.

The remaining portions of Paragraph II prohibit conduct that would facilitate a violation of Paragraph II.A, including barring the exchange of information related to compensation (Paragraph II.B) and barring attempts to engage in prohibited conduct or invitations to others to do so (Paragraphs II.C and II.D).

Paragraph III requires Your Therapy Source to send a copy of the complaint and consent order to its officers, partners, directors, and employees, and retain records sufficient to show Your Therapy Source's compliance with this requirement.

Paragraphs IV, V, VI, and VII impose various obligations on Respondents to report or provide access to information to the Commission to facilitate monitoring of compliance with the consent order.

Finally, paragraph VIII provides that the consent order will expire in 20 years.

Opinion of the Commission

IN THE MATTER OF

OTTO BOCK HEALTHCARE NORTH AMERICA, INC.OPINION OF THE COMMISSION AND FINAL ORDER IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT*Docket No. 9378; File No. 171 0231**Complaint, December 20, 2017 – Initial Decision, May 6, 2019 – Order, November 1, 2019*

This case addresses Otto Bock HealthCare North America, Inc. and Otto Bock HealthCare GmbH's [REDACTED] million acquisition of FIH Group Holdings, LLC (“Freedom”), a non-reportable deal consummated on September 22, 2017. The complaint, 167 F.T.C. 537, alleges that Otto Bock HealthCare North America, Inc. violated section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly lessening competition in the market for microprocessor prosthetic knees (“MPKs”). In his Initial Decision, 167 F.T.C. 552 *et seq.*, the Administrative Law Judge found that the evidence proves that the Acquisition may substantially lessen competition in the relevant market for the sale of MPKs to prosthetic clinics in the United States in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act, *Id.* at 767; and ordered Otto Bock to divest the Freedom Assets and Business, *Id.* at 774. On July 25, 2019, the Commission heard oral arguments in this matter.

*Participants**For the Commission: Stephen Mohr, and Daniel Zach.**For the Respondent: Edward G. Biester III, Duane Morris LLP.***OPINION OF THE COMMISSION
(PROVISIONALLY REDACTED PUBLIC VERSION)**

By Commissioner Rohit Chopra:

I. INTRODUCTION

In competitive markets, even when an individual firm leads its industry in market share, its owners, managers, and employees know that they must continue to innovate if they want to maintain or grow that market share. When a market-leading firm is threatened by challengers and responds by offering new and better products and services at competitive prices, we all benefit. Alternatively, when a market leader reduces the threat from a smaller aggressive competitor through an anticompetitive acquisition, we all lose. In this case, the Commission challenged a consummated acquisition in which a market leader eliminated a primary competitive threat. As explained further below, the Commission addresses a host of issues that may be particularly salient in consummated mergers, such as whether an agreement to “hold separate” the acquired assets eliminated anticompetitive effects and whether a proposed divestiture absolved the merging parties of liability. The Commission also considers contentions that liquidity concerns would have led to the acquired firm’s failure, absent the acquisition.

This matter arises from the consummated acquisition (“the Acquisition”) by Respondent Otto Bock HealthCare North America, Inc. (“Respondent” or “Otto Bock”) of FIH Group Holdings, LLC (“Freedom”). Prior to the Acquisition, the companies were two of the most