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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:	**Jon Leibowitz, Chairman** **J. Thomas Rosch** **Edith Ramirez** **Julie Brill**

In the Matter of **FRESENIUS MEDICAL CARE AG & Co. KGaA,** **a partnership limited by shares.**	**Docket No. C-4348**

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that the Respondent Fresenius Medical Care AG & Co. KGaA ("Fresenius"), a company subject to the jurisdiction of the Commission, has entered into an agreement to acquire Liberty Dialysis Holdings, Inc. ("Liberty"), a company subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. "Dialysis" means filtering a person's blood, inside or outside of the body, to replicate the functions of the kidney.

2. "ESRD" means end stage renal disease, a chronic disease characterized by a near total loss of function of the kidneys, which in healthy people remove toxins and excess fluid from the blood.

3. "Outpatient dialysis services" means all procedures and services related to administering chronic dialysis treatment.

II. RESPONDENT

4. Fresenius Medical Care AG & Co. KGaA ("Fresenius") is a partnership limited by shares organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its offices and principal place of business located at Else-Kröner-Straße 1, 61352 Bad Homburg, Germany. Fresenius is the parent of Fresenius Medical Care Holdings, Inc., a New York corporation, d/b/a Fresenius Medical Care North America with its office and principal place of business located at 920 Winter St., Waltham, MA 02451-1457. Respondent Fresenius, among other things, is engaged in the provision and sale of outpatient dialysis services.

5. Respondent Fresenius is, and at all times herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE ACQUIRED COMPANY

6. Liberty is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7650 SE 27th St., Suite 200, Mercer Island, WA. Liberty, among other things, is engaged in the provision and sale of outpatient dialysis services.

7. Liberty is, and at all times herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. §12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

IV. THE PROPOSED ACQUISITION

8. On August 1, 2011, Fresenius entered into an agreement ("Purchase Agreement") to acquire Liberty for approximately $2.1 billion in cash and the assumption of Liberty debt (the "Acquisition").

V. THE RELEVANT MARKET

9. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the provision of chronic outpatient dialysis services. Most ESRD patients receive dialysis treatments three times per week in sessions lasting between three and five hours. ESRD is fatal if not treated with dialysis. The only alternative to outpatient dialysis treatments for patients suffering from ESRD is a kidney transplant. However, the wait-time for donor kidneys – during which ESRD patients must receive dialysis treatments

– can exceed five years. Additionally, many ESRD patients are not viable transplant candidates. As a result, few ESRD patients receive transplants, and most have no alternative to ongoing outpatient dialysis treatment.

10. The relevant geographic market for the provision of dialysis services is defined by the distance ESRD patients are willing or able to travel to receive outpatient dialysis treatments, and is thus local in nature. Because ESRD patients often suffer from multiple health problems and may require assistance traveling to and from the dialysis clinic, these patients are unwilling and/or unable to travel long distances to receive dialysis treatment. As a general rule, ESRD patients do not travel more than 30 miles or 30 minutes to receive dialysis treatment, although travel times and distances vary depending on geographic barriers, travel patterns, and whether an area is urban, suburban, or rural.

11. For the purposes of this Complaint, the geographic markets within which to assess the competitive effects of the proposed Acquisition are 43 areas comprised of or within the following metropolitan areas: (1) Anchorage, AK CBSA; (2) Flagstaff, AZ; (3) San Francisco–Oakland–Fremont, CA CBSA; (4) San Diego–Carlsbad–San Marcos, CA CBSA; (5) Pueblo, CO CBSA; (6) New Haven–Milford, CT CBSA; (7) Seaford, DE CBSA; (8) Philadelphia–Camden–Wilmington, PA-NJ-DE-MD CBSA; (9) Sarasota–Bradenton–Venice, FL CBSA; (10) Palm Bay–Melbourne–Titusville, FL CBSA; (11) Macon, GA CBSA; (12) Milledgeville, GA CBSA; (13) Savannah, GA CBSA; (14) Honolulu, HI CBSA; (15) a 70-mile radius surrounding Sandpoint, ID; (16) Coeur d'Alene, ID CBSA; (17) Muncie, IN CBSA; (18) Chicago–Naperville–Joliet, IL-IN-WI CBSA; (19) Kokomo, IN CBSA; (20) Lafayette, IN CBSA; (21) Michigan City–La Porte, IN CBSA; (22) Washington–Arlington–Alexandria, DC-VA-MD-WV CBSA; (23) Grand Rapids–Wyoming, MI CBSA; (24) Jackson, MI CBSA; (25) Niles–Benton Harbor, MI CBSA; (26) Charlotte–Gastonia–Concord, NC-SC CBSA; (27) Poughkeepsie–Newburgh–Middletown, NY CBSA; (28) Atlantic City, NJ CBSA; (29) Lawton, OK CBSA; (30) Pittsburgh, PA CBSA; (31) McMinnville, TN CBSA; (32) Memphis, TN-MS-AR CBSA; (33) Nashville–Davidson–Murfreesboro–Franklin, TN CBSA; (34) Tullahoma, TN CBSA; (35) College Station–Bryan, TX CBSA; (36) Laredo, TX CBSA; (37) Dallas–Fort Worth–Arlington, TX CBSA.

VI. THE STRUCTURE OF THE MARKET

12. The market for the provision of outpatient dialysis services is highly concentrated in each of the local areas identified in Paragraph 11, as measured by the Herfindahl-Hirschman Index ("HHI") concentration ratios. The proposed acquisition represents a merger to monopoly in 18 markets and would cause the number of providers to drop from three to two in 23 markets identified in paragraph 11 while significantly increasing concentration in two markets that would have more than two remaining competitors.

13. Fresenius and Liberty are actual and substantial competitors in each of the relevant markets, or will be following a planned entry by one of the two parties.

VII. ENTRY CONDITIONS

14. Entry or expansion into the relevant markets is difficult, most significantly because of the need to locate and contract with a nephrologist with an established referral base to serve as medical director. By law, each dialysis clinic must have a nephrologist medical director. In addition to supervising patient care, the medical director serves as the principal source of patient referrals to the clinic. Most geographic markets have a limited number of nephrology groups, many of which are under exclusive contracts with the major dialysis services chains. The lack of available nephrologists with an established referral stream is a significant barrier to entry in each of the relevant geographic markets identified in Paragraph 11. Additionally, an area must have certain attributes, such as a growing ESRD population, low penetration of other dialysis chains, and a high ratio of commercial to medicare patients, to attract entry. The absence of these attributes is an additional barrier to entry in many of the relevant geographic markets.

15. New entry into the relevant markets sufficient to deter or counteract the anticompetitive effects described in Paragraph 16 is unlikely to occur, and would not occur in a timely manner.

VIII. EFFECTS OF THE ACQUISITION

16. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. eliminating actual, direct, and substantial competition between Fresenius and Liberty in the relevant markets;

b. increasing the ability of the merged entity unilaterally to raise prices for outpatient dialysis services in the relevant markets; and

c. reducing incentives to improve service in the relevant markets.

IX. VIOLATIONS CHARGED

17. The Purchase Agreement described in Paragraph 8 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

18. The Acquisition described in Paragraph 8, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this the twenty-eighth day of February, 2012, issues its Complaint against said Respondent.

By the Commission.

Donald S. Clark
Secretary

SEAL: