

Complaint

IN THE MATTER OF

**AMERICAN RENAL ASSOCIATES, INC.,
AND
FRESENIUS MEDICAL CARE HOLDINGS, INC.**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket C-4202; File No. 051 0234

Complaint, October 17, 2007 – Decision, October 17, 2007

This consent order addresses the \$4.4 million acquisition by American Renal Associates, Inc. (“ARA”) of certain assets from Fresenius Medical Care Holdings, Inc. In 2005, Fresenius and ARA, competitors in the provision of outpatient dialysis services, agreed to close three Fresenius clinics. The parties further agreed that Fresenius would not reopen any outpatient dialysis clinics within 10 to 12 miles of the closed facilities for at least five years, and would attempt to enforce the non-compete provisions of its agreements with the medical directors of the closed facilities for ARA’s benefit. The complaint alleges that this agreement was a horizontal agreement to eliminate competition and a *per se* violation of antitrust laws. The complaint further alleges that ARA’s purchase of outpatient dialysis clinics from Fresenius would reduce dialysis capacity; allocate dialysis customers, territories, or markets; and lessen competition in the outpatient dialysis services market in the Warwick/Cranston area. The consent order prohibits ARA and Fresenius from agreeing with other dialysis clinic operators to close any clinics or from allocating any dialysis service markets.

Participants

For the *Commission*: Bradley S. Albert, Leslie Farber, Mark Frankena, William Layher, Markus H. Meier, Martha H. Oppenheim, James E. Rhilinger, Gary H. Schorr, and Karan R. Singh.

For the *Respondents*: Robert Bloch, Mayer, Brown, Rowe & Maw; and Daniel L. Goldberg, Bingham McCutchen.

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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 American Renal Associates, Inc. (“ARA”) and Fresenius Medical Care Holdings, Inc. (“Fresenius”), together 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, in addition, violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, 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 an agreement between ARA and Fresenius which, if consummated, would have resulted in: (a) Fresenius closing three of its outpatient dialysis clinics in Rhode Island and southeast Massachusetts, each of which is located near a competing ARA facility, in exchange for payments from ARA totaling \$1,641,000; and (b) ARA acquiring Fresenius’s five remaining Rhode Island clinics, two of which compete directly with a nearby ARA clinic, in exchange for payments to Fresenius totaling an additional \$2,759,000.

2. By agreeing to close three Fresenius clinics, Respondents would have denied consumers of outpatient dialysis services in Rhode Island and southeast Massachusetts the benefits of competition, by effectively allocating Fresenius’s patients in those areas to ARA. Further, the proposed acquisition of Fresenius’s two Warwick, Rhode Island, clinics would have left ARA as the sole provider of outpatient dialysis services in Warwick-Cranston area, likely resulting in increased prices and reduced service and quality to consumers of outpatient dialysis services in that area.

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II. RESPONDENTS

3. Respondent American Renal Associates, Inc. (“ARA”), is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 66 Cherry Hill Drive, Beverly, Massachusetts 01915. ARA is the parent of eight entities that are parties to the agreement at issue: Dialysis Center of Wakefield, L.L.C., Dialysis Center of Warwick, L.L.C., Dialysis Center of West Warwick, L.L.C., Dialysis Center of Westerly, L.L.C., Dialysis Center of Woonsocket, L.L.C., ARA-East Providence, L.L.C., ARA-Johnston Dialysis, L.L.C., and ARA-Fall River, L.L.C.

4. Respondent Fresenius Medical Care Holdings, Inc. (“Fresenius”), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 95 Hayden Avenue, Lexington, Massachusetts 02420-9192. Fresenius is the parent of entities that are parties to the agreement at issue, including Renal Care Group, Inc. and Bio-Medical Applications of Rhode Island, Inc.

5. Respondents are corporations within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44.

6. The general business practices of ARA and Fresenius, and the acts and practices described below, affect the interstate movement of patients, the interstate purchase of supplies and products, and the interstate flow of funds, and are in or affect commerce within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44, and Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12.

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**III. THE RESPONDENTS' ASSET PURCHASE
AGREEMENT**

7. ARA and Fresenius entered into an Asset Purchase Agreement dated August 3, 2005, involving payments from ARA to Fresenius totaling \$4.4 million.

8. The Asset Purchase Agreement required Fresenius to close its clinics in East Providence and North Providence, Rhode Island, and in Fall River, Massachusetts, in exchange for ARA's payment of \$1,641,000 ("the Clinic Closing Agreement").

9. The Asset Purchase Agreement also provided for ARA's acquisition of Fresenius's five remaining clinics in Rhode Island – located in Wakefield, Westerly, Woonsocket, Warwick, and West Warwick – for \$2,759,000 ("the Clinic Acquisition Agreement").

10. After Commission staff learned of the Asset Purchase Agreement and contacted Respondents with several concerns about the agreement's terms, Respondents terminated the Asset Purchase Agreement on March 13, 2006.

IV. THE CLINIC CLOSING AGREEMENT**A. Description of the Clinic Closing Agreement**

11. During discussions between ARA and Fresenius concerning the sale of Fresenius's outpatient dialysis clinics in Rhode Island, the Respondents entered into an agreement whereby Fresenius agreed to close three clinics in East Providence and North Providence, Rhode Island, and Fall River, Massachusetts, in return for the sum of \$1,641,000 from ARA.

12. Respondents further agreed that Fresenius would not reopen any outpatient dialysis clinics within 10-12 miles of the closed facilities for at least five years, and would attempt to enforce the

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non-compete provisions of its agreements with the medical directors of the closed facilities, preventing those physicians from serving as medical directors for any potential new entrant.

13. Each of the Fresenius clinics to be closed was located in close proximity to ARA outpatient dialysis clinics in East Providence and Johnston, Rhode Island, and Fall River, Massachusetts, respectively.

14. The Respondents memorialized their agreement in a written contract, listing each Fresenius clinic to be closed, along with the specific amount of money to be paid for closing each clinic allocated to the three ARA clinics in closest proximity to the clinics to be closed. The contract was signed by officials from both ARA and Fresenius.

B. Effects of the Clinic Closing Agreement

15. The Clinic Closing Agreement, if implemented, would have had the effect of unreasonably restraining trade and hindering competition in the provision of outpatient dialysis services, by, among others:

- a. eliminating actual, direct, and substantial competition between ARA and Fresenius;
- b. increasing the ability of ARA to unilaterally raise prices; and
- c. reducing ARA's incentives to improve service or quality.

16. Neither ARA nor Fresenius offered a plausible pro-competitive justification for the Clinic Closing Agreement.

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V. THE CLINIC ACQUISITION AGREEMENT**A. The Relevant Market**

17. The relevant product market in which to assess the competitive effects of the Clinic Acquisition Agreement is the provision of outpatient dialysis services. End stage renal disease (“ESRD”) is 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. ESRD may be treated through dialysis, a process whereby a person’s blood is filtered, inside or outside the body, by machines that act as artificial kidneys.

18. Most ESRD patients receive dialysis treatments at dialysis centers three times per week in sessions lasting between three and five hours. These treatments are done on an outpatient basis, whereby the patient’s time spent at the dialysis center is solely for treatment.

19. The only alternative to outpatient dialysis treatments for patients suffering from ESRD is a kidney transplant. The wait-time for donor kidneys, during which ESRD patients must receive dialysis treatments, however, can exceed five years. Additionally, many ESRD patients are not viable transplant candidates. As a result, many ESRD patients have no alternative to ongoing dialysis treatments.

20. The relevant geographic market in which to assess the competitive effects of the Clinic Acquisition Agreement is the Cranston and Warwick area in Rhode Island (“the Cranston-Warwick market”).

21. The relevant geographic market for the provision of outpatient dialysis services is defined by the distance ESRD patients are willing or able to travel to receive dialysis treatments, and is thus local in nature. Because ESRD patients often suffer from multiple

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health problems and may require assistance traveling to and from the dialysis clinic, and because of the high frequency of treatments, these patients are unwilling or unable to travel long distances to receive dialysis treatment. The time and distance a patient will travel in a particular location are significantly affected by local traffic patterns; whether an area is urban, suburban, or rural; local geography; and a patient's proximity to the nearest dialysis clinic. The size and dimensions of relevant geographic markets are also influenced by a variety of other factors including population density, roads, geographic features, and political boundaries.

B. The Structure of the Market

22. The market for the provision of outpatient dialysis services in the Cranston-Warwick market is highly concentrated, as measured by the Herfindahl-Hirschman Index ("HHI"). Given that ARA and Fresenius are the only two providers of outpatient dialysis services in the market, the Clinic Acquisition Agreement would leave ARA as the sole provider of dialysis services in that area.

C. Entry Conditions

23. The most significant impediment to entry into the relevant market is locating a nephrologist with an established referral base who is willing and able to enter into a contract with a dialysis clinic to serve as the clinic's medical director. Federal law requires that each dialysis clinic have a physician medical director. Having a nephrologist serve as medical director is essential to the competitiveness of the clinic, because he or she is the clinic's primary source of referrals. A medical director's contract with a clinic typically prevents the medical director (and often his or her partners) from serving as a medical director for a competing clinic while serving as the clinic's medical director. The lack of available nephrologists with an established referral stream is a significant impediment to entry into the relevant market.

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24. New entry into the relevant market sufficient to deter or counteract the potential anticompetitive effects of the Clinic Acquisition Agreement is unlikely to occur, and would not occur in a timely manner because it would take over two years to enter and achieve significant market impact.

D. Effects of the Clinic Acquisition Agreement

25. The Clinic Acquisition Agreement, if consummated, would have had the effect of substantially lessening competition in the relevant market by, among others:

- a. eliminating actual, direct, and substantial competition between ARA and Fresenius;
- b. increasing the ability of ARA to unilaterally raise prices; and
- c. reducing ARA's incentives to improve service or quality.

VII. VIOLATIONS CHARGED**A. The Clinic Closing Agreement**

26. The Clinic Closing Agreement constitutes an unfair method of competition in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

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B. The Clinic Acquisition Agreement

27. The effects of the Clinic Acquisition Agreement, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant market, 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventeenth day of October, 2007, issues its complaint against the Respondents.

By the Commission.

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The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent American Renal Associates, Inc., of certain assets owned by Respondent Fresenius Medical Care Holdings, Inc., (hereinafter “Respondents”) and of certain acts and practices of the Respondents, and the Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondents of

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all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent American Renal Associates Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 66 Cherry Hill Drive, Beverly, Massachusetts 01915.

2. Respondent Fresenius Medical Care Holdings, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 95 Hayden Avenue, Lexington, Massachusetts 02420.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

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ORDER**I.**

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

- A. “ARA” means American Renal Associates, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by ARA including, but not limited to, ARA-East Providence Dialysis LLC, ARA-Johnston Dialysis LLC, ARA-Fall River Dialysis LLC, and Dialysis Center of West Warwick LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Fresenius” means Fresenius Medical Care Holdings, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Fresenius Medical Care Holdings, Inc. (including Renal Care Group, Inc. and Bio-Medical Applications of Rhode Island, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Clinic” means a facility that provides Dialysis Services.
- D. “Clinic Operator” means a person who owns or engages in the Operation of a Clinic, or who attempts to own or engage in the Operation of a Clinic.
- E. “Commission” means the Federal Trade Commission.
- F. “Cranston-Warwick Area” means the area within ZIP codes 02818, 02886, 02888, 02889, 02893, 02905, 02907, 02909, 02910, 02920, 02921, that portion of 02919 south of U.S.

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Route 6, and those portions of 02831 and 02816 east of Route 116, which are the ZIP codes in and around the cities of Cranston and Warwick, Rhode Island.

- G. “Dialysis Services” means the provision of outpatient hemodialysis or peritoneal dialysis services to patients suffering from kidney disease.
- H. “Governmental Approvals” means any permissions or sanctions issued by any government or governmental organization, including, but not limited to, licenses, permits, accreditations, authorizations, registrations, certifications, certificates of occupancy, and certificates of need.
- I. “Joint Venture Clinic” means a Clinic in which a Respondent owns an interest of at least 50%, but less than 100%.
- J. “Joint Venture Partner” means a Person other than a Respondent that owns an interest in a Joint Venture Clinic.
- K. “Material Confidential Information” means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person’s business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.
- L. “Operation Of A Clinic” means all activities Relating To the business of a Clinic, including, but not limited to:
 - 1. attracting patients to the Clinic for dialysis services, providing dialysis services to patients of the Clinic, and dealing with their Physicians, including, but not limited

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to, services Relating To hemodialysis and peritoneal dialysis;

2. providing medical products to patients of the Clinic;
 3. maintaining the equipment on the premises of the Clinic, including, but not limited to, the equipment used in providing dialysis services to patients;
 4. purchasing supplies and equipment for the Clinic;
 5. negotiating leases for the premises of the Clinic;
 6. providing counseling and support services to patients receiving products or services from the Clinic;
 7. contracting for the services of medical directors for the Clinic;
 8. dealing with Payors that pay for products or services offered by the Clinic, including but not limited to, negotiating contracts with such Payors and submitting claims to such Payors; and
 9. dealing with Governmental Approvals Relating To the Clinic or that otherwise regulate the Clinic.
- M. "Ordinary Patient Transfer" means the occasional or periodic transfer of an individual patient from one Clinic to another Clinic at the request of the patient, or the patient's family, care giver or physician.
- N. "Payor" means any Person that purchases, reimburses for, or otherwise pays for medical goods or services for themselves or for any other Person, including, but not limited to: health insurance companies; preferred provider organizations; point of service organizations; prepaid hospital, medical, or other

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health service plans; health maintenance organizations; government health benefits programs; employers or other Persons providing or administering self-insured health benefits programs; and patients who purchase medical goods or services for themselves.

- O. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.
- P. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- Q. “Relating To” or “Related To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.

II.

IT IS FURTHER ORDERED that each Respondent shall not, expressly or implicitly, directly or indirectly, enter into, continue, maintain, enforce, or offer to enter into any agreement with any Clinic Operator to (1) close any Clinic, or (2) allocate any Dialysis Services market, territory, or customer.

Provided, however, that nothing in this Paragraph shall prohibit each Respondent from (i) unilaterally deciding to close any of its own Clinics (or, in the case of a Joint Venture Clinic, from making any such decision with its Joint Venture Partner for that Clinic), (ii) assisting the owner of any Clinic managed by such Respondent with respect to the closure of such managed Clinic, (iii) entering into non-competition agreements of reasonable duration and geographic scope (a) ancillary to a lawful sale, acquisition, or formation of a Clinic or Joint Venture Clinic, or (b) ancillary to a contract for employment or professional services of an employee or medical

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director, or (iv) continuing the current non-competition agreements of employees, medical directors, Clinics and Joint Venture Clinics.

Provided further, however, that nothing in this Paragraph shall apply to any agreement entered into for an Ordinary Patient Transfer.

III.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final, Respondent ARA shall not, without providing advance written notification to the Commission in the manner described in this paragraph, directly or indirectly:

- A. acquire any assets of or financial interest in any Clinic located in the Cranston-Warwick Area, except to the extent that the acquisition is in:
 - 1. Clinics owned or operated by Respondent ARA at the time this Order becomes final; or
 - 2. in *de novo* Clinics opened by Respondent ARA.
- B. enter into any contract to participate in the management or Operation Of A Clinic located in the Cranston-Warwick Area, except to the extent that the contract relates exclusively to:
 - 1. off-site lab services or social worker support materials;
 - 2. the management of Clinics owned or operated by Respondent ARA at the time this Order becomes final;
 - 3. the management of a *de novo* Clinic opened by Respondent ARA; or
 - 4. billing services, collection services, bookkeeping services, accounting services, supply purchasing and

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logistics services, or the preparation of financial reports and accounts receivable reports (collectively “Such Services”), where appropriate firewalls and confidentiality agreements are implemented to prevent Material Confidential Information of the Clinic from being disclosed to anyone participating in any way in the operation or management of any Clinic owned by ARA or any Clinic other than the Clinic to which such services are being provided.

Said advance written notification shall contain (i) either a detailed term sheet for the proposed acquisition or the proposed agreement with all attachments, and (ii) documents that would be responsive to Item 4(c) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules, 16 C.F.R. § 801-803, relating to the proposed transaction (hereinafter referred to as “the Notification”), *provided, however*, (i) no filing fee will be required for the Notification, (ii) an original and one copy of the Notification shall be filed only with the Secretary of the Commission and need not be submitted to the United States Department of Justice, and (iii) the Notification is required from ARA and not from any other party to the transaction. ARA shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), ARA shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph for a transaction for which Notification is required to

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be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

IV.

IT IS FURTHER ORDERED that ninety (90) days after the date this order becomes final, twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next ten (10) years, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they are complying and have complied with this Order.

V.

IT IS FURTHER ORDERED that, each Respondent shall notify the Commission at least thirty (30) days prior to any proposed:

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

VI.

IT IS FURTHER ORDERED that, with respect to its own organization, for the purpose of determining or securing compliance with this Order, subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, each Respondent shall permit any duly authorized representative of the Commission:

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- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondent related to compliance with this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on October 17, 2017.

By the Commission.

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

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from American Renal Associates, Inc., and affiliates including, but not limited to, ARA-East Providence Dialysis LLC, ARA-Johnston Dialysis LLC, ARA-Fall River Dialysis LLC, and Dialysis Center of West Warwick LLC; and Fresenius Medical Care Holdings, Inc. and affiliates, including

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Renal Care Group, Inc. and Bio-Medical Applications of Rhode Island, Inc. Under the terms of the Consent Agreement, ARA and Fresenius are prohibited from agreeing with other dialysis clinic operators to close any clinics, or allocate any dialysis service markets. ARA is further required to notify the Commission of acquisitions of dialysis clinic assets in the Warwick/Cranston, Rhode Island, area.

The Consent Agreement 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 Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement or make it final.

Pursuant to an Asset Purchase Agreement dated August 3, 2005, ARA proposed to acquire five Fresenius clinics in the Providence, Rhode Island/Fall River, Massachusetts area, and pay Fresenius to close another three competing clinics, for approximately \$4.4 million. ARA's agreement to pay Fresenius to close its clinics is a *per se* violation of the antitrust laws. In addition, the Commission's Complaint alleges, as summarized below, that the Asset Purchase Agreement, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, by reducing dialysis capacity; allocating dialysis customers, territories, or markets; and lessening competition in the market for the provision of outpatient dialysis services in the Warwick/Cranston area.

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II. The Parties

American Renal Associates, Inc., which is headquartered in Danvers, Massachusetts, operates 65 dialysis centers in 15 states and the District of Columbia. ARA is the sixth-largest provider of outpatient dialysis services in the United States, serving 2,300 dialysis patients, with 2004 revenues exceeding \$80 million. In 2005, ARA owned six clinics in Rhode Island, which were located in Cranston, East Providence, Johnston, Pawtucket, Providence, and Tiverton, and one in nearby Fall River, Massachusetts.

Fresenius Medical Care Holdings, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 95 Hayden Avenue, Lexington, Massachusetts 02420-9192. Fresenius is the parent of entities that are parties to the Consent Agreement, including Renal Care Group, Inc. and Bio-Medical Applications of Rhode Island, Inc.

III. The Asset Purchase Agreement

ARA and Fresenius entered into an Asset Purchase Agreement dated August 3, 2005, under which Fresenius agreed to sell five clinics located in Rhode Island – the Wakefield, Westerly, Woonsocket, Warwick, and West Warwick clinics – to ARA for \$2,759,000. The agreement also required Fresenius to close its clinics in East Providence and North Providence, Rhode Island, and in Fall River, Massachusetts, in exchange for ARA's payment of \$1,641,000. The parties terminated this agreement on March 13, 2006, after the FTC staff raised antitrust concerns.

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IV. The Complaint**A. Agreement Between Competitors to Close Clinics**

The Commission's complaint charges that first and foremost, the agreement between Fresenius and ARA – competitors in the provision of outpatient dialysis services – to close three Fresenius clinics was a horizontal agreement to eliminate competition and to reduce dialysis capacity in the three affected areas. Each of the Fresenius clinics to be closed was located close to a competing ARA outpatient dialysis clinic. The parties memorialized their agreement in a written contract, listing each Fresenius clinic to be closed and the specific amount of money to be paid by ARA for closing each clinic, and allocating each amount to the ARA clinic closest to the clinic to be closed. The parties further agreed that Fresenius would not reopen any outpatient dialysis clinics within 10 to 12 miles of the closed facilities for at least five years, and would attempt to enforce the non-compete provisions of its agreements with the medical directors of the closed facilities for ARA's benefit, preventing those physicians from serving as medical directors for any potential new entrant.

Agreements to pay a competitor to exit a market, such as the one negotiated by ARA and Fresenius, are per se unlawful. Indeed, the parties offered no competitive justification for their conduct, and it is unlikely that there is any plausible justification for such an agreement. Such a naked restraint, like a market division agreement or price fixing, is a per se violation of the antitrust laws.

B. Agreement to Eliminate Competition by Acquiring Clinics

The Commission also charges that ARA's proposed acquisition of Fresenius's two Warwick, Rhode Island, facilities would have substantially reduced competition for outpatient dialysis services by eliminating competition between these Warwick clinics and ARA's nearby Cranston, Rhode Island, clinic. Outpatient dialysis services is the relevant product market in which to assess the effects of the

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clinic acquisition portion of the asset purchase agreement. End stage renal disease (ESRD) is 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. ESRD may be treated through dialysis, a process whereby a person's blood is filtered by machines that act as artificial kidneys. Most ESRD patients receive dialysis treatments in an outpatient dialysis clinic three times per week, in sessions lasting between three and five hours. The only alternative to outpatient dialysis treatments for ESRD patients 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, many ESRD patients have no alternative to ongoing dialysis treatments.

The Commission's complaint also alleges that the relevant geographic market in which to assess the competitive effects of the clinic acquisition portion of the asset purchase agreement is the Cranston and Warwick area in Rhode Island. The relevant geographic market for the provision of outpatient dialysis services is defined by the distance ESRD patients are willing and able to travel to receive 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, and because of the high frequency of treatments, these patients are unwilling and unable to travel long distances for dialysis treatment. The time and distance a patient will travel in a particular location are significantly affected by local traffic patterns; whether an area is urban, suburban, or rural; local geography; and a patient's proximity to the nearest dialysis clinic. The size and dimensions of relevant geographic markets are also influenced by a variety of other factors including population density, roads, geographic features, and political boundaries.

With respect to the clinic acquisition portion of the asset purchase agreement, the Commission's complaint alleges that the

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market for outpatient dialysis services in the Warwick/Cranston area is highly concentrated. The market has only two dialysis providers, ARA and Fresenius, and the transaction as originally proposed would result in a monopoly in the Warwick/Cranston area. The evidence shows that health plans and other private payers who pay for dialysis services used by their members benefit from direct competition between ARA and Fresenius when negotiating the rates of the dialysis provider. As a result, the proposed combination likely would result in higher prices and reduced incentives to improve service or quality in the Warwick/Cranston outpatient dialysis services market defined in the complaint. Also, the complaint alleges that in this market, entry on a level sufficient to deter or counteract the likely anticompetitive effects of the proposed transaction is not likely to occur in a timely manner. The primary barrier to entry is the difficulty associated with locating nephrologists with established patient pools who are willing and able to serve as medical directors. Federal law requires each dialysis clinic to have a physician medical director. As a practical matter, having a nephrologist serve as medical director is essential to the success of a clinic because medical directors are the primary source of referrals.

V. The Consent Agreement

The proposed relief in this case is narrowly tailored to address both the agreement to close clinics and the attempted acquisition of clinics in the Warwick/Cranston area. The order would prohibit ARA and Fresenius for ten years from agreeing with any person to close a dialysis clinic, or allocate any dialysis customer, territory, or market. The consent order also would require ARA to give the Commission prior notice before acquiring any interest in a dialysis clinic in the Warwick/Cranston area because there is a risk that ARA remains interested in expanding in the area, but any such further acquisition likely would fall below Hart-Scott-Rodino Act premerger notification thresholds.

Analysis to Aid Public Comment

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order, or to modify its terms in any way.

Complaint

IN THE MATTER OF

**MYLAN LABORATORIES, INC.,
AND
E. MERCK oHG****CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT***Docket C-4200; File No. 071 0164**Complaint, September 26, 2007 – Decision, November 1, 2007*

The consent order addresses the \$6.6 billion proposed acquisition by Mylan of Merck's generic subsidiary ("Merck Generics") and all subsidiaries held directly by Merck Generics. The complaint alleged that the Merger Agreement violates of Section 5 of the FTC Act, and the acquisition, if consummated, would violate of Section 7 of the Clayton Act by substantially lessening competition and creating a monopoly in the U.S. markets for the manufacture and sale of (1) acebutolol hydrochloride capsules; (2) flecainide acetate tablets; (3) guanfacine hydrochloride tablets; (4) nicardipine hydrochloride capsules; and (5) sotalol hydrochloride AF tablets. The Consent Agreement requires Mylan and Merck are to divest certain rights and assets related to the Products to a Commission-approved acquirer no later than ten (10) days after the acquisition. Specifically the consent order requires that Merck divest its assets in the Products to Amneal.

Participants

For the *Commission*: Daniel P. Ducore, Leslie Farber, Mark Frankena, Roy Levy, Michael R. Moiseyev, David Von Nirschl, David P. Wales, Kari A. Wallace, and Alissa N. Wantman.

For the *Respondents*: Alexandra Carter and Katherine Forrest, Cravath, Swaine & Moore LLP; Andrea Haggerty and Mary Lou Steptoe, Skadden, Arps, Slate, Meagher & Flom LLP.