

Complaint

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

*Docket No. C-4334; File No. 111 0103
Filed, September 2, 2011 — Decision, October 20, 2011*

This consent order addresses the acquisition by DaVita Inc. (“DaVita”) of CDSI Holding Company, Inc. (“CDSI”). DaVita is the second largest provider of outpatient dialysis services in the United States. CDSI is the fifth largest provider of outpatient dialysis services in the United States. The complaint alleges that the acquisition of CDSI by DaVita would substantially lessen competition, result in higher prices, and diminish service and quality for outpatient dialysis services in several geographic markets throughout the United States. The order requires DaVita to divest 29 outpatient dialysis clinics and to implement certain measures to ensure the divestitures is successful.

Participants

For the *Commission*: *Lisa D. DeMarchi Sleigh, Amy S. Posner, and Kari A. Wallace.*

For the *Respondent*: *Joel R. Grosberg and Gregory Heltzer, McDemott Will & Emery LLP.*

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 DaVita Inc. (“DaVita”), a company subject to the jurisdiction of the Commission, has entered into an agreement to acquire CDSI I Holding Company, Inc. (“DSI”), 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 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

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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. Respondent DaVita 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 1551 Wewatta St. Denver, Colorado 80202. Respondent DaVita, among other things, is engaged in the provision and sale of outpatient dialysis services.

5. Respondent DaVita 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. DSI is a 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 424 Church Street, Suite 1900, Nashville, TN 37219. DSI, among other things, is engaged in the provision and sale of outpatient dialysis services.

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7. DSI 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 February 4, 2011, DaVita entered into an agreement (“Purchase Agreement”) to acquire DSI for approximately \$689 million in cash (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 outpatient dialysis services. Most ESRD patients receive dialysis treatments three times per week in sessions lasting between three and five hours. 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, many ESRD patients have no alternative to ongoing dialysis treatments.

10. The relevant geographic market for the provision of dialysis services is defined by the distance ESRD patients are willing and/or 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, 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 22 geographic markets within which to assess the competitive effects of the

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proposed merger are the following 14 metropolitan statistical areas (“MSAs”) and micropolitan statistical areas (“μSAs”) other areas, or particular geographic areas contained therein: (1) Birmingham-Hoover, AL MSA; (2) Blytheville, AR μSA; (3) Phoenix-Mesa-Glendale, AZ MSA; (4) Tampa-St. Petersburg-Clearwater, FL MSA; (5) Atlanta-Sandy Springs-Marietta, GA MSA; (6) Chicago-Joliet-Naperville, IL-IN-WI MSA; (7) Indianapolis-Carmel, IN MSA; (8) Louisville/Jefferson County, KY-IN MSA; (9) Baton Rouge, LA MSA; (10) Greenville-Mauldin-Easley, SC MSA; (11) Memphis, TN-MS-AR MSA; (12) Beeville, TX μSA; (13) Corpus Christi, TX MSA; and (14) El Paso, TX MSA.

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 1 market and would cause the number of providers to drop from three to two in fifteen other markets. Additionally, concentration increases significantly in the remaining six markets.

13. DaVita and DSI are actual and substantial competitors in each of the relevant markets.

VII. ENTRY CONDITIONS

14. The most significant barrier to entry into the relevant markets is locating a nephrologist with an established referral base to serve as the clinic’s medical director. By law, each dialysis clinic must have a nephrologist medical director. The medical director is essential to the competitiveness of the clinic because he or she is the clinic’s primary source of referrals. The lack of available nephrologists with an established referral stream is a significant barrier to entry into each of the relevant geographic markets identified in Paragraph 11. Additionally, an area must have certain attributes (such as a rapidly growing ESRD population, a favorable regulatory environment, average or below nursing and labor costs, and a relatively low penetration of

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managed care) to attract entry. The absence of these attributes is an additional barrier to entry into 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 because it would take over two years to enter and achieve significant market impact.

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 DaVita and DSI in the market for the provision of outpatient dialysis services;
- b. increasing the ability of the merged entity unilaterally to raise prices of outpatient dialysis services; and
- c. reducing incentives to improve service or product quality 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.

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WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this second day of September, 2011, issues its Complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by DaVita Inc. of CDSI I Holding Company, Inc. (“DSI”), and DaVita Inc. (hereafter referred to as “Respondent DaVita”) 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 Respondent DaVita 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

Respondent DaVita, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent DaVita of 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 Respondent DaVita 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 Respondent DaVita has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon

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issued its Complaint and an Order to Hold Separate and Maintain Assets (“Hold Separate Order”), 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 DaVita Inc. 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 1551 Wewatta St. Denver, Colorado 80202.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent DaVita, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “DaVita” means DaVita Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by DaVita Inc. (including, after the Effective Date, CDSI I Holding Company, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “DSI” means CDSI I Holding Company, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by CDSI I Holding Company, Inc., and the respective

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directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “Commission” means the Federal Trade Commission.
- D. “Acquirer” and “Acquirers” means Frazier/NEA, and each Person that receives the prior approval of the Commission to acquire any of the Appendix A Clinic Assets pursuant to Paragraphs II or V of this Order.
- E. “Alabama Governmental Approvals For Divestiture” means any Governmental Approvals For Divestiture issued by the State of Alabama.
- F. “Alabama Clinic Assets” means the DSI Norwood Clinic, located at 1424 North Carraway Boulevard, Birmingham, AL 35234, and all Assets Associated with that Clinic.
- G. “Appendix A Clinics” means Clinics listed in Appendix A to this Order.
- H. “Appendix A Clinic Assets” means the Appendix A Clinics, the Appendix A Joint Venture Equity Interests, and all Assets Associated with each of the Appendix A Clinics, except for the Owned Real Property.
- I. “Appendix A Joint Venture Equity Interests” means the joint venture equity interest owned by DSI in each of the following joint ventures: (1) Renal Care Group South Tampa, LLC; (2) DSI El Paso, LLC (3) Renal Care Group Galleria, LLC; and (4) DSI Greenville, LLC. The joint ventures are more fully described in Appendix A-2.
- J. “Appendix F Clinics” means the clinics identified in Non-Public Appendix F that are owned by DaVita in locations proximate to the DSI Clinics listed in Appendix A. In any given location, there may be a greater, smaller, or equal number of DaVita Clinics in

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Non-Public Appendix F that correspond to DSI Clinics in any given location.

- K. “Appendix F Clinic Assets” means the Appendix F Clinics, the Appendix F Joint Venture Equity Interests and all Assets Associated with each of the Appendix F Clinics, except for the Owned Real Property.
- L. “Appendix F Joint Venture Equity Interests” means the joint venture equity interest owned by DSI described in Appendix F-2.
- M. “Assets Associated” means the following assets Relating To the Operation Of A Clinic:
 - 1. all rights under the Clinic’s Physician Contracts;
 - 2. leases for the Real Property of the Clinic;
 - 3. consumable or disposable inventory, including, but not limited to, janitorial, office, and medical supplies, and at least ten (10) treatment days of dialysis supplies and pharmaceuticals, including, but not limited to, erythropoietin;
 - 4. all rights, title and interest of Respondent DaVita or DSI in any tangible property (except for consumable or disposable inventory) that has been on the premises of the Clinic at any time since January 1, 2011, including, but not limited to, all equipment, furnishings, fixtures, improvements, and appurtenances;
 - 5. books, records, files, correspondence, manuals, computer printouts, databases, and other documents Relating To the Operation Of The Clinic located on the premises of the Clinic or in the possession of the Regional Manager responsible for such Clinic (or copies thereof where Respondent DaVita or DSI has a legal

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obligation to maintain the original document), including, but not limited to:

- a. documents containing information Relating To patients (to the extent transferable under applicable law), including, but not limited to, medical records,
- b. financial records,
- c. personnel files,
- d. Physician lists and other records of the Clinic's dealings with Physicians,
- e. maintenance records,
- f. documents Relating To policies and procedures,
- g. documents Relating To quality control,
- h. documents Relating To Payors,
- i. documents Relating To Suppliers,
- j. documents Relating To Clinics other than the Clinic To Be Divested, *provided, however*, if such documents are located other than on the premises of the Clinic To Be Divested, Respondent DaVita may submit a copy of the document with the portions not Relating To the Clinic To Be Divested redacted, and
- k. copies of contracts with Payors and Suppliers, unless such contracts cannot, according to their terms, be disclosed to third parties even with the permission of Respondent DaVita to make such disclosure;

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6. Respondent DaVita's and DSI's Medicare and Medicaid provider numbers, to the extent transferable;
7. all permits and licenses, to the extent transferable;
8. Intangible Property relating exclusively to the Operation Of The Clinic; and a royalty-free perpetual worldwide license for the use, without any limitation, of all other Intangible Property Relating To the Operation Of The Clinic (including the right to transfer or sublicense such Intangible Property, exclusively or nonexclusively, to others by any means); and
9. assets that are used in, or necessary for, the Operation Of The Clinic.

Provided, however, that "Assets Associated" does not include Excluded Assets.

- N. "Assets To Be Divested" means the Appendix A Clinic Assets and any Appendix F Clinic Assets divested pursuant to Paragraph V.A. of the Order.
- O. "Clinic" means a facility that provides hemodialysis or peritoneal dialysis services to patients suffering from kidney disease.
- P. "Clinic's Physician Contracts" means all agreements to provide the services of a Physician to a Clinic, regardless of whether any of the agreements are with a Physician or with a medical group, including, but not limited to, agreements for the services of a medical director for the Clinic and "joinder" agreements with Physicians in the same medical practice as a medical director of the Clinic.
- Q. "Clinic To Be Divested" and "Clinics To Be Divested" means the Appendix A Clinics, the Appendix A Joint Venture Equity Interests and any Appendix F Clinics

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or Appendix F Joint Venture Equity Interests divested pursuant Paragraph V.A. of the Order.

- R. “Confidential Business 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.
- S. “Contract Services” means services performed pursuant to any Clinic’s Physician Contract.
- T. “DaVita Employee Of A Clinic To Be Divested” and “DaVita Employee Of The Clinic To Be Divested” means an Employee Of A Clinic To Be Divested who is employed by Respondent DaVita or, before the acquisition by Respondent DaVita, by DSI.
- U. “DaVita’s Medical Protocols” means medical protocols promulgated by Respondent DaVita, whether in hard copy or embedded in software, that have been in effect at any time since July 1, 2010. *Provided, however*, “DaVita’s Medical Protocols” does not mean medical protocols adopted or promulgated, at any time, by any Physician or by any Acquirer, even if such medical protocols are identical, in whole or in part, to medical protocols promulgated by Respondent DaVita.
- V. “Designated DaVita Employee” means (1) a DaVita Employee Of A Clinic To Be Divested, and (2) any of the additional DaVita and DSI employees listed in Non-Public Appendix G to this Order.
- W. “Divestiture Agreement” and “Divestiture Agreements” mean any agreement pursuant to which Respondent DaVita or a Divestiture Trustee divests any Appendix A Clinic Assets or Appendix F Clinic

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Assets pursuant to this Order and with the prior approval of the Commission.

- X. “Divestiture Trustee” means the person appointed to act as trustee by the Commission pursuant to Paragraph II.A or V of this Order.
- Y. “DSI’s Medical Protocols” means medical protocols promulgated by DSI, whether in hard copy or embedded in software, that have been in effect at any time since July 1, 2010. *Provided, however*, “DSI’s Medical Protocols” does not mean medical protocols adopted or promulgated, at any time, by any Physician or by any Acquirer, even if such medical protocols are identical, in whole or in part, to medical protocols promulgated by DSI.
- Z. “Effective Date” means the date on which Respondent DaVita acquires DSI.
- AA. “Employee Of A Clinic To Be Divested” and “Employee Of The Clinic To Be Divested” mean any individual (including, but not limited to, a clinic director, manager, nurse, technician, clerk, or social worker) who is not a Regional Manager, who is employed by Respondent DaVita, or before the Acquisition, by DSI, by an Acquirer, or by another manager or owner of such Clinic To Be Divested, and who has worked part time or full-time on the premises of such Clinic To Be Divested at any time since January 1, 2011, regardless of whether the individual has also worked on the premises of any other Clinic.
- BB. “Excluded Assets” means:
 - 1. all cash, cash equivalents, and short term investments of cash;
 - 2. accounts receivable;

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3. income tax refunds and tax deposits due Respondent DaVita or DSI;
4. unbilled costs and fees, and Medicare bad debt recovery claims, arising before a Clinic is divested to an Acquirer;
5. rights to the names “DaVita” and any variation of that name, and any names, phrases, marks, trade names, and trademarks to the extent they include the marks and designs in Exhibit D to this Order;
6. insurance policies and all claims thereunder;
7. prepaid items or rebates;
8. minute books (other than governing body minute books of the Clinic To Be Divested), tax returns, and other corporate books and records;
9. any inter-company balances due to or from Respondent DaVita and DSI or their affiliates;
10. all benefits plans;
11. all writings and other items that are protected by the attorney-client privilege, the attorney work product doctrine or any other cognizable privilege or protection, except to the extent such information is necessary to the Operation Of A Clinic that is divested;
12. telecommunication systems equipment and applications, and information systems equipment including, but not limited to computer hardware, not physically located at a Clinic To Be Divested but shared with the Clinic To Be Divested through local and/or wide area networking systems;
13. e-mail addresses and telephone numbers of Respondent DaVita’s and DSI’s employees;

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14. Software;
 15. computer hardware used in the Operation Of The Clinic that is (a) not located at the Clinic, and (b) not otherwise to be divested pursuant to a Divestiture Agreement;
 16. all Supplier or provider numbers issued to Respondent DaVita or DSI by a Supplier or Payor with respect to any Clinic To Be Divested, except for Respondent DaVita's or DSI's Medicare and Medicaid provider numbers for each Clinic To Be Divested;
 17. rights under agreements with Payors and Suppliers that are not assignable even if Respondent DaVita and DSI approve such assignment;
 18. office equipment and furniture that (a) is not, in the Ordinary Course Of Business, physically located at the Clinic To Be Divested, (b) is shared with Clinics other than the Clinic To Be Divested, and (c) is not necessary to the Operation Of The Clinic To Be Divested.
 19. Licensed Intangible Property; and
 20. strategic planning documents that
 - a. relate to the Operation Of The Clinic other than the Clinic To Be Divested, and
 - b. are not located on the premises of the Clinic To Be Divested.
- CC. "Frazier" means Frazier Healthcare, a growth equity and venture capital partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of

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business located at 601 Union Street, Suite 3200, Seattle, WA 98101.

DD. “Frazier/NEA Divestiture Agreements” means the following agreements:

1. the Amended and Restated Asset Purchase Agreement dated August 26, 2011, by and among Dialysis Newco, Inc., CDSI I Holding Company, Inc., and DaVita Inc., and all attachments and exhibits, thereto, and
2. the Transition Services Agreement dated August 26, 2011, between Dialysis Newco, Inc. and DaVita Inc., and all attachments and exhibits, thereto.

(The Frazier/NEA Divestiture Agreements are attached as Non-Public Appendix E to this Order.)

EE. “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.

FF. “Government Approvals For Continued Operation” means any Governmental Approvals, other than Government Approvals For Divestiture, that an Acquirer must have to continue to operate a Clinic To Be Divested.

GG. “Governmental Approvals For Divestiture” means any Governmental Approvals that an Acquirer must have to own, and to initially operate, a Clinic To Be Divested, including, but not limited to, state-issued licenses and state-issued certificates of need.

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- HH. “Illinois Governmental Approvals For Divestiture” means any Governmental Approvals For Divestiture issued by the State of Illinois.
- II. “Illinois Clinic Assets” means the DSI Scottsdale Clinic located at 4651 West 79th Street, Unit 100 Chicago, IL 60652, and all Assets Associated with that Clinic.
- JJ. “Intangible Property” means intangible property Relating To the Operation Of A Clinic To Be Divested including, but not limited to, intellectual property, software, computer programs, patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, protocols, quality control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intangible property.
- KK. “Licensed Intangible Property” means intangible property licensed to Respondent DaVita from a third party Relating To the Operation Of A Clinic To Be Divested including, but not limited to, intellectual property, software, computer programs, patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, protocols, quality control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intangible property that are licensed to Respondent DaVita. (“Licensed Intangible Property” does not mean modifications and improvements to intangible property that are not licensed to Respondent DaVita.)
- LL. “Monitor Agreement” means the Monitor Agreement dated August 11, 2011, between DaVita Inc., and Richard Shermer, of R. Shermer & Co. (The Monitor Agreement is attached as Appendix C to this Order. The Monitor Agreement Compensation is attached as Confidential Appendix C-1 to this Order.)

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- MM. “NEA” means New Enterprise Associates, a venture capital firm organized, existing and doing business under and by virtue of the laws of the Cayman Islands with its office and principal place of business located at 2855 Sand Hill Road, Menlo Park, CA 94025.
- NN. “Operation Of A Clinic” and “Operation Of The Clinic” mean 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 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.

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- OO. “Ordinary Course Of Business” means actions taken by any Person in the ordinary course of the normal day-to-day Operation Of The Clinic that is consistent with past practices of such Person in the Operation Of The Clinic, including, but not limited to past practice with respect to amount, timing, and frequency.
- PP. “Osceola Non-Compete” means the non-compete agreement between Respondent DaVita and Dr. Nawar Mansour, who was proposed as a Medical Director for a clinic that Respondent DaVita never opened in Osceola, Arkansas.
- QQ. “Other Contracts Of Each Clinic To Be Divested” means all contracts Relating To the Operation Of A Clinic, where such Clinic is a Clinic To Be Divested – including, but not limited to, contracts for goods and services provided to the Clinic and contracts with Payors – but does not mean the Clinic’s Physician Contracts and the leases for the Real Property Of The Clinic.
- RR. “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 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.
- SS. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

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- TT. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- UU. “Real Property Of The Clinic” means real property on which, or in which, the Clinic is located, including real property used for parking and for other functions Relating To the Operation Of The Clinic.
- VV. “Relating To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- WW. “Regional Manager” means any individual who has been employed by Respondent DaVita or DSI with supervisory responsibility for three or more Clinics.
- XX. “Regional Manager Of A Clinic To Be Divested” and “Regional Manager Of The Clinic To Be Divested” mean a Regional Manager who has had direct supervisory responsibility for a Clinic To Be Divested at any time since January 1, 2011.
- YY. “Software” means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.
- ZZ. “Supplier” means any Person that has sold to Respondent DaVita or DSI any goods or services, other than Physician services, for use in a Clinic To Be Divested. *Provided, however*, “Supplier” does not mean an employee of Respondent DaVita or DSI.
- AAA. “Time Of Divestiture” means the date upon which an Appendix A Clinic or an Appendix F Clinic is divested to an Acquirer pursuant to this Order.

II.**IT IS FURTHER ORDERED** that:

- A. Respondent DaVita shall:

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1. within thirty (30) days after the Effective Date, divest to Frazier/NEA, absolutely, and in good faith, pursuant to and in accordance with the Frazier/NEA Divestiture Agreements all the Appendix A Clinic Assets, except for the Alabama Clinic Assets and the Illinois Clinic Assets, as on-going businesses, and grant to the Acquirer a royalty-free, worldwide exclusive license for the use, without any limitation, of the DSI Medical Protocols (including the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means); *provided, however*, that Respondent DaVita may receive, as a part of the Frazier/NEA Divestiture Agreements and for a reasonable amount of time during a transition period, a royalty-free perpetual worldwide license for the use of DSI's Medical Protocols (not including the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means).
2. within ninety (90) days after the Effective Date, divest to Frazier/NEA, absolutely, and in good faith, pursuant to and in accordance with the Frazier/NEA Divestiture Agreements, the Alabama Clinic Assets, as an on-going business.
3. within ninety (90) days after the Effective Date, divest to Frazier/NEA, absolutely, and in good faith, pursuant to and in accordance with the Frazier/NEA Divestiture Agreements, the Illinois Clinic Assets, as an ongoing business.

Provided, however, if, at the time the Commission determines to make this Order final, the Commission notifies Respondent DaVita that Frazier/NEA is not an acceptable Acquirer then, after receipt of such written notification: (1) Respondent DaVita shall immediately notify Frazier/NEA of the notice received from the Commission and shall as soon as practicable, but no

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later than within five (5) business days, effect the rescission of the Divestiture Agreement; and (2) Respondent DaVita shall: (a) within six (6) months of the date DaVita receives notice of such determination from the Commission, divest the Appendix A Clinic Assets, except for the Alabama Clinic Assets and the Illinois Clinic Assets, absolutely and in good faith, at no minimum price, as ongoing businesses to an Acquirer or Acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; and (b) within eight (8) months of the date DaVita receives notice of such determination from the Commission, divest the Alabama Clinic Assets and the Illinois Clinic Assets absolutely and in good faith, at no minimum price, as ongoing businesses, to an Acquirer or Acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

Provided further, however, that if Respondent DaVita has complied with the terms of this Paragraph before the date on which this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent DaVita that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent DaVita or appoint the Divestiture Trustee, to effect such modifications to the manner of divestiture including, but not limited to, entering into additional agreements or arrangements, as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. The Frazier/NEA Divestiture Agreements are incorporated by reference into this Order and made a part hereof as Confidential Appendix E. Any failure by Respondent DaVita to comply with the Frazier/NEA Divestiture Agreements shall constitute a failure to comply with the Order. The Frazier/NEA Divestiture Agreements shall not vary or contradict, or

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be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of Frazier/NEA, or any obligations of Respondent DaVita, under the Frazier/NEA Divestiture Agreements.

C. Respondent DaVita shall:

1. place no restrictions on the use by any Acquirer of any of the Assets To Be Divested or any of the Clinics To Be Divested.
2. cooperate with the Acquirer and assist the Acquirer, at no cost to the Acquirer, at the Time Of Divestiture of each Clinic To Be Divested, in obtaining all Government Approvals For Divestiture, and all Government Approvals For Continued Operation, for each Clinic To Be Divested;
3. at the Time Of Divestiture of each Clinic To Be Divested:
 - a. assign to the Acquirer all rights, title, and interest to leases for the Real Property Of The Clinic, and shall obtain all approvals necessary for such assignments; *provided, however*, that (1) if the Acquirer obtains all rights, title, and interest to a lease for Real Property Of A Clinic To Be Divested before the Assets To Be Divested are divested pursuant to Paragraph II.A. of this Order, and (2) the Acquirer certifies its receipt of such lease and attaches it as part of the Divestiture Agreement, then Respondent DaVita shall not be required to make the assignments for such Clinic To Be Divested as required by this Paragraph; and
 - b. assign to the Acquirer all of the Clinic's Physician Contracts, and shall obtain all

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approvals necessary for such assignment; *provided, however*, that (1) if the Acquirer enters into a Clinic's Physician Contract for a Clinic To Be Divested before the Assets To Be Divested are divested pursuant to Paragraph II.A. of this Order, and (2) the Acquirer certifies its receipt of such contract and attaches it as part of the Divestiture Agreement, then Respondent DaVita shall not be required to make the assignment for such Clinic To Be Divested as required by this Paragraph.

4. With respect to all Other Contracts Of Each Clinic To Be Divested, at the Acquirer's option and at the Time Of Divestiture of each Clinic To Be Divested:
 - a. if such contract can be assigned without third party approval, assign its rights under the contract to the Acquirer; and
 - b. if such contract can be assigned to the Acquirer only with third party approval, assist and cooperate with the Acquirer in obtaining:
 - (1) such third party approval and in assigning the contract to the Acquirer; or
 - (2) a new contract.

D. Respondent DaVita shall:

1. at the Time Of Divestiture of each Clinic To Be Divested, provide to the Acquirer of such Clinic contact information about Payors and Suppliers for the Clinic, and
2. not object to the sharing of Payor and Supplier contract terms Relating To the Clinics To Be Divested: (i) if the Payor or Supplier consents in

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writing to such disclosure upon a request by the Acquirer, and (ii) if the Acquirer enters into a confidentiality agreement with Respondent DaVita not to disclose the information to any third party.

- E. From the time Respondent DaVita signs the Agreement Containing Consent Order until sixty (60) days after the Time Of Divestiture of each Clinic To Be Divested or until January 3, 2012, whichever is later:
1. Respondent DaVita shall, if requested by the Acquirer, facilitate interviews between each Designated DaVita Employee and the Acquirer, and shall not discourage such employee from participating in such interviews;
 2. Respondent DaVita shall not interfere in employment negotiations between each Designated DaVita Employee and the Acquirer;
 3. Respondent DaVita shall not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the Designated DaVita Employee from being employed by the Acquirer, and shall not offer any incentive to the Designated DaVita Employee to decline employment with the Acquirer;
 4. Respondent DaVita shall cooperate with the Acquirer of the Clinic in effecting transfer of the Designated DaVita Employee to the employ of the Acquirer, if the Designated DaVita Employee accepts such offer of employment from the Acquirer;
 5. Respondent DaVita shall eliminate any contractual provisions or other restrictions that would otherwise prevent the Designated DaVita Employee from being employed by the Acquirer;

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6. Respondent DaVita shall eliminate any confidentiality restrictions that would prevent the Designated DaVita Employee who accepts employment with the Acquirer from using or transferring to the Acquirer any information Relating To the Operation Of The Clinic; and
7. Respondent DaVita shall pay, for the benefit of any Designated DaVita Employee who accepts employment with the Acquirer, all accrued bonuses, vested pensions and other accrued benefits.

Provided, however, that if, at any time after the Time of Divestiture, the Acquirer gives Respondent DaVita an unsolicited list of employees from the Non-Public Appendix G to whom the Acquirer does not intend to offer employment, then such employees may be hired by Respondent DaVita as full time employees without violating this Paragraph II.E. *provided, further, however,* that no earlier than fifteen (15) days after the Time of Divestiture, Respondent DaVita may submit a written request to the Acquirer identifying those persons from the Non-Public Appendix G to whom Respondent DaVita wishes to offer full time employment; and if the Acquirer within fifteen (15) days of receipt of such request grants, in writing, such request, then Respondent DaVita may offer employment to such employees; but if the Acquirer within fifteen (15) days of receipt of such request either: (i) chooses to hire such employees, or (ii) chooses to defer a hiring decision and keep the requested employees on the Non-Public Appendix G, then Respondent DaVita shall continue to comply with the terms of this Paragraph II.E. with regard to such employees.

- F. For a period of two (2) years following the Time Of Divestiture of each Clinic To Be Divested, Respondent DaVita shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any

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Designated DaVita Employee who is employed by the Acquirer to terminate his or her employment relationship with the Acquirer, unless that employment relationship has already been terminated by the Acquirer; *provided, however*, Respondent DaVita may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at Acquirer's employees; *provided, further, however*, Respondent DaVita may hire employees who apply for employment with Respondent DaVita, as long as such employees were not solicited by Respondent DaVita in violation of this Paragraph; *provided, further, however*, Respondent DaVita may offer employment to an Designated DaVita Employee who is employed by the Acquirer in only a part-time capacity, if the employment offered by Respondent DaVita would not, in any way, interfere with the employee's ability to fulfill his or her employment responsibilities to the Acquirer.

- G. With respect to each Physician who has provided services to a Clinic To Be Divested pursuant to any of the Clinic's Physician Contracts in effect at any time during the four (4) months preceding the Time Of Divestiture of the Clinic ("Contract Physician"):
 - 1. Respondent DaVita shall not offer any incentive to the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group to decline to provide services to the Clinic To Be Divested, and shall eliminate any confidentiality restrictions that would prevent the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group from using or transferring to the Acquirer of the Clinic To Be Divested any information Relating To the Operation Of The Clinic; and
 - 2. For a period of three (3) years following the Time Of Divestiture of each Clinic To Be Divested, Respondent

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DaVita shall not contract for the services of the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group for the provision of Contract Services to be performed in any of the areas listed in Appendix B of this Order that correspond to such Clinic. *Provided, however*, if the Contract Physician, or the Contract Physician's practice group, or other members of the Contract Physician's practice group were providing services to a Clinic pursuant to a contract with Respondent DaVita or DSI in effect as of January 1, 2011, then Respondent DaVita may contract with such Contract Physicians, or the Contract Physician's practice group, or other members of the Contract Physician's practice group for services to be provided to that particular Clinic.

H. Respondent DaVita shall:

1. not disclose Confidential Business Information relating exclusively to any of the Clinics To Be Divested to any Person other than the Acquirer of such Clinic;
2. after the Time Of Divestiture of such Clinic:
 - a. Respondent DaVita shall not use Confidential Business Information relating exclusively to any of the Clinics To Be Divested for any purpose other than complying with the terms of this Order or with any law; and
 - b. Respondent DaVita shall destroy all records of Confidential Business Information relating exclusively to any of the Clinics To Be Divested , except to the extent that: (1) Respondent DaVita is required by law to retain such information, and (2) Respondent DaVita's inside or outside attorneys may keep one copy solely for archival purposes, but may not

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disclose such copy to the rest of Respondent DaVita.

- I. At the Time Of Divestiture of each Clinic To Be Divested, Respondent DaVita shall provide the Acquirer of the Clinic with manuals, instructions, and specifications sufficient for the Acquirer to access and use any information
 - 1. divested to the Acquirer pursuant to this Order, or
 - 2. in the possession of the Acquirer, and previously used by Respondent DaVita or DSI in the Operation Of The Clinic.
- J. For two (2) years following the Time Of Divestiture of each Clinic To Be Divested, Respondent DaVita shall not solicit the business of any patients that received any goods or services from such Clinic between July 1, 2010, and the date of such divestiture, *provided, however*, Respondent DaVita may (i) make general advertisements for the business of such patients including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at such patients, and (ii) provide advertising and promotions directly to any patient that initiates discussions with, or makes a request to, any Respondent DaVita employee.
- K. Respondent DaVita shall convey to each Acquirer of a Clinic To Be Divested the right to use any Licensed Intangible Property (to the extent permitted by the third-party licensor), if such right is needed for the Operation Of The Clinic by the Acquirer and if the Acquirer is unable, using commercially reasonable efforts, to obtain equivalent rights from other third parties on commercially reasonable terms and conditions.
- L. Respondent DaVita shall do nothing to prevent or discourage Suppliers that, prior to the Time Of

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Divestiture of any Clinic To Be Divested, supplied goods and services for use in any Clinic To Be Divested from continuing to supply goods and services for use in such Clinic.

M. Respondent DaVita shall not acquire DSI until it has obtained for all the Appendix A Clinics:

1. all approvals for the assignment of the Clinic's Physician Contracts, as required by Paragraph II.C.3.b. of this Order;
2. all approvals by joint venture partners necessary for the Acquirer to acquire the Appendix A Clinics that are owned by a joint venture, and shall assign all such approvals to the Acquirer; and
3. all approvals by joint venture partners necessary for the Acquirer of Appendix A Joint Venture Equity Interests to jointly own and operate the Appendix A Clinics that are owned by the joint venture, and shall assign all such approvals to the Acquirer.

Copies of all such approvals shall be incorporated into the Divestiture Agreements as appendices.

N. Respondent DaVita shall not acquire DSI until it has:

1. included, as part of the Divestiture Agreements, a letter stating that the Osceola Non-Compete is rescinded and that it will not be re-entered or re-negotiated for five (5) years following the Time of Divestiture; and
2. provided notice to all parties involved in the Osceola Non-Compete that the Osceola Non-Compete has been rescinded.

O. With respect to Respondent DaVita's Medical Protocols:

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1. Respondent DaVita shall retain a copy of DaVita's Medical Protocols until six (6) months after all of the Assets To Be Divested have been divested, pursuant to this Order;
2. If any Acquirer of a Clinic To Be Divested requests in writing to Respondent DaVita:
 - a. within six (6) months of the Time Of Divestiture of that Clinic to that Acquirer, that DaVita license a copy of DaVita's Medical Protocols to that Acquirer, DaVita shall within five (5) business days of such request, grant to that Acquirer a royalty-free perpetual worldwide license for the use, without any limitation, of DaVita's Medical Protocols (including the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means); or
 - b. before the Time of Divestiture, that DaVita license a copy of DaVita's Medical Protocols to that Acquirer, DaVita shall grant, as part of the Divestiture Agreements, to that Acquirer for a reasonable amount of time during a transition period, a royalty-free perpetual worldwide license for the use of DaVita's Medical Protocols (not including the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means); and
3. DaVita shall create no disincentive for any Acquirer of a Clinic To Be Divested to make such a request for a license for DaVita's Medical Protocols, and shall not enter into any agreement or understanding with any Acquirer that the Acquirer not make such a request.

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- P. Respondent DaVita shall not terminate any transition services agreement that is a part of the Frazier/NEA Divestiture Agreements before the end of the term approved by the Commission without:
1. the written agreement of the Acquirer and thirty (30) days prior notice to the Commission; or,
 2. in the case of a proposed unilateral termination by Respondent DaVita due to an alleged breach of an agreement by the Acquirer, sixty (60) days notice of such termination. *Provided, however,* such sixty (60) days notice shall be given only after the parties have:
 - a. attempted to settle the dispute between themselves, and
 - b. engaged in arbitration and received an arbitrator's decision, or
 - c. received a final court decision after all appeals.
- Q. The purpose of Paragraph II of this Order is to ensure the continuation of the Clinics To Be Divested as, or as part of, ongoing viable enterprises engaged in the same business in which such assets were engaged at the time of the announcement of the acquisition by Respondent DaVita Inc. of DSI, to ensure that the Clinics To Be Divested are operated independently of, and in competition with, Respondent DaVita, and to remedy the lessening of competition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that for a period of five (5) years from the date this Order is issued, Respondent DaVita shall not, without providing advance written notification to the Commission in the manner described in this paragraph, directly or indirectly:

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- A. acquire any assets of or financial interest in any Clinic located in any of the areas listed in Appendix B of this Order; or
- B. enter into any contract to participate in the management or Operation Of A Clinic located in any of the areas listed in Appendix B of this Order, except to the extent that the contract relates exclusively to:
 - 1. off-site lab services or social worker support materials; or
 - 2. billing services, collection services, bookkeeping services, accounting services, supply purchasing and 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 Confidential Business Information of the Clinic from being disclosed to anyone participating in any way in the operation or management of any Clinic owned by Respondent DaVita 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 Respondent DaVita and not from any other party to the transaction. Respondent DaVita shall provide the Notification to the Commission at least thirty (30) days prior to consummating

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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), Respondent DaVita shall not consummate the transaction until thirty 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 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:

- A. Richard Shermer of R. Shermer & Co., shall be appointed Monitor to assure that Respondent DaVita expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. No later than one (1) day after the Effective Date, Respondent DaVita shall, pursuant to the Monitor Agreement and to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform their duties and responsibilities in a manner consistent with the purposes of this Order.
- C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondent DaVita, which consent shall not be unreasonably withheld. If Respondent DaVita has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent DaVita of the identity of

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any proposed Monitor, Respondent DaVita shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondent DaVita shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent DaVita's compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements in a manner consistent with the purposes of this Order.

- D. Respondent DaVita shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
1. The Monitor shall have the power and authority to monitor Respondent DaVita's compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:
 - a. Assuring that Respondent DaVita expeditiously complies with all of its obligations and perform all of its responsibilities as required by the this Order, the Order to Maintain Assets, and the Divestiture Agreements;
 - b. Monitoring any transition services agreements;
 - c. Assuring that Confidential Business Information is not received or used by Respondent DaVita or the Acquirers, except as allowed in this Order and in the Order to Maintain Assets, in this matter.

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2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Monitor shall serve for such time as is necessary to monitor Respondent DaVita's compliance with the provisions of this Order, the Order to Maintain Assets, and the Divestiture Agreements.
4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent DaVita's personnel, books, documents, records kept in the Ordinary Course Of Business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent DaVita's compliance with its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements. Respondent DaVita shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent DaVita's compliance with this Order, the Order to Maintain Assets, and the Divestiture Agreements.
5. The Monitor shall serve, without bond or other security, at the expense of Respondent DaVita on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent DaVita, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
6. Respondent DaVita shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out

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of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.

7. Respondent DaVita shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondent DaVita, and any reports submitted by the Acquirer with respect to the performance of Respondent DaVita's obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements.
 8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondent DaVita of its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements.
 9. Respondent DaVita may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and

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assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitor's duties.

- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph IV.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order, the Order to Maintain Assets, and the Divestiture Agreements.
- H. A Monitor appointed pursuant to this Order may be the same Person appointed as a trustee pursuant to Paragraph V of this Order and may be the same Person appointed as Monitor under the Order to Maintain Assets.

V.**IT IS FURTHER ORDERED** that:

- A. If Respondent DaVita has not divested, absolutely and in good faith and with the Commission's prior approval, all of the Appendix A Assets pursuant to Paragraph II of this Order, the Commission may appoint a trustee to (1) divest any of the Appendix A Assets that have not been divested pursuant to Paragraph II of this Order in a manner that satisfies the requirements of Paragraph II of this Order, which may include negotiations with landlords holding leases to the Assets to be Divested; or, in the event the Appendix A Clinics cannot be divested for whatever reason, (2) divest selected Appendix F Clinic Assets at the option of the Divestiture Trustee and the Commission. In the event that the Commission or the

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Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent DaVita shall consent to the appointment of a trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent DaVita to comply with this Order.

- B. The Commission shall select the trustee, subject to the consent of Respondent DaVita, which consent shall not be unreasonably withheld. The trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent DaVita has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of notice by the staff of the Commission to Respondent DaVita of the identity of any proposed trustee, Respondent DaVita shall be deemed to have consented to the selection of the proposed trustee.
- C. Within ten (10) days after appointment of a trustee, Respondent DaVita shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.
- D. If a trustee is appointed by the Commission or a court pursuant to this Order, Respondent DaVita shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

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1. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any of the Appendix A Assets that have not been divested pursuant to Paragraph II of this Order and, subject to the provisions of Paragraph V.A. of the Order, divest Appendix F Clinic Assets.
2. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a divestiture plan or the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the trustee may request. Respondent DaVita shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent DaVita shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent DaVita shall extend the time for divestiture under this Paragraph V in an amount equal to the delay, as determined by the Commission or, for a court appointed trustee, by the court.

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4. The trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent DaVita's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer or Acquirers that receives the prior approval of the Commission, as required by this Order; *provided, however*, if the trustee receives bona fide offers for particular assets from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity for such assets, the trustee shall divest the assets to the acquiring entity selected by Respondent DaVita from among those approved by the Commission; *provided, further, however*, that Respondent DaVita shall select such entity within five (5) days of receiving notification of the Commission's approval.
5. The trustee shall serve, without bond or other security, at the cost and expense of Respondent DaVita, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent DaVita, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court appointed trustee, by the court, of the account of the trustee, including fees for the trustee's services, all remaining monies shall be paid at the direction of Respondent DaVita, and the trustee's power shall be terminated. The compensation of the trustee shall be based at least in significant part on a

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commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent DaVita shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
 7. The trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 8. The trustee shall report in writing to Respondent DaVita and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.
 9. Respondent DaVita may require the trustee and each of the trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the trustee from providing any information to the Commission.
- E. If the Commission determines that a trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph V.
- F. The Commission or, in the case of a court appointed trustee, the court, may on its own initiative or at the

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request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

- G. The trustee appointed pursuant to this Paragraph may be the same Person appointed as the Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets.

VI.**IT IS FURTHER ORDERED** that:

- A. Beginning thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until Respondent DaVita has fully complied with Paragraphs II.A., II.B., II.C., II.D., II.E., II.G.1, II.I, II.K., II.L., II.M., II.N., and II.O. of this Order, Respondent DaVita shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements. Respondent DaVita shall submit at the same time a copy of these reports to the Monitor.
- B. Beginning 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 four (4) years, Respondent DaVita shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with this Order, the Order to Maintain Assets, and the Divestiture Agreements. Respondent DaVita shall submit at the same time a copy of these reports to the Monitor.

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VII.

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

- A. Any proposed dissolution of DaVita,
- B. Any proposed acquisition, merger or consolidation of DaVita, or
- C. Any other change in DaVita that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in DaVita.

VIII.

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

- A. Access, during office hours of DaVita 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 DaVita related to compliance with this Order; and
- B. Upon five (5) days' notice to DaVita and without restraint or interference from DaVita, to interview officers, directors, or employees of DaVita, who may have counsel present, regarding such matters.

Decision and Order

IX.

IT IS FURTHER ORDERED that this Order shall terminate on October 21, 2021.

By the Commission.

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APPENDIX A-1**CLINICS**

	Clinic Name	Clinic Address
1	DSI Norwood	1424 North Carraway Boulevard Birmingham, AL 35234
2	DSI Avondale	13055 West McDowell Road Avondale, AZ 85323
3	DSI Mesa	1337 South Gilbert Road, #109 Mesa, AZ 85204
4	DSI Northeast Phoenix	3305 East Greenway Road Phoenix, AZ 85032
5	DSI Phoenix South	4621 South Central Avenue Phoenix, AZ 85040
6	DSI Southwest Mesa	1457 West Southern Avenue, Ste. D19 Mesa, AZ 85202
7	DSI Tempe	8820 South Kyrene Road Tempe, AZ 85284
8	DSI South Tampa	731 West Lumsden Brandon, FL 33511
9	DSI Tampa Central	4705 N. Armenia Avenue Tampa, FL 33603
10	DaVita Woodstock	2001 Professional Pkwy, Ste. 100 Woodstock, GA 30188
11	DSI Covington	4179 Baker Street NE Covington, GA 30014
12	DSI Cobb County	506 Roswell Street, Bldg. 100 Marietta, GA 30060
13	DSI Scottsdale	4651 West 79 th Street, Unit 100 Chicago, IL 60652
14	DSI Greenwood	125 Airport Parkway, Suite 140 Greenwood, IN 46143

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	Clinic Name	Clinic Address
15	DSI Northwest Indianapolis	6488 Corporate Drive Indianapolis, IN 46278
16	DSI Louisville	635 S. 3 rd Street Louisville, KY 40202
17	DaVita Baton Rouge	3888 North Blvd. Baton Rouge, LA 70806
18	DaVita Denham Springs	26737 Highway 1032 Denham Springs, LA 70726
19	DSI Pleasantburg	110 Chalmers Road Greenville, SC 29605
20	DSI Easley	125 Whitmire Road Easley, SC 29640
21	DSI Greenville	3 Butternut Drive, Ste. A Greenville, SC 29605
22	DSI Powderhorn	16 Powderhorn Road Simpsonville, SC 29681
23	DSI Galleria	8592 Ricky Bell Cove Memphis, TN 38133
24	DSI Memphis South	3960 Knight Arnold Road, Ste. 107 Memphis, TN 38118
25	DaVita Beeville	100 W. Huntington Street Beeville, TX 78102
26	DSI El Paso East	10737 Gateway West, Ste. 100-101 El Paso, TX 79935
27	DSI El Paso West	3100 North Stanton El Paso, TX 79902
28	DSI El Paso South (<i>de novo</i>)	10651N. Loop Rd. El Paso, TX 79927
29	DaVita Oso Bay	7502 South Padre Island Dr. Corpus Christi, TX 78412

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APPENDIX A-2**JOINT VENTURES**

(Joint Ventures From Which DaVita Will Divest Its Joint Venture
Equity Interests and Clinics Owned by Joint Ventures)

	Joint Venture Name	Clinic Name (Medicare Provider Number)	Clinic Address
1	Renal Care Group South Tampa, LLC	South Tampa (102824)	731 W Lumsden Road, Brandon, FL 33511
2	DSI El Paso, LLC	El Paso Kidney Center East (452749)	10737 Gateway West, Suite 100, El Paso, TX 79935
3	Renal Care Group Galleria, LLC	Galleria Renal Center (442660)	8592 Ricky Bell Cove, Memphis, TN 38113
4	DSI Greenville, LLC	Twin Oaks Dialysis - Greenville (422503)	3 Butternut Drive, Greenville, SC 29605

APPENDIX B**AREA DEFINITIONS TO APPENDIX A****AREA DEFINITIONS**

- Five digit numbers refer to zip codes.
- Geographic areas bounded by roads include all properties abutting the referenced road (*i.e.*, properties on both sides of the road).
- Zip codes or other areas fully surrounded by areas included in the area definition shall be considered part of the area definition.
- Area definitions are based on maps submitted to the Commission staff by DaVita.

	Divested Clinics (Medicare Provider Numbers)	Corresponding Area Definition
1	DSI Norwood	The area in and/or near Birmingham, Alabama, consisting of: 35203, 35204, 35205, 35206, 35207, 35208, 35211, 35212, 35213, 35214, 35215, 35217, 35218, 35222, 35233, 35234, 35254, and the portion of 35224 that lies east of County Road 65, southeast of Lexington Street, southeast of 8 th Avenue, southeast of Richmond Street, southeast of 10 th Avenue, east of 57 th Street, and north of Ens-Pleasant Grove Road.
2	DVA Osceola	The area in and/or near Osceola, Arkansas, consisting of Mississippi County (Arkansas).
3	DSI Avondale	The area in and/or near Avondale, Arizona, consisting of: 85031, 85033, 85035, 85037, 85043, 85323, 85353, 85392, 85395, the portion of 85326 that lies east of North 195 th Avenue, east of South 195 th Avenue, and north of the Gila River, the portion of 85338 that lies north of the Gila River, the portion of 85340 that lies south of West Camelback Road and east of North 195 th Avenue, and the portion of 85396 that lies east of North 195 th Avenue.
4	DSI NE Phoenix	The area in and/or near Phoenix, Arizona, consisting of:

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		85012, 85013, 85014, 85015, 85017, 85020, 85021, 85022, 85023, 85024, 85028, 85029, 85032, 85050, 85051, 85254, the portions of 85007, 85003, and 85004 that lie north of Interstate 10, the portion of 85006 that lies north of Interstate 10 and west of Highway 51, the portion of 85009 that lies north of Interstate 10 and east of Interstate 17 and the portion of 85027 that lies east of Interstate 17.
5	DSI South Phoenix	The area in and/or near Phoenix, Arizona, consisting of: 85003, 85004, 85006, 85007, 85008, 85009, 85012, 85013, 85014, 85015, 85016, 85018, 85034, 85035, 85040, 85041, 85042, 85043; and the portion of 85339 that lies east of S 79 th Avenue, north of Dobbins Road, east of W. Carver Road, and east of S 51 st Avenue.
6	DSI Mesa, Southwest Mesa, Tempe	The area in and/or near Mesa, Arizona consisting of: 85040, 85042, 85044, 85201, 85202, 85203, 85204, 85205, 85206, 85210, 85213, 85224, 85225, 85233, 85234, 85236, 85248, 85249, 85281, 85282, 85283, 85284, 85286, 85287, 85295, 85296, and the portion of 85226 that lies east of Interstate 10.
7	DSI South Tampa	The area in and/or near Brandon, Florida, consisting of: 33510, 33511, 33527, 33534, 33569, 33578, 33584, 33594, 33596, 33610, and 33619.
8	DSI Tampa	The area in and/or near Tampa, Florida, consisting of: 33602, 33603, 33604, 33605, 33606, 33607, 33609, 33610, 33611, 33612, 33613, 33614, 33615, 33616, 33617, 33619, 33624, 33625, 33626, 33629, 33634, and 33635.
9	DSI Cobb County	The area in and/or near Marietta, Georgia consisting of: 30008, 30060, 30062, 30064, 30066, 30067, 30101, 30102, 30144, 30152, and the portion of 30080 that lies north of Windy Hill Road SE.
10	DVA Woodstock	The area in and/or near Woodstock, Georgia consisting of: 30066, 30101, 30102, 30107, 30114, 30115, 30152, 30188, and 30189.
11	DSI Covington	The area in and/or near Covington, Georgia consisting of: 30012, 30013, 30014, 30016, 30025, 30054, and 30094.
12	DSI Scottsdale	The area in and/or near Chicago, Illinois consisting of: 60453, 60455, 60456, 60457, 60458, 60459, 60609, 60617, 60619, 60620, 60621, 60628, 60629, 60632, 60636, 60638, 60643, 60652, 60655, and 60805.
	DSI Greenwood	The area in and/or near Indianapolis, Indiana consisting of:

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13		46142, 46143, 46131, 46184, and the portions of 46217, 46221, 46227, 46237, 46239, and 46259 that lie to the south of Interstate 74.
14	DSI Northwest Indianapolis	The area in and/or near Indianapolis, Indiana consisting of 46214, 46222, 46224, 46228, the portion of 46278 that lies to the east of Interstate 65; the portions 46268, and 46260 that lie to the south of Interstate 865/465, and the portion of 46077 that lies to the south of Interstate 865/465 and east of Interstate 65.
15	DSI Louisville	The area in and/or near Louisville, Kentucky consisting of: 40202, 40203, 40204, 40205, 40206, 40209, 40209, 40210, 40211, 40212, 40215, 40214, 40216, 40258, 40292, and the portion of 40231 that lies to the north of Interstate 264.
16	DVA Baton Rouge 2230	The area in and/or near Baton Rouge, Louisiana consisting of: 70706, 70726, 70739, 70767, 70785, 70801, 70802, 70803, 70805, 70806, 70807, 70808, 70806, 70809, 70812, 70815, 70816, and 70817.
17	DSI Easley, Greenville, Pleasantburg, Powderhorn	The area in and/or near Greenville, South Carolina consisting of: 29625, 29660, 29601, 29605, 29607, 29609, 29611, 29613, 29615, 29617, 29630, 29640, 29642, 29644, 29645, 29657, 29661, 29662, 29669, 29671, 29673, 29680, 29681, and the portion of 29687 that lies south of State Highway 290 and S-23-415.
18	DSI Galleria	The area in and/or near Memphis, Tennessee consisting of: 38002, 38016, 38018, 38068, 38120, 38125, 38127, 38128, 38133, 38134, and 38135.
19	DSI Memphis South:	The are in and/or near Memphis, Tennessee, consisting of: 38111, 38114, 38115, 38117, 38118, 38141, and 38152.
20	DVA Beeville 2245	The area in and/or near Beeville, Texas consisting of: 78102, 78389, 78391. the portion of 77963 that lies south of State Highway 239 and west of US-77, the portion of 78022 that lies east of I-37, the portion of 78071 that lies east of I-37 and State Highway 72, the portion of 78119 that lies south of State Highway 72 and State Highway 239, the portion of 78368 that lies east of I-37, and the portions of 78377, 78378 and 78391 that lie west of US-77.
21	DVA Oso Bay 2219	The area in and/or near Corpus Christi, Texas consisting of: 78401, 78402, 78404, 78405, 78407, 78411, 78413, 78414, 78415, 78416, 78417, 78418, and 78419.

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22	DSI El Paso W and El Paso E	The area in and/or near El Paso, Texas consisting of: 88063, 79836, 79838, 79853, 79901, 79902, 79903, 79905, 79907, 79912, 79922, 79927, 79930, 79932, 79968, and the portions of 79821 and 79835 that lie to the west of E.P.N.G. Pipeline Rd., the portions of 79904 and 79924 that lie to the east of US-54, the portions of 79925, 79935 and 79936 that lie to the south of US-62, and the portions of 79928 and 79938 that are within El Paso County (Texas), Texas.
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CONFIDENTIAL APPENDIX C

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

Decision and Order

CONFIDENTIAL APPENDIX D

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

CONFIDENTIAL APPENDIX E

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

Decision and Order

CONFIDENTIAL APPENDIX F

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

CONFIDENTIAL APPENDIX F-2

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

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CONFIDENTIAL APPENDIX G

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

Order to Maintain Assets

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by DaVita Inc. of CDSI I Holding Company, Inc. (“DSI”), and DaVita Inc. (hereafter referred to as “Respondent DaVita”) 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 Respondent DaVita 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

Respondent DaVita, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent DaVita of 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 Respondent DaVita 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 Respondent has 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 issues its Complaint, makes the following jurisdictional findings, and issues the following Order to Hold Separate and Maintain Assets (“Hold Separate Order”):

1. Respondent DaVita Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and

Order to Maintain Assets

principal place of business located at 1551 Wewatta St.
Denver, Colorado 80202.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent DaVita, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that all capitalized terms used in this Hold Separate Order, but not defined herein, shall have the meanings attributed to such terms in the Decision and Order contained in the Consent Agreement. In addition to the definitions in Paragraph I of the Decision and Order attached to the Agreement Containing Consent Orders, the following definitions shall apply:

- A. “DaVita Clinics” means the DaVita-owned Clinics listed in Appendix A to the Decision and Order and the DaVita Clinics in Non-Public Appendix F to the Decision and Order.
- B. “Decision and Order” means:
 1. the Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
 2. the Final Decision and Order issued and served by the Commission.
- C. “Divestiture Date” means the earliest date on which all of the of the divestitures required by the Decision and Order have been completed.
- D. “Hold Separate Period” means the time from the Effective Date until one day after the Divestiture Date.

Order to Maintain Assets

- E. “Hold Separate Trustee” means the person appointed pursuant to Paragraph III of this Hold Separate Order.
- F. “Monitor” means any monitor appointed pursuant to Paragraph VII of this Hold Separate Order.
- G. “Orders” means the Decision and Order and this Order to Hold Separate and Maintain Assets.

II. (Asset Maintenance)**IT IS FURTHER ORDERED** that:

- A. From the date Respondent DaVita signs the Consent Agreement until the Divestiture Date, Respondent DaVita shall:
 - 1. Maintain each of the DaVita Clinics and all Assets Associated with such Clinics in substantially the same condition (except for normal wear and tear) existing at the time Respondent DaVita signs the Consent Agreement;
 - 2. Take such actions that are consistent with the past practices of Respondent DaVita in connection with each of the DaVita Clinics and the Assets Associated with each and that are taken in the Ordinary Course Of Business and in the normal day today operations of Respondent DaVita;
 - 3. Keep available the services of the current officers, employees, and agents of Respondent DaVita; and maintain the relations and good will with Suppliers, Payors, Physicians, landlords, patients, employees, agents, and others having business relations with the DaVita Clinics and the Assets Associated with them in the Ordinary Course Of Business;
 - 4. Preserve the DaVita Clinics and all Assets Associated with them as an ongoing businesses and

Order to Maintain Assets

not take any affirmative action, or fail to take any action within Respondent DaVita's control, as a result of which the viability, competitiveness, and marketability of the DaVita's Clinics or the Assets Associated with them would be diminished;

- B. From the date Respondent DaVita signs the Consent Agreement until the Divestiture Date, Respondent DaVita shall:
1. Not object to the sharing with the Acquirer the Payor and Supplier contract terms Relating To the Clinics To Be Divested: (i) if the Payor or Supplier consents in writing to such disclosure upon a request by the Acquirer, and (ii) if the Acquirer enters into a confidentiality agreement with Respondent DaVita not to disclose the information to any third party; and
 2. Cooperate with the Acquirer and assist the Acquirer, at no cost to the Acquirer, in obtaining all Third Party Approvals and Government Approvals For Divestiture, and all Government Approvals For Continued Operation, for each Clinic To Be Divested.
- C. The purposes of this Paragraph II are to: (1) preserve the DaVita Clinics as viable, competitive, and ongoing businesses until the divestitures required by the Decision and Order are achieved; (2) prevent interim harm to competition pending the relevant divestitures and other relief; and (3) help remedy any anticompetitive effects of the proposed DaVita-DSI Acquisition as alleged in the Commission's Complaint.

III. (DSI Hold Separate)**IT IS FURTHER ORDERED** that:

- A. From the Effective Date until the Divestiture Date, Respondent DaVita shall hold the entirety of DSI

Order to Maintain Assets

separate, apart, and independent of Respondent DaVita. To hold DSI separate, Respondent DaVita shall, among other things:

1. Not offer DSI employees positions with Respondent DaVita, other than continuing the positions they have within DSI; and
2. Do nothing to prevent or discourage suppliers that, prior to the Effective Date, supplied goods and services to DSI from continuing to supply goods and services to DSI.

Provided, however, that Respondent DaVita may divest any of the Appendix A Clinics to the Acquirer during the Hold Separate Period once all the approvals for divestiture pursuant to the Consent Agreement have been satisfied.

- B. At any time after the Effective Date, the Commission may appoint a Hold Separate Trustee to assure that DSI is held separate from Respondent DaVita.
 1. The Commission shall select the Hold Separate Trustee, subject to the consent of Respondent DaVita which consent shall not be unreasonably withheld. If Respondent DaVita has not opposed, in writing, including the reasons for opposing, the selection of a proposed Hold Separate Trustee within five (5) business days after notice by the staff of the Commission to Respondent DaVita of the identity of any proposed Hold Separate Trustee, Respondent DaVita shall be deemed to have consented to the selection of the proposed Hold Separate Trustee.
 2. Not later than five (5) business days after appointment of the Hold Separate Trustee, Respondent DaVita shall execute an agreement that, subject to the prior approval of the Commission, confers on the Hold Separate Trustee

Order to Maintain Assets

all the rights and powers necessary to permit the Hold Separate Trustee to perform his duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of this Hold Separate Order.

3. Not later than ten (10) business days after appointment of the Hold Separate Trustee, Respondent DaVita shall, pursuant to the Hold Separate Trustee Agreement, transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of the Decision and Order.
4. Respondent DaVita shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Hold Separate Trustee:
 - a. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate Order and the Decision and Order, for monitoring the organization of DSI, for managing DSI through the Manager; for maintaining the independence of DSI; and for monitoring Respondent DaVita's compliance with its obligations pursuant to the Orders.
 - b. Subject to all applicable laws and regulations, the Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of DSI or to any other relevant information as the Hold Separate Trustee may reasonably request including, but not limited to, all documents and records kept by Respondent DaVita in the ordinary course of business that relate to DSI. Respondent DaVita shall develop such financial or other information as the Hold

Order to Maintain Assets

Separate Trustee may request and shall cooperate with the Hold Separate Trustee. Respondent DaVita shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondent DaVita's compliance with the Orders or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separate Order.

- c. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondent DaVita, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.
- d. The Commission may require the Hold Separate Trustee, and Persons hired by the Hold Separate Trustee, to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with performance of the Hold Separate Trustee's duties.
- e. Respondent DaVita may require the Hold Separate Trustee, and Persons hired by the Hold Separate Trustee, to sign a confidentiality agreement prohibiting the disclosure of any Confidential Business Information gained as a result of his or her role as Hold Separate Trustee to anyone other than the Commission.
- f. Thirty (30) days after the appointment of the Hold Separate Trustee pursuant to this Paragraph III.B., and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this

Order to Maintain Assets

Hold Separate Order. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the businesses comprising DSI are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

- g. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Trustee consistent with the terms of this paragraph, subject to the consent of Respondent DaVita, which consent shall not be unreasonably withheld. If Respondent DaVita has not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Trustee within five (5) business days after notice by the staff of the Commission to Respondent DaVita of the identity of any substitute Hold Separate Trustee, Respondent DaVita shall be deemed to have consented to the selection of the proposed substitute trustee. Respondent DaVita and the substitute Hold Separate Trustee shall execute a new Hold Separate Trustee Agreement, subject to the approval of the Commission, consistent with this Paragraph III.B.
- C. Before the Agreement Containing Consent is signed by Respondent DaVita, Respondent DaVita shall designate Leif Murphy to be Manager of DSI for the duration of the Hold Separate Period.
 - 1. Respondent DaVita shall transfer all rights, powers, and authorities necessary to manage and maintain DSI, to the Manager.
 - 2. The Manager shall report directly and exclusively to the Hold Separate Trustee, if one is appointed,

Order to Maintain Assets

or otherwise to Commission staff, and shall manage DSI independently of the management of Respondent DaVita. The Manager shall not be involved, in any way, in the operations of the other businesses of Respondent DaVita during the term of this Hold Separate Order.

3. The Monitor will monitor the activities of the Manager and the operations of DSI during the Hold Separate Period.
4. The Manager shall have no financial interests (other than existing options and interests in securities of Respondent DaVita) affected by Respondent DaVita's revenues, profits or profit margins, except that the compensation of the Manager for managing DSI may include economic incentives dependent on the financial performance of DSI if there are also sufficient incentives for the Manager to operate DSI at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate Order.
5. The Manager shall make no material changes in the present operation of DSI except with the approval of the Hold Separate Trustee, in consultation with the Commission staff, or Commission staff.
6. The Manager shall have the authority, with the approval of the Hold Separate Trustee or Commission staff, to remove employees and replace them with others of similar experience or skills. If any person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Manager, in consultation with the Hold Separate Trustee or Commission staff, may request Respondent DaVita to, and Respondent DaVita shall, appoint a substitute

Order to Maintain Assets

person, which person the Manager shall have the right to approve.

7. In addition to those employees within DSI, the Manager may employ such Persons as are reasonably necessary to assist the Manager in managing DSI.
 8. The Commission staff or the Hold Separate Trustee, in consultation with the Commission staff, shall be permitted, to remove the Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondent DaVita shall appoint a replacement Manager, subject to the approval of the Commission, on the same terms and conditions as provided in Paragraph III.C. of this Hold Separate Order.
 9. In the event that the Manager ceases to act as Manager, then Respondent DaVita shall select substitute Manager(s), subject to the approval of the Hold Separate Trustee, if appointed, and Commission staff, and transfer to the substitute Manager(s) all rights, powers and authorities necessary to permit the substitute Manager(s) to perform his/her/their duties and responsibilities, pursuant to this Hold Separate Order.
- D. No later than five (5) days after this Hold Separate Order becomes final, Respondent DaVita shall circulate to the DSI management and regional managers a copy of this Hold Separate Order and the Consent Agreement with the Commission's press release and analysis to aid public comment.
- E. The purposes of this Paragraph III are to: (1) preserve DSI as a viable, competitive, and ongoing business independent of Respondent DaVita until the divestitures required by the Decision and Order is achieved; (2) assure that no Confidential Business Information is exchanged between Respondent DaVita

Order to Maintain Assets

and DSI, except in accordance with the provisions of this Hold Separate Order; (3) prevent interim harm to competition pending the relevant divestitures and other relief; and (4) help remedy any anticompetitive effects of the proposed DaVita-DSI Acquisition as alleged in the Commission's Complaint.

IV. (Acquisition Requirements)**IT IS FURTHER ORDERED** that:

- A. Respondent DaVita shall not acquire DSI until it has obtained for all the Appendix A Clinics:
1. all approvals for the assignment of the Clinic's Physician Contracts, as required by Paragraph II.C.3.b. of the Decision and Order;
 2. all approvals by joint venture partners necessary for the Acquirer to acquire the Appendix A Clinics that are owned by a joint venture, and shall assign all such approvals to the Acquirer; and
 3. all approvals by joint venture partners necessary for the Acquirer of Appendix A Joint Venture Equity Interests to jointly own and operate the Appendix A Clinics that are owned by the joint venture, and shall assign all such approvals to the Acquirer.

Copies of all such approvals shall be incorporated into the Divestiture Agreements as appendices.

- B. Respondent DaVita shall not acquire DSI until it has:
1. included, as part of the Divestiture Agreements, a letter stating that the Osceola Non-Compete is rescinded and that it will not be re-entered or re-negotiated for five (5) years following the Time of Divestiture; and

Order to Maintain Assets

2. provided notice to all parties involved in the Osceola Non-Compete that the Osceola Non-Compete has been rescinded.

V. (Divestiture Requirements)

IT IS FURTHER ORDERED that at the Time Of Divestiture of each Clinic To Be Divested Respondent shall:

- A. assign to the Acquirer all rights, title, and interest to leases for the Real Property Of The Clinic, and shall obtain all approvals necessary for such assignments; *provided, however*, that (1) if the Acquirer obtains all rights, title, and interest to a lease for Real Property Of A Clinic To Be Divested before the Assets To Be Divested are divested pursuant to Paragraph II.A. of the Decision and Order, and (2) the Acquirer certifies its receipt of such lease and attaches it as part of the Divestiture Agreement, then DaVita shall not be required to make the assignments for such Clinic To Be Divested as required by this Paragraph; and
- B. assign to the Acquirer all of the Clinic's Physician Contracts, and shall obtain all approvals necessary for such assignment; *provided, however*, that (1) if the Acquirer enters into a Clinic's Physician Contract for a Clinic To Be Divested before the Assets To Be Divested are divested pursuant to Paragraph II.A. of the Decision and Order, and (2) the Acquirer certifies its receipt of such contract and attaches it as part of the Divestiture Agreement, then Respondent DaVita shall not be required to make the assignment for such Clinic To Be Divested as required by this Paragraph.

VI. (Facilitate Hiring)

IT IS FURTHER ORDERED that from the time Respondent DaVita signs the Agreement Containing Consent Order until sixty (60) days after the Time Of Divestiture of each Clinic To Be Divested or until January 3, 2012, whichever is later,:

Order to Maintain Assets

- A. Respondent DaVita (which includes the Hold Separate Manager where applicable during the Hold Separate Period) shall:
1. if requested by the Acquirer, facilitate interviews between each Designated DaVita Employee and the Acquirer, and shall not discourage such employee from participating in such interviews;
 2. not interfere in employment negotiations between each Designated DaVita Employee and the Acquirer;
 3. not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the Designated DaVita Employee from being employed by the Acquirer, and shall not offer any incentive to the Designated DaVita Employee to decline employment with the Acquirer;
 4. cooperate with the Acquirer of the Clinic in effecting transfer of the Designated DaVita Employee to the employ of the Acquirer, if the Designated DaVita Employee accepts such offer of employment from the Acquirer;
 5. eliminate any contractual provisions or other restrictions that would otherwise prevent the Designated DaVita Employee from being employed by the Acquirer;
 6. eliminate any confidentiality restrictions that would prevent the Designated DaVita Employee who accepts employment with the Acquirer from using or transferring to the Acquirer any information Relating To the Operation Of The Clinic; and
 7. pay, for the benefit of any Designated DaVita Employee who accepts employment with the

Order to Maintain Assets

Acquirer, all accrued bonuses, vested pensions and other accrued benefits.

Provided, however, that if, at any time after the Time of Divestiture, the Acquirer gives Respondent DaVita an unsolicited list of employees from the Non Public Appendix G of the Decision and Order to whom the Acquirer does not intend to offer employment, then such employees may be hired by Respondent DaVita as full time employees without violating this Paragraph VI. *Provided, further, however*, that no earlier than fifteen (15) days after the Time of Divestiture, Respondent DaVita may submit a written request to the Acquirer identifying those persons from the Non Public Appendix G of the Decision and Order to whom Respondent DaVita wishes to offer full time employment; and if the Acquirer within fifteen (15) days of receipt of such request grants, in writing, such request, then Respondent DaVita may offer employment to such employees; but if the Acquirer within fifteen (15) days of receipt of such request either: (i) chooses to hire such employees, or (ii) chooses to defer a hiring decision and keep the requested employees on the Non Public Appendix G, then Respondent DaVita shall continue to comply with the terms of this Paragraph VI. with regard to such employees..

- B. With respect to each Physician who has provided services to a Clinic To Be Divested pursuant to any of the Clinic's Physician Contracts in effect at any time during the four (4) months preceding the Time Of Divestiture of the Clinic ("Contract Physician"), DaVita shall not offer any incentive to the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group to decline to provide services to the Clinic To Be Divested, and shall eliminate any confidentiality restrictions that would prevent the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group

Order to Maintain Assets

from using or transferring to the Acquirer of the Clinic To Be Divested any information Relating To the Operation Of The Clinic.

VII. (Confidentiality)

IT IS FURTHER ORDERED that:

- A. From the Effective Date until the Divestiture Date:
1. Respondent DaVita shall not permit any of its employees, officers, or directors to be involved in the operations of DSI, unless otherwise authorized by this Hold Separate Order.
 2. Respondent DaVita, and Respondent DaVita's or DSI's personnel operating DSI, shall retain and maintain all Confidential Business Information of DSI on a confidential basis, separate and apart from Respondent DaVita and, except as is requested by Respondent DaVita for purposes of the divestiture of the Appendix A Clinics as required by the Decision and Order, in this matter, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to Respondent DaVita or with Respondent DaVita's personnel.
 3. Respondent DaVita shall not, directly or indirectly, receive, disclose, or use any Confidential Business Information Related To DSI to any Person except the Appendix A Clinics Acquirer or other persons specifically authorized by the Appendix A Clinics Acquirer to receive such information, or than as necessary to comply with the following:
 - a. the requirements of the Orders
 - b. applicable laws and regulations.

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4. Respondent DaVita shall not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the operation of DSI to Respondent DaVita's employees, other than those employees operating DSI pursuant to this Hold Separate Order.
5. Respondent DaVita shall institute procedures and requirements to ensure that:
 - a. Confidential Business Information Related to DSI is not provided to, or obtained by, Respondent DaVita's employees, other than those employees operating DSI pursuant to this Hold Separate Order;
 - b. Respondent DaVita employees with access to Confidential Business Information Relating To DSI do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Hold Separate Order; and
 - c. Respondent DaVita's employees, other than those employees operating DSI pursuant to this Hold Separate Order, do not solicit, access or use any Confidential Business Information that they are prohibited under this Hold Separate Order from receiving for any reason or purpose.
- B. From the Effective Date until the Divestiture Date, Respondent DaVita shall require any Persons with access to Confidential Business Information Relating To the DSI to not to disclose any Confidential Business Information Relating To DSI to Respondent DaVita or to any third party except as otherwise permitted by this Hold Separate Order.
- C. DaVita shall:

Order to Maintain Assets

1. not disclose Confidential Business Information relating exclusively to any of the Clinics To Be Divested to any Person other than the Acquirer of such Clinic;
 2. after the Time Of Divestiture of such Clinic:
 - a. DaVita shall not use Confidential Business Information relating exclusively to any of the Clinics To Be Divested for any purpose other than complying with the terms of this Order or with any law; and
 - b. DaVita shall destroy all records of Confidential Business Information relating exclusively to any of the Clinics To Be Divested , except to the extent that: (1) DaVita is required by law to retain such information, and (2) DaVita's inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of DaVita.
- D. The purposes of this Paragraph IV are to: (1) preserve DSI as a viable, competitive, and ongoing business independent of Respondent DaVita until the divestitures required by the Decision and Order are achieved; (2) assure that no Confidential Business Information is exchanged between Respondent DaVita and DSI, except in accordance with the provisions of this Hold Separate Order; (3) prevent interim harm to competition pending the relevant divestitures and other relief; and (4) help remedy any anticompetitive effects of the proposed DaVita-DSI Acquisition as alleged in the Commission's Complaint.

VIII. (Monitor)**IT IS FURTHER ORDERED** that:

- A. Richard Shermer of R. Shermer & Co. shall be appointed Monitor to assure that Respondent DaVita

Order to Maintain Assets

expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Hold Separate Order and the Decision and Order.

- B. No later than one (1) day after the Effective Date, Respondent DaVita shall, pursuant to the Monitor Agreement, attached as Appendix A and Confidential Appendix A-1, and to this Hold Separate Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform their duties and responsibilities in a manner consistent with the purposes of this Hold Separate Order.
- C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondent DaVita, which consent shall not be unreasonably withheld. If Respondent DaVita has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent DaVita of the identity of any proposed Monitor, Respondent DaVita shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondent DaVita shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent DaVita's compliance with the terms of this Hold Separate Order, the Decision and Order, and the Divestiture Agreements in a manner consistent with the purposes of this Order.
- D. Respondent DaVita shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 - 1. The Monitor shall have the power and authority to monitor Respondent DaVita's compliance with the terms of this Hold Separate Order, the Decision

Order to Maintain Assets

and Order, and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:

- a. Assuring that Respondent DaVita expeditiously complies with all of its obligations and perform all of its responsibilities as required by the this Hold Separate Order, the Decision and Order, and the Divestiture Agreements;
 - b. Monitoring any transition services agreements;
 - c. Assuring that Confidential Business Information is not received or used by Respondent DaVita or the Acquirer, except as allowed in this Hold Separate Order and in the Decision and Order, in this matter.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Monitor shall serve for such time as is necessary to monitor Respondent DaVita's compliance with the provisions of this Hold Separate Order, the Decision and Order, and the Divestiture Agreements.
4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent DaVita's personnel, books, documents, records kept in the Ordinary Course Of Business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent DaVita's compliance with its obligations under this Hold Separate Order, the Decision and Order, and the Divestiture Agreements. Respondent DaVita shall cooperate with any reasonable request of the

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Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent DaVita's compliance with this Hold Separate Order, the Decision and Order, and the Divestiture Agreements.

5. The Monitor shall serve, without bond or other security, at the expense of Respondent DaVita on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent DaVita, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
6. Respondent DaVita shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.
7. Respondent DaVita shall report to the Monitor in accordance with the requirements of this Hold Separate Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondent DaVita, and any reports submitted by the Acquirer with respect to the performance of Respondent DaVita's obligations

Order to Maintain Assets

under this Hold Separate Order, the Decision and Order, and the Divestiture Agreements.

8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondent DaVita of its obligations under this Hold Separate Order, the Decision and Order, and the Divestiture Agreements.
 9. Respondent DaVita may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph VIII.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Hold Separate Order, the Decision and Order, and the Divestiture Agreements.

Order to Maintain Assets

- H. The Monitor appointed pursuant to this Order may be the same Person appointed as a Hold Separate Trustee pursuant to Paragraph IV of this Order and may be the same Person appointed as Monitor or Divestiture Trustee under the Decision and Order.

IX. (Compliance Reports)

IT IS FURTHER ORDERED that within thirty (30) days after the date this Hold Separate Order becomes final, and every sixty (60) days thereafter until the Hold Separate Order terminates, Respondent DaVita shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Hold Separate Order and the related Decision and Order; *provided, however*, that, after the Decision and Order in this matter becomes final, the reports due under this Hold Separate Order shall be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent DaVita pursuant to the Decision and Order.

X. (Change in DaVita)

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

- A. Any proposed dissolution of DaVita,
- B. Any proposed acquisition, merger or consolidation of DaVita, or
- C. Any other change in DaVita that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in DaVita.

Order to Maintain Assets

XI. (Access)

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

- A. Access, during office hours of DaVita 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 DaVita related to compliance with this Order; and
- B. Upon five (5) days' notice to DaVita and without restraint or interference from DaVita, to interview officers, directors, or employees of DaVita, who may have counsel present, regarding such matters.

XII. (Termination)

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate on the earlier of:

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The latter of:
 - 1. the day after the divestitures pursuant to Paragraph II of the Decision and Order are accomplished, or
 - 2. the day after the Commission otherwise directs that this Hold Separate Order is terminated.

By the Commission.

Order to Maintain Assets

APPENDIX A

MONITOR AGREEMENT

MONITOR AGREEMENT

MONITOR AGREEMENT (the "Agreement"), dated as of August 11, 2011, between DaVita Inc ("Respondent") and Richard A. Shermer of R. Shermer & Company ("Monitors").

PRELIMINARY STATEMENT

WHEREAS the Federal Trade Commission (the "Commission") is considering for public comment an Agreement Containing Consent Orders with Respondent, which provides, among other things, that Respondent divest a number of dialysis clinics and assets associated with those clinics, enter into agreements – if necessary – providing the acquirers of the dialysis clinics with transition services, and engage a monitor to monitor Respondent's compliance with its obligations under the Decision and Order and Asset Maintenance Order ("Orders");

WHEREAS, the Commission is expected to issue the Agreement Containing Consent Orders and appoint the Monitors pursuant to the Orders to monitor Respondent's compliance with the terms of the Orders, and the Monitors have consented to such appointment;

WHEREAS, the Orders further provide that Respondent shall execute an agreement, subject to prior approval of the Commission, conferring all the rights and powers necessary to permit the Monitors to carry out their duties and responsibilities pursuant to the Orders;

WHEREAS, this Monitor Agreement, although executed by the Monitors and Respondent, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent or the Monitors under the Orders, until the Asset Maintenance Order has been issued and the Monitor Agreement has been approved by the Commission;

WHEREAS, the parties to this Agreement intend to be legally bound, subject only to the Commission's approval of this Agreement.

DEFINITIONS

1. "Respondent "DaVita" means DaVita Inc., 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 El Segundo, CA, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; its joint ventures, divisions, groups and affiliates controlled by DaVita, and the respective directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns of each.
2. "Other Parties" means any Person that receives approval of the Commission to acquire any of the Assets To Be Divested or is a party to the Relevant Agreements pursuant to Paragraph II and V of the Decision and Order.
3. "Relevant Agreements" means: all the divestiture agreements and transition services agreements entered into pursuant to Paragraphs II and V of the Decision and Order, and the

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Transition Services Agreement between Frazier Healthcare, New Enterprise Associates, and DaVita.

4. All other capitalized words or phrases appearing in this Agreement that are not otherwise defined herein are deemed to have the defined meanings assigned to them in the Orders.

ARTICLE I

Powers of the Monitors. The Monitors shall have the rights, duties, powers and authority conferred upon the Monitor by the Orders that are necessary for the Monitors to monitor Respondent's compliance with the Orders. No later than one day after the Effective Date, Respondent hereby transfers to the Monitors all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities pursuant to the Asset Maintenance Order and consistent with the purposes of the Decision and Order. Any descriptions thereof contained in this Agreement in no way modify the Monitors' powers and authority or Respondent's obligations under the Orders.

Monitor's Duties. The Monitors shall monitor Respondent's compliance with the Orders, including but not limited to:

- a. Assuring that Respondent expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders in this matter;
- b. Monitoring Relevant Agreements;
- c. Assuring that Confidential Business Information is not received or used by Respondent or Other Parties, except as allowed in the Orders in this matter.

Duration of Monitor's Authority. The Monitors shall have all powers and duties described above and consistent with the Orders for the term set forth in the Orders.

Confidential and Proprietary Information. The Monitors shall enter into a confidentiality agreement, attached hereto as Confidential Exhibit A, agreeing to be bound by the terms and conditions of the Orders. The Monitors must retain and maintain all Material Confidential Information it receives from either Respondent or Relevant Parties on a confidential basis except as is permitted by the Orders. The Monitors may disclose confidential information only to persons employed by or working with the Monitors under this Agreement, to persons employed at the Commission, and as permitted by Respondent or Relevant Parties with respect to information they provided the Monitor. The Monitors shall require any person retained by the Monitor to assist in carrying out the duties and responsibilities of the Monitors to execute a confidentiality agreement that requires the same standard of care and obligations of confidentiality to which the Monitors must adhere under this Agreement. The Monitors shall maintain the confidentiality, for a period of five (5) years after the termination of this Agreement, of all other aspects of the performance of his duties under this Agreement and shall not disclose any confidential information relating thereto.

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Restrictions. The Monitors shall not be involved in any way in the management, production, supply and trading, sales marketing, and financial operations of the competing products of the Respondent.

Reports. Monitors shall report to the Commission pursuant to the terms of the Orders and as otherwise requested by the Commission staff.

Access to records, documents and facilities. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent' personnel, to include those employees designated to be transferred to an acquirer, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitors may reasonably request, related to Respondent' compliance with their obligations under the Orders in this matter. Documents, records and other relevant information are to be provided in an electronic format if they exist in that form. Respondent shall cooperate with any reasonable request of the Monitors and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent' compliance with the Orders.

ARTICLE II

Retention and payment of Counsel, Consultants, and other Assistants. The Monitors shall have the authority to employ, at the cost and expense of the Respondent, such attorneys, consultants, accountants, and other representatives and assistants as are necessary to carry out the Monitors' duties and responsibilities as allowed pursuant to the Orders.

1.1 Compensation. The Monitors shall be compensated by Respondent for his services under this Agreement, including all work in connection with the negotiation and preparation of this Monitor Agreement, pursuant to the fee schedule attached as Confidential Exhibit B for time spent in connection with the discharge of his duties under this Agreement and the Orders. In addition, Respondent will pay: (a) out-of-pocket expenses reasonably incurred by the Monitors in the performance of his duties under the Mandate; and (b) fees and disbursements reasonably incurred by any advisor appointed by the Monitors pursuant to the first paragraph in Article II. At its own expense, Respondent may retain an independent auditor to verify such invoices. The Monitors shall provide Respondent with monthly invoices for time and expenses that include details and an explanation of all matters for which the Monitors submit an invoice to Respondent. Respondent shall pay such invoices within thirty (30) days of receipt. The Monitor and Respondent shall submit any disputes about invoices to a mutually agreed upon third party for assistance in resolving such disputes.

1.2 To the extent available, Respondent will provide the Monitor with temporary workspace and access to office equipment owned or used by Respondent at sites the Monitor is required to visit in order to fulfill its obligations under this Agreement. Monitor agrees to comply with all of Respondents' safety and security regulations, instructions and procedures while at Respondents' sites.

ARTICLE III

1.1 Monitor's liabilities and indemnification. Respondent shall indemnify the Monitors and hold the Monitors harmless against any losses, claims, damages, liabilities, or

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expenses arising out of, or in connection with, the performance of the Monitors' duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitors. The Monitor's maximum liability to Respondents relating to services rendered in accordance with this Agreement (regardless of form of action, whether in contract, statutory law, or tort) shall be limited to an amount equal to the total sum of the fees paid to the Monitor by the Respondent. Any claim arising from this Agreement that Respondents may have against the Monitor must be brought no later than one (1) year following the termination or expiration of this Agreement. In the performance of its duties under this Agreement, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his own business affairs. The Monitor shall not be liable for any delays or other failures to perform resulting from circumstances or causes beyond its reasonable control, including, without limitation, fire or other casualty, act of God, strike or labor dispute, war or other violence, or any law, order or requirement of any governmental agency or authority. The Monitor warrants that it will perform its obligations hereunder in good faith. R. Shermer & Company disclaims other warranties, expressed or implied, other than those expressly agreed to in writing between the Parties.

Monitor's removal. If the Commission determines that Monitors cease to act or fail to act diligently and consistent with the purpose of the Orders, Respondent shall terminate this Agreement and appoint a substitute Monitor, subject to Commission approval and consistent with the Orders.

Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission, other than Respondent obligations under Exhibit A and the confidentiality provisions herein.

Termination. This Agreement shall terminate the earlier of: (a) the date set forth in the Order, unless the Commission requires a final report or meeting with the Monitor, in which case, the Order will terminate thirty (30) days following the date set forth in the Order; (b) Respondent's receipt of written notice from the Commission that the Commission has determined that Richard Shermer has ceased to act or failed to act diligently, or are unwilling or unable to continue to serve as Monitor; (c) with at least thirty (30) days advance notice to be provided by the Monitor to Respondent and to the Commission, upon resignation of the Monitors; or (d) when DaVita's last obligation under the Orders and the Relevant Agreements that pertains to the Monitors' service has been fully performed, provided, however, that the Commission may require that DaVita extend this Monitor Agreement or enter into an additional agreement with the Monitors as may be necessary or appropriate to accomplish the purposes of the Orders. If this Monitor Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force.

Conflicts of Interest. If the Monitors become aware during the term of this Agreement that he has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Monitor of any of his duties under this Agreement, the Monitors shall promptly inform Respondent and the Commission of any such conflict.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed
as of the date first above written.

MONITORS

BY:

NAME: RICHARD A. SHERMER
R. Shermer & Company

RESPONDENT

BY:

NAME: David R. Finn
TITLE: Vice President

Order to Maintain Assets

CONFIDENTIAL APPENDIX A-1

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from DaVita Inc. (“DaVita”). The purpose of the Consent Agreement is to remedy the anticompetitive effects resulting from DaVita’s purchase of CDSI I Holding Company, Inc. (“DSI”). Under the terms of the Consent Agreement, DaVita is required to divest 28 dialysis clinics and terminate one management contract in 22 markets across the United States.

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 agreement dated February 4, 2011, DaVita proposes to acquire DSI for approximately \$689 million. The Commission’s complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C.

Commission Act, as amended, 15 U.S.C.

competition for the provision of outpatient dialysis services in 22 markets.

☐ 18, and Section 5 of the
☐ 45, by lessening

The Parties

Headquartered in Denver, Colorado, DaVita is the second largest provider of outpatient dialysis services in the United States. DaVita operates 1,612 outpatient dialysis clinics in 42 states and the District of Columbia at which approximately 125,000 end stage renal disease (“ESRD”) patients receive treatment. In 2010 DaVita’s revenues were approximately \$7.63 billion.

DSI, headquartered in Nashville, Tennessee, is a privately held company and the fifth largest provider of outpatient dialysis services in the United States. DSI operates 106 dialysis centers, providing dialysis services to approximately 8,000 patients in 23 states.

Outpatient Dialysis Services

Outpatient dialysis services is the appropriate relevant product market in which to assess the effects of the proposed transaction. For patients suffering from ESRD, dialysis treatments are a life-sustaining therapy that replaces the function of the kidneys by removing toxins and excess fluid from the blood. Most ESRD patients receive dialysis treatments three times per week in sessions lasting between three and five hours. Kidney transplantation is the only alternative to dialysis for ESRD patients. 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 relevant geographic markets for the provision of dialysis services are local in nature. They are limited by the distance ESRD patients are willing and/or able to travel to receive dialysis treatments. Most ESRD patients are quite ill and suffer from multiple health problems. As such, it is difficult for ESRD patients to travel long distances for dialysis treatment. Generally, ESRD patients are unwilling and/or unable to travel further than 30 miles or 30 minutes to receive dialysis treatments, depending on traffic patterns, local geography, and the patient's proximity to the nearest center. As a result, competition among dialysis clinics occurs at a local level, corresponding to metropolitan areas or subsets thereof.

Entry into the outpatient dialysis services markets addressed by the Consent Agreement 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 to serve as medical

Analysis to Aid Public Comment

directors. By law, each dialysis clinic must have a nephrologist medical director. As a practical matter, medical directors are essential to the success of a clinic because they are the primary source of referrals. The lack of available nephrologists with an established referral stream is a significant barrier to entry into each of the relevant markets. Beyond that, entry is also inhibited where certain attributes (such as a rapidly growing ESRD population, a favorable regulatory environment, average or below nursing and labor costs, and a low penetration of managed care) are not present, as is the case in many of the geographic markets identified in the Commission's complaint.

Each of the geographic markets addressed by the Consent Agreement is highly concentrated. The proposed acquisition represents a merger to monopoly in one market and would cause the number of providers to drop from three to two in fifteen other markets. Additionally, concentration increases significantly in the remaining six markets addressed by the Consent Agreement. In each of these markets, the post-acquisition HHI level exceeds 3,500, and the change in HHI is more than 170. The high post-acquisition concentration levels, along with the elimination of DaVita and DSI's head-to-head competition in these markets, indicates that the combined firm would be able to exercise unilateral market power. The evidence shows that health insurance companies and other private payors who pay for dialysis services used by their members benefit from direct competition between DaVita and DSI when negotiating rates charged by dialysis providers. As a result, the proposed combination likely would result in higher prices and diminished service and quality for outpatient dialysis services in many geographic markets.

The Consent Agreement

The Consent Agreement effectively remedies the proposed acquisition's anticompetitive effects in 22 markets where both DaVita and DSI operate dialysis clinics by requiring DaVita to divest -- prior to acquiring DSI -- 29 outpatient dialysis clinics to Dialysis Newco, Inc., a corporation formed by Frazier Healthcare and New Enterprise Associates ("Frazier/NEA").

Analysis to Aid Public Comment

As part of these divestitures, DaVita is required to obtain the agreement of the medical directors affiliated with the divested clinics to continue providing physician services after the transfer of ownership to Frazier/NEA. Similarly, the Consent Agreement requires DaVita to obtain the consent of all lessors necessary to assign the leases for the real property associated with the divested clinics to Frazier/NEA. These provisions ensure that Frazier/NEA will have the assets necessary to operate the divested clinics in a competitive manner.

The Consent Agreement contains several additional provisions designed to ensure that the divestitures are successful. First, the Consent Agreement provides Frazier/NEA with the opportunity to interview and hire employees affiliated with the divested clinics and prevents DaVita from offering these employees incentives to decline Frazier/NEA's offer of employment. This will ensure that Frazier/NEA has access to patient care and supervisory staff who are familiar with the clinics' patients and the local physicians. Second, the Consent Agreement prevents DaVita from contracting with the medical directors (or their practice groups) affiliated with the divested clinics for three years. This provides Frazier/NEA with sufficient time to build goodwill and a working relationship with its medical directors before DaVita can attempt to capitalize on its prior relationships in soliciting their services. Third, to ensure continuity of patient care and records as Frazier/NEA implements its quality care, billing, and supply systems, the Consent Agreement allows DaVita to provide transition services for a period of 12 months. Firewalls and confidentiality agreements have been established to ensure that competitively sensitive information is not exchanged. Fourth, the Consent Agreement requires DaVita to provide Frazier/NEA with a license to use DSI's policies, procedures, and medical protocols, as well as the option to obtain DaVita's medical protocols, which will further enhance Frazier/NEA's ability to provide continuity of care to patients. Finally, the Consent Agreement requires DaVita to provide prior notice to the Commission of its planned acquisitions of dialysis clinics located in the 22 markets addressed by the Consent Agreement. This provision ensures that subsequent acquisitions do not adversely impact competition in the markets at issue and undermine the remedial goals of the proposed order.

Analysis to Aid Public Comment

The Commission is satisfied that Frazier/NEA is a qualified acquirer of the divested assets. Dialysis Newco, Inc. is a newly-formed company whose management has experience operating, acquiring, integrating, and developing outpatient dialysis clinics. The company has received a substantial equity investment from Frazier, a firm with a dedicated focus on healthcare, and NEA, the world's largest venture capital firm with over \$10.5 billion under management.

The Commission has appointed Richard Shermer of R. Shermer & Co. as an Interim Monitor to oversee the transition service agreements, and the implementation of, and compliance with, the Consent Agreement. Mr. Shermer assists client companies undergoing regulator-mandated ownership transitions, including experience with transitions of outpatient dialysis clinics.

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 the Order to Maintain Assets, or to modify their terms in any way.

Opinion of the Commission

IN THE MATTER OF
THE NORTH CAROLINA BOARD OF DENTAL
EXAMINERS

FINAL COMMISSION OPINION AND ORDER

Docket No. D-9343; File No. 111 0103
Filed, September 2, 2011 — Decision, December 2, 2011

On July 17, 2010, the Commission issued an administrative complaint alleging that the North Carolina Board of Dental Examiners (“Board”) harmed competition by ordering non-dentists to stop providing teeth-whitening services in the state. As a result, which has madeThe complaint alleged teeth-whitening services performed by non-dentists are significantly less expensive than when performed by dentists. As a result of the Board’s actions, it became more difficult and more expensive for North Carolina consumers to obtain teeth-whitening services. In an Initial Decision issued July 14, 2011, Administrative Law Judge Chappell (“ALJ”) held that non-dentists compete with dentists to provide teeth whitening services in North Carolina and that the Board’s concerted action to exclude non-dentist-provided teeth whitening services from the market had a tendency to harm competition. The ALJ further held that the Dental Board’s action had no valid pro-competitive justification and constituted an unreasonable restraint of trade and an unfair method of competition. Accordingly, the ALJ issued an order requiring the Board to stop the challenged conduct. The Board appealed the Initial Decision to the Commission for *de novo* review. In its Final Opinion, the Commission unanimously affirmed the ALJ’s Initial Decision, holding that the Board excluded non-dentists from the market for teeth-whitening services, in violation of Section 5 of the FTC Act. The Commission found that the Board’s conduct constituted concerted action and that this concerted action resulted in higher prices and reduced choices for consumer. The Commission further held the Board had failed to advance a legitimate procompetitive justification for its conduct. In examining the Board’s conduct, the Commission applied both a full “rule of reason” analysis, as well as an abbreviated “quick look” approach. reasons The Final Order of the Commission bars the Board from ordering non-dentists to stop providing teeth-whitening products or services and from informing teeth whitening providers that it is illegal for non-dentists to provide teeth whitening products or services.

Participants

For the Commission: *Michael Bergman, Michael J. Bloom, Richard B. Dagen, William L. Lanning, Steve J. Osnowitz,*