

Complaint

IN THE MATTER OF

FRESENIUS MEDICAL CARE AG & CO. KGAACONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

*Docket No. C-4348; File No. 111 0170
Complaint, February 28, 2012 – Decision, May 23, 2012*

This consent order addresses the \$2.1 billion acquisition by Fresenius Medical Care AG & Co. KGaA of certain assets of Liberty Dialysis Holdings, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in 43 markets for the provision of outpatient dialysis services. The consent order requires Fresenius to divest 60 dialysis clinics and terminate one management contract in 43 geographic markets across the United States.

Participants

For the *Commission*: Jordan Andrew, Lisa D. DeMarchi Sleigh, Amy S. Posner, and Mark Silvia, and Aylin M. Skroejer.

For the *Respondent*: Brian Burke and Katherine Funk, Baker & McKenzie LLP; and Robert Leibenluft and Mary Anne Mason, Hogan Lovells US 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 Fresenius Medical Care AG & Co. KGaA (“Fresenius”), a company subject to the jurisdiction of the Commission, has entered into an agreement to acquire Liberty Dialysis Holdings, Inc. (“Liberty”), a company subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof

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would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. “Dialysis” means filtering a person’s blood, inside or outside of the body, to replicate the functions of the kidney.
2. “ESRD” means end stage renal disease, a chronic disease characterized by a near total loss of function of the kidneys, which in healthy people remove toxins and excess fluid from the blood.
3. “Outpatient dialysis services” means all procedures and services related to administering chronic dialysis treatment.

II. RESPONDENT

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

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

III. THE ACQUIRED COMPANY

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

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things, is engaged in the provision and sale of outpatient dialysis services.

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

IV. THE PROPOSED ACQUISITION

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

V. THE RELEVANT MARKET

9. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the provision of chronic outpatient dialysis services. Most ESRD patients receive dialysis treatments three times per week in sessions lasting between three and five hours. ESRD is fatal if not treated with dialysis. The only alternative to outpatient dialysis treatments for patients suffering from ESRD is a kidney transplant. However, the wait-time for donor kidneys – during which ESRD patients must receive dialysis treatments – can exceed five years. Additionally, many ESRD patients are not viable transplant candidates. As a result, few ESRD patients receive transplants, and most have no alternative to ongoing outpatient dialysis treatment.

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

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although travel times and distances vary depending on geographic barriers, travel patterns, and whether an area is urban, suburban, or rural.

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

VI. THE STRUCTURE OF THE MARKET

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

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

VII. ENTRY CONDITIONS

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

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

VIII. EFFECTS OF THE ACQUISITION

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

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

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- b. increasing the ability of the merged entity unilaterally to raise prices for outpatient dialysis services in the relevant markets; and
- c. reducing incentives to improve service in the relevant markets.

IX. VIOLATIONS CHARGED

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

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

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

By the Commission.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS
[Redacted Public Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Fresenius Medical Care AG & Co. KGaA of Liberty Dialysis Holdings, Inc. (“Liberty”), and Fresenius Medical Care AG & Co. KGaA (hereafter referred to as “Respondent Fresenius”) 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 Fresenius with violations of Section 7 of the

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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 Fresenius, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent Fresenius 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 Fresenius 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 Fresenius 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 Fresenius Medical Care AG & Co. KGaA is a partnership limited by shares organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its office and principal place of business located at Else-Kröner-Straße 1, 61352 Bad Homburg, Germany. Fresenius Medical Care AG & Co. KGaA is the parent of Fresenius Medical Care Holdings, Inc., a New York corporation, d/b/a Fresenius Medical Care North America (“FMCNA”) with its office and principal place of business located at 920 Winter St., Waltham, MA 02451-1457.

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2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent Fresenius, 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. “Fresenius Clinics” means the Fresenius-owned Clinics listed in Appendix A to the Decision and Order and the Fresenius 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 divestitures of the Appendix A Clinic Assets, except for the Secondary Divestiture Assets, as 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, or the divestiture of the Dallas Joint Venture Equity Interests, whichever is later.
- E. “Hold Separate Trustee” means the person appointed pursuant to Paragraph III of this Hold Separate Order.

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- F. “Monitor” means any monitor appointed pursuant to Paragraph VII of this Hold Separate Order.
- G. “Orders” means the Decision and Order and this Hold Separate Order.
- H. “Secondary Divestiture Assets” means the Hawaii Clinic Assets, Connecticut Clinic Assets, the New York Clinic Assets, and the Florida Viera Clinic Assets.
- I. “Secondary Divestiture Date” means each of the dates on which Secondary Divestiture Assets are divested to DSI, or the Acquirer pursuant to Paragraph II or Paragraph V of the Order.

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

- A. From the date Respondent Fresenius signs the Consent Agreement until the Divestiture Date and Secondary Divestiture Dates, Respondent Fresenius shall:
 - 1. Maintain each of the Fresenius Clinics and all Assets Associated with such Clinics in substantially the same condition (except for normal wear and tear) existing at the time Respondent Fresenius signs the Consent Agreement;
 - 2. Take such actions that are consistent with the past practices of Respondent Fresenius in connection with each of the Fresenius 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 Fresenius;
 - 3. Keep available the services of the current officers, employees, and agents of Respondent Fresenius; and maintain the relations and good will with Suppliers, Payors, Physicians, landlords, patients, employees, agents, and others having business

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relations with the Fresenius Clinics and the Assets Associated with them in the Ordinary Course Of Business;

4. Preserve the Fresenius Clinics and all Assets Associated with them as ongoing businesses and not take any affirmative action, or fail to take any action within Respondent Fresenius's control, as a result of which the viability, competitiveness, and marketability of the Fresenius's Clinics or the Assets Associated with them would be diminished;
 5. Not object to 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 Fresenius not to disclose the information to any third party; and
 6. 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.
- B. From the date Respondent Fresenius signs the Consent Agreement until the Secondary Divestiture Dates, Respondent Fresenius shall:
1. appoint an executive responsible for overseeing and maintaining such Secondary Divestiture Assets to be the primary contact between Respondent Fresenius and Commission staff and the Monitor.
 2. maintain such assets until each of the Secondary Divestiture Dates in a business-as-usual manner and/or in accordance with the applicable business plan. The appointed executive shall compare past business plans, operating and capital budgets to

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current metrics to assure that the clinics are maintained appropriately.

- C. The purposes of this Paragraph II are to: (1) preserve the Fresenius 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 Fresenius-Liberty Acquisition as alleged in the Commission's Complaint.

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

- A. For the Hold Separate Period, Respondent Fresenius shall hold the entirety of Liberty separate, apart, and independent of Respondent Fresenius. To hold Liberty separate, Respondent Fresenius shall, among other things:
1. Not offer Liberty employees positions with Respondent Fresenius, other than continuing the positions they have within Liberty; and
 2. Do nothing to prevent or discourage suppliers that, prior to the Effective Date, supplied goods and services to Liberty from continuing to supply goods and services to Liberty.
- Provided, however,* that Respondent Fresenius 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 Liberty is held separate from Respondent Fresenius.

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1. The Commission shall select the Hold Separate Trustee, subject to the consent of Respondent Fresenius which consent shall not be unreasonably withheld. If Respondent Fresenius 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 Fresenius of the identity of any proposed Hold Separate Trustee, Respondent Fresenius 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 Fresenius shall execute an agreement that, subject to the prior approval of the Commission, confers on the Hold Separate Trustee 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 Fresenius 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 Fresenius 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

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Hold Separate Order and the Decision and Order, for monitoring the organization of Liberty, for managing Liberty through the Manager, for maintaining the independence of Liberty, and for monitoring Respondent Fresenius'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 Liberty 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 Fresenius in the ordinary course of business that relate to Liberty. Respondent Fresenius shall develop such financial or other information as the Hold Separate Trustee may request and shall cooperate with the Hold Separate Trustee. Respondent Fresenius shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondent Fresenius'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 Fresenius, 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

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received in connection with performance of the Hold Separate Trustee's duties.

- e. Respondent Fresenius 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 Hold Separate Order. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the businesses comprising Liberty 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 Fresenius, which consent shall not be unreasonably withheld. If Respondent Fresenius 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 Fresenius of the identity of any substitute Hold Separate Trustee, Respondent Fresenius shall be deemed to have consented to

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the selection of the proposed substitute trustee. Respondent Fresenius 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. Respondent Fresenius shall designate Mr. Mark Caputo, Chief Executive Officer of Liberty, to be Manager of Liberty for the duration of the Hold Separate Period.
1. Respondent Fresenius shall transfer all rights, powers, and authorities necessary to manage and maintain Liberty, to the Manager.
 2. The Manager shall report directly and exclusively to the Hold Separate Trustee, if one is appointed, or otherwise to Commission staff, and shall manage Liberty independently of the management of Respondent Fresenius. The Manager shall not be involved, in any way, in the operations of the other businesses of Respondent Fresenius during the term of this Hold Separate Order.
 3. The Monitor will monitor the activities of the Manager and the operations of Liberty during the Hold Separate Period unless and until a Hold Separate Trustee is appointed.
 4. The Manager shall have no financial interests (other than existing options and interests in securities of Respondent Fresenius) affected by Respondent Fresenius's revenues, profits or profit margins, except that the compensation of the Manager for managing Liberty may include economic incentives dependent on the financial performance of Liberty if there are also sufficient incentives for the Manager to operate Liberty at no less than current rates of operation (including, but not limited to, current rates of production and

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sales) and to achieve the objectives of this Hold Separate Order.

5. The Manager shall make no material changes in the present operation of Liberty except with the approval of the Hold Separate Trustee or Monitor, 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 Fresenius to, and Respondent Fresenius shall, appoint a substitute person, which person the Manager shall have the right to approve.
7. In addition to those employees within Liberty, the Manager may employ such Persons as are reasonably necessary to assist the Manager in managing Liberty.
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 Fresenius 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 Fresenius shall select substitute Manager(s), subject to the approval of the Hold Separate Trustee, if appointed, and Commission staff, and transfer to the substitute

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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 Fresenius shall circulate to the Liberty 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 Liberty as a viable, competitive, and ongoing business independent of Respondent Fresenius until the divestitures required by the Decision and Order is achieved; (2) assure that no Confidential Business Information is exchanged between Respondent Fresenius and Liberty, 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 Fresenius-Liberty Acquisition as alleged in the Commission's Complaint.

IV. (Acquisition Requirements)

IT IS FURTHER ORDERED that:

- A. Respondent Fresenius shall not acquire Liberty 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 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

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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.
- B. Respondent Fresenius shall hold separate the entirety of Liberty, pursuant to Paragraph III of this Hold Separate Order, and not take control over or possession of Liberty, until it has obtained for all the Appendix A Clinics, except for the Secondary Divestiture Assets, all approvals for the assignment of the rights, title, and interest to a lease for Real Property Of A Clinic To Be Divested to the Acquirer, and divested pursuant to Paragraph II of the Order and Paragraph V of this Hold Separate Order.

Copies of all approvals required by this Paragraph IV shall be incorporated into the Divestiture Agreements as appendices.

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 Fresenius 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

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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 Fresenius 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:

- A. Respondent Fresenius shall:
1. if requested by an Acquirer, facilitate interviews between each Designated Fresenius Employee and the Acquirer, and shall not discourage such employee from participating in such interviews;
 2. not interfere in employment negotiations between each Designated Fresenius Employee and an Acquirer.
 3. not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the Designated Fresenius Employee from being employed by an Acquirer, and shall not offer any incentive to the Designated Fresenius Employee to decline employment with an Acquirer;
 4. cooperate with an Acquirer of a Clinic in effecting transfer of the Designated Fresenius Employee to the employ of the Acquirer, if the Designated Fresenius Employee accepts such offer of employment from an Acquirer;
 5. eliminate any contractual provisions or other restrictions that would otherwise prevent the Designated Fresenius Employee from being employed by an Acquirer;

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

Respondent Fresenius shall comply with the terms of this Paragraph IV.A from the time Respondent Fresenius signs the Consent Agreement until sixty (60) days after the Time Of Divestiture of each Clinic To Be Divested for the employees who are Designated Fresenius Employees described in Paragraph I.Y.1.

Respondent Fresenius shall comply with the terms of this Paragraph IV.A. from the time Respondent Fresenius signs the Agreement Containing Consent Order until one-hundred twenty (120) days after the divestiture required pursuant to Paragraph II.A.1. of the Decision and Order is completed for the employees who are Designated Fresenius Employees described in Paragraph I.Y.2.

Provided, however, that the terms of this Paragraph IV.A. as it relates to the interviewing and hiring of Regional Managers shall not apply after the Acquirer has hired five (5) Regional Managers.

Provided, however, that if, at any time after the Time of Divestiture, DSI or the Acquirer of the Appendix A Clinic Assets gives Respondent Fresenius 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 Fresenius as full time employees without violating this Paragraph IV.A. *Provided, further, however,* that no earlier than fifteen (15) days

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after the Time of Divestiture, Respondent Fresenius may submit a written request to the Acquirer identifying those persons from the Non-Public Appendix G to whom Respondent Fresenius 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 Fresenius 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 to the Decision and Order, then Respondent Fresenius shall continue to comply with the terms of this Paragraph IV.A. 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"), Respondent Fresenius 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.

VII. (Confidentiality)

IT IS FURTHER ORDERED that:

- A. During the Hold Separate Period:
1. Respondent Fresenius shall not permit any of its employees, officers, or directors to be involved in

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the operations of Liberty, unless otherwise authorized by this Hold Separate Order.

2. Respondent Fresenius, and Respondent Fresenius's or Liberty's personnel operating Liberty, shall retain and maintain all Confidential Business Information of Liberty on a confidential basis, separate and apart from Respondent Fresenius and, except as is requested by Respondent Fresenius 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 Fresenius or with Respondent Fresenius's personnel.
3. Respondent Fresenius shall not, directly or indirectly, receive, disclose, or use any Confidential Business Information Related To Liberty 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.
4. Respondent Fresenius shall not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the operation of Liberty to Respondent Fresenius's employees, other than those employees operating Liberty pursuant to this Hold Separate Order.
5. Respondent Fresenius shall institute procedures and requirements to ensure that:

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- a. Confidential Business Information Related to Liberty is not provided to, or obtained by, Respondent Fresenius's employees, other than those employees operating Liberty pursuant to this Hold Separate Order;
 - b. Respondent Fresenius employees with access to Confidential Business Information Relating To Liberty 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 Fresenius's employees, other than those employees operating Liberty 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. During the Hold Separate Period, Respondent Fresenius shall require any Persons with access to Confidential Business Information Relating To Liberty not to disclose any such Confidential Business Information to Respondent Fresenius or to any third party except as otherwise permitted by this Hold Separate Order.
- C. Respondent Fresenius 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. not use Confidential Business Information relating exclusively to any of the Clinics To Be Divested for any purpose other than complying

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with the terms of this Order or with any law;
and

- b. destroy all records of Confidential Business Information relating exclusively to any of the Clinics To Be Divested , except to the extent that: (1) Respondent Fresenius is required by law to retain such information, and (2) Respondent Fresenius's inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of Respondent Fresenius.
- D. The purposes of this Paragraph VII are to: (1) preserve Liberty as a viable, competitive, and ongoing business independent of Respondent Fresenius until the divestitures required by the Decision and Order are achieved; (2) assure that no Confidential Business Information is exchanged between Respondent Fresenius and Liberty, 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 Fresenius-Liberty 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 Fresenius 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 Fresenius 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

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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 Fresenius, which consent shall not be unreasonably withheld. If Respondent Fresenius 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 Fresenius of the identity of any proposed Monitor, Respondent Fresenius 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 Fresenius 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 Fresenius'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 Fresenius 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 Fresenius's compliance with the terms of this Hold Separate Order, the Decision 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 Fresenius expeditiously complies with all of its obligations and perform all of its

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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 Fresenius 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 Fresenius'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 Fresenius'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 Fresenius's compliance with its obligations under this Hold Separate Order, the Decision and Order, and the Divestiture Agreements. Respondent Fresenius 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 Fresenius'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 Fresenius on such reasonable and customary terms and

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conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Fresenius, 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 Fresenius 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 Fresenius 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 Fresenius, and any reports submitted by the Acquirer with respect to the performance of Respondent Fresenius's obligations 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 Fresenius of its obligations under this Hold Separate Order, the

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Decision and Order, and the Divestiture Agreements.

9. Respondent Fresenius 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.
- 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

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terminates, Respondent Fresenius 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 Fresenius pursuant to the Decision and Order.

X. (Change in Fresenius)

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

- A. Any proposed dissolution of Fresenius,
- B. Any proposed acquisition, merger or consolidation of Fresenius, or
- C. Any other change in Fresenius 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 Fresenius.

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 Fresenius, Fresenius shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Fresenius 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 Fresenius related to compliance with this Order, which copying services shall be provided by Respondent at

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the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

- B. Upon five (5) days' notice to Fresenius and without restraint or interference from Fresenius, to interview officers, directors, or employees of Fresenius, 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 end of the Hold Separate Period, or
 2. the day after the Commission otherwise directs that this Hold Separate Order is terminated.

By the Commission.

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APPENDIX A

MONITOR AGREEMENT

MONITOR AGREEMENT

MONITOR AGREEMENT (this “**Agreement**”), dated as of January 21, 2012, between Fresenius Medical Care Holdings, Inc. (“**FMCH** or **Respondent**”), and Richard A. Shermer of R. Shermer & Company (“**Monitor**”).

PRELIMINARY STATEMENT

WHEREAS the Federal Trade Commission (the “**Commission**”) is considering for public comment an Agreement Containing Consent Orders with Respondent or its parent company, which provides, among other things, that Respondent divest a number of dialysis clinics and assets associated with those clinics, Respondent terminate management contracts Respondent has with certain dialysis 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 (a) the Decision and Order and (b) the Order to Maintain Assets (collectively, the “**Orders**”);

WHEREAS, the Commission is expected to issue the Agreement Containing Consent Orders and appoint the Monitor pursuant to the Orders to monitor Respondent’s compliance with the terms of the Orders, and the Monitor has 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 Monitor to carry out its duties and responsibilities pursuant to the Orders;

WHEREAS, this Agreement, although executed by Monitor and Respondent, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent or Monitor under the Orders, until the Order to Maintain Assets has been issued and this 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**” means Fresenius Medical Care Holdings, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 920 Winter Street, Waltham, MA 02451, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; its joint ventures, divisions, groups and affiliates controlled by FMCH, 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 the Decision and Order.

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3. “**Acquisition Date**” means the date on which the first of the Relevant Agreements pursuant to the Decision and Order goes into effect.

4. “**Relevant Agreements**” means: all the divestiture agreements, management termination agreements, and transition services agreements entered into pursuant to the Decision and Order, including, but not limited to, the Divestiture Agreements, and the Transition Services Agreement between the Other Parties and FMCH or one of its subsidiaries.

5. 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

1.1 **Powers of the Monitor.** Monitor shall have the rights, duties, powers and authority conferred upon Monitor by the Orders that are necessary for Monitor to monitor Respondent’s compliance with the Orders. No later than one day after the Order to Maintain Assets becomes final, Respondent hereby transfers to Monitor all rights, powers, and authorities necessary to permit Monitor to perform its duties and responsibilities pursuant to the Order to Maintain Assets and consistent with the purposes of the Decision and Order. Any descriptions thereof contained in this Agreement in no way modify Monitor’s powers and authority or Respondent’s obligations under the Orders.

1.2 **Monitor’s Duties.** Monitor shall monitor Respondent’s compliance with the Orders, including, but not limited to:

- a. Assuring that Respondent expeditiously complies with all of the obligations, and performs all of responsibilities, of Respondent as required by the Orders in this matter;
- b. Monitoring Relevant Agreements; and
- 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.

1.3 **Duration of Monitor’s Authority.** Monitor shall have all powers and duties described above and consistent with the Orders for the term set forth in the Orders.

1.4 **Confidential and Proprietary Information.** Monitor shall enter into confidentiality agreements, in substantially the form attached hereto as Confidential Exhibit A, agreeing to be bound by the terms and conditions of the Orders. Monitor must retain and maintain all Material Confidential Information it receives from either Respondent or Other Parties on a confidential basis, except as is permitted by the Orders. Monitor may disclose confidential information only to persons employed by or working with Monitor under this Agreement, to persons employed at the Commission, and as permitted by Respondent or Other Parties with respect to information they provided Monitor. Monitor shall require any person retained by Monitor to assist in carrying out the duties and responsibilities of Monitor to execute a confidentiality agreement that

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requires the same standard of care and obligations of confidentiality to which Monitor must adhere under this Agreement. Monitor 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 its duties under this Agreement and shall not disclose any confidential information relating thereto.

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

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

1.7 Access to Records, Documents and Facilities. Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to Respondent's 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 Monitor may reasonably request, related to Respondent's compliance with the obligations of Respondent 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 Monitor and shall take no action to interfere with or impede Monitor's ability to monitor Respondent's compliance with the Orders.

ARTICLE II

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. Monitor 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 Monitor's duties and responsibilities as allowed pursuant to the Orders.

2.2 Compensation. Monitor 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 its duties under this Agreement and the Orders. In addition, Respondent will pay: (a) out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the orders; and (b) fees and disbursements reasonably incurred by any advisor appointed by Monitor pursuant to the first paragraph in Article II. At its own expense, Respondent may retain an independent auditor to verify such invoices. Monitor shall provide Respondent with monthly invoices for time and expenses that include details and an explanation of all matters for which Monitor submits 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 the Commission for assistance in resolving such disputes.

2.3 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

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comply with all of Respondents' safety and security regulations, instructions and procedures while at Respondents' sites.

ARTICLE III

3.1 Monitor's Liabilities and Indemnification. Respondent shall indemnify the Monitor and hold Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of Monitor'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 gross negligence, willful or wanton acts, or bad faith by Monitor. 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.

3.2 Monitor's Removal. If the Commission determines that Monitor ceases 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.

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

3.4 Termination: This Agreement shall terminate the earlier of: (a) thirty (30) days following the termination date set forth in the applicable Order; (b) Respondent's receipt of written notice from the Commission that the Commission has determined that Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; (c) with at least thirty (30) days advance notice to be provided by Monitor to Respondent and to the Commission, upon resignation of the Monitor; or (d) when FMCH'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 FMCH extend this Agreement or enter into an additional agreement with Monitor as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force.

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3.5 Conflicts of Interest: If Monitor becomes aware during the term of this Agreement that it 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 its duties under this Agreement, Monitor 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.

MONITOR**R. SHERMER & COMPANY**

NAME: Richard A. Shermer, President

RESPONDENT**FRESENIUS MEDICAL CARE HOLDINGS, INC.**BY: NAME: DOUGLAS G. KRAFTTITLE: SENIOR VICE PRESIDENT

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NON-PUBLIC APPENDIX A-1**MONITOR COMPENSATION**

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

DECISION AND ORDER
[Redacted Public Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Fresenius Medical Care AG & Co. KGaA of Liberty Dialysis Holdings, Inc. (“Liberty”), and Fresenius Medical Care AG & Co. KGaA (hereafter referred to as “Respondent Fresenius”) 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 Fresenius 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 Fresenius, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent Fresenius 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 Fresenius 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 Fresenius has violated the said Acts, and that a Complaint should

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issue stating its charges in that respect, and having thereupon 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 Fresenius Medical Care AG & Co. KGaA is a partnership limited by shares organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its office and principal place of business located at Else-Kröner-Straße 1, 61352 Bad Homburg, Germany. Fresenius Medical Care AG & Co. KGaA is the parent of Fresenius Medical Care Holdings, Inc., a New York corporation, d/b/a Fresenius Medical Care North America (“FMCNA”) with its office and principal place of business located at 920 Winter St., Waltham, MA 02451-1457.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent Fresenius, 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. “Fresenius” means Fresenius Medical Care AG & Co. KGaA, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries (including, but not limited to Fresenius Medical Care AG & Co. KGaA, a partnership limited by shares organized under the laws of the Federal Republic of Germany, Fresenius

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Medical Care Holdings, Inc., and Florence Acquisition, Inc.), divisions, groups, and affiliates controlled by Fresenius Medical Care AG & Co. KGaA (including, after the Effective Date, Liberty Dialysis Holdings, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, “Fresenius” includes Liberty.

- B. “Liberty” means Liberty Dialysis Holdings, Inc., a corporation organized under the laws of Delaware, with its office and principal place of business located at 7650 SE 27th St., Suite 200, Mercer Island, WA 98040. Liberty Dialysis Holdings, Inc., includes Renal Advantage Inc. (“RAI”).
- C. “Commission” means the Federal Trade Commission.
- D. “Acquirer” and “Acquirers” means each Person that receives the prior approval of the Commission to acquire particular Clinic Assets pursuant to Paragraph II or Paragraph V of this Order.
- E. “Alaska Clinic Assets” means the Liberty Dialysis Clinic located at 901 East Dimond Blvd, Anchorage, Alaska, 99515, and all Assets Associated with that Clinic.
- F. “Alaska Clinic Assets Acquirer” means Alaska Investment Partners (HC) LLC, or any Person that receives the prior approval of the Commission to acquire the Alaska Clinic Assets pursuant to Paragraph II or Paragraph V of this Order.
- 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-2 Joint Venture Equity Interests, and all Assets Associated with each of the Appendix A Clinics.

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- I. “Appendix A-2 Joint Venture Equity Interests” means the joint venture equity interest in Clinics owned by Liberty and Respondent Fresenius described in Appendix A-2.
- J. “Appendix F Clinics” means the clinics identified in Non-Public Appendix F that are (1) owned by Respondent Fresenius in locations proximate to the Liberty Clinics listed in Appendix A, or (2) Liberty Clinics in locations proximate to the Fresenius Clinics listed in Appendix A. In any given location, there may be a greater, smaller, or equal number of Fresenius Clinics in Non-Public Appendix F that correspond to Liberty Clinics in any given location, or greater, smaller, or equal number of Liberty Clinics in Non-Public Appendix F that correspond to Fresenius Clinics in any given location.
- K. “Appendix F Clinic Assets” means the Appendix F Clinics, the Appendix F-2 Joint Venture Equity Interests and all Assets Associated with each of the Appendix F Clinics.
- L. “Appendix F-2 Joint Venture Equity Interests” means the joint venture equity interest owned by Respondent Fresenius or Liberty 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 consistent with the Ordinary Course of Business at the Clinics To Be Divested including, but not limited to, janitorial, office, medical supplies, dialysis supplies, and pharmaceuticals including, but not limited to, erythropoietin;

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4. all rights, title and interest of Respondent Fresenius or Liberty in any tangible property (except for consumable or disposable inventory) that has been on the premises of the Clinic at any time since July 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 Fresenius or Liberty has a legal 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 the Clinics to be Divested that are also Related To the Operation

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Of 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 Fresenius 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 Fresenius to make such disclosure;
- 6. Respondent Fresenius's and Liberty'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.

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- 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-2 Joint Venture Equity Interests, and where applicable, the Alaska Clinic Assets, or the Dallas Clinics Joint Venture Interests, and any Appendix F Clinics or Appendix F-2 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. “Connecticut Governmental Approvals For Divestiture” means any Governmental Approvals For Divestiture issued by the State of Connecticut.
- T. “Connecticut Clinic Assets” means the following: Liberty Orange Clinic, 240 Indian River Rd., Orange, CT; and Liberty North Haven Clinic, 510 Washington Avenue, North Haven, CT; and all Assets Associated with each of those Clinics.
- U. “Contract Services” means services performed pursuant to any Clinic’s Physician Contract.
- V. “Dallas Clinics Joint Ventures” means the following limited liability companies that own Clinics in and around Dallas, Texas: (1) Liberty Rockwall LLC; (2) Liberty Mesquite LLC; (3) WAXLD Holdings LLC;

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(4) Liberty Duncanville LLC; and (5) Liberty Lancaster LLC.

- W. “Dallas Clinics Joint Venture Interests” means all of Liberty’s equity and other interests held in each of the Dallas Joint Ventures.
- X. “Dallas Clinics Joint Venture Interests Acquirer” means Gibraltar 12 Holdings LLC, or the person who receives prior Commission approval to acquire the Dallas Clinics Joint Venture Interests pursuant to Paragraph II or Paragraph V of this Order.
- Y. “Designated Fresenius Employee” means:
1. each Fresenius Employee Of A Clinic To Be Divested for the Acquirer of the Assets To Be Divested, the Acquirer of the Alaska Clinic Assets, and the Acquirer of the Dallas Clinic Joint Venture Interests, and
 2. for the Acquirer of the Assets To Be Divested:
 - a. any Regional Manager of a Clinic To Be Divested, and
 - b. any of the additional Persons or a Person filling the job description (if the Person listed is no longer employed at that particular job) listed in Non-Public Appendix G to this Order.
- Z. “Divestiture Agreement” and “Divestiture Agreements” mean any agreement pursuant to which Respondent Fresenius or a Divestiture Trustee divests any of the Assets To Be Divested pursuant to this Order and with the prior approval of the Commission.
- AA. “Divestiture Trustee” means the person appointed to act as trustee by the Commission pursuant to Paragraph II.A or Paragraph V of this Order.
- BB. “DSI” means Dialysis Newco, Inc., a corporation organized, existing and doing business under and by

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virtue of the laws of the State of Delaware with its office and principal place of business located at 424 Church Street, Ste. 1900, Nashville, TN 37219.

CC. “DSI-Fresenius Divestiture Agreements” means the following agreements:

1. the Asset Purchase Agreement dated February 1, 2012, by and among DSI and Respondent Fresenius, and all attachments and exhibits, thereto, and
2. the Transition Services Agreement, which is an exhibit to the Asset Purchase Agreement, between DSI and Respondent Fresenius, and all attachments and exhibits, thereto.

The DSI-Fresenius Divestiture Agreements are attached as Non-Public Appendix E to this Order.

DD. “Effective Date” means the date on which Respondent Fresenius acquires Liberty.

EE. “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, dietician, or social worker) who is not a Regional Manager, who is employed by Respondent Fresenius, or before the Acquisition, by Liberty, 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 July 1, 2011, regardless of whether the individual has also worked on the premises of any other Clinic.

FF. “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 Fresenius or Liberty;
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 “Fresenius,” “Liberty Dialysis,” and “Renal Advantage,” (unless otherwise licensed to an Acquirer pursuant to the Order), 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 expenses;
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 Fresenius and Liberty 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;

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13. e-mail addresses and telephone numbers of Respondent Fresenius's and Liberty's employees;
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 Fresenius or Liberty by a Supplier or Payor with respect to any Clinic To Be Divested, except for Respondent Fresenius's or Liberty'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 Fresenius and Liberty 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;
20. Fresenius Medical Protocols and Liberty Medical Protocols, subject to the licensing provisions in this Order;
21. Contracts to which Respondent Fresenius or Liberty or their affiliates (other than the Clinics To Be Divested) are a party and are not otherwise included in the Assets Associated with a Clinic To Be Divested; and

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22. 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.

GG. “Florida Governmental Approvals for Divestiture” means any Governmental Approvals for Divestiture issued by the State of Florida.

HH. “Florida Viera Clinic Asset” means the FMC Viera Clinic, located at 8041 Spyglass Road, Viera, FL 32940; and all Assets Associated with such Clinic.

II. “Fresenius Employee Of A Clinic To Be Divested” and “Fresenius Employee Of The Clinic To Be Divested” means an Employee Of A Clinic To Be Divested who is employed by Respondent Fresenius or, before the acquisition by Respondent Fresenius, by Liberty.

JJ. “Fresenius’s Medical Protocols” means medical protocols promulgated by Respondent Fresenius, whether in hard copy or embedded in software, that have been in effect at any time since July 1, 2010. *Provided, however*, “Fresenius’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 Fresenius.

KK. “Good Samaritan Hospital” means a hospital that is part of the Bons Secours Charity Health System located at 255 Lafayette Ave. (Route 59), Suffern, NY 10901.

LL. “Good Samaritan Hospital Dialysis Clinic” means the Regional Kidney Center Clinic owned by Good

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Samaritan Hospital and located at 331 Route 17M, Harriman, NY 10926.

- MM. “Good Samaritan Management Agreement” means collectively:
1. the Administrative Services Agreement dated January 1, 2010, by and between Good Samaritan Hospital and Renal Research Institute, LLC, an affiliate of Respondent Fresenius, and
 2. any other agreements between Good Samaritan Hospital and Respondent Fresenius Relating To the management of the dialysis clinics at Good Samaritan Hospital located at 255 Lafayette Ave. (Route 59), Suffern, NY 10901, and 331 Route 17M, Harriman, NY 10926.
- NN. “Good Samaritan Management Termination Letter” means the February 1, 2012, letter from Renal Research Institute, LLC, an affiliate of Respondent Fresenius, and Good Samaritan Hospital giving sixty (60) days advance notice of termination of the Good Samaritan Management Agreement.
- OO. “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.
- PP. “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.
- QQ. “Governmental Approvals For Divestiture” means any Governmental Approvals that an Acquirer must have to own, and to initially operate, a Clinic To Be

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Divested, including, but not limited to, state-issued licenses and state-issued certificates of need.

RR. “Hawaii Governmental Approvals For Divestiture” means any Governmental Approvals For Divestiture issued by the State of Hawaii.

SS. “Hawaii Clinic Assets” means the following clinics and all Assets Associated with each of those Clinics:

1. FMC Aloha Clinic, 1520 Liliha Street, Honolulu, HI;
2. FMC Kapahulu Clinic, 750 Palani Avenue, Honolulu, HI;
3. FMC Pearlridge Clinic, 98-1005 Moanaloa Road, Suite 420, Aiea, HI;
4. FMC Honolulu Clinic, 226 N. Kuakini Street, Honolulu, HI;
5. FMC Kapolei Clinic, 555 Farrington Highway, Kapolei, HI;
6. FMC Ko'Olau Clinic, 47-388 Hui Iwa Street, Kaneohe, HI;
7. FMC Wahiawa Clinic, 850 Kilani Avenue, Wahiawa, HI;
8. FMC Windward Clinic, 45-480 Kaneohe Bay Drive #D09, Kaneohe, HI; and
9. FMC Waipahu Clinic (de novo), location to be determined, Waipahu, HI.

TT. “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

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control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intangible property.

- UU. “Liberty’s Medical Protocols” means medical protocols promulgated by Liberty, whether in hard copy or embedded in software, that have been in effect at any time since July 1, 2010. *Provided, however*, “Liberty’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 Liberty.
- VV. “Licensed Intangible Property” means intangible property licensed to Respondent Fresenius 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 Fresenius. (“Licensed Intangible Property” does not mean modifications and improvements to intangible property that are not licensed to Respondent Fresenius.)
- WW. “Monitor Agreement” means the Monitor Agreement dated January 21, 2012, between Fresenius, and Richard A. Shermer, of R. Shermer & Company. (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.)
- XX. “New York Governmental Approvals For Divestiture” means any Governmental Approvals For Divestiture issued by the State of New York.

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- YY. “New York Clinic Assets” means the FMC Dutchess Clinic located at 2585 South Rd., Poughkeepsie, NY, and all Assets Associated with that Clinic.
- ZZ. “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.
- AAA. “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

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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.

- BBB. “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.
- CCC. “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.
- DDD. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.
- EEE. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- FFF. “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.
- GGG. “Regional Manager” means any individual who has been employed by Respondent Fresenius, RAI, or Liberty with a geographic regional, or area supervisory, or management responsibility for one or

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more Clinics. A Regional Manager may go by various names including, but not limited to, director of operations.

HHH. “Regional Manager Of A Clinic To Be Divested” and “Regional Manager Of The Clinic To Be Divested” mean a Regional Manager with a geographic regional, or area supervisory, or management responsibility for a Clinic To Be Divested at any time since July 1, 2011.

III. “Relating To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.

JJJ. “Software” means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.

KKK. “Supplier” means any Person that has sold to Respondent Fresenius, RAI, or Liberty any goods or services, other than Physician services, for use in a Clinic To Be Divested.

LLL. “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.

MMM. “University of California, San Diego Clinic” means the Clinic currently located at 200 W. Arbor Dr., San Diego, CA 92103.

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

A. Respondent Fresenius shall:

1. within thirty-two (32) days after the Effective Date, divest to DSI, absolutely, and in good faith, pursuant to and in accordance with the DSI-Fresenius Divestiture Agreements all the Appendix A Clinic Assets, except for the Connecticut Clinic Assets, Hawaii Clinic Assets, the New York Clinic

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Assets, and the Florida Viera Clinic Assets, as on-going businesses, and grant to the Acquirer a royalty-free, worldwide non-exclusive license for the use, without any limitation, of the Fresenius Medical Protocols and the Liberty Medical Protocols (including the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means). Any failure by Respondent Fresenius to comply with the DSI-Fresenius Divestiture Agreements shall constitute a failure to comply with the Order. The DSI-Fresenius Divestiture Agreements shall not vary or contradict, or 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 DSI, or any obligations of Respondent Fresenius, under the DSI-Fresenius Divestiture Agreements.

2. within ninety (90) days after the Effective Date, divest to DSI, absolutely, and in good faith, pursuant to and in accordance with the DSI-Fresenius Divestiture Agreements, the Connecticut Clinic Assets, as an on-going business;
3. within ninety (90) days after the Effective Date, divest to DSI, absolutely, and in good faith, pursuant to and in accordance with the DSI-Fresenius Divestiture Agreements, the Hawaii Clinic Assets, as an on-going business;
4. within one (1) year after the Effective Date, divest to DSI, absolutely, and in good faith, pursuant to and in accordance with the DSI-Fresenius Divestiture Agreements, the New York Clinic Assets, as an on-going business;
5. within sixty (60) days after the Effective Date, divest to DSI, absolutely, and in good faith, pursuant to and in accordance with the DSI-Fresenius Divestiture Agreements, the Florida Viera Clinic Assets, as an on-going business;

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6. within fifteen (15) days after the Effective Date:
- a. pursuant to and in accordance with the Good Samaritan Management Termination Letter, give notice to terminate the Good Samaritan Management Agreement, and pursuant to such letter and such management agreement, transfer management of the Good Samaritan Hospital Dialysis Clinic to Good Samaritan Hospital, who will either operate the Good Samaritan Hospital Dialysis Clinic itself or seek a new operator through a request for proposal process.
 - b. enter into a transition services agreement with Good Samaritan Hospital which shall be submitted to the Commission for approval within the fifteen-day time period, and shall include, but not be limited to:
 - i. providing services consistent with, or similar to, the services currently provided to Good Samaritan under the Good Samaritan Management Agreement;
 - ii. a term not to extend beyond December 31, 2012;
 - iii. the unilateral option of Good Samaritan Hospital to terminate such agreement or phase out particular services or parts of such agreement upon notice as determined by Good Samaritan Hospital;
 - iv. assigning values or costs for particular services, such that if the services are phased out before the end of the transition services agreement, there will be no dispute on remaining costs;

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- v. a firewall to protect Confidential Business Information Relating To the Good Samaritan Dialysis Clinic; and
- vi. a prohibition on Respondent Fresenius from assigning such agreement.

The Good Samaritan Management Termination Letter and the Good Samaritan transition services agreement, when final and approved by the Commission, are incorporated by reference into this Order and made a part hereof as Non-Public Appendix J. If Respondent Fresenius fails to submit an executed transition services agreement to the Commission for approval within fifteen (15) days after the Effective Date, or if the Commission denies its approval of any agreement submitted for approval, then the Monitor, in consultation with Commission staff, shall be given the immediate and absolute authority to negotiate all terms of the transition services agreement with Good Samaritan, consistent with the terms of this Order, and subject to the Commission's prior approval. After the Effective Date and until the transition services agreement terminates, Respondent Fresenius shall not disclose Confidential Business Information Relating To the Good Samaritan Hospital Dialysis Clinic; and Respondent Fresenius shall assure that any employee who obtains or possesses Confidential Business Information Relating To the Good Samaritan Hospital Dialysis Clinic shall not disclose it to any employee who does not have primary responsibility for providing transition services to the Good Samaritan Hospital Dialysis Clinic.

Any failure by Respondent Fresenius to comply with the Good Samaritan Management Termination Letter and the final Good Samaritan transition services agreement shall constitute a failure to comply with the Order. The Good Samaritan Management Termination Letter and the final Good Samaritan transition services agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing

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in this Order shall reduce, or be construed to reduce, any rights or benefits of the Good Samaritan Hospital, or any obligations of Respondent Fresenius, under the Good Samaritan Management Termination Letter and the final Good Samaritan transition services agreement.

7. Within ten (10) days after the Effective Date, divest to the Alaska Clinic Acquirer, absolutely, and in good faith, pursuant to and in accordance with the Alaska Clinic Divestiture Agreement, the Alaska Clinic Assets as an on-going business, and grant to the Acquirer a royalty-free, worldwide non-exclusive license for the use, without any limitation, of the Liberty Medical Protocols (including the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means). The Alaska Clinic Divestiture Agreement is incorporated by reference into this Order and made a part hereof as Non-Public Appendix H. Any failure by Respondent Fresenius to comply with the Alaska Clinic Divestiture Agreement shall constitute a failure to comply with the Order. However, in the event that the Alaska Clinic Divestiture Agreement varies from or contradicts, or be construed to vary or contradict, the terms of this Order, the terms of this Order shall control. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of the Alaska Clinic Acquirer, or any obligations of Respondent Fresenius, under the Alaska Clinic Divestiture Agreement.
8. Within thirty-two (32) days after the Effective Date, divest to the Dallas Clinics Joint Venture Interests Acquirer, absolutely, and in good faith, pursuant to and in accordance with the Dallas Clinics Joint Venture Interests Divestiture Agreement, the Dallas Clinics Joint Venture Interests, and grant to the Dallas Clinics Joint Venture Interests Acquirer a royalty-free, worldwide non-exclusive license for the use,

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without any limitation, of the Liberty Medical Protocols (including the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means). The Dallas Clinics Joint Venture Interests Divestiture Agreement is incorporated by reference into this Order and made a part hereof as Non-Public Appendix I. Any failure by Respondent Fresenius to comply with the Dallas Clinics Joint Venture Interests Divestiture Agreement shall constitute a failure to comply with the Order. The Dallas Clinics Joint Venture Interests Divestiture Agreement shall not vary or contradict, or 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 the Dallas Clinics Joint Venture Interests Acquirer, or any obligations of Respondent Fresenius, under the Dallas Clinics Joint Venture Interests Divestiture Agreement.

Provided, however, if, at the time the Commission determines to make this Order final, the Commission notifies Respondent Fresenius that DSI, the Dallas Clinics Joint Venture Interests Acquirer, or the Alaska Clinic Acquirer is not an acceptable Acquirer then, after receipt of such written notification: (1) Respondent Fresenius shall immediately notify DSI, the Dallas Clinics Joint Venture Interests Acquirer, or the Alaska Clinic Acquirer of the notice received from the Commission and shall as soon as practicable, but no later than within five (5) business days, effect the rescission of the applicable Divestiture Agreement; and (2) Respondent Fresenius shall, within six (6) months of the date Respondent Fresenius receives notice of such determination from the Commission, divest the Appendix A Clinic Assets, the Dallas Clinics Joint Venture Interests, or the Alaska Clinic Assets, as applicable, absolutely and in good faith, at no minimum price, as on-going businesses to an Acquirer or Acquirers that receive the prior approval

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of the Commission and only in a manner that receives the prior approval of the Commission.

Provided further, however, that if Respondent Fresenius 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 Fresenius that the manner in which any of the divestitures accomplished is not acceptable, the Commission may direct Respondent Fresenius 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. Respondent Fresenius shall not acquire Liberty until it has obtained for all the Appendix A Clinics:
1. all approvals for the assignment of the Clinic's Physician Contracts to the Acquirer;
 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
 3. all approvals by joint venture partners necessary for the Acquirer of Appendix A-2 Joint Venture Equity Interests to jointly own and operate the Clinics that are owned by the joint venture.

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

- C. Respondent Fresenius shall hold separate the entirety of Liberty, and not take control over or possession of Liberty, until it has obtained for all the Appendix A Clinics all approvals for the assignment of the rights, title, and interest to a lease for Real Property Of A

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Clinic To Be Divested to the Acquirer. The specific terms of the hold separate are in the Order to Maintain Assets and Hold Separate attached to the Agreement Containing Consent Orders.

D. Respondent Fresenius shall:

1. place no restrictions on the use by any Acquirer of any of the Assets To Be Divested to such Acquirer or any of the Clinics To Be Divested to such Acquirer, or interfere with or otherwise attempt to interfere with any Acquirer's use of any of the Assets To Be Divested to such Acquirer or any of the Clinics To Be Divested to such Acquirer including, but not limited to, seeking or requesting the imposition of Governmental Approvals or other governmental restrictions on the Acquirer's business operations relating to 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,
 - a. at the Time Of Divestiture of each Clinic To Be Divested, in obtaining all Government Approvals For Divestiture, and
 - b. all Government Approvals For Continued Operation, for each Clinic To Be Divested to such Acquirer.
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 divested to such Acquirer. *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 to such Acquirer pursuant to Paragraph II.A. of this

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Order, and (2) the Acquirer certifies its receipt of such lease and attaches it as part of the Divestiture Agreement, then Respondent Fresenius 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 for the Clinics divested to such Acquirer. *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 Fresenius shall not be required to make the assignment for such Clinic To Be Divested as required by this Paragraph.
 - c. assign to the Acquirer all approvals by joint venture partners necessary for the Acquirer to acquire the Appendix A Clinics that are owned by a joint venture; and
 - d. assign to the Acquirer 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.
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 Respondent Fresenius's rights under the contract to the Acquirer; and

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- b. if such contract can be assigned to the Acquirer only with third party approval, assist and cooperate with the Acquirer in obtaining:
 - i. such third party approval and in assigning the contract to the Acquirer; or
 - ii. a new contract.
- E. Respondent Fresenius 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 writing to such disclosure upon a request by the Acquirer, and (ii) if the Acquirer enters into a confidentiality agreement with Respondent Fresenius not to disclose the information to any third party.
- F. Respondent Fresenius shall:
 - 1. if requested by an Acquirer, facilitate interviews between each Designated Fresenius Employee and the Acquirer, and shall not discourage such employee from participating in such interviews;
 - 2. not interfere in employment negotiations between each Designated Fresenius Employee and an Acquirer.
 - 3. not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the Designated Fresenius Employee from being employed by an Acquirer, and shall not offer any incentive to the Designated Fresenius Employee to decline employment with an Acquirer;

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4. cooperate with an Acquirer of a Clinic in effecting transfer of the Designated Fresenius Employee to the employ of the Acquirer, if the Designated Fresenius Employee accepts such offer of employment from an Acquirer;
5. eliminate any contractual provisions or other restrictions that would otherwise prevent the Designated Fresenius Employee from being employed by an Acquirer;
6. eliminate any confidentiality restrictions that would prevent the Designated Fresenius Employee who accepts employment with the Acquirer from using or transferring to an Acquirer any information Relating To the Operation Of The Clinic; and
7. pay, for the benefit of any Designated Fresenius Employee who accepts employment with an Acquirer, all accrued bonuses, vested pensions and other accrued benefits.

Respondent Fresenius shall comply with the terms of this Paragraph II.F. from the time Respondent Fresenius signs the Agreement Containing Consent Order until sixty (60) days after the Time Of Divestiture of each Clinic To Be Divested for the employees who are Designated Fresenius Employees described in Paragraph I.Y.1.

Respondent Fresenius shall comply with the terms of this Paragraph II.F. from the time Respondent Fresenius signs the Agreement Containing Consent Order until one-hundred twenty (120) days after the divestiture required pursuant to Paragraph II.A.1. is completed for the employees who are Designated Fresenius Employees described in Paragraph I.Y.2.

Provided, however, that the terms of this Paragraph II.F. as it relates to the interviewing and hiring of

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Regional Managers shall not apply after the Acquirer has hired five (5) Regional Managers.

Provided, further, however, that if, at any time after the Time of Divestiture, DSI or the Acquirer of the Appendix A Clinic Assets gives Respondent Fresenius 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 Fresenius as full time employees without violating this Paragraph II.F. *Provided, further, however,* that no earlier than fifteen (15) days after the Time of Divestiture, Respondent Fresenius may submit a written request to the Acquirer identifying those persons from the Non-Public Appendix G to whom Respondent Fresenius 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 Fresenius 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 Fresenius shall continue to comply with the terms of this Paragraph II.F. with regard to such employees.

- G. For a period of:
1. two (2) years following the Time Of Divestiture of each Clinic To Be Divested, Respondent Fresenius shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any employee who is employed by any of the Acquirers to terminate his or her employment relationship with such Acquirer, unless that employment relationship has already been terminated by the Acquirer; *Provided, however,* Respondent Fresenius may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at

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any of an Acquirer's employees; *Provided, further, however,* Respondent Fresenius may hire employees who apply for employment with Respondent Fresenius, as long as such employees were not solicited by Respondent Fresenius in violation of this Paragraph; *Provided, further, however,* Respondent Fresenius may offer employment to a Designated Fresenius Employee who is employed by the Acquirer in only a part-time capacity, if the employment offered by Respondent Fresenius would not, in any way, interfere with the employee's ability to fulfill his or her employment responsibilities to the Acquirer; and

2. six (6) months following the Time Of Divestiture of each Clinic To Be Divested, Respondent Fresenius shall not, directly or indirectly, employ, directly or indirectly, including as a paid or unpaid consultant, any Person who owns any interest in any of the Clinics or interests in Clinics divested pursuant to Paragraph II or Paragraph V of this Order; *Provided however,* for purposes of this Paragraph II.G.2., a Person does not include an individual who is part of the Alaska Clinic Assets Acquirer or the Dallas Clinics Joint Venture Interests Acquirer, and is employed or engaged as a medical director at a Respondent Fresenius Clinic, or otherwise engaged as a medical advisor for Respondent Fresenius.

H. 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 Fresenius 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

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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 Fresenius 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 Fresenius or Liberty in effect as of July 1, 2011, then Respondent Fresenius 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.

I. Respondent Fresenius 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. shall not use Confidential Business Information relating exclusively to any of the Clinics To Be Divested for any purpose other than complying

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with the terms of this Order or with any law;
and

- b. 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 Fresenius is required by law to retain such information, and (2) Respondent Fresenius's inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of Respondent Fresenius.

J. At the Time Of Divestiture of each Clinic To Be Divested, Respondent Fresenius 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 Fresenius or Liberty in the Operation Of The Clinic.
 - a. For two (2) years following the Time Of Divestiture of each Clinic To Be Divested, Respondent Fresenius shall not solicit the business of any patient who received any goods or services from such Clinic between July 1, 2011, and the date of such divestiture, *Provided, however*, Respondent Fresenius 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 Fresenius employee.

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- K. Respondent Fresenius 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 Fresenius shall do nothing to prevent or discourage Suppliers that, prior to the Time Of 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 Fresenius shall not terminate any transition services agreement that is a part of any of the 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 Fresenius 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.
- N. The purpose of Paragraph II of this Order is to ensure the continuation of the Clinics To Be Divested as, or

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as part of, an 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 Fresenius of Liberty, to ensure that the Clinics To Be Divested are operated independently of, and in competition with, Respondent Fresenius, and to remedy the lessening of competition alleged in the Commission's Complaint.

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

- A. For a period of five (5) years from the date this Order is issued, Respondent Fresenius shall not, without providing advance written notification to the Commission in the manner described in this paragraph, directly or indirectly:
1. acquire any assets of or financial interest in any Clinic located in any of the areas listed in Appendix B of this Order; or
 2. 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:
 - a. off-site lab services or social worker support materials; or
 - b. 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

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management of any Clinic owned by Respondent Fresenius 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 Fresenius and not from any other party to the transaction. Respondent Fresenius shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Fresenius 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.indirectly:

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- B. For the duration of the Order, Respondent Fresenius shall not:
1. acquire, directly or indirectly, any interest in the University of California, San Diego Clinic, where currently located, or wherever subsequently located within San Diego County, California; or
 2. enter into any agreement or otherwise agree to manage, operate, expand, or move such University of California, San Diego Clinic, wherever it may be located within San Diego County, California.
 3. shall not acquire, directly or indirectly, without receiving prior Commission approval, any interest in the Clinics divested, or any Clinics divested, pursuant to the terms of this Order including, but not limited to, entering into a management or operation agreement with such Clinics.

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

- A. Richard A. Shermer, of R. Shermer & Company, shall be appointed Monitor to assure that Respondent Fresenius 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 Fresenius 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 Fresenius, which consent shall not be unreasonably withheld. If Respondent

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Fresenius 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 Fresenius of the identity of any proposed Monitor. Respondent Fresenius 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 Fresenius 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 Fresenius'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 Fresenius 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 Fresenius'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 Fresenius 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

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Respondent Fresenius or the Acquirers, except as allowed in this Order and in the Order to Maintain Assets, 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 Fresenius'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 Fresenius'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 Fresenius's compliance with its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements. Respondent Fresenius 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 Fresenius'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 Fresenius 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 Fresenius, 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

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rendered, subject to the approval of the Commission.

6. Respondent Fresenius 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 Fresenius 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 Fresenius, and any reports submitted by the Acquirer with respect to the performance of Respondent Fresenius'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 Fresenius of its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements.
9. Respondent Fresenius 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*

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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 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 Fresenius has not divested, absolutely and in good faith and with the Commission's prior approval,
 - 1. 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

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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.

2. all of the Dallas Clinics Joint Venture Interests pursuant to Paragraph II of this Order, the Commission may appoint a trustee to (1) divest the Dallas Clinics Joint Venture Interests 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; or, in the event the Dallas Clinics Joint Venture Interests cannot be divested for whatever reason, (2) divest the Appendix F-3 Clinics in the Dallas area at the option of the Divestiture Trustee and the Commission.
3. all of the Alaska Clinic Assets pursuant to Paragraph II of this Order, the Commission may appoint a trustee to (1) divest the Alaska Clinic 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; or, in the event the Alaska Clinic Assets cannot be divested for whatever reason, (2) divest the Appendix F-4 Clinics in the Alaska area at the option of the Divestiture Trustee and the Commission.

In the event that the Commission or the 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 Fresenius 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

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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 Fresenius to comply with this Order.

- B. The Commission shall select the trustee, subject to the consent of Respondent Fresenius, which consent shall not be unreasonably withheld. The trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent Fresenius 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 Fresenius of the identity of any proposed trustee, Respondent Fresenius shall be deemed to have consented to the selection of the proposed trustee.
- C. Within ten (10) days after appointment of a trustee, Respondent Fresenius 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 Fresenius shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
 - 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.

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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 Fresenius shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent Fresenius shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Fresenius 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.
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 Fresenius'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

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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 Fresenius from among those approved by the Commission; *Provided, further, however,* that Respondent Fresenius 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 Fresenius, 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 Fresenius, 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 Fresenius, and the trustee's power shall be terminated. The compensation of the trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
6. Respondent Fresenius 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,

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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 Fresenius and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.
 9. Respondent Fresenius 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 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.

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

- A. Beginning thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent Fresenius has fully complied with Paragraphs II.A., II.B., II.C., II.D.1., II.D.2.a., II.D.3., II.D.4., II.E., II.F., II.G.2., II.I.2., II.J., II.L., and IV.B. of this Order, Respondent Fresenius 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 Fresenius 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 Fresenius 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 Fresenius shall submit at the same time a copy of these reports to the Monitor.

VII.

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

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

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dissolution of subsidiaries, or any other change in Respondent Fresenius.

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 Fresenius, Respondent Fresenius shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Fresenius 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 Fresenius related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. Upon five (5) days' notice to Fresenius and without restraint or interference from Fresenius, to interview officers, directors, or employees of Fresenius, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date the Order is made final.

By the Commission.

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APPENDIX A**APPENDIX A CLINICS**

	Clinic Name	Clinic Address
1	Liberty Flagstaff De Novo	2268 North Walgreens Street Flagstaff, AZ 86004
2	FMC Berkeley	2895 7 th Street Berkeley, CA 94710
3	Liberty Broadway Chula Vista	1181 Broadway, Suite 5 Chula Vista, CA 91911
4	Liberty El Camino Real	2227 South El Camino Real, Suite B Oceanside, CA 92054
5	Liberty Pueblo	850 Eagleridge Boulevard Pueblo, CO 81008
6	Liberty Orange	240 Indian River Road Orange, CT 6477
7	Liberty North Haven	510 Washington Avenue North Haven, CT 6473
8	Liberty Seaford	600 Health Service Drive Seaford, DE 19973
9	Liberty Wilmington	913 Delaware Avenue Wilmington, DE 19806
10	Liberty Sarasota	1921 Waldemere Street, Suite 107 Sarasota, FL 34239
11	FMC Viera	8041 Spyglass Road Viera, FL 32940
12	FMC Pine Street	745 Pine Street Macon, GA 31210

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13	BMA of Macon Inc.	280 Clinton Street Macon, GA 31217
14	FMC South Macon Dialysis	2500 Second Street Macon, GA 31205
15	FMC Milledgeville	411 North Jefferson Street Milledgeville, GA 31061
16	Liberty Drayton Savannah	1020 Drayton Street Savannah, GA 31401
17	FMC Aloha	1520 Liliha Street Honolulu, HI 96817
18	FMC Kapahulu	750 Palani Avenue Honolulu, HI 96816
19	FMC Pearlridge	98-1005 Moanaloa Road, Suite 420 Aiea, HI 96701
20	FMC Honolulu	226 North Kuakini Street Honolulu, HI 96817
21	FMC Kapolei	555 Farrington Highway Kapolei, HI 96707
22	FMC Ko'Olau	47-388 Hui Iwa Street Kaneohe, HI 96744
23	FMC Wahiawa	850 Kilani Avenue Wahiawa, HI 96786
24	FMC Waipahu De Novo	TBD Waipahu, HI 96797
25	FMC Windward	45-480 Kaneohe Bay, Drive D09 Kaneohe, HI 96744
26	FMC Idaho Panhandle	204 North Triangle Drive Ponderay, ID 83852
27	Liberty Hayden	7600 Mineral Drive Coeur D'Alene, ID 83815

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28	Liberty Daleville	14520 West Davis Drive Daleville, IN 47334
29	Liberty North Granville Ave	3001 North Granville Avenue Muncie, IN 47303
30	Liberty North Street Muncie	2705 West North Street Muncie, IN 47303
31	Liberty Duneland Coffee Creek	3100 Village Point, Suite 101 Chesterton, IN 46304
32	Liberty Kokomo	3760 South Reed Road Kokomo, IN 46902
33	FMC Lafayette	915 Mezzanine Drive Lafayette, IN 47905
34	Liberty Duneland LaPorte	1007 Lincolnway LaPorte, IN 46350
35	Liberty Old Alexandria Clinton	7201 Old Alexandria Ferry Road Clinton, MD 20735
36	Liberty Silver Hill	5652 Silver Hill Road District Heights, MD 20747
37	Liberty Indian Head Oxon Hill	5410 Indian Head Highway Oxon Hill, MD 20745
38	FMC Kent County De Novo	TBD Wyoming, MI
39	Liberty South East Jackson	200 South East Avenue Jackson, MI 49201
40	FMC Watervliet	8816 Red Arrow Highway Watervliet, MI 49098
41	FMC Dutchess	2585 South Road Poughkeepsie, NY 12601
42	Liberty Latrobe Charlotte	3515 Latrobe Drive Charlotte, NC 28211

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43	Liberty Glenwater Charlotte	9030 Glenwater Drive #B Charlotte, NC 28262
44	Liberty Sooner Dialysis Lawton	924 Southwest 28 th Street Lawton, OK 73505
45	Liberty Uniontown	201 Mary Higginson Lane, Suite A Uniontown, PA 15401
46	Liberty Sparta Drive McMinnville	1524 Sparta Street McMinnville, TN 37110
47	Liberty Pace Road	4185 Pace Road Memphis, TN 38116
48	Liberty Poplar Avenue	1333 Poplar Avenue Memphis, TN 38104
49	Liberty Gallatin	270 East Main Street, Suite 100 Gallatin, TN 37066
50	Liberty Manchester	367 Interstate Drive Manchester, TN 37355
51	FMC Bryan	1612 North Texas Avenue Bryan, TX 77803
52	FMC West Laredo	4151 Bob Bullock Loop, Suite 105 Laredo, TX 78046
53	FMC South Laredo	802 Guadalupe Street Laredo, TX 78040
54	FMC Laredo	5501 Springfield Avenue Laredo, TX 78041

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APPENDIX A-2**APPENDIX A-2 JOINT VENTURES**

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

	Joint Venture Name	Clinic Name (Medicare Provider)	Clinic Address
1	LDFS LLC	Liberty Flagstaff De Novo	2268 North Walgreens Street Flagstaff, AZ 86004
2	Liberty Dialysis – Pueblo LLC	Liberty Pueblo	850 Eagleridge Boulevard Pueblo, CO 81008
3	LDO LLC	Liberty Orange	240 Indian River Road Orange, CT 6477
4	Liberty Dialysis – North Haven LLC	Liberty North Haven	510 Washington Avenue North Haven, CT 6473
5	LDSD LLC	Liberty Seaford	600 Health Service Drive Seaford, DE 19973
6	Liberty Wilmington LLC	Liberty Wilmington	913 Delaware Avenue Wilmington, DE 19806
7	Liberty Dialysis – Hayden LLC	Liberty Hayden	7600 Mineral Drive Coeur D’Alene, ID 83815
8	Liberty Dialysis – Duneland LLC	Liberty Duneland Coffee Creek	3100 Village Point, Suite 101 Chesterton, IN 46304

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	Joint Venture Name	Clinic Name (Medicare Provider)	Clinic Address
9	Liberty Dialysis – Kokomo, LLC	Liberty Kokomo	3760 South Reed Road Kokomo, IN 46902
10	FMC Clarian Arnett, LLC	FMC Lafayette	915 Mezzanine Drive Lafayette, IN 47905
11	Liberty Dialysis – Duneland LLC	Liberty Duneland LaPorte	1007 Lincolnway La Porte, IN 46350
12	RAI Care Centers of Clinton, LLC	Liberty Old Alexandria Clinton	7201 Old Alexandria Ferry Road Clinton, MD 20735
13	Lawton Med Partners, LLC	Liberty Sooner Dialysis Lawton	924 Southwest 28 th Street Lawton, OK 73505
14	RAI Care Centers of Uniontown, LLC	Liberty Uniontown	201 Mary Higginson Lane, Suite A Uniontown, PA 15401
15	NRA-Memphis (Midtown), Tennessee, LLC	Liberty Pace Road	4185 Pace Road Memphis, TN 38116
16	NRA-Memphis (Midtown), Tennessee, LLC	Liberty Poplar Avenue	1333 Poplar Avenue Memphis, TN 38104
17	RAI Care Centers of Gallatin I, LLC	Liberty Gallatin	270 East Main Street, Suite 100 Gallatin, TN 37066

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APPENDIX B**AREA DEFINITIONS TO APPENDIX A CLINICS, THE DALLAS
JOINT VENTURE INTERESTS CLINICS, AND THE ALASKA CLINIC
ASSETS****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 Fresenius.

	Divested Clinics	Corresponding Area Definition
1	Liberty Alaska LLC	The area in and/or near Anchorage, AK, consisting of: 99501; 99502; 99503; 99504; 99505; 99506; 99507; 99508; 99515; 99516; 99517; 99518; 99520; 99540; 99567; 99577; 99587; 99654; and the portion of 99645 that lies south and west of Chickaloon, AK.
2	Liberty Flagstaff De Novo	The area in and/or near Flagstaff, AZ, consisting of: 86001, 86004, 86030, 86031, 86033, 86034, 86035, 86039, 86040, 86042, 86043, 86044, 86045, 86046, 86047, 86048, 86053, 86054, 86435, and 86510.

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3	FMC Berkeley	The area in and/or near Berkeley, CA, consisting of: 94051; 94501; 94530; 94547; 94564; 94601; 94602; the portion of 94605 that lies north of 66 th Avenue; 94606; 94607; 94608; 94609; 94610; 94611; 94612; 94613; 94618; 94619; 94702; 94703; 94704; 94705; 94706; 94707; 94708; 94709; 94710; 94611; 94613; 94618; 94619; 94801; 94803; 94804; 94805; and 94806.
4	Liberty Broadway Chula Vista	The area in and/or near Chula Vista, CA, consisting of: the portion of 91901 that lies south of Japatul Road; 91905; 91906; 91910; 91911; 91913; 91914; 91915; 91917; 91932; 91934; 91935; 91945; 91950; 91962; 91963; 91977; 91978; 92101; 92102; the portion of 92103 that lies south of West Washington Street; 92104; 92105; 92113; 92114; the portion of 92115 that lies south of University Avenue; 92118; 92135; 92136; 92139; 92154; 91962; 91963; 92173; and 92174.

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5	Liberty El Camino Real Oceanside	The area in and/or near Oceanside, CA, consisting of: the portions of 91901, 91962, and 92021 that lie north of 8, 91916, 91948, 92003, 92004, 92007, 92008, 92009, 92010, 92011, 92014, 92024, 92025, 92026, 92027, 92028, 92029, 92036, 92037, 92040, 92054, 92055, 92056, 92057, 92058, 92059, 92060, 92061, 92064, 92065, 92066, 92067, 92069, 92070, the portions of 92071, 92111, 92123, and 92124 that lie north of Route 52, 92075, 92078, 92081, 92082, 92083, 92084, 92086, 92121, 92122, 92126, 92127, 92128, 92129, 92130, 92131, 92137, and 92145.
6	Liberty Pueblo	The area in and/or near Pueblo, CO, consisting of: 81001, 81002, 81003, 81004, 81005, 81006, 81007, 81008, 81022, 81023, and 81069.
7	Liberty Orange and Liberty North Haven	The area in and/or near New Haven, CT, consisting of: 06405, 06460, 06461, 06471, 06472, 06473, 06477, the portions of 06410 and 06492 that lie south of Route 68, 06511, 06512, 06513, 06514, 06515, 06516, 06517, 06518, and 06519.
8	Liberty Seaford	The area in and/or near Seaford, DE, consisting of: 19931, 19933, 19939, 19940, 19947, 19950, 19956, 19966, and 19973.

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9	Liberty Wilmington	The area in and/or near Wilmington, DE, consisting of: 19701, 19702, 19703, 19706, 19707, 19709, 19711, 19713, 19720, 19733, 19801, 19802, 19803, 19805, 19806, 19807, 19808, 19809, and 19810.
10	Liberty Sarasota	The area in and/or near Sarasota, FL, consisting of: 34201, 34203, 34207, 34231, 34232, 34233, 34234, 34235, 34236, 34237, 34238, 34239, 34240, 34243, the portion of 34202 that lies to the south of State Road 64, the portion of 34208 that lies to the east of 57 th Street East, the portion of 34241 that lies to the north of Clark Road/State Road 72.
11	FMC Viera	The area in and/or near Merritt Island, FL, consisting of: 32920, 32922, 32924, 32926, 32927, 32931, 32940, 32952, 32953, 32954, 32955, and the portion of 32937 that lies north of Route 404.
12	FMC Pine Street, BMA of Macon Inc., and FMC South Macon Dialysis	The area in and/or near Macon, GA, consisting of: 31017, 31020, 31032, 31033, 31044, 31052, 31066, 31201, 31203, 31204, 31206, 31210, 31211, 31216, 31217, 31218, and 31220.

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13	FMC Milledgeville	The area in and/or near Milledgeville, GA, consisting of: 31024, 31031, 31042, 31054, 31061, the portion of 31082 that lies to the west of North Indian Trail Road and South Indian Trail Road, 31087, and 31090.
4	Liberty Drayton Savannah	The area in and/or near Savannah, GA, consisting of: the portion of Chatham County, GA that lies to the east of I-95, and the portion of 29927 that lies to the south of the line formed by Route 170.
15	FMC Aloha, FMC Kapahulu, FMC Pearlridge, FMC Honolulu, FMC Kapolei, FMC Ko'Olau, FMC Wahiawa, FMC Waipahu De Novo, FMC Windward	The area in and/or near Honolulu, HI, consisting of the island of Oahu, HI.
16	FMC Idaho Panhandle	The area in and/or near Bonner, ID, consisting of: 83801, 83804, 83805, 83809, 83811, 83813, 83821, 83822, 83836, 83845, 83846, 83848, 83853, the portion of 83856 that lies in Idaho, 83864, and 83860.

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17	Liberty Hayden	The area in and/or near Coeur d'Alene, ID, consisting of: 83801, 83802, 83804, 83808, 83810, 83812, 83814, 83824, 83830, 83833, 83835, 83837, 83839, 83846, 83850, 83851, 83854, 83858, 83861, 83869, 83870, 83873, and 83876.
18	Liberty Daleville	The area in and/or near Daleville, IN, consisting of: 46001, 46011, 46012, 46013, 46015, 46016, 46017, 46018, 47334, and 47356.
19	Liberty North Granville Avenue and Liberty North Street Muncie	The area in and/or near Muncie, IN, consisting of: 47302, 47303, 47304, 47305, 47306, 47320, 47336, 47338, 47342, 47348, 47356, 47383, and 47396.
20	Liberty Duneland Coffee Creek	The area in and/or near Gary, IN, consisting of: 46304, 46342, 46347, 46360, 46368, 46383, 46384, 46385, 46403, 46405, 46410, and the portions of 46307, 46410, and 46341 that lie east of Highway 65.
21	Liberty Kokomo	The area in and/or near Kokomo, IN, consisting of: 46901, 46902, 46936, and 46979.

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22	FMC Lafayette	The area in and/or near Lafayette, IN, consisting of: 46923, 47901, 47904, 47905, 47906, 47907, 47909, 47917, 47918, 47920, 47921, 47923, 47929, 47930, 47942, 47944, 47948, 47951, 47970, 47971, 47975, 47977, 47981, 47991, 47992, 47993, and the portions of 47980, 47960, and 47995 that lie south of Highway 24.
23	Liberty Duneland La Porte	The area in and/or near La Porte, IN, consisting of: 46350, 46552, 46360, 46365, 46371, 46390, and 46391.
24	Liberty Old Alexandria Clinton, Liberty Silver Hill District Heights, Liberty Indian Head Oxon Hill	The area in and/or near Oxon Hill, MD, consisting of: 20019, 20020, 20032, 20623, 20731, 20735, 20743, 20744, 20745, 20746, 20747, 20748, 20749, 20762, and the portion of 20772 that lies south of Highway 4 and east of U.S. Route 301, and the portion of 20774 that lies south of Highway 214 and east of U.S. Route 301.
25	FMC Kent County De Novo	The area in and/or near Grand Rapids, MI, consisting of: 49301, 49302, 49306, 49315, 49316, 49319, 49321, 49323, 49330, 49331, 49335, 49339, 49341, 39343, 49344, 49345, 49348, 49418, 49426, 49428, 49503, 49504, 49505, 49506, 49507, 49508, 49509, 49512, 49519, 49525, 49534, 49544, 49546, and 49548.

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26	Liberty South East Jackson	The area in and/or near Jackson, MI, consisting of: 49201, 49202, 49203, 49204, 49224, 49230, 49234, 49237, 49240, 49241, 49245, 49246, 49259, the portion of 49264 south of Wilcox Lane, 49269, 49272, 49277, 49283, and 49284.
27	FMC Watervliet	The area in and/or near Watervliet, MI, consisting of: 49013, 49022, 49038, 49043, 49045, 49047, 49057, 49064, 49085, 49098, 49101, 49102, 49103, 49106, 49107, 49111, 49113, 49117, 49120, 49125, 49126, 49127, 49128, and 49129.
28	Fresenius Medical Director Agreement	The area in and/or near Atlantic City, NJ, consisting of: 08201, 08203, 08205, 08221, 08225, 08226, 08330, 08232, 08234, 08241, 08244, 08401, 08402, 08403, 08406, the portion of 08037 that lies east of Ellwood Road, and the portion of 08215 that lies south of Mullica River.
29	FMC Dutchess	The area in and/or near Poughkeepsie, NY, consisting of: 12501, 12507, 12508, 12514, 12522, 12524, 12527, 12531, 12533, 12538, 12540, 12545, 12546, 12564, 12567, 12569, 12570, 12571, 12572, 12578, 12580, 12581, 12582, 12585, 12590, 12592, 12594, 12601, 12603, and 12604.

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30	Fresenius' Samaritan Management Contract	Good	The area in and/or near Newburgh, NY, consisting of: 10916, 10917, 10919, 10928, 10930, 10941, 10950, 10992, 10996, 12429, 12493, 12515, 12518, 12520, 12525, 12528, 12542, 12547, 12548, 12549, 12550, 12551, 12553, 12561, 12566, 12575, 12577, 12586, 12589 and the portions of 10918 and 10924 that lie north of Brookside Avenue, the portion of 10926 that lies north of and includes Route 17M, the portion of 10940 that lies north of Route 84, east of County Road 78, south of Ingrassia Road, and east of Route 17M, the portion of 10950 that lies north of and includes Route 17M, and the portion of 10958 that lies north of Route 17M.
31	RAI Latrobe, RAI Glenwater		The area in and/or near Charlotte, NC, consisting of Mecklenburg County, NC.
32	Liberty Lawton		The area in and/or near Lawton, OK, consisting of: 73501, 73503, 73505, 73507, 73527, 73528, 73530, 73531, 73538, 73540, 73541, 73542, 73543, 73546, 73548, 73551, 73552, 73553, 73557, 73562, 73566, 73568, 73570, and 73572.

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33	RAI Uniontown	The area in and/or near Uniontown, PA, consisting of: 15401, 15416, 15422, 15425, 15431, 15435, 15436, 15437, 15440, 15443, 15445, 15451, 15456, 15458, 15459, 15461, 15468, 15470, 15474, 15478, 15480, 15484, 15486, and 15488.
34	RAI McMinnville	The area in and/or near McMinnville, TN, consisting of: 37110, 37166, 37357, 37190, 38581, and 38585.
35	RAI Pace Road, RAI Poplar Avenue	The area in and/or near Memphis, TN, consisting of: 38103, 38104, 38105, 38106, 38107, 38108, 38109, 38111, 38112, 38113, 38114, 38116, 38122, 38126, 38127, 38128, 38131, and 38132.
36	RAI Gallatin	The area in and/or near Gallatin, TN consisting of: 37022, 37031, 37048, 37066, 37074, 37075, 37186, and the portions of 37072, 37148, and 37188 that lie east of Interstate 65.
37	RAI Manchester	The area in and/or near Tullahoma, TN, consisting of: 37183, 37144, 37160, 37318, 37324, 37330, 37334, 37342, 37348, 37349, 37352, 37355, 37359, 37360, 37388, 37398, the portions of 37306, 37335, and 37345 that lie north of Route 64, and the portion of 37375 that lies north of Sewanee Highway.

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38	FMC Bryan	The area in and/or near Bryan, TX, consisting of: 75852, 76629, 77363, 77801, 77802, 77803, 77807, 77808, 77830, 77831, 77836, 77837, 77840, 77845, 77856, 77859, 77861, 77864, 77868, 77872, and 77879.
39	FMC West Laredo, FMC South Laredo, FMC Laredo	The area in and/or near Laredo, TX, consisting of: 78040, 78041, 78043, 78044, 78045, 78046, 78067, 78076, 78344, 78360, 78361, and 78369.
40	Liberty Duncanville, Liberty Lancaster	The area in and/or near Duncanville and Lancaster, TX, consisting of: 75052, 75104, 75115, 75116, 75125, 75134, 75137, 75141, 75146, 75172, 75203, 75211, 75215, 75216, 75224, 75232, 75233, 75236, 75237, 75241, 75249, and the portion of 75154 that lies within Dallas County.
41	Liberty Mesquite	The area in and/or near Mesquite, TX, consisting of: 75043, 75149, 75150, 75159, 75180, 75181, 75182, 75210, 75217, 75223, 75227, 75228, and 75253.
42	Liberty Rockwall	The area in and/or near Rockwall, TX, consisting of: 75032, 75040, 75041, 75043, 75048, 75087, 75088, 75089, 75098, 75132, 75166, 75173, 75228, and the portion of 75189 that lies within Rockwall County.

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43	Liberty Waxahachie	The area in and/or near Waxahachie, TX, consisting of: 75119, 75125, 75152, 75154, 75165, 75167, 76041, 76064, 76065, 76084, and 76651.
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APPENDIX C**MONITOR AGREEMENT****MONITOR AGREEMENT**

MONITOR AGREEMENT (this “**Agreement**”), dated as of January 21, 2012, between Fresenius Medical Care Holdings, Inc. (“**FMCH** or **Respondent**”), and Richard A. Shermer of R. Shermer & Company (“**Monitor**”).

PRELIMINARY STATEMENT

WHEREAS the Federal Trade Commission (the “**Commission**”) is considering for public comment an Agreement Containing Consent Orders with Respondent or its parent company, which provides, among other things, that Respondent divest a number of dialysis clinics and assets associated with those clinics, Respondent terminate management contracts Respondent has with certain dialysis 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 (a) the Decision and Order and (b) the Order to Maintain Assets (collectively, the “**Orders**”);

WHEREAS, the Commission is expected to issue the Agreement Containing Consent Orders and appoint the Monitor pursuant to the Orders to monitor Respondent’s compliance with the terms of the Orders, and the Monitor has 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 Monitor to carry out its duties and responsibilities pursuant to the Orders;

WHEREAS, this Agreement, although executed by Monitor and Respondent, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent or Monitor under the Orders, until the Order to Maintain Assets has been issued and this 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**” means Fresenius Medical Care Holdings, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 920 Winter Street, Waltham, MA 02451, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; its joint ventures, divisions, groups and affiliates controlled by FMCH, 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 the Decision and Order.

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3. “**Acquisition Date**” means the date on which the first of the Relevant Agreements pursuant to the Decision and Order goes into effect.

4. “**Relevant Agreements**” means: all the divestiture agreements, management termination agreements, and transition services agreements entered into pursuant to the Decision and Order, including, but not limited to, the Divestiture Agreements, and the Transition Services Agreement between the Other Parties and FMCH or one of its subsidiaries.

5. 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

1.1 Powers of the Monitor. Monitor shall have the rights, duties, powers and authority conferred upon Monitor by the Orders that are necessary for Monitor to monitor Respondent’s compliance with the Orders. No later than one day after the Order to Maintain Assets becomes final, Respondent hereby transfers to Monitor all rights, powers, and authorities necessary to permit Monitor to perform its duties and responsibilities pursuant to the Order to Maintain Assets and consistent with the purposes of the Decision and Order. Any descriptions thereof contained in this Agreement in no way modify Monitor’s powers and authority or Respondent’s obligations under the Orders.

1.2 Monitor’s Duties. Monitor shall monitor Respondent’s compliance with the Orders, including, but not limited to:

- a. Assuring that Respondent expeditiously complies with all of the obligations, and performs all of responsibilities, of Respondent as required by the Orders in this matter;
- b. Monitoring Relevant Agreements; and
- 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.

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

1.4 Confidential and Proprietary Information. Monitor shall enter into confidentiality agreements, in substantially the form attached hereto as Confidential Exhibit A, agreeing to be bound by the terms and conditions of the Orders. Monitor must retain and maintain all Material Confidential Information it receives from either Respondent or Other Parties on a confidential basis, except as is permitted by the Orders. Monitor may disclose confidential information only to persons employed by or working with Monitor under this Agreement, to persons employed at the Commission, and as permitted by Respondent or Other Parties with respect to information they provided Monitor. Monitor shall require any person retained by Monitor to assist in carrying out the duties and responsibilities of Monitor to execute a confidentiality agreement that

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requires the same standard of care and obligations of confidentiality to which Monitor must adhere under this Agreement. Monitor 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 its duties under this Agreement and shall not disclose any confidential information relating thereto.

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

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

1.7 Access to Records, Documents and Facilities. Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to Respondent's 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 Monitor may reasonably request, related to Respondent's compliance with the obligations of Respondent 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 Monitor and shall take no action to interfere with or impede Monitor's ability to monitor Respondent's compliance with the Orders.

ARTICLE II

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. Monitor 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 Monitor's duties and responsibilities as allowed pursuant to the Orders.

2.2 Compensation. Monitor 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 its duties under this Agreement and the Orders. In addition, Respondent will pay: (a) out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the orders; and (b) fees and disbursements reasonably incurred by any advisor appointed by Monitor pursuant to the first paragraph in Article II. At its own expense, Respondent may retain an independent auditor to verify such invoices. Monitor shall provide Respondent with monthly invoices for time and expenses that include details and an explanation of all matters for which Monitor submits 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 the Commission for assistance in resolving such disputes.

2.3 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

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comply with all of Respondents' safety and security regulations, instructions and procedures while at Respondents' sites.

ARTICLE III

3.1 **Monitor's Liabilities and Indemnification.** Respondent shall indemnify the Monitor and hold Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of Monitor'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 gross negligence, willful or wanton acts, or bad faith by Monitor. 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.

3.2 **Monitor's Removal.** If the Commission determines that Monitor ceases 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.

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

3.4 **Termination:** This Agreement shall terminate the earlier of: (a) thirty (30) days following the termination date set forth in the applicable Order; (b) Respondent's receipt of written notice from the Commission that the Commission has determined that Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; (c) with at least thirty (30) days advance notice to be provided by Monitor to Respondent and to the Commission, upon resignation of the Monitor; or (d) when FMCH'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 FMCH extend this Agreement or enter into an additional agreement with Monitor as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force.

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3.5 Conflicts of Interest: If Monitor becomes aware during the term of this Agreement that it 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 its duties under this Agreement, Monitor 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.

MONITOR**R. SHERMER & COMPANY**

NAME: Richard A. Shermer, President

RESPONDENT**FRESENIUS MEDICAL CARE HOLDINGS, INC.**BY: NAME: DOUGLAS G. KOSTTITLE: SENIOR VICE PRESIDENT

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NON-PUBLIC APPENDIX C-1

COMPENSATION PROVISIONS OF MONITOR AGREEMENT

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

APPENDIX D

EXCLUDED TRADEMARKS & DESIGNS

[None]

NON-PUBLIC APPENDIX E

DSI-FRESENIUS DIVESTITURE AGREEMENTS

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

NON-PUBLIC APPENDIX F

**LIST OF ALTERNATIVE CLINICS TO APPENDIX A CLINICS TO
DIVEST**

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

Decision and Order

NON-PUBLIC APPENDIX F-2

**LIST OF ALTERNATIVE JOINT VENTURES TO APPENDIX A-2
JOINT VENTURES**

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

NON-PUBLIC APPENDIX F-3

**LIST OF ALTERNATIVE CLINICS TO DIVEST IN DALLAS, TEXAS
AREA**

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

NON-PUBLIC APPENDIX F-4

**LIST OF ALTERNATIVE CLINIC TO DIVEST IN ANCHORAGE,
ALASKA AREA**

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

Decision and Order

NON-PUBLIC APPENDIX G

DESIGNATED FRESENIUS EMPLOYEES:

ADDITIONAL FRESENIUS, RAI, AND LIBERTY EMPLOYEES LIST

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

NON-PUBLIC APPENDIX H

ALASKA CLINIC DIVESTITURE AGREEMENT

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

NON-PUBLIC APPENDIX I

**DALLAS CLINICS JOINT VENTURE INTERESTS DIVESTITURE
AGREEMENT**

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

Analysis to Aid Public Comment

NON-PUBLIC APPENDIX J

**GOOD SAMARITAN MANAGEMENT TERMINATION LETTER,
GOOD SAMARITAN MANAGEMENT AGREEMENT,
AND FINAL GOOD SAMARITAN TRANSITION SERVICES
AGREEMENT**

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

**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 Fresenius Medical Care AG & Co. KGaA (“Fresenius”). The purpose of the Consent Agreement is to remedy the anticompetitive effects resulting from Fresenius’s purchase of Liberty Dialysis Holdings, Inc. (“Liberty”). Under the terms of the Consent Agreement, Fresenius is required to divest 60 dialysis clinics and terminate one management contract in 43 geographic 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 August 1, 2011, Fresenius proposes to acquire Liberty for approximately \$2.1 billion. The Commission’s complaint alleges that the proposed acquisition, if

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consummated, would violate 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, by substantially lessening competition in 43 markets for the provision of outpatient dialysis services.

The Parties

Headquartered in Bad Homburg, Germany, Fresenius is the largest provider of outpatient dialysis services in the United States. Fresenius operates more than 1,800 outpatient dialysis clinics in all 50 states and the District of Columbia treating approximately 131,000 patients. In 2010, Fresenius's revenues were approximately \$8 billion.

Liberty, headquartered in Mercer Island, Washington, is a privately held company and the third-largest provider of outpatient dialysis services in the United States. Liberty operates 260 dialysis centers, providing dialysis services to approximately 19,000 patients in 32 states and the District of Columbia.

Outpatient Dialysis Services

Outpatient dialysis services is the relevant product market in which to assess the effects of the proposed transaction. For patients suffering from End Stage Renal Disease ("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 treatment 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, ESRD patients have no alternative to dialysis treatments. ESRD patients who are not hospitalized must obtain dialysis treatments from outpatient dialysis clinics.

Dialysis services are provided in local geographic markets limited by the distance ESRD patients are able to travel to receive treatments. ESRD patients are often very ill and suffer from

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multiple health problems, making travel further than 30 miles or 30 minutes very difficult. As a result, competition among dialysis clinics occurs at a local level, corresponding to metropolitan areas or subsets thereof. The exact contours of each market vary depending on traffic patterns, local geography, and the patient's proximity to the nearest center.

Entry into the outpatient dialysis services markets identified in the Commission's Complaint is not likely to occur in a timely manner at a level sufficient to deter or counteract the likely anticompetitive effects of the proposed transaction. The primary barrier to entry is the difficulty associated with locating nephrologists with established patient pools to serve as medical directors. By law, each dialysis clinic must have a nephrologist medical director. As a practical matter, medical directors are also 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, the attractiveness of entry is diminished where certain attributes, including 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 identified in the Complaint is highly concentrated. The proposed acquisition represents a merger-to-monopoly in 17 markets and would cause the number of providers to drop from three to two in 24 other markets. Additionally, in the remaining two markets identified in the Complaint, concentration is already very high and would increase significantly. In these two markets, the fourth market participant is small and does not meaningfully impact competition. Further, 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 Fresenius and Liberty when negotiating rates charged by dialysis providers. The high post-acquisition concentration levels, along with the elimination of Fresenius's and Liberty's head-to-head competition in these markets suggest the proposed combination likely would

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result in higher prices and diminished service and quality for outpatient dialysis services in many geographic markets.

The Consent Agreement

The Consent Agreement remedies the proposed acquisition's anticompetitive effects in 43 markets where both Fresenius and Liberty operate dialysis clinics by requiring Fresenius to divest 54 outpatient dialysis clinics to Dialysis Newco, Inc. (d/b/a DSI Renal) ("New DSI"); divest one outpatient dialysis clinic to Alaska Investment Partners LLC ("AIP"), and five outpatient dialysis clinics to Dallas Renal Group ("DRG"). The Consent Agreement also requires Fresenius to terminate one management services agreement pursuant to which it manages an outpatient dialysis clinic on behalf of a third-party owner. As with the divestitures, termination of this management services agreement will ensure that this clinic remains a viable independent competitor.

As part of these divestitures, Fresenius 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 the buyers. Similarly, the Consent Agreement requires Fresenius to obtain the consent of all lessors necessary to assign the leases for the real property associated with the divested clinics to the buyers. These provisions ensure that each buyer 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 each buyer with the opportunity to interview and hire employees affiliated with the divested clinics and prevents Fresenius from offering these employees incentives to decline any buyer's offer of employment. This will ensure that each buyer has access to patient care and supervisory staff who are familiar with the clinics' patients and the local physicians. Second, the Consent Agreement prevents Fresenius from contracting with the medical directors (or their practice groups) affiliated with the divested clinics for three years. This provides each buyer with sufficient time to build goodwill and a working relationship with its medical directors before Fresenius can

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attempt to capitalize on its prior relationships in soliciting their services. Third, to ensure continuity of patient care and records as each buyer implements its quality care, billing, and supply systems, the Consent Agreement allows Fresenius 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 Fresenius to provide each buyer with a license to use Fresenius's policies, procedures, and medical protocols, as well as the option to obtain Fresenius's medical protocols, which will further enhance the buyer's ability to continue to care for patients in the clinics that will be divested. Finally, the Consent Agreement requires Fresenius to provide notice to the Commission prior to any acquisitions of dialysis clinics in the markets addressed by the Consent Agreement in order to ensure that subsequent acquisitions do not adversely impact competition in the markets at issue or undermine the remedial goals of the proposed order.

The Commission is satisfied that New DSI is a qualified acquirer of the majority of the divested assets. New DSI is currently a significant operator of dialysis clinics, having been formed to acquire the divested assets resulting from the 2011 DaVita/DSI investigation. The company was formed by Frazier Healthcare, a firm with a dedicated focus on healthcare, and New Enterprise Associates, the world's largest venture capital firm with over \$10.5 billion under management.

Similarly, the Commission is satisfied that AIP is a qualified acquirer of divested assets in Alaska. AIP is a limited liability company wholly-owned by Dr. Mary Dittrich, the divested clinic's medical director, and Dr. William Dittrich. AIP has received financial support from Crystal Cascades LLC, an investment fund that manages \$100 million.

Finally, the Commission is satisfied that DRG is a qualified acquirer of divested assets in the Dallas, Texas area. DRG is an integrated care provider in Dallas, Texas with nine nephrologists on staff and whose nephrologists currently serve as the medical directors of these divested assets. DRG holds the majority ownership interest in the five Liberty clinics in Dallas that would be divested, and has a strong reputation in the Dallas area.

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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 ownership transitions, and has specific 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.

Complaint

IN THE MATTER OF

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

Docket No. C-4355; File No. 121 0014
Complaint, May 1, 2012 – Decision, June 12, 2012

This consent order addresses the \$38 billion acquisition by Kinder Morgan, Inc. of certain assets of El Paso Corporation. The complaint alleges that the acquisition, if consummated, would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the market for pipeline transportation services. The consent order requires Respondent to divest its own Rockies Express (REX), Kinder Morgan Interstate Gas Transmission, and Trailblazer pipelines, as well as associated processing and storage capacity.

Participants

For the *Commission: Nathan Chubb, Keitha Clopper, Philip Eisenstat, and Terry Thomas.*

For the *Respondent: Vadim Brusser, Steve Newborn, Megan Peloquin, and Laura Wilkinson, Weil, Gotshal & Manges LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Respondent Kinder Morgan, Inc., and El Paso Corporation have entered into an acquisition agreement which, if consummated, would violate 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 it appearing to the Federal Trade Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows: