

Complaint

IN THE MATTER OF

**DAVITA INC.,
AND
TOTAL RENAL CARE, 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-4752; File No. 211 0013**Complaint, October 21, 2021 – Decision, January 12, 2022*

This consent order addresses the \$80.9 million acquisition by DaVita, Inc. of certain assets of University of Utah. 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 reducing competition and increasing concentration in outpatient dialysis services provided in the Provo, Utah market. The consent order requires DaVita to divest three dialysis clinics to Sanderling Renal Services, Inc., (“SRS”) and provide SRS with transition services for one year.

Participants

For the *Commission*: *Stuart Hirschfeld, Ben Lorigo, Danica Noble, and David Von Nirschl.*

For the *Respondents*: *Michael Perry, Steve Pet, and Stephen Weissman, Gibson Dunn; David Simon, Foley & Lardner.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent DaVita Inc., through its wholly-owned subsidiary, Total Renal Care, Inc. (“DaVita”), subject to the jurisdiction of the Commission, entered into an agreement to acquire substantially all the dialysis assets of the dialysis business of the University of Utah (“the University”), in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent DaVita is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its executive offices and principal place of business located at 2000 16th Street, Denver, Colorado 80202. DaVita is the largest provider of dialysis services in the United States. DaVita owns and manages outpatient dialysis facilities throughout the United States and provides acute inpatient dialysis services within hospitals.

Complaint

2. Respondent Total Renal Care, Inc. is a wholly-owned subsidiary of DaVita and is a corporation organized, existing, and doing business under, and by virtue of the laws of the State of California, with its executive offices and principal place of businesses located at 601 Hawaii Street, Segundo, California 90245.

3. DaVita is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 5 U.S.C. § 12, and are companies whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED ASSETS

4. The University is an academic medical health system and public research university of the State of Utah, with its office and principal place of business located at 201 Presidents Circle, Salt Lake City, Utah 84112-9018.

5. DaVita proposes to acquire the University’s 18 dialysis clinics and associated assets. The clinics extend from the southeast corner of Nevada to the southern part of Idaho, with the majority of the clinics in Utah along the corridor that connects Las Vegas and Boise.

III. THE PROPOSED ACQUISITION

6. Pursuant to an Asset Purchase Agreement (“Agreement”) between DaVita and the University dated September 23, 2021, DaVita will acquire all rights, titles, and interests in, and substantially all the assets and properties of the University’s dialysis business, including its 18 dialysis clinics, in a non-HSR-reportable transaction.

7. The Agreement constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

IV. THE RELEVANT MARKET

8. The relevant line of commerce in which to analyze the effects of the Agreement is the provision of outpatient dialysis services. Patients receiving dialysis services have end stage renal disease (“ESRD”), a chronic disease characterized by a near total loss of function of the kidneys. ESRD is fatal if not treated.

9. The only alternative to dialysis treatment for patients suffering from ESRD is curing the disease through a kidney transplant. However, many ESRD patients are not viable transplant candidates, and for those who are, the wait time for donor kidneys, can exceed three years, during which ESRD patients must receive dialysis treatment. Additionally, most ESRD patients are not viable candidates for home dialysis. As a result, many ESRD patients have no alternative to outpatient dialysis treatment.

10. The distance ESRD patients will travel to receive dialysis treatments defines the outer boundaries of the relevant geographic markets for the provision of outpatient dialysis

Complaint

services. Because ESRD patients often suffer from multiple health problems and may require assistance traveling to and from the dialysis clinic, these patients will not or cannot travel long distances to receive dialysis treatment. Also, most ESRD patients receive dialysis treatment three times per week in sessions lasting between three and four hours. Accordingly, as a general rule, most ESRD patients are unwilling or unable to travel more than 30 minutes or 30 miles for treatment, although travel times and distances may vary by location.

11. The relevant geographic market within which to assess the competitive effects of the Agreement is the greater Provo, Utah area. The relevant geographic market is defined by the contiguous communities located along Interstate 15 east of Utah Lake and south of Salt Lake City. The market is centered on Provo, Utah and extends north to Orem, Utah and south to Payson, Utah.

V. MARKET STRUCTURE

12. In Utah there are currently five providers of outpatient dialysis services: the University, Fresenius, DaVita, Intermountain Healthcare, and Anthem. In the greater Provo market, there are only three providers: the University (which has three clinics in the market), DaVita (four clinics), and Fresenius (one clinic). The University and DaVita directly and substantially compete in the relevant geographic market.

VI. ENTRY CONDITIONS

13. Entry into the relevant market described in Section IV would not be likely, timely, or sufficient in magnitude, character, and scope to deter or counteract the expected anticompetitive effects of the Agreement.

14. The most significant entry barrier is engaging a nephrologist with an established referral base to serve as the dialysis clinic's medical director. By law, each dialysis clinic must have a nephrologist medical director. Locating and contracting with a nephrologist to serve as medical director is difficult because clinics typically enter into exclusive contractual arrangements with a nephrologist who is paid a medical director fee. Finding patients may also be difficult if the nephrologist does not have local ties, because most nephrologists typically refer their patients to the clinic at which they (or one of their partners) are medical director. A potential entrant into the relevant markets would also need to develop a reputation for consistent quality and service before referrals would be made. Additionally, other things being equal, an area must have a low penetration of dialysis clinics and a high ratio of commercial to Medicare patients to attract entry. The absence of these attributes is an additional impediment to entry into the relevant market.

VII. EFFECTS OF THE AGREEMENT

15. The effects of the Agreement, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. The Acquisition would eliminate actual, direct, and substantial competition between DaVita and University in the market for outpatient dialysis services in the relevant area, increasing the

Order to Maintain Assets

ability of the merged entity unilaterally to raise prices for outpatient dialysis services and reducing incentives to improve service or quality in the relevant market.

VIII. VIOLATIONS CHARGED

16. The Acquisition, 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 twenty-first day of October, 2021 issues its Complaint against said Respondent.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent Total Renal Care, Inc., a wholly owned subsidiary of Respondent DaVita Inc. (“Respondents”), of certain assets comprising dialysis clinics owned and operated by the University of Utah. The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 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 (collectively “Acts”).

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

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. §

Order to Maintain Assets

2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent DaVita Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at 2000 16th Street, Denver, Colorado 80202.
2. Respondent Total Renal Care, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of California, with its executive offices and principal place of business located at 601 Hawaii Street, Segundo, California 90245.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER TO MAINTAIN ASSETS**I. Definitions**

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the Decision and Order, which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Decision and Order” means the proposed Decision and Order contained in the Consent Agreement or the Decision and Order issued in this matter.
- B. “Orders” means this Order to Maintain Assets and the Decision and Order.

II. Maintain Assets

IT IS FURTHER ORDERED that until the Divestiture Clinic Assets have been fully transferred to the Acquirer, Respondents shall, subject to their obligations under the Orders, ensure that the Divestiture Clinic Assets and Divestiture Clinics are operated and maintained in the ordinary course of business consistent with past practices, and shall:

- A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Divestiture Clinic Assets and Divestiture Clinics, to minimize any risk of loss of competitive potential of the Divestiture Clinic Assets and Divestiture Clinics, to operate the Divestiture Clinic Assets and Divestiture Clinics in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Clinic Assets and Divestiture Clinics, except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Clinic Assets and Divestiture Clinics (other than in the manner prescribed in the Orders), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Clinic Assets and Divestiture Clinics; and

Order to Maintain Assets

- B. Not terminate the Dialysis Business of the Divestiture Clinics, and shall conduct or cause to be conducted the Dialysis Business of the Divestiture Clinics in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Divestiture Clinic Assets and Divestiture Clinics, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Divestiture Clinics.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Divestiture Clinic Assets and consistent with the purposes of the Orders.

III. Transition Assistance

IT IS FURTHER ORDERED that:

- A. At the option of the Acquirer, Respondents shall provide the Acquirer with Transition Assistance sufficient to (1) efficiently transfer the Divestiture Clinic Assets and the related Dialysis Business to the Acquirer, and (2) assist the Acquirer in operating the Divestiture Clinics in all material respects in the manner in which they were operated prior to the Acquisition.
- B. Respondents shall provide such Transition Assistance:
1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);
 2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost; and
 3. For a period sufficient to meet the requirements of Section III, which shall be, at the option of the Acquirer, the later of (1) up to one year after the Divestiture Date, or (2) the date the Acquirer has its own Centers for Medicare & Medicaid Service billing numbers for each of the Divestiture Clinic locations, unless the Acquirer terminates the provision of such Transition Assistance at an earlier date. *Provided however,* that upon the Acquirer's request, Respondents must file with the Commission a written request to extend the time period.
- C. Respondents shall allow the Acquirer to terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.

Order to Maintain Assets

- D. Respondents shall not cease providing Transition Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents' breach of the Divestiture Agreement.

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

- A. Until 6 months after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Divestiture Clinic Assets to evaluate independently and offer employment to the Divestiture Clinic Employees.
- B. Until 90 days after the Divestiture Date, Respondents shall:
1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Divestiture Clinic Employees and provide Employee Information for each;
 2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to meet outside the presence or hearing of any employee or agent of any Respondent with any of the Divestiture Clinic Employees, and to make offers of employment to any of the Divestiture Clinic Employees;
 3. Remove any impediments within the control of Respondents that may deter Divestiture Clinic Employees from accepting employment with the Acquirer, including removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Divestiture Clinic Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;
 4. Continue to provide Divestiture Clinic Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits while they are employed by Respondents;
 5. Provide reasonable financial incentives for Divestiture Clinic Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Divestiture Clinic Employees by the Acquirer; and
 6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Divestiture Clinic Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not

Order to Maintain Assets

otherwise interfere with the recruitment of any Divestiture Clinic Employee by the Acquirer.

- C. Respondents shall not, for a period of 180 days following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Divestiture Clinic Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:
1. Hire an employee whose employment has been terminated by the Acquirer;
 2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Divestiture Clinic Employees; or
 3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section IV.
- D. With respect to each Physician who has provided services to a Divestiture Clinic pursuant to any of the Clinic Physician Contracts in effect at any time during the 4 months preceding the Divestiture Date of the Divestiture Clinic ("Contract Physician"), Respondents shall not, for a period of 180 days, 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 a Divestiture Clinic acquired by the Acquirer, 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 any information related to the operation of a Divestiture Clinic.
- E. Respondents:
1. Shall not enforce, directly or indirectly, any non-compete provision or agreement, and not enter into any new non-compete provision or agreement, with any Physician employed by the University of Utah, that limit the Physician's right to be a medical director at any Clinic owned or operated by a Person other than the Respondents within the State of Utah; *provided, however*, Respondents may require, directly or indirectly, any University of Utah nephrologist serving under a Respondent's Clinic Physician Contract at a dialysis clinic operated by Respondents to abide by a non-compete provision or agreement effective solely to restrict such nephrologist from simultaneously being a medical director at a clinic not operated by Respondents; and

Order to Maintain Assets

2. Shall give each Physician affected by Paragraph IV.E.1 written notice of Paragraph IV.E.1. Such notice shall include the contents of Paragraph IV.E.1 and a description of its terms, including notice that Respondents cannot enforce any non-compete that prevents the Physician from serving as a medical director, at any time and without penalty, at a Clinic owned or operated by a Person other than the Respondents except as provided above, in Paragraph IV.E.1.
- F. Respondents shall not enter into any agreement with the Acquirer that restricts the Acquirer from soliciting Respondents' employees for employment at the Acquirer.

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

- A. Respondents shall (x) not disclose (including as to Respondents' employees), and (y) not use, for any reason or purpose, any Confidential Business Information received or maintained by Respondents, *provided, however*, that Respondents may disclose or use such Confidential Business Information in the course of:
1. Performing their obligations or as permitted under the Orders or any Divestiture Agreement; or
 2. Complying with financial reporting requirements, historical record-keeping for audit purposes, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Divestiture Clinic Assets or Divestiture Clinics, or as required by law, rule or regulation.
- B. Respondents shall only disclose Confidential Business Information to an employee or any other Person if disclosure is permitted in Paragraph V.A and the employee or other Person has signed an agreement to maintain the confidentiality of such information and not violate the disclosure requirements of this Order.
- C. Respondents shall enforce the terms of Section V and take necessary actions to ensure that their employees or other Persons comply with its terms, including implementing access and data controls, training of employees, and taking other actions that Respondents would take to protect their own trade secrets and proprietary information.

Order to Maintain Assets

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

- A. The Commission appoints Richard Shermer of R. Shermer & Co. as the Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.
- B. The Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:
 - 1. Shall be subject to the approval of the Commission;
 - 2. Shall not limit, and the signatories shall not construe it to limit, the terms of Section VI or the Section relating to the Monitor in the Decision and Order ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and
 - 3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.
- C. The Monitor shall:
 - 1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;
 - 2. Act in consultation with the Commission or its staff;
 - 3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;
 - 4. Serve without bond or other security;
 - 5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
 - 6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

Order to Maintain Assets

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;
8. Report in writing to the Commission concerning Respondents' compliance with the Orders on a schedule set by Commission staff and at any other time requested by Commission staff; and
9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, and VI of the Decision and Order, and file a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;
2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;
3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;
4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and
5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage,

Order to Maintain Assets

liability, or expense results from gross negligence or willful misconduct by the Monitor.

- E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.
- F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents.

Respondents:

- 1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;
 - 2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and
 - 3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VIII.B; or (b) receives Commission approval.
- 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 the Orders.

VII. Divestiture Trustee**IT IS FURTHER ORDERED** that:

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Clinic Assets as required by the Decision and Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or

Order to Maintain Assets

otherwise convey these assets in a manner that satisfies the requirements of the Orders.

- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Section IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with the Orders.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- D. Not later than 10 days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Orders.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section VII, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by the Decision and Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;
 - 2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the

Order to Maintain Assets

divestitures 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 2 times;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by the Decision and Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures under Section IX in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

4. The Divestiture 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 Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by the Decision and Order,

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

Provided further, however, that Respondents shall select such person within 5 days of receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture

Order to Maintain Assets

Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture 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 the Decision and Order;

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Clinic Assets required to be divested by the Decision and Order;
8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

- F. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in Section IX, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to Section IX.
- H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by the Orders.

Order to Maintain Assets

VIII. Prior Approval

IT IS FURTHERED ORDERED that Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission:

- A. Acquire any ownership or leasehold interest in any facility that has operated as a Clinic, within the 6 months prior to the date of such proposed acquisition, within the State of Utah;
- B. Acquire any ownership interest in any Person that owns any interest in or operates a Clinic within the State of Utah, *provided, however*, Respondents are not required to obtain the prior approval of the Commission if the only Clinic ownership interest is a Clinic owned or operated by Respondents within the State of Utah; and
- C. Enter into any contract for Respondents to participate in the management or Dialysis Business of a Clinic located in within the State of Utah;

Provided however, that Respondents are not required to obtain the prior approval of the Commission for the Respondents' construction, opening, or participation in the management of new facilities.

Provided further, however, that if Respondents propose to acquire any ownership interest in any Person that owns any interest in or operates Clinics within both the State of Utah and other states, including if such an acquisition requires a Hart-Scott-Rodino premerger notification, this Section applies only to the Clinics within the State of Utah.

IX. Compliance Reports

IT IS FURTHER ORDERED that Respondents shall file verified written reports ("compliance reports") in accordance with the following:

- A. Respondents shall submit compliance reports 30 days after the Commission issues this Order to Maintain Assets and every 30 days thereafter until the Commission issues a Decision and Order in this matter;
- B. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented and plan to implement to comply with each paragraph of the Orders;
- C. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in the

Order to Maintain Assets

compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Orders and provide copies of these documents to Commission staff upon request; and

- D. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov; provided, however, that Respondents need only file electronic copies of the interim reports required by Paragraph XI.B.1 (a) of the Decision and Order. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

X. Change in Respondent

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

- A. The proposed dissolution of DaVita Inc. or Total Renal Care Inc., respectively;
- B. The proposed acquisition, merger, or consolidation of DaVita Inc. or Total Renal Care Inc., respectively; or
- C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of the Orders.

XI. Access

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with the Orders, and subject to any legally recognized privilege, and upon written request and upon 5 days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondents 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 the Respondents related to compliance with the Orders, which copying services shall be provided by the Respondents at their expense; and
- B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

Decision and Order

XII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Clinic Assets through their full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the Divestiture Clinic Assets; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Clinic Assets except for ordinary wear and tear.

XIII. Term

IT IS FURTHER ORDERED that this Order shall terminate the day after the Decision and Order in this matter becomes final or the Commission withdraws acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34.

By the Commission.

DECISION

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent Total Renal Care, Inc., a wholly owned subsidiary of Respondent DaVita Inc. (“Respondents”), of certain assets comprising dialysis clinics owned and operated by the University of Utah. The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 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 (collectively “Acts”).

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

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it

Decision and Order

issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent DaVita Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at 2000 16th Street, Denver, Colorado 80202.
2. Respondent Total Renal Care, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of California, with its executive offices and principal place of business located at 601 Hawaii Street, Segundo, California 90245.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER**I. Definitions**

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

- A. “DaVita” or “Respondent” means DaVita Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, including Total Renal Care, Inc., partnerships, divisions, groups, and affiliates controlled by DaVita Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.
- B. “Total Renal Care” or “Respondent” means Total Renal Care, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Total Renal Care, Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.
- C. “University of Utah” means the public research University of the State of Utah, with its office and principal place of business located at 201 Presidents Circle, Salt Lake City, Utah 84112-9018.
- D. “Respondents” means both DaVita and Total Renal Care.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer” means: (1) Sanderling or (2) any other Person that acquires the Divestiture Clinic Assets pursuant to this Order.

Decision and Order

- G. “Acquisition” means the proposed acquisition described in the Asset Purchase Agreement dated September 24, 2021, between Total Renal Care, Inc., a corporation owned by DaVita Inc., and the University of Utah.
- H. “Acquisition Date” means the date the Acquisition is consummated.
- I. “Business Information” means books, records, data, and information, wherever located and however stored, including electronic medical records, documents, written information, graphic materials, and data and information in electronic format. Business Information includes records and information relating to sales, marketing, advertising, personnel, accounting, business strategy, information technology systems, customers, suppliers, research and development, registrations, licenses, permits (to the extent transferable), and operations. For clarity, Business Information includes rights and control of any owner of a Divestiture Clinic over information and material provided to any other Person.
- J. “Clinic” means a facility that provides outpatient hemodialysis or peritoneal dialysis services to patients suffering from kidney disease.
- K. “Clinic Physician Contract” 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, 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.
- L. “Confidential Business Information” means all Business Information not in the public domain that is related to or used in connection with the Divestiture Clinic Assets or the Dialysis Business of any Divestiture Clinic, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.
- M. “Consent” means any approval, consent, ratification, waiver, or other authorization.
- N. “Contract” means an agreement, contract, mutual understanding, arrangement, license agreement, lease, consensual obligation, commitment, promise and undertaking (whether written or oral and whether express or implied), whether or not legally binding.
- O. “Dialysis Business” means all activities relating to the business of a Clinic, including:
1. Attracting patients to such Clinic for dialysis services;
 2. Providing dialysis services to patients of such Clinic, and dealing with their physicians, including, services relating to hemodialysis and peritoneal dialysis;

Decision and Order

3. Providing medical products to patients of such Clinic;
 4. Maintaining the equipment on the premises of such Clinic, including, the equipment used in providing dialysis services to patients (which machines shall be delivered to the Acquirer in a condition that meets or exceeds all current operational, functional, and productive capabilities required to perform dialysis);
 5. Purchasing supplies and equipment for such Clinic;
 6. Negotiating leases for the premises of such Clinic;
 7. Providing counseling and support services to patients receiving products or services from such Clinic;
 8. Contracting for the services of medical directors for such Clinic;
 9. Dealing with Payors, including, negotiating contracts with such Payors and submitting claims to such Payors; and
 10. Obtaining or maintaining Governmental Permits relating to such Clinic or otherwise dealing with government entities that regulate operations of the Clinic.
- P. “Direct Cost” means a cost not to exceed the actual cost of labor, materials, travel, and other expenditures. The cost of any labor included in Direct Cost shall not exceed the then-current average hourly wage rate for the employee providing such labor.
- Q. “Divestiture Agreement” means
1. Asset Purchase Agreement by and between Sanderling and Total Renal Care, dated September 24, 2021, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Order as Nonpublic Appendix I; or
 2. Any other agreement between a Respondent or the Divestiture Trustee and an Acquirer to purchase the Divestiture Clinic Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto.
- R. “Divestiture Clinic” means any one, or all, of the following:
1. University of Utah’s Provo, UT Clinic, located at 1675 N Freedom Boulevard, Suite 15, Provo, Utah, 84604;
 2. University of Utah’s Payson, UT Clinic, located at 15 S 1000 E, Suite 50, Payson, Utah, 84651; and

Decision and Order

3. University of Utah's American Fork, UT Clinic, located at 1159 E 200 N, Suite 150, American Fork, Utah, 84003.
- S. "Divestiture Clinic Assets" means the rights, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible of every kind and description, wherever located, used in or relating to the Dialysis Business of each Divestiture Clinic, other than the Excluded Assets, including:
1. All rights under the Clinic's Physician Contracts;
 2. All rights to all of the leasehold interest in the real property at which the Divestiture Clinic is located and the building and improvements thereon (including rights in any related parking facility or lot);
 3. At least a three-week supply of all general medical products regularly used in the conduct of the Dialysis Business at the Divestiture Clinic that are intended for one-time or temporary use (*e.g.*, gloves, needles, paper products, syringes, and wipes) and any other medical supplies, including dialysis supplies and pharmaceuticals including erythropoietin;
 4. At least a three-week supply of janitorial supplies, including such supplies as are required to prevent exposure to potentially infectious materials;
 5. All Fixtures and Equipment;
 6. All computers and computer equipment, printers, software and databases, routers, servers, switches and time clocks and documentation relating to any of the foregoing used or held for use in the operation of the Dialysis Business of each of the Divestiture Clinics (all cabling within each facility shall remain in place), which shall also include access to any computer databases or patient information connected or related to each Divestiture Clinic held outside the respective Divestiture Clinic;
 7. All Intellectual Property;
 8. All Business Information;
 9. Respondents' Medicare and Medicaid provider numbers, to the extent transferable;
 10. All permits and licenses, to the extent transferable; and
 11. Any other assets that are used in, or necessary for, the Dialysis Business of a Divestiture Clinic.

Provided, however, that "Divestiture Clinic Assets" do not include Excluded Assets.

Decision and Order

- T. “Divestiture Clinic Employee” means any full-time, part-time, or contract individual employed in the Dialysis Business of the Divestiture Clinic, as of September 1, 2020.
- U. “Divestiture Date” means the date on which Respondents (or the Divestiture Trustee) close on a transaction to divest the Divestiture Clinic Assets.
- V. “Divestiture Trustee” means the Person appointed by the Commission pursuant to Section IX of this Order.
- W. “Employee Information” means for each Divestiture Clinic Employee, to the extent permitted by law, the following information summarizing the employment history of each employee that includes:
1. Name, job title or position, date of hire, and effective service date;
 2. Specific description of the employee’s responsibilities;
 3. The base salary or current wages;
 4. Most recent bonus paid, aggregate annual compensation for Respondent’s last fiscal year, and current target or guaranteed bonus, if any;
 5. Written performance reviews for the past three years, if any;
 6. Employment status (*i.e.*, active or on leave or disability; full-time or part-time);
 7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
 8. At the Acquirer’s option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.
- X. “Excluded Assets” means those assets listed on Appendix II.
- Y. “Fixtures and Equipment” means all furniture, fixtures, furnishings, machinery (including dialysis machines), equipment, supplies and other tangible personal property used or held for use in the operation of the Dialysis Business of each of the Divestiture Clinics respectively, or if leased, the leasehold interest therein.
- Z. “Governmental Permit” means all Consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any governmental entity necessary to effect the complete transfer and divestiture of the Divestiture Clinic Assets to the Acquirer and for such Acquirer to operate the Divestiture Clinic.

Decision and Order

- AA. “Intellectual Property” means intellectual property of any kind including patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, written and unwritten know-how, trade secrets, and proprietary information.
- BB. “License” means a royalty-free, fully paid-up, perpetual, irrevocable, transferable, and sub-licensable license and such tangible embodiments of the licensed rights (including physical and electronic copies) as may be necessary or appropriate to enable the licensee to use the rights.
- CC. “Monitor” means any Person appointed by the Commission to serve as a monitor pursuant to the Orders.
- DD. “Orders” means this Order and the Order to Maintain Assets entered in this action.
- EE. “Payor” means any Person that administers, pays, or insures health or medical expenses on behalf of beneficiaries or recipients including the following: government entities (*e.g.*, Medicare or Medicaid), health insurance companies; preferred provider organizations; point of service organizations; prepaid hospital, medical, or other health service plans; healthcare maintenance organizations; employers or other persons providing or administering self-insured health benefits programs; and patients who purchase medical goods or services for themselves.
- FF. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture, or other entity or a governmental body.
- GG. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- HH. “Policies and Procedures” means the dialysis policies and procedures manual, whether in hard copy or electronic copy, that have been in effect at the Divestiture Clinic.
- II. “Real Property” means the real property on which, or in which, any Divestiture Clinic is located, including real property used for parking and for other functions related to the Divestiture Clinic.
- JJ. “Sanderling” means (1) Sanderling Renal Services-USA LLC, a limited liability company organized, existing and doing business under the laws of the State of Delaware with its executive offices and principal place of business located at 511 Union Street, #1800, Nashville, Tennessee 37219, (2) SRS-Utah, LLC, a limited liability company organized, existing and doing business under the laws of the State of Delaware with its executive offices and principal place of business located at 511 Union Street, #1800, Nashville, Tennessee 37219, and (3) any Person

Decision and Order

controlled by or under common control of Sanderling Renal Services-USA LLC or SRS-Utah, LLC.

- KK. “Transition Assistance” means technical services, personnel, assistance, training, and other logistical, administrative, and other transitional support as required by the Acquirer to facilitate the transfer of the Divestiture Clinic Assets to the Acquirer, including training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, general medical products supply, purchasing, quality control, transfer of information technology and related systems, maintenance and repair of facilities and Fixtures and Equipment, use of any name or brand used in the Dialysis Business of the respective Divestiture Clinic for transitional purposes, Governmental Permits, regulatory compliance, sales and marketing, patient services, and supply chain management and patient transfer logistics.
- LL. “University of Utah Medical Protocols” means medical protocols promulgated by the University of Utah, whether in hard copy or electronic copy, that are or have been in effect at a Divestiture Clinic, *provided, however*, “University of Utah 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 the University of Utah.

II. Divestiture

IT IS FURTHER ORDERED that:

- A. No later than 10 days after the Acquisition Date, Respondents shall divest the Divestiture Clinic Assets, absolutely and in good faith, as an ongoing business, to Sanderling.
- Provided, however*, that, if within 12 months after the date the Commission issues this Order, the Commission determines, in consultation with the Acquirer and the Monitor (if one has been appointed), the Acquirer needs one or more of the Excluded Assets to operate the Dialysis Business of the Divestiture Clinics in a manner that achieves the purpose of this Order, Respondents shall divest or license, absolutely and in good faith, such needed Excluded Assets to the Acquirer.
- B. If Respondents have divested the Divestiture Clinic Assets to Sanderling prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
1. Sanderling is not acceptable as the acquirer of the Divestiture Clinic Assets, then Respondents shall immediately rescind the Divestiture Agreement, and shall divest the Divestiture Clinic Assets no later than 120 days from the date this Order is issued, absolutely and in good faith, at no minimum price,

Decision and Order

to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture of the Divestiture Clinic Assets to Sanderling was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Divestiture Clinic Assets as the Commission may determine are necessary to satisfy the requirements of this Order.
- C. Respondents shall assist the Acquirer to conduct a due diligence investigation of the Divestiture Clinic Assets that the Acquirer seeks to purchase, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process, and affording the Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts, and Business Information, with such rights of access to be exercised in a manner that does not unreasonably interfere with the operations of Respondents.
- D. Respondents shall grant to Acquirer, absolutely and in good faith, a royalty-free, fully paid-up, perpetual, irrevocable, transferable, and sub-licensable license and such tangible embodiments of the licensed rights (including physical and electronic copies) as may be necessary or appropriate to enable the licensee to use the rights, for the use, without any limitation, of all Policies and Procedures related to the Divestiture Clinics, including the University of Utah Medical Protocols for the Divestiture Clinics.
- E. Respondents shall not consummate the Acquisition until they have obtained for all the Divestiture Clinics:
1. All approvals for the assignment to the Acquirer of the rights, title, and interest to each lease for Real Property of each Divestiture Clinic;
 2. All approvals for the assignment to the Acquirer of the Clinic Physician Contracts related to each Divestiture Clinic; and
 3. All Governmental Permits.
- F. Respondents shall:
1. Place no restrictions on the use by the Acquirer of any of the Divestiture Clinic Assets to be divested to such Acquirer, or interfere with or otherwise attempt to interfere with any Acquirer's use of any of the Divestiture Clinic Assets to be divested to such Acquirer, including seeking or requesting the imposition of governmental restrictions on the Acquirer's business operations relating to the Divestiture Clinic Assets.

Decision and Order

2. Assign to the Acquirer all of the Clinic Physician Contracts related to each Divestiture Clinic.

Provided, however, that (i) if the Acquirer enters into a Clinic Physician Contract for a Divestiture Clinic before such Clinics are divested pursuant to Paragraph II.A of this Order, and (ii) the Acquirer certifies its receipt of such contract and attaches it as part of the Divestiture Agreement, then Respondents shall not be required to make the assignment for such Clinics as required by Section II.

3. With respect to all contracts included in the Divestiture Clinic Assets other than Clinic Physician Contracts, at the Acquirer's option and on the Divestiture Date of each Divestiture Clinic:

- a. if such contract can be assigned without third party approval, assign Respondents' rights under the contract to the Acquirer; and
- b. if such contract can be assigned to the Acquirer only with third party approval, assist and cooperate with the Acquirer in obtaining such third party approval and in assigning the contract to the Acquirer, or in obtaining a new contract.

- G. For 2 years following the Divestiture Date, Respondents shall not solicit the business of any patient who received any goods or services from the Divestiture Clinics between September 1, 2020, and the Divestiture Date.

Provided, however, Respondents may (i) make general advertisements for the business of such patients including 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 employee of Respondents.

III. Divestiture Agreement

IT IS FURTHERED ORDERED that:

- A. Each Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of a Divestiture Agreement shall constitute a violation of this Order; *provided, however,* that no Divestiture Agreement shall limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.
- B. Respondents shall not modify or amend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the

Decision and Order

Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transition Assistance

IT IS FURTHER ORDERED that:

- A. At the option of the Acquirer, Respondents shall provide the Acquirer with Transition Assistance sufficient to (1) efficiently transfer the Divestiture Clinic Assets and the related Dialysis Business to the Acquirer, and (2) assist the Acquirer in operating the Divestiture Clinics in all material respects in the manner in which they were operated prior to the Acquisition.
- B. Respondents shall provide such Transition Assistance:
 - 1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);
 - 2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost; and
 - 3. For a period sufficient to meet the requirements of Section IV, which shall be, at the option of the Acquirer, the later of (1) up to one year after the Divestiture Date, or (2) the date the Acquirer has its own Centers for Medicare & Medicaid Service billing numbers for each of the Divestiture Clinic locations, unless the Acquirer terminates the provision of such Transition Assistance at an earlier date. *Provided however*, that upon the Acquirer's request, Respondents must file with the Commission a written request to extend the time period.
- C. Respondents shall allow the Acquirer to terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.
- D. Respondents shall not cease providing Transition Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents' breach of the Divestiture Agreement.

V. Employees

IT IS FURTHER ORDERED that:

- A. Until 6 months after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Divestiture Clinic Assets to evaluate independently and offer employment to the Divestiture Clinic Employees.

Decision and Order

- B. Until 90 days after the Divestiture Date, Respondents shall:
1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Divestiture Clinic Employees and provide Employee Information for each;
 2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to meet outside the presence or hearing of any employee or agent of any Respondent with any of the Divestiture Clinic Employees, and to make offers of employment to any of the Divestiture Clinic Employees;
 3. Remove any impediments within the control of Respondents that may deter Divestiture Clinic Employees from accepting employment with the Acquirer, including removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Divestiture Clinic Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;
 4. Continue to provide Divestiture Clinic Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits while they are employed by Respondents;
 5. Provide reasonable financial incentives for Divestiture Clinic Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Divestiture Clinic Employees by the Acquirer; and
 6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Divestiture Clinic Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Divestiture Clinic Employee by the Acquirer.
- C. Respondents shall not, for a period of 180 days following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Divestiture Clinic Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:
1. Hire an employee whose employment has been terminated by the Acquirer;
 2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either

Decision and Order

case not targeted specifically at one or more Divestiture Clinic Employees;
or

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section V.
- D. With respect to each Physician who has provided services to a Divestiture Clinic pursuant to any of the Clinic Physician Contracts in effect at any time during the 4 months preceding the Divestiture Date of the Divestiture Clinic (“Contract Physician”), Respondents shall not, for a period of 180 days, 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 a Divestiture Clinic acquired by the Acquirer, 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 any information related to the operation of a Divestiture Clinic.
- E. Respondents:
1. Shall not enforce, directly or indirectly, any non-compete provision or agreement, and not enter into any new non-compete provision or agreement, with any Physician employed by the University of Utah, that limit the Physician’s right to be a medical director at any Clinic owned or operated by a Person other than the Respondents within the State of Utah; *provided, however*, Respondents may require, directly or indirectly, any University of Utah nephrologist serving under a Respondent’s Clinic Physician Contract at a dialysis clinic operated by Respondents to abide by a non-compete provision or agreement effective solely to restrict such nephrologist from simultaneously being a medical director at a clinic not operated by Respondents; and
 2. Shall give each Physician affected by Paragraph V.E.1 written notice of Paragraph V.E.1. Such notice shall include the contents of Paragraph V.E.1 and a description of its terms, including notice that Respondents cannot enforce any non-compete that prevents the Physician from serving as a medical director, at any time and without penalty, at a Clinic owned or operated by a Person other than the Respondents except as provided above, in Paragraph V.E.1.
- F. Respondents shall not enter into any agreement with the Acquirer that restricts the Acquirer from soliciting Respondents’ employees for employment at the Acquirer.

Decision and Order

VI. Asset Maintenance

IT IS FURTHER ORDERED that until the Divestiture Clinic Assets have been fully transferred to the Acquirer, Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that the Divestiture Clinic Assets and Divestiture Clinics are operated and maintained in the ordinary course of business consistent with past practices, and shall:

- A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Divestiture Clinic Assets and Divestiture Clinics, to minimize any risk of loss of competitive potential of the Divestiture Clinic Assets and Divestiture Clinics, to operate the Divestiture Clinic Assets and Divestiture Clinics in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Clinic Assets and Divestiture Clinics, except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Clinic Assets and Divestiture Clinics (other than in the manner prescribed in the Orders), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Clinic Assets and Divestiture Clinics; and
- B. Not terminate the Dialysis Business of the Divestiture Clinics, and shall conduct or cause to be conducted the Dialysis Business of the Divestiture Clinics in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Divestiture Clinic Assets and Divestiture Clinics, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Divestiture Clinics.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Divestiture Clinic Assets and consistent with the purposes of the Orders.

VII. Confidentiality

IT IS FURTHER ORDERED that:

- A. Respondents shall (x) not disclose (including as to Respondents' employees), and (y) not use, for any reason or purpose, any Confidential Business Information received or maintained by Respondents, *provided, however,* that Respondents may disclose or use such Confidential Business Information in the course of:
 - 1. Performing their obligations or as permitted under the Orders or any Divestiture Agreement; or

Decision and Order

2. Complying with financial reporting requirements, historical record-keeping for audit purposes, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Divestiture Clinic Assets or Divestiture Clinics, or as required by law, rule or regulation.
- B. Respondents shall only disclose Confidential Business Information to an employee or any other Person if disclosure is permitted in Paragraph VII.A and the employee or other Person has signed an agreement to maintain the confidentiality of such information and not violate the disclosure requirements of this Order.
- C. Respondents shall enforce the terms of Section VII and take necessary actions to ensure that their employees or other Persons comply with its terms, including implementing access and data controls, training of employees, and taking other actions that Respondents would take to protect their own trade secrets and proprietary information.

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

- A. The Commission appoints Richard Shermer of R. Shermer & Co. as the Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.
- B. The Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:
1. Shall be subject to the approval of the Commission;
 2. Shall not limit, and the signatories shall not construe it to limit, the terms of Section VIII or the Section relating to the Monitor in the Order to Maintain Assets ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and
 3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

Decision and Order

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;
2. Act in consultation with the Commission or its staff;
3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;
4. Serve without bond or other security;
5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;
7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;
8. Report in writing to the Commission concerning Respondents' compliance with the Orders on a schedule set by Commission staff and at any other time requested by Commission staff; and
9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, and VI, and file a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

Decision and Order

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;
 3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;
 4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and
 5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.
- E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.
- F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents.

Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;
2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not

Decision and Order

opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VIII.B; or (b) receives Commission approval.
- 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 the Orders.

IX. Divestiture Trustee**IT IS FURTHER ORDERED** that:

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Clinic Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order.
- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Section IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- D. Not later than 10 days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to

Decision and Order

permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section IX, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;
2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures 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 2 times;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures under Section IX in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;
4. The Divestiture 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 Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by this Order,

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission

Decision and Order

determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

Provided further, however, that Respondents shall select such person within 5 days of receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture 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. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Clinic Assets required to be divested by this Order;
8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

Decision and Order

- F. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in Section IX, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to Section IX.
- H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

X. Prior Approval

IT IS FURTHERED ORDERED that Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission:

- A. Acquire any ownership or leasehold interest in any facility that has operated as a Clinic, within the 6 months prior to the date of such proposed acquisition, within the State of Utah;
- B. Acquire any ownership interest in any Person that owns any interest in or operates a Clinic within the State of Utah, *provided, however*, Respondents are not required to obtain the prior approval of the Commission if the only Clinic ownership interest is a Clinic owned or operated by Respondents within the State of Utah; and
- C. Enter into any contract for Respondents to participate in the management or Dialysis Business of a Clinic located in within the State of Utah;

Provided however, that Respondents are not required to obtain the prior approval of the Commission for the Respondents' construction, opening, or participation in the management of new facilities.

Provided further, however, that if Respondents propose to acquire any ownership interest in any Person that owns any interest in or operates Clinics within both the State of Utah and other states, including if such an acquisition requires a Hart-Scott-Rodino premerger notification, this Section applies only to the Clinics within the State of Utah.

Decision and Order

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and each Divestiture Date no later than 5 days after the occurrence of each; and
2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the relevant Divestiture Date.

B. Respondents shall submit verified written reports (“compliance reports”) in accordance with the following:

1. Respondents shall submit:
 - a. Interim compliance reports 30 days after the Order is issued, and every 60 days thereafter until Respondents have fully complied with the provisions of Sections II, IV, and VI;
 - b. Annual compliance reports one year after the date this Order is issued, and annually for the next 9 years on the anniversary of that date; and
 - c. Additional compliance reports as the Commission or its staff may request.
2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order. Conclusory statements that Respondents have complied with their obligations under this Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented and plan to implement to comply with each paragraph of the Orders.
3. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents’ obligations under the Orders and provide copies of these documents to Commission staff upon request.

Decision and Order

4. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov; *provided, however*, that Respondents need only file electronic copies of the interim reports required by Paragraph XI.B.1 (a). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XII. Change in Respondent

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

- A. The proposed dissolution of DaVita Inc. or Total Renal Care Inc., respectively;
- B. The proposed acquisition, merger, or consolidation of DaVita Inc. or Total Renal Care Inc., respectively; or
- C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XIII. 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 and upon 5 days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondents 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 the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and
- B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and ensure the Acquirer can operate the

Decision and Order

Dialysis Business related to each of the Divestiture Clinics and Divestiture Clinic Assets at least equivalent in all material respects to the manner in which the Dialysis Business was operated prior to the Acquisition.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate 10 years from the date it is issued.

By the Commission.

NONPUBLIC APPENDIX I**Divestiture Agreements****APPENDIX II****Excluded Assets**

1. All cash, cash equivalents, and short term investments of cash, securities and other instruments;
2. Accounts receivable and rights to bill (including all proceeds thereof) for all services delivered or performed and products provided in connection the business of a Clinic before a Clinic is divested to an Acquirer or which remain outstanding and unpaid before a Clinic is divested to an Acquirer;
3. General ledgers and accounting records of University of Utah;
4. Income tax refunds and tax deposits due to Respondents;
5. Unbilled costs and fees, recoupments, claims, demands, deposits, rebates, and bad debt recovery claims against any Payor including Medicare, arising before a Clinic is divested to an Acquirer;

Decision and Order

6. Rights to the names “DaVita” and “University of Utah” and any variation of those names (unless otherwise licensed to an Acquirer pursuant to the Order) and other copyrights, trademarks, trade names, service marks, and logos relating to the “DaVita” and “University of Utah” names;
7. Insurance policies and all benefits and claims thereunder;
8. Rights in connection with and assets of University Health Plans;
9. Minute books, personnel records, (other than governing body minute books of a Clinic), tax returns, and other corporate books and records;
10. Any inter-company balances due to or from Respondents or its affiliates;
11. All employee benefits plans;
12. 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;
13. All DaVita or University of Utah software;
14. DaVita and University of Utah e-mail addresses, websites, and domain names;
15. Office equipment and furniture that (a) is not, in the ordinary course of business, physically located at any University of Utah Clinic, (b) is shared with Clinics other than the Divestiture Clinics, and (c) is not necessary to the operation of a Divestiture Clinics;
16. All assets of (i) University Hospitals and Clinics; and (ii) the evaluation and maintenance clinic, primary care provider, and hospital assets in the University of Utah’s hospital building, including computers and furniture;
17. Licensed intangible property;
18. University of Utah Policies and Procedures, including medical protocols, subject to the licensing provisions in this Order;
19. Strategic planning documents that (a) related to the operation of a Clinic other than a Divestiture Clinic and (b) are not located on the premises of a Divestiture Clinic;
20. Telephone numbers that cannot be transferred;
21. Utility accounts for telephone, television, waste disposal, gas, and electrical services;
22. Rights under agreements with suppliers that do not relate exclusively to any Divestiture Clinic, that are not assignable even if the University and Respondent approve such assignment, or for which Acquirer has not elected to take assignment;

Concurring Statement

23. All employer numbers, national provider identification numbers, payer identification numbers, payer licenses, business licenses, or fire clearances issued to the University for any University Clinic, except for the University's Medicare and Medicaid provider numbers and CLIA Certificates;
24. Acute dialysis services agreements;
25. Servers, domains, data storage services, software licenses, and vehicles belonging to the University that do not relate exclusively to any Divestiture Clinic;
26. Business operations and other services provided by the University;
27. Purchase orders placed by the University; and
28. Computer hardware, telecommunications systems and equipment, and information systems equipment that Acquirer has elected not to take.
29. Assets of the University that are not transferring to DaVita under the Asset Purchase Agreement between Total Renal Care, Inc., a corporation owned by DaVita, Inc. and the University of Utah.

CONCURRING STATEMENT OF COMMISSIONER CHRISTINE S. WILSON

Today, the Commission announces a consent order to settle allegations that the proposed acquisition of the dialysis business of the University of Utah Health ("University") by Total Renal Care, Inc., a wholly-owned subsidiary of DaVita Inc. ("DaVita"), may substantially lessen competition in the market for outpatient dialysis services in the greater Provo, Utah area. I support the outcome but believe that two aspects of the consent order warrant discussion so that my support is not misconstrued. Those two sets of provisions relate to prior approval and non- compete agreements. I then highlight a third provision – a ban on no-poach agreements – in light of the ongoing dialogue regarding whether antitrust enforcement adequately protects competition for labor inputs.

Prior Approval and Non-Compete Agreement Provisions

First, DaVita is required to receive prior approval from the Commission before acquiring any new ownership interest in a dialysis clinic in Utah. The Commission rescinded the 1995 Policy Statement Concerning Prior Approval and Prior Notice ("1995 Policy") on July 21, 2021. I dissented from this rescission for three reasons: the 1995 Policy was put in place to prevent resource-intensive and vindictive litigation; it preserved the use of prior approval provisions in

Concurring Statement

appropriate circumstances; and the majority did not provide new guidance explaining how these provisions would be used following rescission of the 1995 Policy.¹

Because I believe the 1995 Policy provided sound guidance on the appropriate use of prior approval provisions, I will assess the propriety of the prior approval provision in this matter against that touchstone. The 1995 Policy noted that prior approval is most likely appropriate where there is a credible risk that a company engaged in an anticompetitive merger would attempt the same or approximately the same merger in the future.² DaVita has engaged in a pattern of acquiring independent dialysis facilities;³ many of these acquisitions fall below HSR thresholds and consequently escape premerger review,⁴ including this proposed acquisition. There is some evidence that this pattern of sub-HSR acquisitions has led to higher prices and lower service levels in the dialysis field.⁵ It is for this reason that I have encouraged the Commission on previous occasions to study this industry.⁶

1 Oral Remarks of Commissioner Christine S. Wilson, Open Commission Meeting on July 21, 2021 at 8-11 (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf. See also Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf.

2 Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39745, 39746 (Aug. 3, 1995), https://www.ftc.gov/system/files/documents/public_statements/410471/frnpriorapproval.pdf.

3 Paul J. Eliason et al., How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry, 135 QUARTERLY J. ECON. 221, 235 (2020) (showing how the acquisitions of independent facilities have contributed to DaVita's overall growth).

4 Thomas Wollmann, How to Get Away With Merger: Stealth Consolidation and its Real Effects on US Healthcare (Nat'l Bureau of Econ. Rsch., Working Paper No. 27274) ("In short, the FTC blocks nearly all reportable facility acquisitions resulting duopoly and monopoly. In sharp contrast, the dashed line reflects exempt facility acquisitions. These ownership changes witness effectively no enforcement actions, regardless of simulated HHI change. This includes dozens of facility acquisitions involving $\Delta\text{HHI} > 2,000$, several of which involve ΔHHI near 5,000.").

5 Eliason et al., *supra* note 3, at 223 ("We find that acquired facilities alter their treatments in ways that increase reimbursements and decrease costs. For instance, facilities capture higher payments from Medicare by increasing the amount of drugs they administer to patients, for which Medicare paid providers a fixed per-unit rate during our study period. ... On the cost side, large chains replace high-skill nurses with lower-skill technicians at the facilities they acquire, reducing labor expenses. Facilities also increase the patient load of each employee by 11.7% and increase the number of patients treated at each dialysis station by 4.5%, stretching resources and potentially reducing the quality of care received by patients.").

6 See, e.g., Statement of Commissioner Christine S. Wilson, Joined by Commissioner Rohit Chopra, Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (February 11, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566385/statement_by_commissioners_wilson_and_chopra_re_hsr_6b.pdf#:~:text=Statement%20of%20Commissioner%20Christine%20S.%20Wilson%2C%20Joined%20by,that%20drive%20content%20curation%20and%20targeted%20advertising%20practices.

Concurring Statement

Against this backdrop, I believe a prior approval provision is appropriate here. Specifically, there is a credible risk that DaVita will attempt to acquire additional dialysis facilities in the same general area in which divestiture has been ordered. But to be clear, my vote in favor of this consent should not be construed as support for the liberal use of prior approval provisions foreshadowed by the Commission's majority when it rescinded the 1995 Policy.

Second, the order contains provisions that prohibit DaVita from enforcing non-compete agreements in the University of Utah nephrologists' medical director contracts.⁷ Some commentators have suggested that non-compete provisions should be banned, and some of my current and former colleagues on the Commission have expressed sympathy for that view.⁸

While I disagree with that perspective,⁹ I have concluded that the provisions limiting the effect of non-competes in this matter are necessary to achieve an effective remedy. Specifically, the operations of a dialysis facility must occur under the auspices of a nephrologist; indeed, without a nephrologist, a dialysis clinic cannot operate. Nephrologists are in short supply,¹⁰ and the inability of a facility owner to retain or replace a licensed nephrologist could serve as a barrier to entry or, in this case, preclude the buyer from continuing to compete in the market. Moreover, a

7 Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of DaVita, Inc. and Total Renal Care, Inc., No. 211-0013 (October 25, 2021), (“[The Order] prohibits DaVita from entering into or enforcing non-compete agreements with any University nephrologist”).

8 Letter from Chair Lina M. Khan to Chair Cicilline and Ranking Member Buck at 2 (Sept. 28, 2021), <https://docs.house.gov/meetings/JU/JU05/20210928/114057/HRG-117-JU05-20210928-SD005.pdf> (“The FTC has heard concerns about noncompete clauses at its open meetings, and the Commission recently opened a docket to solicit public comment on the prevalence and effects of contracts that may harm fair competition. As we pursue this work, I am committed to considering the Commission’s full range of tools, including enforcement and rulemaking.”); New Decade, New Resolve to Protect and Promote Competitive Markets for Workers, Remarks of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery at FTC Workshop on Non-Compete Clauses in the Workplace at 1 (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561475/slaughter_-_noncompete_clauses_workshop_remarks_1-9-20.pdf (“I also want to thank the advocates and academics—including those participating today—who have raised awareness about and contributed both research and new ideas to the discussion concerning non-compete provisions in employment contracts. State attorneys general and their staff have also been at the forefront of this issue by investigating and initiating legal action to end unjustified and anticompetitive non-compete clauses in employment contracts.”); Letter from Commissioner Rohit Chopra to Assistant Attorney General Makan Delrahim at 3 (Sept. 18, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544564/chopra_-_letter_to_doj_on_labor_market_competition.pdf (“A rulemaking proceeding that defines when a non-compete clause is unlawful is far superior than case-by-case adjudication.”); Open Markets Institute et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses, (posted by the Fed. Trade Comm’n on July 21, 2021), <https://www.regulations.gov/document/FTC-2021-0036-0001>.

9 Testimony of Commissioner Christine S. Wilson at the Hearing on Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker at 9-12, (Sept. 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596880/commissioner_wilson_hearing_on_reviving_competition_part_4_-_21st_century_antitrust_reforms_and_the.pdf.

10 Muhammad U. Sharif et al., The global nephrology workforce: emerging threats and potential solutions!, 9 CLINICAL KIDNEY J. 11, 13 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4720191/> (“These facts would suggest that the current nephrology workforce [in the U.S.] should increase in order to compensate for the expected growth in patient numbers. Unfortunately, the opposite appears to be the case.”).

Concurring Statement

repeal of non-competes to effectuate a remedy is not novel: past consent orders have included provisions that prohibit merging parties from enforcing non-competes to aid divestiture buyers in hiring employees.¹¹ For these reasons, I support the provisions pertaining to non-competes in this matter – but my acquiescence to these provisions should not be construed as support for a sweeping condemnation of non-competes more generally.

Ban on No-Poach Agreements

The order contains an anti-no-poach provision that prevents DaVita from entering into any agreement that would restrict the divestiture buyer from soliciting DaVita’s employees. I highlight this provision because some critics have asserted that antitrust enforcement ignores competition for labor as an input.¹² I believe that modern antitrust enforcement does, in fact, police the market for unlawful practices impacting competition for labor.¹³ Naked no-poach agreements are per se illegal under the antitrust laws, and have been subject to enforcement accordingly.¹⁴

With respect to the instant matter, DaVita and its former CEO were recently indicted for agreeing with competitors to refrain from recruiting one another’s employees.¹⁵ In a past consent order, where respondents had entered into no-poach agreements, provisions explicitly prohibiting

11See, e.g., Decision and Order, Gallo et al. No. 191-0110 at VI.A.4 (April 5, 2021), https://www.ftc.gov/system/files/documents/cases/gallo-cbi_decision_and_order_final_201107.pdf (“Remove any impediments within the control of Respondents that may deter relevant Divestiture Business Employees from accepting employment with the Acquirer, including removal of any non-compete...”); Decision and Order, Stryker et al., No. 201-0014 at VI.B.3 (Dec. 17, 2020), https://www.ftc.gov/system/files/documents/cases/2010014c4728_strykerwrightorder.pdf (“Remove any impediments within the control of Respondents that may deter Implant Business Employees from accepting employment with the Acquirer, including removal of any non-compete...”); Decision and Order, Arko Holdings et al., No. 201-0041 at VI.B.3 (Oct. 7, 2020), https://www.ftc.gov/system/files/documents/cases/c-4726_201_0041_arko_empire_order.pdf (“Remove any impediments within the control of Respondents that may deter Retail Fuel Employees from accepting employment with an Acquirer ...”). This consent does contain a new twist on our approach to non-competes. Specifically, DaVita may not enforce non-competes to the extent they prevent competitors or potential competitors from obtaining the services of a nephrologist, which will allow potential competitors to launch a competing dialysis clinic in Utah. Given my understanding of DaVita’s business practices, the nephrologist shortage, and the historical industry context, I believe this remedy constitutes appropriate fencing-in relief.

12 Testimony of Eric A. Posner on Antitrust and Labor Markets at 2 (Sept. 28, 2021), <https://docs.house.gov/meetings/JU/JU05/20210928/114057/HHRG-117-JU05-Wstate-PosnerE-20210928.pdf> (“Yet, while thousands of antitrust cases have been brought over the years, hardly any have addressed labor market cartelization. The Justice Department and the Federal Trade Commission have reviewed thousands of mergers, approving some and rejecting others, but have not even once analyzed the labor market effects of a merger.”).

13 Testimony of Commissioner Christine S. Wilson at the Hearing on Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker at 12-14, (Sept. 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596880/commissioner_wilson_hearing_on_reviving_competition_part_4_-_21st_century_antitrust_reforms_and_the.pdf.

14 DWP’T OF JUSTICE, ANTITRUST DIV. & FED. TRADE COMM’N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

15 Indictment, United States v. DaVita Inc. et al., No. 1:21-cr-00229 (D. Colo. July 14, 2021).

Analysis to Aid Public Comment

these agreements have been included in an order.¹⁶ I support the inclusion of an anti-no-poach provision in this order because of the relevant allegations against DaVita and to allow the Commission to pursue an order violation in the event that DaVita attempts to limit competition through anticompetitive no-poach agreements in the future.

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) with DaVita, Inc., through its wholly-owned subsidiary, Total Renal Care, Inc. (“DaVita”). The proposed Consent Agreement is intended to remedy the anticompetitive effects that would likely result from DaVita’s proposed acquisition (“Proposed Acquisition”) of all dialysis clinics owed by the University of Utah (“University”).

Pursuant to an Asset Purchase Agreement dated September 22, 2021, DaVita proposes to acquire all 18 dialysis clinics from the University in a non-HSR-reportable transaction. DaVita is the largest provider of dialysis services in the United States and the University is an academic and public research institution in the State of Utah. The 18 dialysis clinics extend from the southeast corner of Nevada to the southern part of Idaho. The Commission alleges in its Complaint that the Proposed 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, by reducing competition and increasing concentration in outpatient dialysis services provided in the Provo, Utah market.

The proposed Consent Agreement will remedy the alleged violations by preserving competition that would otherwise be eliminated by the Proposed Acquisition. Under the terms of the Consent Agreement, DaVita is required to divest three dialysis clinics to Sanderling Renal Services, Inc., (“SRS”) and must provide SRS with transition services for one year. In addition, DaVita cannot: (1) enter into, or enforce, any non-compete agreements with physicians employed by the University that would restrict their ability to work at a clinic operated by a competitor of DaVita (except to prevent a medical director under a contract with DaVita from simultaneously

¹⁶ Press Release, Fed. Trade Comm’n, VieVu’s Former Parent Company Safariland Agrees to Settle Charges That It Entered into Anticompetitive Agreements with Body-Worn Camera Systems Seller Axon (April 17, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/vievu-former-parent-company-safariland-agrees-settle-charges-it> (“According to the complaint, the agreements barred Safariland from competing with Axon now and in the future on all of Axon’s products, limited solicitation of customers and employees by either company, and stifled potential innovation or expansion by Safariland. ... Under the proposed order, Safariland is required to obtain approval from the Commission before entering into any agreement with Axon that restricts competition between the two companies.”).

Analysis to Aid Public Comment

serving as a medical director at a clinic operated by a competitor); (2) enter into any agreement that restricts SRS from soliciting DaVita's employees for hire; or (3) directly solicit patients who receive services from the divested clinics for two years. Finally, DaVita is required to receive prior approval from the Commission before acquiring any new ownership interest in a dialysis clinic in Utah.

II. The Relevant Market and Competitive Effects

The Commission's Complaint alleges that the relevant line of commerce is the provision of outpatient dialysis services. Patients receiving dialysis services have end stage renal disease ("ESRD"), a chronic disease characterized by a near total loss of function of the kidneys and fatal if not treated. Many ESRD patients have no alternative to outpatient dialysis treatment because they are not viable home dialysis or transplant candidates (or they are waiting for a transplant for multiple years, during which time they must still receive dialysis treatment). Treatments are usually performed three times per week for sessions lasting between three and four hours. According to the United States Renal Data System, there were over 555,000 ESRD dialysis patients in the United States in 2018.

The Commission's Complaint also alleges that the relevant geographic market in which to assess the competitive effects of the Proposed Acquisition is the greater Provo, Utah area. Specifically, the market is centered on Provo, Utah and extends north to Orem, Utah and south to Payson, Utah. The market is defined by the distance ESRD patients will travel to receive reoccurring treatments. Because ESRD patients are often suffering from multiple health problems and may require assistance traveling to and from the dialysis clinic, patients cannot travel long distances to receive treatment. Accordingly, most patients are unwilling or unable to travel more than 30 minutes or 30 miles for treatment, although travel times and distances may vary by location.

Dialysis providers seek to attract patients by competing on quality of services. To some extent, the providers also compete on price. Although Medicare eventually will cover all ESRD patients' dialysis costs, there is a 30-month transition period where commercially insured patients' costs are covered by their insurers, which compensate the providers at competitively negotiated rates.

In the greater Provo market, there are only three providers: The University (which has three clinics), DaVita (four clinics) and Fresenius Medical Care (one clinic). Therefore, the University and DaVita directly and substantially compete in the relevant market as the two largest providers, and DaVita would own seven of the eight clinics in the region. The Proposed Acquisition would eliminate competition between DaVita and The University in the relevant market for outpatient dialysis services, increasing the ability to unilaterally raise prices to third-party payers and decreasing the incentive to improve the quality of services provided to patients.

III. Entry

Entry into the outpatient dialysis services market in the greater Provo, Utah area would not be likely, timely, or sufficient in magnitude, character, and scope to deter or counteract the

Analysis to Aid Public Comment

anticompetitive effects of the Proposed Acquisition. The most significant barrier to entry is contracting a nephrologist with an established referral base to serve as the clinic's medical director. The Department of Health and Human Services requires that each dialysis clinic must have a nephrologist as a medical director. Locating a nephrologist is difficult because clinics typically enter into exclusive contractual arrangements with a nephrologist who is paid a medical director fee. Finding patients may also be difficult if the nephrologist does not have local ties, as most nephrologists typically refer their patients to the clinic where they serve as medical director. Moreover, the area itself must have a low penetration of dialysis clinics and a high ratio of commercial to Medicare patients to attract entry.

IV. The Agreement Containing Consent Order

Section II of the Proposed Order requires that DaVita divest the three University clinics in the greater Provo market to SRS, including all of the assets necessary for SRS to independently and successfully operate the clinics, which include, among other things, all leases for real property, all medical director contracts, and a license for each clinics' policies and procedures.

Section IV of the Proposed Order requires that DaVita provide transition services to SRS for up to one year, and Section V requires DaVita to provide assistance to SRS in hiring the employees at the divested clinics and to refrain from soliciting those employees for 180 days. In addition, Section V prohibits DaVita from entering into or enforcing non-compete agreements with any University nephrologist, except to prevent a medical director under a contract with DaVita from simultaneously serving as a medical director at a clinic operated by a competitor. Section V also prohibits DaVita from entering into any non-solicitation agreement with SRS that would prevent SRS from soliciting DaVita's employees for hire.

Section VI of the Proposed Order, along with the Order to Maintain Assets, requires that DaVita take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the divested clinics and their assets. Section VIII provides for the appointment of a Monitor to oversee the divestiture.

Section X of the Proposed Order requires DaVita to obtain prior approval from the Commission for any future acquisition of any ownership interests in any dialysis clinic in Utah. With regard to transactions involving clinics in multiple states, such prior approval only applies to the clinics in Utah.

The Commission does not intend this analysis to constitute an official interpretation of the proposed Order or to modify its terms in any way.

Complaint

IN THE MATTER OF

**THE GOLUB CORPORATION,
TOPS MARKETS CORPORATION,
AND
PROJECT P NEWCO HOLDINGS, 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-4753; File No. 211 0002

Complaint, November 5, 2021 – Decision, January 20, 2022

This consent order addresses the \$772 million acquisition by The Golub Corporation of certain assets of Tops Markets Corporation. The complaint alleges that the Merger, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by removing a direct and substantial supermarket competitor in New York, Connecticut, Vermont, Massachusetts, New Hampshire, and Pennsylvania. The consent order requires Respondents to divest twelve supermarkets and related assets in eleven local geographic markets in New York and Vermont to C&S Wholesale Grocers.

Participants

For the *Commission*: Lindsey Bohl, Jeff Dahnke, Guia Dixon, Paul Frangie, Jennifer Lee, and Jeanne Nichols.

For the *Respondents*: Jamillia Ferris, Michelle Yost Hale, and Scott Sher, Wilson Sonsini Goodrich & Rosati; Logan Breed and Ashley Howett, Hogan Lovells.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent The Golub Corporation (“Price Chopper”), a corporation subject to the jurisdiction of the Commission, agreed to merge with Respondent Tops Markets Corporation (“Tops”), a corporation subject to the jurisdiction of the Commission, becoming wholly-owned subsidiaries of Respondent Project P Newco Holdings, Inc. (“Holdco”), a corporation subject to the jurisdiction of the Commission, 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, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent The Golub Corporation (“Price Chopper”) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 461 Nott Street, Schenectady, New York.