

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
 Thomas B. Leary
 Pamela Jones Harbour
 Jon Leibowitz

In the Matter of

**DAVITA INC.,
a corporation.**

Docket No. C-4152

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by DaVita Inc. of Gambro Healthcare Inc., a subsidiary of Gambro AB, and DaVita Inc. (hereafter referred to as “Respondent”) having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order to 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 office and principal place of business located at 601 Hawaii Street, El Segundo, CA 90245.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, all capitalized terms used in this Order to Maintain Assets, but not defined herein, shall have the meanings attributed to such terms in the Decision and Order contained in the Consent Agreement.

II.

IT IS FURTHER ORDERED that:

- A. From the date DaVita signs the Consent Agreement until the Time of Divestiture of each Clinic To Be Divested and until all Assets Associated with each Clinic To Be Divested are divested pursuant to the Consent Agreement, DaVita shall:
 1. Maintain each Clinic To Be Divested and all Assets Associated with it in substantially the same condition (except for normal wear and tear) existing at the time DaVita signs the Consent Agreement;
 2. Take such actions that are consistent with the past practices of DaVita or Gambro, respectively, in connection with such Clinic To Be Divested and the Assets Associated with it and that are taken in the Ordinary Course Of Business and in the normal day-to-day operations of DaVita or Gambro;
 3. Keep available the services of the current officers, employees, and agents of DaVita; and maintain the relations and good will with Suppliers, Payors, Physicians, landlords, patients, employees, agents, and others having business relations with the Clinic To Be Divested and the Assets Associated with it in the Ordinary Course Of Business; and
 4. Preserve the Clinic To Be Divested and all Assets Associated with it as an ongoing business and not take any affirmative action, or fail to take any action within DaVita's control, as a result of which the viability, competitiveness, and marketability of the Clinic To Be Divested or all Assets Associated with it would be diminished.

B. From the date DaVita signs the Consent Agreement until DaVita divests the Owned Real Property pursuant to the Consent Agreement, DaVita shall:

1. Maintain the Owned Real Property in substantially the same condition (except for normal wear and tear) existing at the time DaVita signs the Consent Agreement;
2. Take such actions that are consistent with the past practices of DaVita or Gambro, respectively, in connection with the Owned Real Property and that are taken in the Ordinary Course Of Business and in the normal day-to-day operations of DaVita or Gambro; and
3. Take no action Relating To the Owned Real Property that would diminish the viability, competitiveness, or marketability of any Clinic To Be Divested located on or in the Owned Real Property.

C. From the date DaVita signs the Consent Agreement until the date this Order to Maintain Assets terminates pursuant to Paragraph VII, DaVita shall do the following:

1. Until sixty (60) days after the Time Of Divestiture of each Clinic To Be Divested, DaVita shall not interfere in employment negotiations between each DaVita Employee Of A Clinic To Be Divested and the Acquirer of the Clinic; *PROVIDED, HOWEVER*, this Paragraph II.C.1. does not apply to the South S.F. Clinic, to the Assets Associated with that Clinic, or to the Acquirer of that Clinic.
2. With respect to each DaVita Employee Of A Clinic To Be Divested who receives, within sixty (60) days of the Time Of Divestiture of any Clinic at which he or she is employed, an offer of employment from the Acquirer of that Clinic, DaVita shall not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the DaVita Employee Of The Clinic To Be Divested from being employed by the Acquirer of the Clinic, and shall not offer any incentive to the DaVita Employee Of The Clinic To Be Divested to decline employment with the Acquirer of the Clinic; *PROVIDED, HOWEVER*, this Paragraph II.C.2. does not apply to the South S.F. Clinic, to the Assets Associated with that Clinic, or to the Acquirer of that Clinic.
3. For a period of two (2) years following the Time Of Divestiture of each Clinic To Be Divested, DaVita shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Employee Of A Clinic To Be Divested who is employed by the Acquirer to terminate his or her employment relationship with the Acquirer, unless that employment relationship has already been terminated by the Acquirer; *PROVIDED, HOWEVER*, DaVita may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at Acquirer's employees; *PROVIDED, FURTHER, HOWEVER*, DaVita may hire employees who apply for employment with DaVita, as long as such employees were not

solicited by DaVita in violation of this Paragraph II.C.3.; *PROVIDED, FURTHER, HOWEVER*, DaVita may offer employment to an Employee Of A Clinic To Be Divested who is employed by the Acquirer in only a part-time capacity, if the employment offered by DaVita would not, in any way, interfere with the employee's ability to fulfill his or her employment responsibilities to the Acquirer.

4. For a period of not less than forty-five (45) days, which period may begin prior to the signing of the Consent Agreement and which shall end no earlier than ten (10) days after the Time Of Divestiture of each Clinic To Be Divested ("Forty-Five Day Hiring Period"), DaVita shall not interfere in employment negotiations between each Regional Manager Of A Clinic To Be Divested and the Acquirer of the Clinic; *PROVIDED, HOWEVER*, the terms of this Paragraph II.C.4. shall not apply after Acquirers have hired six (6) Regional Managers who were each previously employed by DaVita or Gambro at any time since June 1, 2005; *PROVIDED, FURTHER, HOWEVER*, the terms of this Paragraph II.C.4. shall not apply to the Westside Clinic, the Colton Clinic, and the South S.F. Clinic, to the Assets Associated with those Clinics, or to the Acquirers of those Clinics.
5. With respect to each Regional Manager Of A Clinic To Be Divested who receives, within the Forty-Five Day Hiring Period required by Paragraph II.C.4. of this Order to Maintain Assets an offer of employment from the Acquirer of that Clinic, for a period of two (2) years following the Time Of Divestiture of the Clinic To Be Divested, DaVita shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Regional Manager of the Acquirer who was previously a Regional Manager of A Clinic To Be Divested to terminate his or her employment relationship with the Acquirer unless the individual has been terminated by the Acquirer; *PROVIDED, HOWEVER*, DaVita may make general advertisements for Regional Managers including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at Acquirer's Regional Managers; *PROVIDED, FURTHER, HOWEVER*, DaVita may hire Regional Managers who apply for employment with DaVita, as long as such Regional Managers were not solicited by DaVita in violation of this Paragraph II.C.5.; *PROVIDED, HOWEVER*, after Acquirers have hired six (6) Regional Managers who were each previously employed by DaVita or Gambro at any time since June 1, 2005, the terms of this Paragraph II.C.5. shall apply only to those six (6) Regional Managers hired by the Acquirers; *PROVIDED, FURTHER, HOWEVER*, the terms of this Paragraph II.C.5. shall not apply to the Westside Clinic, the Colton Clinic, and the South S.F. Clinic, to the Assets Associated with those Clinics, or to the Acquirers of those Clinics.
6. With respect to each Physician who has provided services to a Clinic To Be Divested pursuant to any of the Clinic's Physician Contracts in effect at any time during the four (4) months preceding the Time Of Divestiture of the Clinic ("Contract Physician"):

- a. DaVita shall not offer any incentive to the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group to decline to provide services to the Clinic To Be Divested, and shall eliminate any confidentiality restrictions that would prevent the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group from using or transferring to the Acquirer of the Clinic To Be Divested any information Relating To the Operation Of The Clinic; *PROVIDED, HOWEVER*, this Paragraph II.C.6.a. does not apply to the South S.F. Clinic, to the Assets Associated with that Clinic, or to the Acquirer of that Clinic; and
 - b. For a period of three (3) years following the Time Of Divestiture of each Clinic To Be Divested, DaVita shall not contract for the services of the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group for the provision of Contract Services to be performed in any of the areas that correspond to such Clinic as listed in Appendix B to the Decision and Order contained in the Consent Agreement. *PROVIDED, HOWEVER*, if the Contract Physician, or the Contract Physician's practice group, or other members of the Contract Physician's practice group were providing services to a Clinic pursuant to a contract with DaVita or Gambro in effect as of June 1, 2005, then DaVita may contract with such Contract Physicians, or the Contract Physician's practice group, or other members of the Contract Physician's practice group for services to be provided to that particular Clinic; *PROVIDED, FURTHER, HOWEVER*, the terms of this Paragraph II.C.6.b. shall not apply to the Westside Clinic, the Colton Clinic, and the South S.F. Clinic, to the Assets Associated with those Clinics, or to the Acquirers of those Clinics; *PROVIDED, FURTHER, HOWEVER*, the terms of this Paragraph II.C.6.b. shall not apply, in Kent County, Michigan, to Renal Associates of Grand Rapids if, prior to the date the Appendix A Clinic Assets are divested pursuant to the Consent Agreement, DaVita terminates, in writing, any contractual rights DaVita has with Renal Associates of Grand Rapids that prevent or hinder, in any way, the ability of Renal Associates of Grand Rapids, to contract with, or offer services to, any Person other than DaVita.
7. With respect to Material Confidential Information relating exclusively to any of the Clinics To Be Divested, DaVita shall:
- a. not disclose such information to any Person other than the Acquirer of such Clinic;
 - b. after the Time Of Divestiture of such Clinic:
 - (1) not use such information for any purpose other than complying with the terms of the Consent Agreement or with any law; and

- (2) destroy all records of such information, except to the extent that: (1) DaVita is required by law to retain such information, and (2) DaVita's inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of DaVita.

8. For two (2) years following the Time Of Divestiture of each Clinic To Be Divested, DaVita shall not solicit the business of any patients that received any goods or services from such Clinic between May 1, 2005, and the date of such divestiture, *PROVIDED, HOWEVER*, DaVita may (i) make general advertisements for the business of such patients including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at such patients, and (ii) provide advertising and promotions directly to any patient that initiates discussions with, or makes a request to, any DaVita employee.
9. DaVita shall do nothing to prevent or discourage Suppliers that, prior to the Time Of Divestiture of any Clinic To Be Divested, supplied goods and services for use in any Clinic To Be Divested from continuing to supply goods and services for use in such Clinic.

D. The purpose of Paragraph II of this Order to Maintain Assets is:

1. to preserve the Clinics To Be Divested and the Assets To Be Divested as viable, competitive, and ongoing businesses, to prevent their destruction, removal, wasting, deterioration, or impairment, and to prevent interim harm to competition, pending the relevant divestitures and other relief;
2. to preserve the good will of the employees and Regional Managers of the Clinics To Be Divested and of the Physicians, Suppliers, and patients that do business with those Clinics; and
3. to prevent Material Confidential Information relating exclusively to the Clinics To Be Divested from being exchanged with DaVita's retained dialysis businesses.

III.

IT IS FURTHER ORDERED that:

- A. John Strack and Mitch S. Nielson, CPA, of Focal Point Medical Consulting Group, shall be appointed Monitors to assure that DaVita expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Consent Agreement and by this Order to Maintain Assets.

- B. No later than one (1) day after this Order to Maintain Assets is made final, DaVita shall, pursuant to the Monitor Agreement and to this Order to Maintain Assets, transfer to the Monitors all the rights, powers, and authorities necessary to permit the Monitors to perform their duties and responsibilities in a manner consistent with the purposes of the Consent Agreement and this Order to Maintain Assets.
- C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of DaVita, which consent shall not be unreasonably withheld. If DaVita has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to DaVita of the identity of any proposed Monitor, DaVita shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, DaVita shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitors to monitor DaVita's compliance with the terms of the Consent Agreement and this Order to Maintain Assets in a manner consistent with the purposes of this Order to Maintain Assets.
- D. DaVita shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitors:
 - 1. The Monitors shall have the power and authority to monitor DaVita's compliance with the terms of the Consent Agreement and this Order to Maintain Assets, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitors in a manner consistent with the purposes of the Consent Agreement and this Order to Maintain Assets and in consultation with the Commission, including, but not limited to:
 - a. Assuring that DaVita expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Consent Agreement and this Order to Maintain Assets;
 - b. Monitoring any transition services agreements;
 - c. Assuring that Material Confidential Information is not received or used by DaVita or the Acquirers, except as allowed in the Consent Agreement and in this Order to Maintain Assets, in this matter.
 - 2. The Monitors shall act in a fiduciary capacity for the benefit of the Commission.
 - 3. The Monitors shall serve for such time as is necessary to monitor DaVita's compliance with the provisions of the Consent Agreement and this Order to Maintain Assets.

4. Subject to any demonstrated legally recognized privilege, the Monitors shall have full and complete access to DaVita's personnel, books, documents, records kept in the Ordinary Course Of Business, facilities and technical information, and such other relevant information as the Monitors may reasonably request, related to DaVita's compliance with its obligations under the Consent Agreement and this Order to Maintain Assets. DaVita shall cooperate with any reasonable request of the Monitors and shall take no action to interfere with or impede the Monitors' ability to monitor DaVita's compliance with the Consent Agreement and this Order to Maintain Assets.
5. The Monitors shall serve, without bond or other security, at the expense of DaVita on such reasonable and customary terms and conditions as the Commission may set. The Monitors shall have authority to employ, at the expense of DaVita, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitors' duties and responsibilities. The Monitors shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
6. DaVita shall indemnify the Monitors and hold the Monitors harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitors' duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitors.
7. DaVita shall report to the Monitors in accordance with the requirements of this Order to Maintain Assets and/or as otherwise provided in any agreement approved by the Commission. The Monitors shall evaluate the reports submitted to the Monitors by DaVita, and any reports submitted by the Acquirer with respect to the performance of DaVita's obligations under the Consent Agreement and this Order to Maintain Assets.
8. Within one (1) month from the date the Monitors are appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by DaVita of its obligations under the Consent Agreement and this Order to Maintain Assets.
9. DaVita may require the Monitors and each of the Monitors' consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *PROVIDED, HOWEVER*, such agreement shall not restrict the Monitors from providing any information to the Commission.

- E. The Commission may, among other things, require the Monitors and each of the Monitors' consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitors' duties.
- F. If the Commission determines that the Monitors have ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph III.
- G. The Commission may on its own initiative, or at the request of the Monitors, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Consent Agreement and this Order to Maintain Assets

IV.

IT IS FURTHER ORDERED that, beginning fifteen (15) days after the date on which DaVita signs the Consent Agreement and every thirty (30) days thereafter until this Order to Maintain Assets terminates pursuant to Paragraph VII, DaVita shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the terms of this Order to Maintain Assets. DaVita shall submit at the same time a copy of these reports to the Monitors, if any Monitors have been appointed.

V.

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

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

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege,

and upon written request with reasonable notice to DaVita, DaVita shall permit any duly authorized representative of the Commission:

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

VII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate at the earlier of:

- A. three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. such time as (1) all Assets To Be Divested have been divested, and all Management Contracts have been terminated, pursuant to the terms of the Consent Agreement, and (2) the Decision and Order has been made final.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: October 3, 2005