

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

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
 Pamela Jones Harbour
 Jon Leibowitz
 William E. Kovacic
 J. Thomas Rosch

<p>In the Matter of</p> <p>American Renal Associates, Inc., a corporation,</p> <p>and</p> <p>Fresenius Medical Care Holdings, Inc., a corporation.</p>
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Docket No. C-

DECISION AND ORDER

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

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should

issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent American Renal Associates Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 66 Cherry Hill Drive, Beverly, Massachusetts 01915.
2. Respondent Fresenius Medical Care Holdings, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 95 Hayden Avenue, Lexington, Massachusetts 02420.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

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

- A. “ARA” means American Renal Associates, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by ARA including, but not limited to, ARA-East Providence Dialysis LLC, ARA-Johnston Dialysis LLC, ARA-Fall River Dialysis LLC, and Dialysis Center of West Warwick LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Fresenius” means Fresenius Medical Care Holdings, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Fresenius Medical Care Holdings, Inc. (including Renal Care Group, Inc. and Bio-Medical Applications of Rhode Island, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Clinic” means a facility that provides Dialysis Services.
- D. “Clinic Operator” means a person who owns or engages in the Operation of a Clinic, or who attempts to own or engage in the Operation of a Clinic.
- E. “Commission” means the Federal Trade Commission.

- F. “Cranston-Warwick Area” means the area within ZIP codes 02818, 02886, 02888, 02889, 02893, 02905, 02907, 02909, 02910, 02920, 02921, that portion of 02919 south of U.S. Route 6, and those portions of 02831 and 02816 east of Route 116, which are the ZIP codes in and around the cities of Cranston and Warwick, Rhode Island.
- G. “Dialysis Services” means the provision of outpatient hemodialysis or peritoneal dialysis services to patients suffering from kidney disease.
- H. “Governmental Approvals” means any permissions or sanctions issued by any government or governmental organization, including, but not limited to, licenses, permits, accreditations, authorizations, registrations, certifications, certificates of occupancy, and certificates of need.
- I. “Joint Venture Clinic” means a Clinic in which a Respondent owns an interest of at least 50%, but less than 100%.
- J. “Joint Venture Partner” means a Person other than a Respondent that owns an interest in a Joint Venture Clinic.
- K. “Material Confidential Information” means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person’s business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.
- L. “Operation Of A Clinic” means all activities Relating To the business of a Clinic, including, but not limited to:
 - 1. attracting patients to the Clinic for dialysis services, providing dialysis services to patients of the Clinic, and dealing with their Physicians, including, but not limited to, services Relating To hemodialysis and peritoneal dialysis;
 - 2. providing medical products to patients of the Clinic;
 - 3. maintaining the equipment on the premises of the Clinic, including, but not limited to, the equipment used in providing dialysis services to patients;
 - 4. purchasing supplies and equipment for the Clinic;
 - 5. negotiating leases for the premises of the Clinic;
 - 6. providing counseling and support services to patients receiving products or services from the Clinic;

7. contracting for the services of medical directors for the Clinic;
 8. dealing with Payors that pay for products or services offered by the Clinic, including but not limited to, negotiating contracts with such Payors and submitting claims to such Payors; and
 9. dealing with Governmental Approvals Relating To the Clinic or that otherwise regulate the Clinic.
- M. “Ordinary Patient Transfer” means the occasional or periodic transfer of an individual patient from one Clinic to another Clinic at the request of the patient, or the patient’s family, care giver or physician.
- N. “Payor” means any Person that purchases, reimburses for, or otherwise pays for medical goods or services for themselves or for any other Person, including, but not limited to: health insurance companies; preferred provider organizations; point of service organizations; prepaid hospital, medical, or other health service plans; health maintenance organizations; government health benefits programs; employers or other Persons providing or administering self-insured health benefits programs; and patients who purchase medical goods or services for themselves.
- O. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.
- P. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- Q. “Relating To” or “Related To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.

II.

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

PROVIDED, HOWEVER, that nothing in this Paragraph shall prohibit each Respondent from (i) unilaterally deciding to close any of its own Clinics (or, in the case of a Joint Venture Clinic, from making any such decision with its Joint Venture Partner for that Clinic), (ii) assisting the owner of any Clinic managed by such Respondent with respect to the closure of such managed Clinic, (iii) entering into non-competition agreements of reasonable duration and geographic

scope (a) ancillary to a lawful sale, acquisition, or formation of a Clinic or Joint Venture Clinic, or (b) ancillary to a contract for employment or professional services of an employee or medical director, or (iv) continuing the current non-competition agreements of employees, medical directors, Clinics and Joint Venture Clinics.

PROVIDED FURTHER, HOWEVER, that nothing in this Paragraph shall apply to any agreement entered into for an Ordinary Patient Transfer.

III.

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

- A. acquire any assets of or financial interest in any Clinic located in the Cranston-Warwick Area, except to the extent that the acquisition is in:
 - 1. Clinics owned or operated by Respondent ARA at the time this Order becomes final; or
 - 2. in *de novo* Clinics opened by Respondent ARA.

- B. enter into any contract to participate in the management or Operation Of A Clinic located in the Cranston-Warwick Area, except to the extent that the contract relates exclusively to:
 - 1. off-site lab services or social worker support materials;
 - 2. the management of Clinics owned or operated by Respondent ARA at the time this Order becomes final;
 - 3. the management of a *de novo* Clinic opened by Respondent ARA; or
 - 4. billing services, collection services, bookkeeping services, accounting services, supply purchasing and logistics services, or the preparation of financial reports and accounts receivable reports (collectively “Such Services”), where appropriate firewalls and confidentiality agreements are implemented to prevent Material Confidential Information of the Clinic from being disclosed to anyone participating in any way in the operation or management of any Clinic owned by ARA or any Clinic other than the Clinic to which such services are being provided.

Said advance written notification shall contain (i) either a detailed term sheet for the proposed acquisition or the proposed agreement with all attachments, and (ii) documents that would be responsive to Item 4(c) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules,

16 C.F.R. § 801-803, relating to the proposed transaction (hereinafter referred to as “the Notification), *PROVIDED, HOWEVER*, (i) no filing fee will be required for the Notification, (ii) an original and one copy of the Notification shall be filed only with the Secretary of the Commission and need not be submitted to the United States Department of Justice, and (iii) the Notification is required from ARA and not from any other party to the transaction. ARA shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), ARA shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

PROVIDED, HOWEVER, that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

IV.

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

V.

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

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

VI.

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

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

VII.

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

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: