

Analysis of Agreement Containing Consent Order to Aid Public Comment
In the Matter of American Renal Associates, Inc. File No. 051-0234

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from American Renal Associates, Inc., and affiliates 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 Fresenius Medical Care Holdings, Inc. and affiliates, including Renal Care Group, Inc. and Bio-Medical Applications of Rhode Island, Inc. Under the terms of the Consent Agreement, ARA and Fresenius are prohibited from agreeing with other dialysis clinic operators to close any clinics, or allocate any dialysis service markets. ARA is further required to notify the Commission of acquisitions of dialysis clinic assets in the Warwick/Cranston, Rhode Island, area.

The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement or make it final.

Pursuant to an Asset Purchase Agreement dated August 3, 2005, ARA proposed to acquire five Fresenius clinics in the Providence, Rhode Island/Fall River, Massachusetts area, and pay Fresenius to close another three competing clinics, for approximately \$4.4 million. ARA’s agreement to pay Fresenius to close its clinics is a *per se* violation of the antitrust laws. In addition, the Commission’s Complaint alleges, as summarized below, that the Asset Purchase Agreement, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, by reducing dialysis capacity; allocating dialysis customers, territories, or markets; and lessening competition in the market for the provision of outpatient dialysis services in the Warwick/Cranston area.

II. The Parties

American Renal Associates, Inc., which is headquartered in Danvers, Massachusetts, operates 65 dialysis centers in 15 states and the District of Columbia. ARA is the sixth-largest provider of outpatient dialysis services in the United States, serving 2,300 dialysis patients, with 2004 revenues exceeding \$80 million. In 2005, ARA owned six clinics in Rhode Island, which were located in Cranston, East Providence, Johnston, Pawtucket, Providence, and Tiverton, and one in nearby Fall River, Massachusetts.

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 02420-9192. Fresenius is the

parent of entities that are parties to the Consent Agreement, including Renal Care Group, Inc. and Bio-Medical Applications of Rhode Island, Inc.

III. The Asset Purchase Agreement

ARA and Fresenius entered into an Asset Purchase Agreement dated August 3, 2005, under which Fresenius agreed to sell five clinics located in Rhode Island – the Wakefield, Westerly, Woonsocket, Warwick, and West Warwick clinics – to ARA for \$2,759,000. The agreement also required Fresenius to close its clinics in East Providence and North Providence, Rhode Island, and in Fall River, Massachusetts, in exchange for ARA’s payment of \$1,641,000. The parties terminated this agreement on March 13, 2006, after the FTC staff raised antitrust concerns.

IV. The Complaint

A. Agreement Between Competitors to Close Clinics

The Commission’s complaint charges that first and foremost, the agreement between Fresenius and ARA – competitors in the provision of outpatient dialysis services – to close three Fresenius clinics was a horizontal agreement to eliminate competition and to reduce dialysis capacity in the three affected areas. Each of the Fresenius clinics to be closed was located close to a competing ARA outpatient dialysis clinic. The parties memorialized their agreement in a written contract, listing each Fresenius clinic to be closed and the specific amount of money to be paid by ARA for closing each clinic, and allocating each amount to the ARA clinic closest to the clinic to be closed. The parties further agreed that Fresenius would not reopen any outpatient dialysis clinics within 10 to 12 miles of the closed facilities for at least five years, and would attempt to enforce the non-compete provisions of its agreements with the medical directors of the closed facilities for ARA’s benefit, preventing those physicians from serving as medical directors for any potential new entrant.

Agreements to pay a competitor to exit a market, such as the one negotiated by ARA and Fresenius, are per se unlawful. Indeed, the parties offered no competitive justification for their conduct, and it is unlikely that there is any plausible justification for such an agreement. Such a naked restraint, like a market division agreement or price fixing, is a per se violation of the antitrust laws.

B. Agreement to Eliminate Competition by Acquiring Clinics

The Commission also charges that ARA’s proposed acquisition of Fresenius’s two Warwick, Rhode Island, facilities would have substantially reduced competition for outpatient dialysis services by eliminating competition between these Warwick clinics and ARA’s nearby Cranston, Rhode Island, clinic. Outpatient dialysis services is the relevant product market in which to assess the effects of the clinic acquisition portion of the asset purchase agreement. End

stage renal disease (ESRD) is a chronic disease characterized by a near total loss of function of the kidneys, which in healthy people remove toxins and excess fluid from the blood. ESRD may be treated through dialysis, a process whereby a person's blood is filtered by machines that act as artificial kidneys. Most ESRD patients receive dialysis treatments in an outpatient dialysis clinic three times per week, in sessions lasting between three and five hours. The only alternative to outpatient dialysis treatments for ESRD patients is a kidney transplant. However, the wait-time for donor kidneys – during which ESRD patients must receive dialysis treatments – can exceed five years. Additionally, many ESRD patients are not viable transplant candidates. As a result, many ESRD patients have no alternative to ongoing dialysis treatments.

The Commission's complaint also alleges that the relevant geographic market in which to assess the competitive effects of the clinic acquisition portion of the asset purchase agreement is the Cranston and Warwick area in Rhode Island. The relevant geographic market for the provision of outpatient dialysis services is defined by the distance ESRD patients are willing and able to travel to receive dialysis treatments, and is thus local in nature. Because ESRD patients often suffer from multiple health problems and may require assistance traveling to and from the dialysis clinic, and because of the high frequency of treatments, these patients are unwilling and unable to travel long distances for dialysis treatment. The time and distance a patient will travel in a particular location are significantly affected by local traffic patterns; whether an area is urban, suburban, or rural; local geography; and a patient's proximity to the nearest dialysis clinic. The size and dimensions of relevant geographic markets are also influenced by a variety of other factors including population density, roads, geographic features, and political boundaries.

With respect to the clinic acquisition portion of the asset purchase agreement, the Commission's complaint alleges that the market for outpatient dialysis services in the Warwick/Cranston area is highly concentrated. The market has only two dialysis providers, ARA and Fresenius, and the transaction as originally proposed would result in a monopoly in the Warwick/Cranston area. The evidence shows that health plans and other private payers who pay for dialysis services used by their members benefit from direct competition between ARA and Fresenius when negotiating the rates of the dialysis provider. As a result, the proposed combination likely would result in higher prices and reduced incentives to improve service or quality in the Warwick/Cranston outpatient dialysis services market defined in the complaint. Also, the complaint alleges that in this market, entry on a level sufficient to deter or counteract the likely anticompetitive effects of the proposed transaction is not likely to occur in a timely manner. The primary barrier to entry is the difficulty associated with locating nephrologists with established patient pools who are willing and able to serve as medical directors. Federal law requires each dialysis clinic to have a physician medical director. As a practical matter, having a nephrologist serve as medical director is essential to the success of a clinic because medical directors are the primary source of referrals.

V. The Consent Agreement

The proposed relief in this case is narrowly tailored to address both the agreement to close clinics and the attempted acquisition of clinics in the Warwick/Cranston area. The order would prohibit ARA and Fresenius for ten years from agreeing with any person to close a dialysis clinic, or allocate any dialysis customer, territory, or market. The consent order also would require ARA to give the Commission prior notice before acquiring any interest in a dialysis clinic in the Warwick/Cranston area because there is a risk that ARA remains interested in expanding in the area, but any such further acquisition likely would fall below Hart-Scott-Rodino Act premerger notification thresholds.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order, or to modify its terms in any way.