

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION  
2017 OCT -4 AM 10:34  
EXPEDITED PROCESSING SECTION

\_\_\_\_\_  
In the Matter of \_\_\_\_\_  
FRESENIUS MEDICAL CARE AG \_\_\_\_\_  
& CO. KGaA, \_\_\_\_\_  
a partnership limited by shares. \_\_\_\_\_  
\_\_\_\_\_

Docket No. C-4348

**APPLICATION FOR APPROVAL OF PROPOSED PLAN TO  
ESTABLISH A NEW OUTPATIENT HEMODIALYSIS  
CLINIC AND REQUEST FOR EXPEDITED TREATMENT**

In accordance with Section 2.41(f) of the Federal Trade Commission (“Commission”) Rules of Practice and Procedure, 16 C.F.R. § 2.41(f) (2017), and Paragraph III.B.3 of the Commission’s Decision and Order in the above-captioned matter, Fresenius Medical Care (“Fresenius”) hereby notifies and requests approval from the Commission of its plan to establish and operate an outpatient hemodialysis clinic at [REDACTED].<sup>1</sup> Note that Fresenius does not believe that the Order requires prior Commission approval for it to establish and operate an outpatient hemodialysis dialysis clinic at this location. Nevertheless, Fresenius understands that the Commission may take a different view and in the interest of avoiding any dispute, submits this request to provide the Commission an opportunity to review the proposed transaction.

<sup>1</sup> Throughout this application, Fresenius redacts confidential information that is necessary to protect its business from potential harm. In compliance with 16 C.F.R. § 4.9(c) (2017) Section 6(f) of the Federal Trade Commission Act, Fresenius intends to deliver to the Commission’s Office of the General Counsel a separate submission that will provide additional detail in support of Fresenius’s request to protect this information from public disclosure.

**I. INTRODUCTION**

In 2011, Fresenius entered into an agreement to acquire Liberty Dialysis Holdings, Inc. (“Liberty”). On February 28, 2012, the Commission issued a complaint alleging that the proposed acquisition would substantially lessen competition. Simultaneously, the Commission accepted an Agreement Containing Consent Order including a proposed Decision and Order and an Order to Hold Separate and Maintain Assets, resolving the allegations contained in the complaint. After the conclusion of the public-comment period, the Commission approved and issued the final Decision and Order (“Order”) on May 25, 2012.

The Order required Fresenius to make certain divestitures—including any interests it held in the property located at [REDACTED] (the “Property”)—to [REDACTED].<sup>2</sup> See Appendix A of the Order. Further, the Order prohibits Fresenius from re-acquiring without prior Commission approval any interests in the clinics divested for the duration of the Order. See Paragraph III.B.3 of the Order. At all times, Fresenius has complied and continues to comply with all of its obligations under the Order—including making the required divestitures [REDACTED].

Now, Fresenius intends to establish an outpatient hemodialysis clinic at the Property (the proposed “Transaction”). This submission sets out the pertinent factual background, describes the principal terms of, as well as Fresenius’s rationale for, the proposed Transaction and sets out the reasons meriting Commission approval. Simply put, the Commission should approve the proposed Transaction because (1) it does not threaten and will not cause any potential reduction in or lessening of competition; and (2) it is the most expeditious and efficient manner for Fresenius to introduce the additional outpatient hemodialysis treatment capacity that is needed by dialysis patients in the surrounding area.

---

<sup>2</sup> Disclosing the physical address of the property and the identification of the acquirer under the Order could threaten Fresenius’s business interests.

## II. REQUEST FOR EXPEDITED TREATMENT

Fresenius wishes to complete the proposed Transaction as soon as possible following Commission approval. As described below, no dialysis clinic has ever been operated by Fresenius, [REDACTED], or any other entity at the Property. The Fresenius clinics in the area are operating at capacity and must expand to serve local dialysis patients. Fresenius's establishment of an outpatient dialysis clinic at the Property will benefit these area patients. These factors, as described in greater detail below, establish a clear basis for expedited approval. As a result, Fresenius requests that the Commission waive the customary 30-day public comment period as permitted under Section 2.41(f)(2) of the Commission Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(2), and approve the proposed transaction no later than October 16, 2017.

## III. FACTUAL BACKGROUND<sup>3</sup>

Fresenius entered into a lease agreement for the Property with the intention of establishing an outpatient hemodialysis clinic on [REDACTED]. Following the execution of that lease but prior to the Commission's issuance of the Order, Fresenius took a number of actions with respect to the Property in furtherance of that intention—for example, Fresenius:

- Installed all equipment required to operate an outpatient hemodialysis clinic, including chairs, machines, water system, etc.;
- Acquired and delivered items to the Property needed for the clinic to serve patients—*e.g.*, televisions, computers, furniture, and supplies;
- Entered into a contract with a nephrologist to serve as medical director of the clinic;
- Received technical approval from the state of [REDACTED] for the water system<sup>4</sup> installed at the Property;
- Successfully completed the state of [REDACTED] technical survey required to operate an outpatient hemodialysis clinic at the Property; and

---

<sup>3</sup> Within this section, Fresenius redacts only the confidential information required to protect its business interests.

<sup>4</sup> Water systems at hemodialysis clinics must be tested to ensure patients may be safely dialyzed. Water samples were taken and tested.

- Received authorization to begin the 30-day patient trial, which is the last step before final certification can be received from the Centers for Medicare and Medicaid Services.<sup>5</sup>

In accordance with the Order, however, Fresenius divested all of its interests in and assets located at the Property to [REDACTED]—including the assignment of its medical director agreement and its lease agreement for the Property.

But [REDACTED] never established or operated a dialysis clinic at the Property. In 2016, [REDACTED] [REDACTED] acquired [REDACTED].<sup>6</sup> As part of that transaction, Fresenius understands that [REDACTED] acquired any and all interests that [REDACTED] still held in any assets or agreements, as well as assumed any enduring obligations, associated with the Property—including the lease agreement for the Property. [REDACTED], like [REDACTED], never established or operated a dialysis clinic at the Property, which Fresenius understands has been vacant since it fulfilled its divestiture obligations under the Order.

To Fresenius’s best knowledge, [REDACTED] stripped the Property of all movable assets that Fresenius installed and that could be repurposed at a dialysis clinic in a different location—including the chairs, dialysis machines, televisions, computers, supplies, and the water system. Today, only the walls and the millwork initially installed by Fresenius remain at the Property.

#### IV. TRANSACTION DESCRIPTION<sup>7</sup>

In furtherance of its plan to establish a new outpatient hemodialysis clinic at the Property, a subsidiary of Fresenius executed [REDACTED] for the Property on [REDACTED]

[REDACTED]

<sup>5</sup> [REDACTED]

<sup>6</sup> [REDACTED]

<sup>7</sup> Within this section, Fresenius redacts only the confidential information required to protect its business interests.

[REDACTED]

[REDACTED]

While the [REDACTED] allows for the operation of an outpatient hemodialysis clinic at the Property—as did [REDACTED]—nothing [REDACTED] obligates Fresenius to operate a clinic there. Indeed, Fresenius must expend substantial additional effort and resources before it can begin operating a dialysis clinic at the Property—*e.g.*, make substantial physical improvements, apply for and receive all required permits/authorizations from [REDACTED] and the federal government, acquire and install necessary equipment (*i.e.*, chairs, dialysis machines, computers, water system), and reach an agreement with a medical director.

**V. TRANSACTION RATIONALE<sup>8</sup>**

Fresenius currently operates [REDACTED] outpatient hemodialysis clinics near the Property—one of which Fresenius established [REDACTED] to alleviate capacity concerns at [REDACTED]. Now, just two years later, the [REDACTED] is once again operating at near maximum capacity—[REDACTED]. Meanwhile, the [REDACTED] is rapidly approaching a state where it will be capacity constrained. Internal Fresenius projections estimate that [REDACTED] will be able to accept new patients in [REDACTED] without adding shifts.

Put simply, Fresenius requires additional outpatient hemodialysis treatment capacity in the area and establishing a new clinic is necessary because there is insufficient space to expand capacity at its existing clinics.

Given that much of the site work required to establish a dialysis clinic has already been performed at the Property, it is an attractive option for Fresenius’s required area expansion. Indeed, Fresenius estimates that it can establish a clinic at the Property at approximately [REDACTED] of the

---

<sup>8</sup> Public disclosure of the redacted details supporting the strategic rationale for the proposed Transaction would threaten harm to Fresenius’s business.

cost and [REDACTED] faster than if it were to do so at some different area location. These substantial time and costs savings would enable Fresenius to better service its patients.

The proposed Transaction is procompetitive. Fresenius intends to establish a new dialysis clinic to increase the amount of treatment capacity available to its patients. No reduction of competition will result from Fresenius's plans—the Property has been vacant since Fresenius's 2012 divestiture transaction with [REDACTED] and no dialysis patient has ever received treatment there. In fact, the new facility should be expected to increase competition in the area.

Additionally, [REDACTED] operates several outpatient hemodialysis clinics near the Property. Indeed, [REDACTED] recently established a new dialysis clinic located approximately [REDACTED] away from the Property. The proposed Transaction is simply the latest manifestation of the healthy state of competition in the area.

## VI. CONCLUSION

Fresenius has complied with all of its divestiture obligations under the Order—including those with respect to the Property—and continues to do so. Significantly, however, no dialysis clinic was ever established at the Property by [REDACTED], or any other entity. Indeed, the Property has been vacant and unproductive since Fresenius's divestiture to [REDACTED]. Fresenius must establish an additional outpatient hemodialysis clinic in the area near the Property in order to best serve its patients and the Property is the most expeditious and cost-effective area location for Fresenius to do so.

Fresenius establishing a new clinic at the Property does not contravene the letter or spirit of the Order. Opening an additional dialysis clinic benefits patients and is facially procompetitive by increasing available treatment capacity. Moreover, converting a vacant and unproductive space into an active business enhances the community. The only connection between the Order and the Property is the physical address, which is an insufficient basis for the Commission to raise any material competitive or other concern.

Fresenius respectfully requests that the Commission expeditiously approve the proposed Transaction and waive the public comment period allowing Fresenius to begin serving area dialysis patients at the new clinic it will establish at the Property as soon as possible.

**VII. REQUEST FOR CONFIDENTIAL TREATMENT**

This application contains confidential, competitively sensitive information of Fresenius, the disclosure of which could significantly harm Fresenius's business. Accordingly, Fresenius requests that this information be afforded the fullest confidentiality protections available under all applicable laws and regulations, including Sections 2.41(f)(4), 4.9(c), and 4.10(a)(2) of the Commission's Rules of Practice and Procedure (16 C.F.R. §§ 2.41(f)(4), 4.9(c), 4.10(a)(2)) and Sections 6(f) and 21(c) of the Federal Trade Commission Act (15 U.S.C. §§ 46(f), 57b-2(c)).

In compliance with Section 4.2(d) of the Commission's Rules of Practice and Procedure, Fresenius is submitting a public version of this application with confidential information redacted, as well as a confidential version including such information.

Dated: October 4, 2017

Respectfully submitted,



---

Brian F. Burke  
Baker & McKenzie LLP  
815 Connecticut Avenue, N.W.  
Washington, DC 20006-4078  
Direct: +1 202-452-7085  
[brian.burke@bakermckenzie.com](mailto:brian.burke@bakermckenzie.com)

*Counsel for Fresenius Medical Care*