

**UNITED STATES OF AMERICA
BEFORE THE 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, and</p> <p>Fresenius Medical Care Holdings, Inc., a corporation.</p>	<p>Docket No. C-4202</p>
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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Renal Associates, Inc. (“ARA”) and Fresenius Medical Care Holdings, Inc. (“Fresenius”), together hereinafter sometimes collectively referred to as “Respondents,” have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and, in addition, violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

I. NATURE OF THE CASE

1. This matter concerns an agreement between ARA and Fresenius which, if consummated, would have resulted in: (a) Fresenius closing three of its outpatient dialysis clinics in Rhode Island and southeast Massachusetts, each of which is located near a competing ARA facility, in exchange for payments from ARA totaling \$1,641,000; and (b) ARA acquiring Fresenius’s five remaining Rhode Island clinics, two of which compete directly with a nearby ARA clinic, in exchange for payments to Fresenius totaling an additional \$2,759,000.

2. By agreeing to close three Fresenius clinics, Respondents would have denied consumers of outpatient dialysis services in Rhode Island and southeast Massachusetts the benefits of competition, by effectively allocating Fresenius’s patients in those areas to ARA. Further, the proposed acquisition of Fresenius’s two Warwick, Rhode Island, clinics would have

left ARA as the sole provider of outpatient dialysis services in Warwick-Cranston area, likely resulting in increased prices and reduced service and quality to consumers of outpatient dialysis services in that area.

II. RESPONDENTS

3. Respondent American Renal Associates, Inc. (“ARA”), 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. ARA is the parent of eight entities that are parties to the agreement at issue: Dialysis Center of Wakefield, L.L.C., Dialysis Center of Warwick, L.L.C., Dialysis Center of West Warwick, L.L.C., Dialysis Center of Westerly, L.L.C., Dialysis Center of Woonsocket, L.L.C., ARA-East Providence, L.L.C., ARA-Johnston Dialysis, L.L.C., and ARA-Fall River, L.L.C.

4. Respondent Fresenius Medical Care Holdings, Inc. (“Fresenius”), 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 agreement at issue, including Renal Care Group, Inc. and Bio-Medical Applications of Rhode Island, Inc.

5. Respondents are corporations within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44.

6. The general business practices of ARA and Fresenius, and the acts and practices described below, affect the interstate movement of patients, the interstate purchase of supplies and products, and the interstate flow of funds, and are in or affect commerce within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44, and Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12.

III. THE RESPONDENTS’ ASSET PURCHASE AGREEMENT

7. ARA and Fresenius entered into an Asset Purchase Agreement dated August 3, 2005, involving payments from ARA to Fresenius totaling \$4.4 million.

8. The Asset Purchase Agreement 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 Clinic Closing Agreement”).

9. The Asset Purchase Agreement also provided for ARA’s acquisition of Fresenius’s five remaining clinics in Rhode Island – located in Wakefield, Westerly, Woonsocket, Warwick, and West Warwick – for \$2,759,000 (“the Clinic Acquisition Agreement”).

10. After Commission staff learned of the Asset Purchase Agreement and contacted Respondents with several concerns about the agreement's terms, Respondents terminated the Asset Purchase Agreement on March 13, 2006.

IV. THE CLINIC CLOSING AGREEMENT

A. Description of the Clinic Closing Agreement

11. During discussions between ARA and Fresenius concerning the sale of Fresenius's outpatient dialysis clinics in Rhode Island, the Respondents entered into an agreement whereby Fresenius agreed to close three clinics in East Providence and North Providence, Rhode Island, and Fall River, Massachusetts, in return for the sum of \$1,641,000 from ARA.

12. Respondents further agreed that Fresenius would not reopen any outpatient dialysis clinics within 10-12 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, preventing those physicians from serving as medical directors for any potential new entrant.

13. Each of the Fresenius clinics to be closed was located in close proximity to ARA outpatient dialysis clinics in East Providence and Johnston, Rhode Island, and Fall River, Massachusetts, respectively.

14. The Respondents memorialized their agreement in a written contract, listing each Fresenius clinic to be closed, along with the specific amount of money to be paid for closing each clinic allocated to the three ARA clinics in closest proximity to the clinics to be closed. The contract was signed by officials from both ARA and Fresenius.

B. Effects of the Clinic Closing Agreement

15. The Clinic Closing Agreement, if implemented, would have had the effect of unreasonably restraining trade and hindering competition in the provision of outpatient dialysis services, by, among others:

- a. eliminating actual, direct, and substantial competition between ARA and Fresenius;
- b. increasing the ability of ARA to unilaterally raise prices; and
- c. reducing ARA's incentives to improve service or quality.

16. Neither ARA nor Fresenius offered a plausible pro-competitive justification for the Clinic Closing Agreement.

V. THE CLINIC ACQUISITION AGREEMENT

A. The Relevant Market

17. The relevant product market in which to assess the competitive effects of the Clinic Acquisition Agreement is the provision of outpatient dialysis services. 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, inside or outside the body, by machines that act as artificial kidneys.

18. Most ESRD patients receive dialysis treatments at dialysis centers three times per week in sessions lasting between three and five hours. These treatments are done on an outpatient basis, whereby the patient’s time spent at the dialysis center is solely for treatment.

19. The only alternative to outpatient dialysis treatments for patients suffering from ESRD is a kidney transplant. The wait-time for donor kidneys, during which ESRD patients must receive dialysis treatments, however, 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.

20. The relevant geographic market in which to assess the competitive effects of the Clinic Acquisition Agreement is the Cranston and Warwick area in Rhode Island (“the Cranston-Warwick market”).

21. The relevant geographic market for the provision of outpatient dialysis services is defined by the distance ESRD patients are willing or 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 or unable to travel long distances to receive 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.

B. The Structure of the Market

22. The market for the provision of outpatient dialysis services in the Cranston-Warwick market is highly concentrated, as measured by the Herfindahl-Hirschman Index (“HHI”). Given that ARA and Fresenius are the only two providers of outpatient dialysis services in the market, the Clinic Acquisition Agreement would leave ARA as the sole provider of dialysis services in that area.

C. Entry Conditions

23. The most significant impediment to entry into the relevant market is locating a nephrologist with an established referral base who is willing and able to enter into a contract with a dialysis clinic to serve as the clinic's medical director. Federal law requires that each dialysis clinic have a physician medical director. Having a nephrologist serve as medical director is essential to the competitiveness of the clinic, because he or she is the clinic's primary source of referrals. A medical director's contract with a clinic typically prevents the medical director (and often his or her partners) from serving as a medical director for a competing clinic while serving as the clinic's medical director. The lack of available nephrologists with an established referral stream is a significant impediment to entry into the relevant market.

24. New entry into the relevant market sufficient to deter or counteract the potential anticompetitive effects of the Clinic Acquisition Agreement is unlikely to occur, and would not occur in a timely manner because it would take over two years to enter and achieve significant market impact.

D. Effects of the Clinic Acquisition Agreement

25. The Clinic Acquisition Agreement, if consummated, would have had the effect of substantially lessening competition in the relevant market by, among others:

- a. eliminating actual, direct, and substantial competition between ARA and Fresenius;
- b. increasing the ability of ARA to unilaterally raise prices; and
- c. reducing ARA's incentives to improve service or quality.

VII. VIOLATIONS CHARGED

A. The Clinic Closing Agreement

26. The Clinic Closing Agreement constitutes an unfair method of competition in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

B. The Clinic Acquisition Agreement

27. The effects of the Clinic Acquisition 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventeenth day of October, 2007, issues its complaint against the Respondents.

By the Commission.

Donald S. Clark
Secretary

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