

MONITOR AGREEMENT

MONITOR AGREEMENT (this “**Agreement**”), dated as of January 21, 2012, between Fresenius Medical Care Holdings, Inc. (“**FMCH** or **Respondent**”), and Richard A. Shermer of R. Shermer & Company (“**Monitor**”).

PRELIMINARY STATEMENT

WHEREAS the Federal Trade Commission (the “**Commission**”) is considering for public comment an Agreement Containing Consent Orders with Respondent or its parent company, which provides, among other things, that Respondent divest a number of dialysis clinics and assets associated with those clinics, Respondent terminate management contracts Respondent has with certain dialysis clinics, enter into agreements – if necessary – providing the acquirers of the dialysis clinics with transition services, and engage a monitor to monitor Respondent’s compliance with its obligations under (a) the Decision and Order and (b) the Order to Maintain Assets (collectively, the “**Orders**”);

WHEREAS, the Commission is expected to issue the Agreement Containing Consent Orders and appoint the Monitor pursuant to the Orders to monitor Respondent’s compliance with the terms of the Orders, and the Monitor has consented to such appointment;

WHEREAS, the Orders further provide that Respondent shall execute an agreement, subject to prior approval of the Commission, conferring all the rights and powers necessary to permit Monitor to carry out its duties and responsibilities pursuant to the Orders;

WHEREAS, this Agreement, although executed by Monitor and Respondent, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent or Monitor under the Orders, until the Order to Maintain Assets has been issued and this Agreement has been approved by the Commission;

WHEREAS, the parties to this Agreement intend to be legally bound, subject only to the Commission’s approval of this Agreement.

DEFINITIONS

1. “**Respondent**” means Fresenius Medical Care Holdings, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 920 Winter Street, Waltham, MA 02451, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; its joint ventures, divisions, groups and affiliates controlled by FMCH, and the respective directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns of each.

2. “**Other Parties**” means any Person that receives approval of the Commission to acquire any of the Assets to Be Divested or is a party to the Relevant Agreements pursuant to the Decision and Order.

3. “**Acquisition Date**” means the date on which the first of the Relevant Agreements pursuant to the Decision and Order goes into effect.

4. “**Relevant Agreements**” means: all the divestiture agreements, management termination agreements, and transition services agreements entered into pursuant to the Decision and Order, including, but not limited to, the Divestiture Agreements, and the Transition Services Agreement between the Other Parties and FMCH or one of its subsidiaries.

5. All other capitalized words or phrases appearing in this Agreement that are not otherwise defined herein are deemed to have the defined meanings assigned to them in the Orders.

ARTICLE I

1.1 Powers of the Monitor. Monitor shall have the rights, duties, powers and authority conferred upon Monitor by the Orders that are necessary for Monitor to monitor Respondent’s compliance with the Orders. No later than one day after the Order to Maintain Assets becomes final, Respondent hereby transfers to Monitor all rights, powers, and authorities necessary to permit Monitor to perform its duties and responsibilities pursuant to the Order to Maintain Assets and consistent with the purposes of the Decision and Order. Any descriptions thereof contained in this Agreement in no way modify Monitor’s powers and authority or Respondent’s obligations under the Orders.

1.2 Monitor’s Duties. Monitor shall monitor Respondent’s compliance with the Orders, including, but not limited to:

a. Assuring that Respondent expeditiously complies with all of the obligations, and performs all of responsibilities, of Respondent as required by the Orders in this matter;

b. Monitoring Relevant Agreements; and

c. Assuring that Confidential Business Information is not received or used by Respondent or Other Parties, except as allowed in the Orders in this matter.

1.3 Duration of Monitor’s Authority. Monitor shall have all powers and duties described above and consistent with the Orders for the term set forth in the Orders.

1.4 Confidential and Proprietary Information. Monitor shall enter into confidentiality agreements, in substantially the form attached hereto as Confidential Exhibit A, agreeing to be bound by the terms and conditions of the Orders. Monitor must retain and maintain all Material Confidential Information it receives from either Respondent or Other Parties on a confidential basis, except as is permitted by the Orders. Monitor may disclose confidential information only to persons employed by or working with Monitor under this Agreement, to persons employed at the Commission, and as permitted by Respondent or Other Parties with respect to information they provided Monitor. Monitor shall require any person retained by Monitor to assist in carrying out the duties and responsibilities of Monitor to execute a confidentiality agreement that

requires the same standard of care and obligations of confidentiality to which Monitor must adhere under this Agreement. Monitor shall maintain the confidentiality, for a period of five (5) years after the termination of this Agreement, of all other aspects of the performance of its duties under this Agreement and shall not disclose any confidential information relating thereto.

1.5 Restrictions. Monitor shall not be involved in any way in the management, production, supply and trading, sales marketing, and financial operations of the competing products of Respondent.

1.6 Reports. Monitor shall report to the Commission pursuant to the terms of the Orders and as otherwise requested by the Commission staff.

1.7 Access to Records, Documents and Facilities. Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to Respondent's personnel, to include those employees designated to be transferred to an acquirer, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as Monitor may reasonably request, related to Respondent's compliance with the obligations of Respondent under the Orders in this matter. Documents, records and other relevant information are to be provided in an electronic format if they exist in that form. Respondent shall cooperate with any reasonable request of Monitor and shall take no action to interfere with or impede Monitor's ability to monitor Respondent's compliance with the Orders.

ARTICLE II

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. Monitor shall have the authority to employ, at the cost and expense of the Respondent, such attorneys, consultants, accountants, and other representatives and assistants as are necessary to carry out the Monitor's duties and responsibilities as allowed pursuant to the Orders.

2.2 Compensation. Monitor shall be compensated by Respondent for his services under this Agreement, including all work in connection with the negotiation and preparation of this Monitor Agreement, pursuant to the fee schedule attached as Confidential Exhibit B for time spent in connection with the discharge of its duties under this Agreement and the Orders. In addition, Respondent will pay: (a) out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the orders; and (b) fees and disbursements reasonably incurred by any advisor appointed by Monitor pursuant to the first paragraph in Article II. At its own expense, Respondent may retain an independent auditor to verify such invoices. Monitor shall provide Respondent with monthly invoices for time and expenses that include details and an explanation of all matters for which Monitor submits an invoice to Respondent. Respondent shall pay such invoices within thirty (30) days of receipt. The Monitor and Respondent shall submit any disputes about invoices to the Commission for assistance in resolving such disputes.

2.3 To the extent available, Respondent will provide the Monitor with temporary workspace and access to office equipment owned or used by Respondent at sites the Monitor is required to visit in order to fulfill its obligations under this Agreement. Monitor agrees to

comply with all of Respondents' safety and security regulations, instructions and procedures while at Respondents' sites.

ARTICLE III

3.1 Monitor's Liabilities and Indemnification. Respondent shall indemnify the Monitor and hold Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation 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 gross negligence, willful or wanton acts, or bad faith by Monitor. The Monitor's maximum liability to Respondents relating to services rendered in accordance with this Agreement (regardless of form of action, whether in contract, statutory law, or tort) shall be limited to an amount equal to the total sum of the fees paid to the Monitor by the Respondent. Any claim arising from this Agreement that Respondents may have against the Monitor must be brought no later than one (1) year following the termination or expiration of this Agreement. In the performance of its duties under this Agreement, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his own business affairs. The Monitor shall not be liable for any delays or other failures to perform resulting from circumstances or causes beyond its reasonable control, including, without limitation, fire or other casualty, act of God, strike or labor dispute, war or other violence, or any law, order or requirement of any governmental agency or authority. The Monitor warrants that it will perform its obligations hereunder in good faith. R. Shermer & Company disclaims other warranties, expressed or implied, other than those expressly agreed to in writing between the Parties.

3.2 Monitor's Removal. If the Commission determines that Monitor ceases to act or fail to act diligently and consistent with the purpose of the Orders, Respondent shall terminate this Agreement and appoint a substitute Monitor, subject to Commission approval and consistent with the Orders.

3.3 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission, other than Respondent obligations under Confidential Exhibit A and the confidentiality provisions herein.

3.4 Termination: This Agreement shall terminate the earlier of: (a) thirty (30) days following the termination date set forth in the applicable Order; (b) Respondent's receipt of written notice from the Commission that the Commission has determined that Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; (c) with at least thirty (30) days advance notice to be provided by Monitor to Respondent and to the Commission, upon resignation of the Monitor; or (d) when FMCH's last obligation under the Orders and the Relevant Agreements that pertains to the Monitors' service has been fully performed; provided, however, that the Commission may require that FMCH extend this Agreement or enter into an additional agreement with Monitor as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force.

3.5 Conflicts of Interest: If Monitor becomes aware during the term of this Agreement that it has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Monitor of any of its duties under this Agreement, Monitor shall promptly inform Respondent and the Commission of any such conflict.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first above written.

MONITOR

R. SHERMER & COMPANY



NAME: Richard A. Shermer, President

RESPONDENT

FRESENIUS MEDICAL CARE HOLDINGS, INC.

BY: 
NAME: DOUGLAS G. KOST
TITLE: SENIOR VICE PRESIDENT

CONFIDENTIAL EXHIBIT A
FORM OF CONFIDENTIALITY AGREEMENTS

CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (this "Agreement") is made this 21st day of January, 2012, by and between FRESNIUS MEDICAL CARE HOLDINGS, INC., a New York corporation ("FMCH"), and RICHARD A. SHERMER of R. SHERMER & COMPANY ("Monitor") for the purpose of maintaining the Material Confidential Information (as defined below) of FMCH which the Monitor receives, prior to and from time to time after, the date of this Agreement from FMCH in connection with the Monitor's performance of its obligations under the Monitor Agreement (as defined below). Acknowledging the receipt of good and adequate consideration and intending to be legally bound, the parties agree as follows:

1. Definitions.
 - a. "Material Confidential Information" means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to FMCH or FMCH'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.
 - b. "Monitor Agreement" means the Monitor Agreement, dated as of January 21, 2012, by and between FMCH and the Monitor.
 - c. Capitalized terms used but not defined herein have the meanings given in the Monitor Agreement.
2. The Monitor acknowledges that it has been informed of the confidential and proprietary nature of FMCH's Material Confidential Information. The Monitor agrees to be bound by the terms and conditions of the Orders that are related to Material Confidential Information, and to retain and maintain all Material Confidential Information it receives, directly or indirectly, from FMCH (including from any of its consultants, accountants, attorneys and other representatives) on a confidential basis, except as is permitted or required by the Orders. The Monitor may disclose Material Confidential Information only to persons employed by or working with the Monitor under the Monitor Agreement who have a need to know (subject to the following sentence) and to persons employed at the Commission, in each case in connection with the Monitor's performance of its obligations under the Monitor Agreement, and as otherwise permitted by FMCH in writing. The Monitor shall require any person employed by or working with the Monitor under the Monitor Agreement to execute a confidentiality agreement that requires the same standard of care and obligations of confidentiality to which the Monitor must adhere under this Agreement. Without limiting the generality of the foregoing, the Monitor shall not disclose the Material Confidential Information it receives directly or indirectly from FMCH to the Other Parties. The Monitor shall use the same degree of care as it uses to protect the confidentiality of its own confidential information of like nature, but no less than a reasonable degree of care, to maintain in confidence the Material Confidential Information of FMCH. The Monitor shall store the Material Confidential Information separate from the confidential information of

any other Persons (including the Other Parties) and implement processes and procedures to ensure that the Material Confidential Information is not accessible by any other Persons, except as otherwise expressly contemplated by this Section 2. The Monitor shall be entitled to provide reports containing Material Confidential Information to persons employed at the Commission, which reports may be shared between and among persons employed at the Commission.

3. The Monitor shall use Material Confidential Information solely as necessary to perform its obligations under the Monitor Agreement. Material Confidential Information of FMCH may not be copied, reproduced or translated into another format or language, or decompiled, reverse engineered or transmitted without FMCH's prior written consent, except in connection with the performance by the Monitor of its obligations under the Monitor Agreement.
4. Material Confidential Information shall not include any information that:
 - (i) is at the time of disclosure, or thereafter becomes, through a source other than the Monitor, publicly known;
 - (ii) is subsequently learned from a third party (other than the Other Parties) that does not impose an obligation of confidentiality on the Monitor;
 - (iii) was known to the Monitor at the time of disclosure; or
 - (iv) is developed independently by the Monitor.
5. The nondisclosure obligations set forth herein shall survive for a period of five (5) years after the termination of the Monitor Agreement.
6. The Monitor acknowledges and agrees that the Material Confidential Information received from FMCH is and shall remain, *vis-a-vis* the Monitor, the sole and exclusive property of FMCH.
7. The Monitor acknowledges that monetary remedies will be inadequate to protect Material Confidential Information and that injunctive relief will be appropriate to protect such rights. The Monitor acknowledges that FMCH will be irreparably damaged to the extent that any of the terms of this Agreement are violated and agrees that such terms shall be enforceable through (i) issuance of an injunction restraining the unauthorized copying, duplication, use, dissemination or disclosure of any Material Confidential Information, or (ii) any other legal or equitable remedies, which shall be cumulative with and not exclusive of any other remedy or remedies.
8. All Material Confidential Information transmitted hereunder, and, except as otherwise required by the Commission, all copies thereof, shall be promptly returned to FMCH upon written request, or destroyed at FMCH's option, except that the Monitor may upon written notice to FMCH retain a single complete copy of the Material Confidential Information solely for use in connection with the prosecution or defense of any dispute between FMCH and the Monitor arising from this Agreement.

9. This Agreement is the entire agreement among the parties relating to the subject matter hereof and supersedes all prior agreements, written or oral. This Agreement may be modified only by a writing signed by both parties. Neither this Agreement nor any right granted hereunder shall be assignable or otherwise transferable. If any term or provision of this Agreement shall be found to be illegal or unenforceable, then, notwithstanding that term, all other terms of this Agreement shall remain in full force and effect.
10. The obligation of the Monitor to maintain the confidentiality of Material Confidential Information shall not apply to any information that (a) is required to be disclosed by law, subpoena or other process, or (b) is disclosed in connection with any dispute, claim or action between the parties; provided that, in the case of clause (a), the Monitor shall promptly notify FMCH and tender to it, if it so elects, the defense of such demand. If requested by FMCH, the Monitor shall cooperate (at the expense of FMCH) in the defense of the demand.
11. Nothing contained in this Agreement, nor any exchange of information hereunder, shall grant or confer upon any party any right, license or authority in or to the information exchanged. Nothing contained in this Agreement shall be construed as granting or conferring any rights to the Monitor by license or otherwise, expressly, impliedly, or otherwise, for any trademark, copyright, patent or other intellectual property, or any invention, discovery or improvement made, conceived or acquired directly or indirectly by FMCH or any of its affiliates prior to or after the date of this Agreement.
12. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives as of the date first set forth above.

R. SHERMER & COMPANY



BY: _____

NAME: _____

Richard A. Shermer, President

FRESENIUS MEDICAL CARE HOLDINGS, INC.

BY: 

NAME: DOUGLAS G. COST

TITLE: SENIOR VICE PRESIDENT

CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (this "Agreement") is made this ____ day of January, 2012, by and between [divestiture clinic purchaser], a [Delaware limited liability company] ("PURCHASER"), and RICHARD A. SHERMER of R. SHERMER & COMPANY ("Monitor") for the purpose of maintaining the Material Confidential Information (as defined below) of PURCHASER which the Monitor receives, prior to and from time to time after, the date of this Agreement from PURCHASER in connection with the Monitor's performance of its obligations under the Monitor Agreement (as defined below). Acknowledging the receipt of good and adequate consideration and intending to be legally bound, the parties agree as follows:

1. Definitions.
 - a. "FMCH" means Fresenius Medical Care Holdings, Inc., a New York corporation.
 - b. "Material Confidential Information" means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to PURCHASER or PURCHASER'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.
 - c. "Monitor Agreement" means the Monitor Agreement, dated as of January 21, 2012, by and between FMCH and the Monitor.
 - c. Capitalized terms used but not defined herein have the meanings given in the Monitor Agreement.
2. The Monitor acknowledges that it has been informed of the confidential and proprietary nature of PURCHASER's Material Confidential Information. The Monitor agrees to be bound by the terms and conditions of the Orders that are related to Material Confidential Information, and to retain and maintain all Material Confidential Information it receives, directly or indirectly, from PURCHASER (including from any of its consultants, accountants, attorneys and other representatives) on a confidential basis, except as is permitted or required by the Orders. The Monitor may disclose Material Confidential Information only to persons employed by or working with the Monitor under the Monitor Agreement who have a need to know (subject to the following sentence) and to persons employed at the Commission, in each case in connection with the Monitor's performance of its obligations under the Monitor Agreement, and as otherwise permitted by PURCHASER in writing. The Monitor shall require any person employed by or working with the Monitor under the Monitor Agreement to execute a confidentiality agreement that requires the same standard of care and obligations of confidentiality to which the Monitor must adhere under this Agreement. Without limiting the generality of the foregoing, the Monitor shall not disclose the Material Confidential Information it receives directly or indirectly from PURCHASER to FMCH. The Monitor shall use the same degree of care as it uses to protect the confidentiality of its own confidential information of like nature, but no less than a reasonable degree of care, to maintain in confidence the Material

Confidential Information of PURCHASER. The Monitor shall store the Material Confidential Information separate from the confidential information of any other Persons (including FMCH) and implement processes and procedures to ensure that the Material Confidential Information is not accessible by any other Persons, except as otherwise expressly contemplated by this Section 2. The Monitor shall be entitled to provide reports containing Material Confidential Information to persons employed at the Commission, which reports may be shared between and among persons employed at the Commission.

3. The Monitor shall use Material Confidential Information solely as necessary to perform its obligations under the Monitor Agreement. Material Confidential Information of PURCHASER may not be copied, reproduced or translated into another format or language, or decompiled, reverse engineered or transmitted without PURCHASER's prior written consent, except in connection with the performance by the Monitor of its obligations under the Monitor Agreement.
4. Material Confidential Information shall not include any information that:
 - (i) is at the time of disclosure, or thereafter becomes, through a source other than the Monitor, publicly known;
 - (ii) is subsequently learned from a third party (other than FMCH) that does not impose an obligation of confidentiality on the Monitor;
 - (iii) was known to the Monitor at the time of disclosure; or
 - (iv) is developed independently by the Monitor.
5. The nondisclosure obligations set forth herein shall survive for a period of five (5) years after the termination of the Monitor Agreement.
6. The Monitor acknowledges and agrees that the Material Confidential Information received from PURCHASER is and shall remain, *vis-a-vis* the Monitor, the sole and exclusive property of PURCHASER.
7. The Monitor acknowledges that monetary remedies will be inadequate to protect Material Confidential Information and that injunctive relief will be appropriate to protect such rights. The Monitor acknowledges that PURCHASER will be irreparably damaged to the extent that any of the terms of this Agreement are violated and agrees that such terms shall be enforceable through (i) issuance of an injunction restraining the unauthorized copying, duplication, use, dissemination or disclosure of any Material Confidential Information, or (ii) any other legal or equitable remedies, which shall be cumulative with and not exclusive of any other remedy or remedies.
8. All Material Confidential Information transmitted hereunder, and, except as otherwise required by the Commission, all copies thereof, shall be promptly returned to PURCHASER upon written request, or destroyed at PURCHASER's option, except that the Monitor may upon written notice to PURCHASER retain a single complete copy of the Material Confidential Information solely for use in connection with the prosecution or

defense of any dispute between PURCHASER and the Monitor arising from this Agreement.

9. This Agreement is the entire agreement among the parties relating to the subject matter hereof and supersedes all prior agreements, written or oral. This Agreement may be modified only by a writing signed by both parties. Neither this Agreement nor any right granted hereunder shall be assignable or otherwise transferable. If any term or provision of this Agreement shall be found to be illegal or unenforceable, then, notwithstanding that term, all other terms of this Agreement shall remain in full force and effect.
10. The obligation of the Monitor to maintain the confidentiality of Material Confidential Information shall not apply to any information that (a) is required to be disclosed by law, subpoena or other process, or (b) is disclosed in connection with any dispute, claim or action between the parties; provided that, in the case of clause (a), the Monitor shall promptly notify PURCHASER and tender to it, if it so elects, the defense of such demand. If requested by PURCHASER, the Monitor shall cooperate (at the expense of PURCHASER) in the defense of the demand.
11. Nothing contained in this Agreement, nor any exchange of information hereunder, shall grant or confer upon any party any right, license or authority in or to the information exchanged. Nothing contained in this Agreement shall be construed as granting or conferring any rights to the Monitor by license or otherwise, expressly, impliedly, or otherwise, for any trademark, copyright, patent or other intellectual property, or any invention, discovery or improvement made, conceived or acquired directly or indirectly by PURCHASER or any of its affiliates prior to or after the date of this Agreement.
12. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives as of the date first set forth above.

R. SHERMER & COMPANY

BY: _____

NAME: _____

Richard A. Shermer, President

PURCHASER

BY: _____

NAME: _____

TITLE: _____