

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Joseph J. Simons, Chairman  
Noah Joshua Phillips  
Rohit Chopra  
Rebecca Kelly Slaughter  
Christine S. Wilson

_____	)	
<b>In the Matter of</b>	)	
	)	
<b>FRESENIUS MEDICAL CARE AG &amp; CO. KGaA</b>	)	
<b>a partnership limited by shares;</b>	)	
	)	<b>DOCKET NO. C-4671</b>
<b>and</b>	)	
	)	
<b>NXSTAGE MEDICAL, INC.,</b>	)	
<b>a corporation.</b>	)	
_____	)	

**ORDER TO MAINTAIN ASSETS**  
**[Public Record Version]**

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent Fresenius Medical Care AG & CO. KGaA (“Fresenius”) of Respondent NxStage Medical, Inc. (“NxStage”) (collectively, “Respondents”). The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Order” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true; (3)

waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place 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 issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Fresenius is a partnership limited by shares, organized, existing, and doing business under and by virtue of the laws of Germany with its principal executive offices located at Else Kroener-Strasse 1, 61352 Bad Homburg, Germany, and its United States address for service of process and the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Fresenius Medical Care Holdings, Inc., 920 Winter Street, Waltham, MA 02451-1457.
2. Respondent NxStage is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its corporate office and principal place of business located at 350 Merrimack, Lawrence, MA 01843.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

#### **I.**

**IT IS HEREBY ORDERED** that, as used in this Order to Maintain Assets, the following definitions shall apply (to the extent any capitalized term appearing in this Order to Maintain Assets is not defined below, the term shall be defined as that term is defined in the Decision and Order contained in the Consent Agreement):

- A. "Decision and Order" means the:
  1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and
  2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- B. "Orders" means the Decision and Order in this matter and this Order to Maintain Assets.

## II.

**IT IS FURTHER ORDERED** that from the date this Order to Maintain Assets becomes final and effective:

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Hemodialysis Bloodline Assets, and shall not cause the wasting or deterioration of any of the Hemodialysis Bloodline Assets. Respondents shall cause the Hemodialysis Bloodline Assets to be operated in a manner consistent with applicable laws, and they shall not sell, transfer, encumber, or otherwise impair the viability, marketability, or competitiveness of the Hemodialysis Bloodline Assets.
- B. Respondents shall conduct or cause to be conducted the Hemodialysis Bloodline Business in the regular and ordinary course of business, in accordance with past practice (including regular repair and maintenance efforts) and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Hemodialysis Bloodline Business in the regular and ordinary course of business, in accordance with past practice, making all payments required to be paid under any contract or lease, and providing sufficient working capital to operate at least at current rates of operation to meet all capital calls with respect to the Hemodialysis Bloodline Business.
- C. Respondents shall not terminate the operation of any of the Hemodialysis Bloodline Assets and shall maintain the books and Records of the Hemodialysis Bloodline Business.
- D. Respondents shall continue to maintain the operation, inspection, and maintenance schedule of each of the Hemodialysis Bloodline Assets at levels and intervals in the regular and ordinary course of business, in accordance with past practice, including: (1) providing funds sufficient to perform all routine maintenance and maintenance necessary to, and all replacements of, any assets related to the operation of the Hemodialysis Bloodline Assets; (2) providing support services at least at the level as was being provided as of the date the Consent Agreement was signed by Respondents; and (3) maintaining, and not terminating or permitting the lapse of, any permit or license necessary for the operation of any Hemodialysis Bloodline Asset.
- E. Respondents shall maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Hemodialysis Bloodline Business, including:

1. Providing each employee of the Hemodialysis Bloodline Business with reasonable financial incentives, including continuation of all employee benefits and regularly scheduled raises and bonuses, to continue in his or her position pending divestiture of the Hemodialysis Bloodline Assets;
  2. Using reasonable best efforts to retain employees;
  3. When vacancies occur, replacing the employees in the regular and ordinary course of business, in accordance with past practice; and
  4. Not transferring any employees from the Hemodialysis Bloodline Business.
- F. The purposes of this Paragraph II is to: (1) preserve the Hemodialysis Bloodline Assets as a viable, competitive, and ongoing business until the assets are transferred to Acquirer; (2) prevent interim harm to competition pending the relevant divestitures and other relief; and (3) help remedy any anticompetitive effects of the Acquisition as alleged in the Commission's Complaint.

### **III.**

**IT IS FURTHER ORDERED** that:

- A. With respect to any Confidential Information received or maintained by Respondents relating to the Hemodialysis Bloodline Business, Respondents shall (1) not disclose such Confidential Information, including to Respondents' employees; and (2) not use such Confidential Information for any reason or purpose; *provided, however*, that Respondents may disclose or use such Confidential Information in the course of:
1. Performing their obligations or as permitted under the Orders or any Divestiture Agreement; or
  2. Complying with financial, regulatory, or other legal obligations; obtaining legal advice; prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Hemodialysis Bloodline Assets; or as required by law.
- B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph III.A. of this Order to Maintain Assets, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph III.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

- C. Respondents shall enforce the terms of this Paragraph III as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph III, including implementation of access and data controls, training of their employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

#### IV.

**IT IS FURTHER ORDERED** that:

- A. Richard Shermer of R. Shermer & Co. shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix A (“Monitor Agreement”) and Non-Public Appendix B (“Monitor Compensation”). The Monitor is appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders.
- B. No later than one day after the Acquisition Date, Respondents shall transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities pursuant to the Orders and consistent with the purposes of the Orders.
- C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
  - 1. The Monitor shall (i) monitor Respondents’ compliance with the obligations set forth in the Orders, (ii) act in consultation with the Commission or its staff, and (iii) serve as an independent third party and not as an employee or agent of the Respondent or of the Commission;
  - 2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents’ personnel, books, records, documents, and facilities relating to compliance with the Orders or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to the Orders;
  - 3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor’s duties and responsibilities;

4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his 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 the Monitor's gross negligence or willful misconduct; and
  5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- D. The Monitor shall report in writing to the Commission (i) every 30 days after the Acquisition Date for a period of one year, (ii) every 90 days thereafter until Respondents have completed all obligations required by Paragraph II of this Order to Maintain Assets (including a final report when Respondents have completed all such obligations), and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.
- provided, however*, that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the reports required to be submitted by the Monitor pursuant the Decision and Order.
- E. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:
1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 5 days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
  2. Respondents shall, no later than 5 days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights,

powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to the Orders on the same terms and conditions as provided in this Paragraph IV.

- G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

**V.**

**IT IS FURTHER ORDERED** that within 30 days after the date this Order to Maintain Assets is issued by the Commission, and every 30 days thereafter until Respondents have fully complied with this Order to Maintain Assets, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all the provisions of this Order to Maintain Assets.

- A. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order to Maintain Assets. Conclusory statements that Respondents have complied with their obligations under this Order to Maintain Assets are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a detailed description of (i) all efforts undertaken by Respondents related to the maintenance of the Hemodialysis Bloodline Assets, and (ii) the transitional services being provided by the relevant Respondent to the Acquirer.

*provided, however,* that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the reports required to be submitted by Respondents pursuant the Decision and Order.

- B. Each compliance report shall be verified in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at [ElectronicFilings@ftc.gov](mailto:ElectronicFilings@ftc.gov) and to the Compliance Division at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

## VI.

**IT IS FURTHER ORDERED** that Respondent Fresenius shall notify the Commission at least 30 days prior to:

- A. Any proposed dissolution of Respondent Fresenius Medical Care AG & Co. KGaA;
- B. Any proposed acquisition, merger, or consolidation of Respondent Fresenius Medical Care AG & Co. KGaA; or
- C. Any other change in Respondent Fresenius Medical Care AG & Co. KGaA, including assignment or the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

## VII.

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, upon written request and five days' notice to the relevant Respondent, made to its principal place of business as identified in this Order to Maintain Assets, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of Respondents related to compliance with this Order, which copying services shall be provided by Respondents at the request of the authorized representative of the Commission and at the expense of Respondents; and
- B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

## VIII.

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. The later of:

1. the day after the divestitures pursuant to Paragraph II of the Decision and Order are accomplished, or
2. three (3) days after the related Decision and Order becomes final.

By the Commission, Commissioners Chopra and Slaughter dissenting.

April J. Tabor  
Acting Secretary

SEAL:  
ISSUED: February 19, 2019

**Appendix A**  
**Monitor Agreement**

**Non-Public  
Appendix B**

**Monitor Compensation Agreement**

**[Redacted From the Public Record Version, But Incorporated By Reference]**