UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
DaVita Inc.,	)	**DECISION AND ORDER**
a corporation, and	)	**Docket No. C-**
Total Renal Care, Inc.,	)	
a corporation.	)	

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Total Renal Care, Inc., a wholly owned subsidiary of Respondent DaVita Inc. ("Respondents"), of certain assets comprising dialysis clinics owned and operated by the University of Utah. 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 (collectively "Acts").

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("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 Consent 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 considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly

considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent DaVita Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at 2000 16th Street, Denver, Colorado 80202.

2. Respondent Total Renal Care, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of California, with its executive offices and principal place of business located at 601 Hawaii Street, Segundo, California 90245.

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3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER

I. Definitions

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "DaVita" or "Respondent" means DaVita Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, including Total Renal Care, Inc., partnerships, divisions, groups, and affiliates controlled by DaVita Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Total Renal Care" or "Respondent" means Total Renal Care, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Total Renal Care, Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "University of Utah" means the public research University of the State of Utah, with its office and principal place of business located at 201 Presidents Circle, Salt Lake City, Utah 84112-9018.

D. "Respondents" means both DaVita and Total Renal Care.

E. "Commission" means the Federal Trade Commission.

F. "Acquirer" means: (1) Sanderling or (2) any other Person that acquires the Divestiture Clinic Assets pursuant to this Order.

G. "Acquisition" means the proposed acquisition described in the Asset Purchase Agreement dated September 24, 2021, between Total Renal Care, Inc., a corporation owned by DaVita Inc., and the University of Utah.

H. "Acquisition Date" means the date the Acquisition is consummated.

I. "Business Information" means books, records, data, and information, wherever located and however stored, including electronic medical records, documents, written information, graphic materials, and data and information in electronic format. Business Information includes records and information relating to sales, marketing, advertising, personnel, accounting, business strategy, information technology systems, customers, suppliers, research and development, registrations, licenses, permits (to the extent transferable), and operations. For clarity, Business Information includes rights and control of any owner of a Divestiture Clinic over information and material provided to any other Person.

J. "Clinic" means a facility that provides outpatient hemodialysis or peritoneal dialysis services to patients suffering from kidney disease.

K. "Clinic Physician Contract" means all agreements to provide the services of a Physician to a Clinic, regardless of whether any of the agreements are with a Physician or with a medical group, including, agreements for the services of a medical director for the Clinic and "joinder" agreements with Physicians in the same medical practice as a medical director of the Clinic.

L. "Confidential Business Information" means all Business Information not in the public domain that is related to or used in connection with the Divestiture Clinic Assets or the Dialysis Business of any Divestiture Clinic, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.

M. "Consent" means any approval, consent, ratification, waiver, or other authorization.

N. "Contract" means an agreement, contract, mutual understanding, arrangement, license agreement, lease, consensual obligation, commitment, promise and undertaking (whether written or oral and whether express or implied), whether or not legally binding.

O. "Dialysis Business" means all activities relating to the business of a Clinic, including:

1. Attracting patients to such Clinic for dialysis services;

2. Providing dialysis services to patients of such Clinic, and dealing with their physicians, including, services relating to hemodialysis and peritoneal dialysis;

3. Providing medical products to patients of such Clinic;

4. Maintaining the equipment on the premises of such Clinic, including, the equipment used in providing dialysis services to patients (which machines shall be delivered to the Acquirer in a condition that meets or exceeds all current operational, functional, and productive capabilities required to perform dialysis);

5. Purchasing supplies and equipment for such Clinic;

6. Negotiating leases for the premises of such Clinic;

7. Providing counseling and support services to patients receiving products or services from such Clinic;

8. Contracting for the services of medical directors for such Clinic;

9. Dealing with Payors, including, negotiating contracts with such Payors and submitting claims to such Payors; and

10. Obtaining or maintaining Governmental Permits relating to such Clinic or otherwise dealing with government entities that regulate operations of the Clinic.

P. "Direct Cost" means a cost not to exceed the actual cost of labor, materials, travel, and other expenditures. The cost of any labor included in Direct Cost shall not exceed the then-current average hourly wage rate for the employee providing such labor.

Q. "Divestiture Agreement" means

1. Asset Purchase Agreement by and between Sanderling and Total Renal Care, dated September 24, 2021, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Order as Nonpublic Appendix I; or

2. Any other agreement between a Respondent or the Divestiture Trustee and an Acquirer to purchase the Divestiture Clinic Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto.

R. "Divestiture Clinic" means any one, or all, of the following:

1. University of Utah's Provo, UT Clinic, located at 1675 N Freedom Boulevard, Suite 15, Provo, Utah, 84604;

2. University of Utah's Payson, UT Clinic, located at 15 S 1000 E, Suite 50, Payson, Utah, 84651; and

3. University of Utah's American Fork, UT Clinic, located at 1159 E 200 N, Suite 150, American Fork, Utah, 84003.

S. "Divestiture Clinic Assets" means the rights, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible of every kind and description, wherever located, used in or relating to the Dialysis Business of each Divestiture Clinic, other than the Excluded Assets, including:

1. All rights under the Clinic's Physician Contracts;

2. All rights to all of the leasehold interest in the real property at which the Divestiture Clinic is located and the building and improvements thereon (including rights in any related parking facility or lot);

3. At least a three-week supply of all general medical products regularly used in the conduct of the Dialysis Business at the Divestiture Clinic that are intended for one-time or temporary use (*e.g.*, gloves, needles, paper products, syringes, and wipes) and any other medical supplies, including dialysis supplies and pharmaceuticals including erythropoietin;

4. At least a three-week supply of janitorial supplies, including such supplies as are required to prevent exposure to potentially infectious materials;

5. All Fixtures and Equipment;

6. All computers and computer equipment, printers, software and databases, routers, servers, switches and time clocks and documentation relating to any of the foregoing used or held for use in the operation of the Dialysis Business of each of the Divestiture Clinics (all cabling within each facility shall remain in place), which shall also include access to any computer databases or patient information connected or related to each Divestiture Clinic held outside the respective Divestiture Clinic;

7. All Intellectual Property;

8. All Business Information;

9. Respondents' Medicare and Medicaid provider numbers, to the extent transferable;

10. All permits and licenses, to the extent transferable; and

11. Any other assets that are used in, or necessary for, the Dialysis Business of a Divestiture Clinic.

Provided, however, that "Divestiture Clinic Assets" do not include Excluded Assets.

T. "Divestiture Clinic Employee" means any full-time, part-time, or contract individual employed in the Dialysis Business of the Divestiture Clinic, as of September 1, 2020.

U. "Divestiture Date" means the date on which Respondents (or the Divestiture Trustee) close on a transaction to divest the Divestiture Clinic Assets.

V. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Section IX of this Order.

W. "Employee Information" means for each Divestiture Clinic Employee, to the extent permitted by law, the following information summarizing the employment history of each employee that includes:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondent's last fiscal year, and current target or guaranteed bonus, if any;

5. Written performance reviews for the past three years, if any;

6. Employment status (*i.e.,* active or on leave or disability; full-time or part-time);

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

X. "Excluded Assets" means those assets listed on Appendix II.

Y. "Fixtures and Equipment" means all furniture, fixtures, furnishings, machinery (including dialysis machines), equipment, supplies and other tangible personal property used or held

for use in the operation of the Dialysis Business of each of the Divestiture Clinics respectively, or if leased, the leasehold interest therein.

Z. "Governmental Permit" means all Consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any governmental entity necessary to effect the complete transfer and divestiture of the Divestiture Clinic Assets to the Acquirer and for such Acquirer to operate the Divestiture Clinic.

AA. "Intellectual Property" means intellectual property of any kind including patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, written and unwritten know-how, trade secrets, and proprietary information.

BB. "License" means a royalty-free, fully paid-up, perpetual, irrevocable, transferable, and sub-licensable license and such tangible embodiments of the licensed rights (including physical and electronic copies) as may be necessary or appropriate to enable the licensee to use the rights.

CC. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to the Orders.

DD. "Orders" means this Order and the Order to Maintain Assets entered in this action.

EE. "Payor" means any Person that administers, pays, or insures health or medical expenses on behalf of beneficiaries or recipients including the following: government entities (*e.g.*, Medicare or Medicaid), health insurance companies; preferred provider organizations; point of service organizations; prepaid hospital, medical, or other health service plans; healthcare maintenance organizations; employers or other persons providing or administering self-insured health benefits programs; and patients who purchase medical goods or services for themselves.

FF. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture, or other entity or a governmental body.

GG. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

HH. "Policies and Procedures" means the dialysis policies and procedures manual, whether in hard copy or electronic copy, that have been in effect at the Divestiture Clinic.

II. "Real Property" means the real property on which, or in which, any Divestiture Clinic is located, including real property used for parking and for other functions related to the Divestiture Clinic.

JJ. "Sanderling" means (1) Sanderling Renal Services-USA LLC, a limited liability company organized, existing and doing business under the laws of the State of Delaware with its executive offices and principal place of business located at 511 Union Street, #1800, Nashville, Tennessee 37219, (2) SRS-Utah, LLC, a limited liability company organized, existing and doing business under the laws of the State of Delaware with its executive offices and principal place of business located at 511 Union Street, #1800, Nashville, Tennessee 37219, and (3) any Person controlled by or under common control of Sanderling Renal Services-USA LLC or SRS-Utah, LLC.

KK. "Transition Assistance" means technical services, personnel, assistance, training, and other logistical, administrative, and other transitional support as required by the Acquirer to facilitate the transfer of the Divestiture Clinic Assets to the Acquirer, including training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, general medical products supply, purchasing, quality control, transfer of information technology and related systems, maintenance and repair of facilities and Fixtures and Equipment, use of any name or brand used in the Dialysis Business of the respective Divestiture Clinic for transitional purposes, Governmental Permits, regulatory compliance, sales and marketing, patient services, and supply chain management and patient transfer logistics.

LL. "University of Utah Medical Protocols" means medical protocols promulgated by the University of Utah, whether in hard copy or electronic copy, that are or have been in effect at a Divestiture Clinic, *provided, however*, "University of Utah Medical Protocols" does not mean medical protocols adopted or promulgated, at any time, by any Physician or by any Acquirer, even if such medical protocols are identical, in whole or in part, to medical protocols promulgated by the University of Utah.

II. Divestiture

IT IS FURTHER ORDERED that:

A. No later than 10 days after the Acquisition Date, Respondents shall divest the Divestiture Clinic Assets, absolutely and in good faith, as an ongoing business, to Sanderling.

Provided, however, that, if within 12 months after the date the Commission issues this Order, the Commission determines, in consultation with the Acquirer and the Monitor (if one has been appointed), the Acquirer needs one or more of the Excluded Assets to operate the Dialysis Business of the Divestiture Clinics in a manner that achieves the purpose of this Order, Respondents shall divest or license, absolutely and in good faith, such needed Excluded Assets to the Acquirer.

B. If Respondents have divested the Divestiture Clinic Assets to Sanderling prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. Sanderling is not acceptable as the acquirer of the Divestiture Clinic Assets, then Respondents shall immediately rescind the Divestiture Agreement, and shall divest the Divestiture Clinic Assets no later than 120 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture of the Divestiture Clinic Assets to Sanderling was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Divestiture Clinic Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

C. Respondents shall assist the Acquirer to conduct a due diligence investigation of the Divestiture Clinic Assets that the Acquirer seeks to purchase, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process, and affording the Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts, and Business Information, with such rights of access to be exercised in a manner that does not unreasonably interfere with the operations of Respondents.

D. Respondents shall grant to Acquirer, absolutely and in good faith, a royalty-free, fully paid-up, perpetual, irrevocable, transferable, and sub-licensable license and such tangible embodiments of the licensed rights (including physical and electronic copies) as may be necessary or appropriate to enable the licensee to use the rights, for the use, without any limitation, of all Policies and Procedures related to the Divestiture Clinics, including the University of Utah Medical Protocols for the Divestiture Clinics.

E. Respondents shall not consummate the Acquisition until they have obtained for all the Divestiture Clinics:

1. All approvals for the assignment to the Acquirer of the rights, title, and interest to each lease for Real Property of each Divestiture Clinic;

2. All approvals for the assignment to the Acquirer of the Clinic Physician Contracts related to each Divestiture Clinic; and

3. All Governmental Permits.

F. Respondents shall:

1. Place no restrictions on the use by the Acquirer of any of the Divestiture Clinic Assets to be divested to such Acquirer, or interfere with or otherwise attempt to interfere with any Acquirer's use of any of the Divestiture Clinic Assets to be divested to such Acquirer, including seeking or requesting the imposition of governmental restrictions on the Acquirer's business operations relating to the Divestiture Clinic Assets.

2. Assign to the Acquirer all of the Clinic Physician Contracts related to each Divestiture Clinic.

   Provided, however, that (i) if the Acquirer enters into a Clinic Physician Contract for a Divestiture Clinic before such Clinics are divested pursuant to Paragraph II.A of this Order, and (ii) the Acquirer certifies its receipt of such contract and attaches it as part of the Divestiture Agreement, then Respondents shall not be required to make the assignment for such Clinics as required by Section II.

3. With respect to all contracts included in the Divestiture Clinic Assets other than Clinic Physician Contracts, at the Acquirer's option and on the Divestiture Date of each Divestiture Clinic:

   a. if such contract can be assigned without third party approval, assign Respondents' rights under the contract to the Acquirer; and

   b. if such contract can be assigned to the Acquirer only with third party approval, assist and cooperate with the Acquirer in obtaining such third party approval and in assigning the contract to the Acquirer, or in obtaining a new contract.

G. For 2 years following the Divestiture Date, Respondents shall not solicit the business of any patient who received any goods or services from the Divestiture Clinics between September 1, 2020, and the Divestiture Date.

Provided, however, Respondents may (i) make general advertisements for the business of such patients including in newspapers, trade publications, websites, or other media not targeted specifically at such patients, and (ii) provide advertising and promotions directly to any patient that initiates discussions with, or makes a request to, any employee of Respondents.

III. Divestiture Agreement

IT IS FURTHERED ORDERED that:

A. Each Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of a Divestiture Agreement shall constitute a violation of this Order; *provided, however*, that no Divestiture Agreement shall limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transition Assistance

IT IS FURTHER ORDERED that:

A. At the option of the Acquirer, Respondents shall provide the Acquirer with Transition Assistance sufficient to (1) efficiently transfer the Divestiture Clinic Assets and the related Dialysis Business to the Acquirer, and (2) assist the Acquirer in operating the Divestiture Clinics in all material respects in the manner in which they were operated prior to the Acquisition.

B. Respondents shall provide such Transition Assistance:

1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost; and

3. For a period sufficient to meet the requirements of Section IV, which shall be, at the option of the Acquirer, the later of (1) up to one year after the Divestiture Date, or (2) the date the Acquirer has its own Centers for Medicare & Medicaid Service billing numbers for each of the Divestiture Clinic locations, unless the Acquirer terminates the provision of such Transition Assistance at an earlier date. *Provided however,* that upon the Acquirer's request, Respondents must file with the Commission a written request to extend the time period.

C. Respondents shall allow the Acquirer to terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.

D. Respondents shall not cease providing Transition Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents' breach of the Divestiture Agreement.

V. Employees

IT IS FURTHER ORDERED that:

A. Until 6 months after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Divestiture Clinic Assets to evaluate independently and offer employment to the Divestiture Clinic Employees.

B. Until 90 days after the Divestiture Date, Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Divestiture Clinic Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to meet outside the presence or hearing of any employee or agent of any Respondent with any of the Divestiture Clinic Employees, and to make offers of employment to any of the Divestiture Clinic Employees;

3. Remove any impediments within the control of Respondents that may deter Divestiture Clinic Employees from accepting employment with the Acquirer, including removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Divestiture Clinic Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Divestiture Clinic Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits while they are employed by Respondents;

5. Provide reasonable financial incentives for Divestiture Clinic Employees to

continue in their positions, and as may be necessary, to facilitate the employment of such Divestiture Clinic Employees by the Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Divestiture Clinic Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Divestiture Clinic Employee by the Acquirer.

C. Respondents shall not, for a period of 180 days following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Divestiture Clinic Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Divestiture Clinic Employees; or

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section V.

D. With respect to each Physician who has provided services to a Divestiture Clinic pursuant to any of the Clinic Physician Contracts in effect at any time during the 4 months preceding the Divestiture Date of the Divestiture Clinic ("Contract Physician"), Respondents shall not, for a period of 180 days, offer any incentive to the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group to decline to provide services to a Divestiture Clinic acquired by the Acquirer, and shall eliminate any confidentiality restrictions that would prevent the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group from using or transferring to the Acquirer any information related to the operation of a Divestiture Clinic.

E. Respondents:

1. Shall not enforce, directly or indirectly, any non-compete provision or agreement, and not enter into any new non-compete provision or agreement, with any Physician employed by the University of Utah, that limit the Physician's right to be a medical director at any Clinic owned or operated by a Person other than the Respondents within the State of Utah; *provided, however*, Respondents may require, directly or indirectly, any University of Utah nephrologist serving under a Respondent's Clinic Physician Contract at a dialysis clinic operated by Respondents to abide by a non-compete provision or agreement effective solely to restrict such nephrologist from simultaneously being a medical director at a clinic

not operated by Respondents; and

2. Shall give each Physician affected by Paragraph V.E.1 written notice of Paragraph V.E.1. Such notice shall include the contents of Paragraph V.E.1 and a description of its terms, including notice that Respondents cannot enforce any non-compete that prevents the Physician from serving as a medical director, at any time and without penalty, at a Clinic owned or operated by a Person other than the Respondents except as provided above, in Paragraph V.E.1.

F. Respondents shall not enter into any agreement with the Acquirer that restricts the Acquirer from soliciting Respondents' employees for employment at the Acquirer.

VI. Asset Maintenance

IT IS FURTHER ORDERED that until the Divestiture Clinic Assets have been fully transferred to the Acquirer, Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that the Divestiture Clinic Assets and Divestiture Clinics are operated and maintained in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Divestiture Clinic Assets and Divestiture Clinics, to minimize any risk of loss of competitive potential of the Divestiture Clinic Assets and Divestiture Clinics, to operate the Divestiture Clinic Assets and Divestiture Clinics in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Clinic Assets and Divestiture Clinics, except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Clinic Assets and Divestiture Clinics (other than in the manner prescribed in the Orders), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Clinic Assets and Divestiture Clinics; and

B. Not terminate the Dialysis Business of the Divestiture Clinics, and shall conduct or cause to be conducted the Dialysis Business of the Divestiture Clinics in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Divestiture Clinic Assets and Divestiture Clinics, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Divestiture Clinics.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Divestiture Clinic Assets and consistent with the purposes of the Orders.

VII. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall (x) not disclose (including as to Respondents' employees), and (y) not use, for any reason or purpose, any Confidential Business Information received or maintained by Respondents, *provided, however,* that Respondents may disclose or use such Confidential Business Information in the course of:

1. Performing their obligations or as permitted under the Orders or any Divestiture Agreement; or

2. Complying with financial reporting requirements, historical record-keeping for audit purposes, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Divestiture Clinic Assets or Divestiture Clinics, or as required by law, rule or regulation.

B. Respondents shall only disclose Confidential Business Information to an employee or any other Person if disclosure is permitted in Paragraph VII.A and the employee or other Person has signed an agreement to maintain the confidentiality of such information and not violate the disclosure requirements of this Order.

C. Respondents shall enforce the terms of Section VII and take necessary actions to ensure that their employees or other Persons comply with its terms, including implementing access and data controls, training of employees, and taking other actions that Respondents would take to protect their own trade secrets and proprietary information.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Richard Shermer of R. Shermer & Co. as the Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

B. The Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of Section VIII or the Section relating to the Monitor in the Order to Maintain Assets ("Monitor Sections"), and to the extent any provision in the agreement varies

from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with the Orders on a schedule set by Commission staff and at any other time requested by Commission staff; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, and VI, and file a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents.

Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VIII.B; or (b) receives Commission approval.

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.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Clinic Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Section IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If

Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Not later than 10 days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section IX, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;

2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures can be achieved within a reasonable time, the divestiture period may be extended by the Commission,

   Provided, however, the Commission may extend the divestiture period only 2 times;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures under Section IX in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by this Order,

   Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

   Provided further, however, that Respondents shall select such person within 5 days of receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee'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 or willful misconduct by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Clinic Assets required to be divested by this Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee'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 Divestiture Trustee's duties.

G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in Section IX, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to Section IX.

H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

X. Prior Approval

IT IS FURTHERED ORDERED that Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Clinic, within the 6 months prior to the date of such proposed acquisition, within the State of Utah;

B. Acquire any ownership interest in any Person that owns any interest in or operates a Clinic within the State of Utah, *provided, however*, Respondents are not required to obtain the prior approval of the Commission if the only Clinic ownership interest is a Clinic owned or operated by Respondents within the State of Utah; and

C. Enter into any contract for Respondents to participate in the management or Dialysis Business of a Clinic located in within the State of Utah;

Provided however, that Respondents are not required to obtain the prior approval of the Commission for the Respondents' construction, opening, or participation in the management of new facilities.

Provided further, however, that if Respondents propose to acquire any ownership interest in any Person that owns any interest in or operates Clinics within both the State of Utah and other states, including if such an acquisition requires a Hart-Scott-Rodino premerger notification, this Section applies only to the Clinics within the State of Utah.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and each Divestiture Date no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the relevant Divestiture Date.

B. Respondents shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit:

   a. Interim compliance reports 30 days after the Order is issued, and every 60 days thereafter until Respondents have fully complied with the provisions of Sections II, IV, and VI;

   b. Annual compliance reports one year after the date this Order is issued, and annually for the next 9 years on the anniversary of that date; and

   c. Additional compliance reports as the Commission or its staff may request.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order. Conclusory statements that Respondents have complied with their obligations under this Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures

Respondents have implemented and plan to implement to comply with each paragraph of the Orders.

3. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Orders and provide copies of these documents to Commission staff upon request.

4. Respondents shall verify each compliance report 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 and to the Compliance Division at bccompliance@ftc.gov*; provided, however*, that Respondents need only file electronic copies of the interim reports required by Paragraph XI.B.1 (a). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XII. Change in Respondent

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

A. The proposed dissolution of DaVita Inc. or Total Renal Care Inc., respectively;

B. The proposed acquisition, merger, or consolidation of DaVita Inc. or Total Renal Care Inc., respectively; or

C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XIII. Access

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon 5 days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts,

correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and

B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and ensure the Acquirer can operate the Dialysis Business related to each of the Divestiture Clinics and Divestiture Clinic Assets at least equivalent in all material respects to the manner in which the Dialysis Business was operated prior to the Acquisition.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate 10 years from the date it is issued.

By the Commission.

April J. Tabor
Secretary

SEAL:

ISSUED:

NONPUBLIC APPENDIX I

Divestiture Agreements

APPENDIX II

Excluded Assets

1. All cash, cash equivalents, and short term investments of cash, securities and other instruments;

2. Accounts receivable and rights to bill (including all proceeds thereof) for all services delivered or performed and products provided in connection the business of a Clinic before a Clinic is divested to an Acquirer or which remain outstanding and unpaid before a Clinic is divested to an Acquirer;

3. General ledgers and accounting records of University of Utah;

4. Income tax refunds and tax deposits due to Respondents;

5. Unbilled costs and fees, recoupments, claims, demands, deposits, rebates, and bad debt recovery claims against any Payor including Medicare, arising before a Clinic is divested to an Acquirer;

6. Rights to the names "DaVita" and "University of Utah" and any variation of those names (unless otherwise licensed to an Acquirer pursuant to the Order) and other copyrights, trademarks, trade names, service marks, and logos relating to the "DaVita" and "University of Utah" names;

7. Insurance policies and all benefits and claims thereunder;

8. Rights in connection with and assets of University Health Plans;

9. Minute books, personnel records, (other than governing body minute books of a Clinic), tax returns, and other corporate books and records;

10. Any inter-company balances due to or from Respondents or its affiliates;

11. All employee benefits plans;

12. All writings and other items that are protected by the attorney-client privilege, the attorney work product doctrine or any other cognizable privilege or protection, except to the extent such information is necessary to the operation of a Clinic;

13. All DaVita or University of Utah software;
14. DaVita and University of Utah e-mail addresses, websites, and domain names;

15. Office equipment and furniture that (a) is not, in the ordinary course of business, physically located at any University of Utah Clinic, (b) is shared with Clinics other than the Divestiture Clinics, and (c) is not necessary to the operation of a Divestiture Clinics;

16. All assets of (i) University Hospitals and Clinics; and (ii) the evaluation and maintenance clinic, primary care provider, and hospital assets in the University of Utah's hospital building, including computers and furniture;

17. Licensed intangible property;

18. University of Utah Policies and Procedures, including medical protocols, subject to the licensing provisions in this Order;

19. Strategic planning documents that (a) related to the operation of a Clinic other than a Divestiture Clinic and (b) are not located on the premises of a Divestiture Clinic;

20. Telephone numbers that cannot be transferred;

21. Utility accounts for telephone, television, waste disposal, gas, and electrical services;

22. Rights under agreements with suppliers that do not relate exclusively to any Divestiture Clinic, that are not assignable even if the University and Respondent approve such assignment, or for which Acquirer has not elected to take assignment;

23. All employer numbers, national provider identification numbers, payer identification numbers, payer licenses, business licenses, or fire clearances issued to the University for any University Clinic, except for the University's Medicare and Medicaid provider numbers and CLIA Certificates;

24. Acute dialysis services agreements;

25. Servers, domains, data storage services, software licenses, and vehicles belonging to the University that do not relate exclusively to any Divestiture Clinic;

26. Business operations and other services provided by the University;

27. Purchase orders placed by the University; and

28. Computer hardware, telecommunications systems and equipment, and information systems equipment that Acquirer has elected not to take.

29. Assets of the University that are not transferring to DaVita under the Asset Purchase Agreement between Total Renal Care, Inc., a corporation owned by DaVita, Inc. and the University of Utah.