



Office of Commissioner
Rebecca Kelly Slaughter

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

**Dissenting Statement of
Commissioner Rebecca Kelly Slaughter**
In the Matter of Fresenius Medical Care /NxStage
Commission File No. 171-0227
February 19, 2019

Today, the Commission voted to approve Fresenius Medical Care AG & Co. KGaA's ("Fresenius") acquisition of NxStage Medical, Inc. ("NxStage") with a consent decree to address the loss of head-to-head competition in the market for bloodlines, components necessary for hemodialysis therapy. I agree with the complaint's allegation of harm to horizontal competition in the market for bloodlines, but I also have strong reservations about the competitive implications of the vertical aspects of this transaction.

As I noted in a recent statement,¹ I am concerned about the competitive implications of vertical mergers, especially in highly concentrated, oligopoly markets with significant barriers to entry that may inhibit future competition. The existing markets are already highly concentrated; indeed, this merger combines Fresenius, one of the two largest providers of in-clinic and in-home dialysis treatment and a significant manufacturer of a range of dialysis equipment, with NxStage, the manufacturer of SystemOne, the only competitively significant in-home hemodialysis machine. This means that in addition to having a significant share of hemodialysis treatment clinics, the merged entity would have a monopoly or near-monopoly position for the manufacturing and sale of both in-clinic and in-home hemodialysis machines. Moreover, the substantial technological investment and regulatory approvals necessary for new in-home hemodialysis machines present significant barriers to entry for potential future competitors.

The majority, of course, agrees that these factors trigger scrutiny; hence the analysis they provide of various theories of vertical harm. In addition, as the majority notes, this merger implicates not only competition but also serious and material health consequences for patients with end stage renal disease, given the data that shows improved health outcomes and a better quality of life from the use of in-home hemodialysis. I am confident that my fellow Commissioners, as well as the staff, appreciate the importance of this transaction and that we all approach it with common goals. We all want to protect competition and to ensure that dialysis patients receive the highest quality treatment and care possible, including greater access to in-home hemodialysis and the significant benefits it offers.

¹ Dissenting Statement of Commissioner Rebecca Kelly Slaughter, In the Matter of Sycamore Partners, Staples, and Essendant, File No. 181-0180 (January 28, 2019), *available at*: https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf.

I respectfully dissent because I do not share the majority's conclusion that this merger is competitively benign or that it will result in an improvement in health outcomes. I am concerned that Fresenius will have the profit incentive to foreclose or raise the costs of its rivals when it acquires and controls access to the SystemOne, especially given its position as the dominant supplier of in-clinic machines and a significant supplier of other products used by competing dialysis clinics. Indeed, the investigation indicated that these strategies could be profitable for Fresenius. I am not persuaded that Fresenius's incentive to improve the adoption of in-home hemodialysis is a merger-specific efficiency sufficient to outweigh the negative effects that would result from a strategy of foreclosure or partial foreclosure. In addition, I have strong reservations about the merger inhibiting new entry into the in-home hemodialysis machine market, even if they could provide an improved product or lower prices.

Given the high concentration levels and high barriers to entry in the markets involved in this transaction, I again urge the Commission to monitor closely the competitive conditions in these markets and to conduct a retrospective review of this merger. We all want to improve patient outcomes; it will be extremely valuable for the Commission to later assess the accuracy of current predictions to see whether this transaction in fact has the effects the parties and the majority anticipate.